

## **Revised draft policy statement: CPS Policy for Prosecuting Cases of Racist and Religious Crime**

### **Response from the National Secular Society**

Our concerns:

#### **1. A need to consult Human Rights and specifically non-religious groups**

i) We are concerned that in making its proposals, the CPS has consulted groups that have a specific agenda relating to ethnicity and or faith, to the almost total exclusion of groups with potentially conflicting views. Similarly, the Prosecution Policy specifically states that it seeks to 'deepen links with faith communities'.

**ii) We recommend that groups concerned with Human Rights in general, and specifically the non-religious, are also consulted routinely, in consultations and on all occasions when faith groups are approached. Following representations we made following an earlier consultation process, the NSS was kindly invited to meet the Director of Public Prosecutions on 27 July 2004. We made similar points then as will be evident from our letter reproduced in Appendix 2, several aspects of which are relevant to the consultation.**

#### **2. Conflation between faith and racial identity**

i) The NSS is concerned at the frequent conflation of faith and other identity, in particular ethnic or 'racial' identity in CPS documents including the Prosecution Policy.

ii) The conflation can lead to insufficient awareness of, and attention to, the differences between racial and religious crime/hatred etc. It is obvious but must be reiterated and made absolutely clear in the code that ethnic identity is something one is born into and cannot be changed. Faith/religion is an elective and chosen belief that comes with proscriptions and prescriptions that may be contentious and may themselves infringe on Human Rights, such as advocating capital punishment for apostasy and homosexuality. Children can also be abused in many ways as a result of religious practices. Freedom of expression over such matters should not only be permissible but is desirable and even necessary to protect the vulnerable and victims in the longer term.

iii) We are concerned about the use of 'properly' in the comment on page 10: "So it will be more difficult to prosecute for inciting religious hatred as opposed to racial hatred (for which the standard is already properly high)." It could be interpreted as being implied criticism of the Racial And Religious Hatred Act 2006 (RRHA) freedom of expression safeguards (Section 29) and lower burden of proof, relative to that for Racial Hatred. Both of these reflect the very philosophical distinctions between the two offences that we believe are insufficiently reflected in the Prosecution Policy.

iv) In particular, we would oppose any subversion of the RRHA freedom of expression safeguards and lower burden of proof through any change or amendment or 'revision' to the Prosecution Policy or any other document that has not been received Parliamentary assent.

**v) We recommend that much greater distinction be made between racial and religious matters in the Prosecution Policy (as well as in other CPS documents and the CPS's work), in particular to emphasise the much greater need for freedom of expression on religious issues than on racial issues.**

### **3. Blasphemy**

i) Given that all blasphemy statutes have long ago been repealed and we are concerned at the inclusion of potential blasphemy prosecutions in the Prosecution Policy, particularly since it appears without reference to the implications of the HRA 1998, we would like to repeat the substance of our comments made to Mr McDonald in our 2004 letter (Appendix 2):

"1. We are also concerned about the preservation of the right of non-believers to criticize religion. The CPS publication *Racist and Religious Crime. CPS Prosecution Policy*, in discussing the law of blasphemy, says that although "people are free to express anti-religious views providing they do so in a reasonable manner...We would, however, consider carefully any future case referred to us for advice and make a decision based on the evidence available." We are very concerned indeed that the revival of the law of blasphemy should even be contemplated and we recall that the Law Commission recommended its abolition as long ago as 1985 (Law Com. No. 145).

"Among other concerns contained in the First Report of the Select Committee on Religious Offences, are the difficulties in ensuring compliance with the Human Rights Act 1998. Appendix 3 of that Report states that (although its comment must be speculative in the absence of recent cases) "it is our view that any prosecution for blasphemy today- even one which met all the criteria described in paras 5-7 above is likely to fail on grounds either of discrimination or the denial of the right to freedom of expression" (para.10). Does the DPP differ from this view?

“A further powerful argument against the use of the law of blasphemy is that in a diverse society it is no longer acceptable that one religion should have a degree of protection which is denied to others. This is especially so when the doctrine concerned (that of the C of E) is rejected by and offensive to the religious sensibilities of other religions, to say nothing of the feelings of atheists. We would welcome a clear written acknowledgement that the CPS policy is not to bring forward any further prosecutions using the common law of blasphemy.

“2. We would like to use as a case study a dignified public reading in 2002 of the poem that was the subject of the Gay News trial in 1976 in which prominent public figures of our own and kindred organisations each read a verse of the poem, without any amplification. (The reading was referred to by the Religious Offences Select Committee ...) We were abused by Christian fundamentalists who had come in force with the intention of being offended and came armed with powerful public address equipment which, even when broadcast from the other side of a busy road, drowned out our reading. Would the DPP care to comment on whether, if this happened today, a prosecution for religiously aggravated crime would be likely to be brought? If not, why not? If so, would prosecutions be made against one side or both?”

#### **4. Protect the belief or the believer?**

i) A wider policy issue surrounding blasphemy is whether there is an intention to use the criminal justice system to protect the belief or the believer. We agree with the CRE’s position (quoted in more length below) that it should be the latter and not the former. To us, to take this position is a question of principle, but in a multi-religious society it is also the only satisfactory solution on pragmatic grounds.

ii) A possible objection to this stance might be that the CPS should use all laws at its disposal, not pick and choose which ones to ignore. Our response to that would be that the only law to come into this category is not at its disposal for the reasons set out above.

iii) A CRE briefing entitled “The need to protect faith communities from incitement to hatred” on 13 January 2005 included the following passage:

“In essence we believe that the law should protect the believer; the belief should be strong enough and confident enough to fight for itself. Christians, Jews, Muslims and Sikhs may all need to be protected against being turned into the objects of someone else’s rage and hatred; Christianity, Judaism, Islam and Sikhism are robust enough and old enough to fight for themselves. In short, God does not need the Lord Chancellor to be His bodyguard.”

(<http://www.cre.gov.uk/Default.aspx?LocID=0hgnew03r.RefLocID=0hg00900c002.Lang=EN.htm>)

**iv) We recommend that Prosecution Policy (as well as in other CPS documents and the CPS's work) emphasise the protection of believers rather than belief.**

## **5. Wider issues – Subjectivity, Freedom of Expression**

i) In addition to the overriding Human Rights objections, unjustifiably restricting freedom of expression is counterproductive on pragmatic grounds: it simply drives dissent underground where it ferments. We are concerned that the Prosecution Policy over-emphasises protection for victims or those who consider themselves (rightly or wrongly) to be the victims of religious hatred. Society itself can be a victim if freedom of expression is compromised.

**ii) We recommend that:**

- a) much greater emphasis be given in the Prosecution Policy on the need over alleged religious hatred to protect freedom of expression, and**
- b) references to 'victims' should be changed to 'alleged victims', and**
- c) the definition of 'religious incident' should include a reasonableness test and be altered to exclude reported incidents that would not, in the opinion of the police or CPS, constitute grounds for prosecution.**
- d) We recommend that it is made clear in the Prosecution Policy that in a multicultural society almost anything can offend someone, and that there is no general right to protection from offence unless elements of a criminal offence are also present.**

## **6. Definition of 'a religious incident'**

i) We believe the definition of 'a religious incident' ('Any incident which is believed to be motivated because of a person's religion or perceived religion, by the victim or any other person') is seriously in error in not referring also to belief/non-belief. We also fear this is a symptom of a lesser degree of importance being attached to non-believers as opposed to believers.

ii) We also consider the definition to be too subjective. For example: (i), 'any other person' could include someone who is mentally ill; (ii) or could be based on verifiably incorrect set of facts e.g. where a remark which has been independently recorded was simply misheard. Currently, the fact that it could be demonstrated that the facts did not occur as alleged would not prevent its categorisation as a religious incident.

**iii) We recommend that the definition of 'religious incident' should:**

- a) refer specifically to belief/non-belief**

- b) include a reasonableness test, and**
- c) be altered to exclude reported incidents that would not in the opinion of the police or CPS constitute grounds for prosecution.**

## **7. Annual Hate Crime Report, and use of the expression 'hate crime'**

i) We note that the RIMS annual report will be replaced by the Annual Hate Crime Report. We welcome the 'recording of the religion and belief of all defendants', something the Society has been advocating for several years. Although 'The CPS consulted internally and externally with a wide range of community partners', the NSS was not consulted and believe we should have been.

ii) We are concerned that the expression 'hate crime' is used indiscriminately.

**iii) We recommend:**

- a) The report's title should only refer to Hate Crime if it is restricted to prosecutable incidents, otherwise it should refer to Hate Incidents.**
- b) The NSS is consulted in future on such matters, including when faith groups are consulted.**

iv) The CPS consulted internally and externally with a wide range of community partners with regard to what additional data should be recorded by the CPS. The following key priority areas were identified and these should be recorded from April 2007:

- recording the religion and belief of all defendants and all victims (we secured the agreement of the Association of Chief Police Officers to amend the monitoring forms used by police forces);

## **8. Even-handedness**

i) A member has written in with some offensive phrases he has seen in the media, although no sources were given, they – or similar ones - appear to have been seen by other members. Although there may be some prosecutions for such threats, we are not aware of any significant number.

The uncorroborated phrases are:

'death to unbelievers' (meaning non-Muslims)

'Nuke Britain'

'slaughter those who insult Islam'

'death to Jews'

'death to homosexuals'

'kuffar are dirty'

## ii) Recommendation

**It is essential that the Criminal Justice System is even-handed in making prosecutions, including when the targets of hate are white, non-believers (however defined), British or gay. If prosecutions are not seen to be even-handed in this respect it will be unfair and also create resentment.**

## **9. Identity politics and vulnerable sub-groups within religious communities**

i) We see dangers in categorising the population in relation to its perceived religion. The incidence of this is growing, particularly in the public sector and in communicating with the groups so categorised through their religious leaders. A danger particularly relevant to the CPS's area of responsibility in protecting the weak is to those in such communities who do not conform to the norms of the community, such as those who have renounced their faith and homosexuals. Such people fall through the net as a direct result of the religious community approach and need special assistance, perhaps even specifically on hate crime.

**ii) We recommend emphasis being placed on easing the plight of those in such communities who do not conform to the norms of the community, such as those who have renounced their faith and homosexuals. Particular care needs to be taken in reaching out to them as it cannot be through their religious leaders.**

iii) Similarly, though away from the direct subject of this consultation, we would like to see much more effort being invested in reaching those in (especially minority) religious communities who are being oppressed, for example in: freedom of movement or association; ability to form relationships with who they please (and not with whom they do not wish to); or in relation to their sexual orientation.

## **APPENDIX 1**

### **WHAT IS THE NATIONAL SECULAR SOCIETY? (NSS)**

- The National Secular Society (NSS) is a Human Rights organisation, the most prominent one campaigning for a secular society that gives equality of rights and opportunities for everyone, including the non-religious. The Society consequently also fights for the elimination of religious privilege. We emphasise that the Society campaigns for freedom of belief, including non-belief, and is emphatic that no one should be victimised because of their belief or lack of belief.

Nevertheless the manifesting of belief does not confer any immunity from the laws of the land.

- The NSS was founded in 1866, since when it has championed many human rights that are taken for granted today. Founder Charles Bradlaugh MP campaigned for the right to affirm rather than swear in parliament and the courts. Annie Besant and Bradlaugh made material on birth control available to working class people, despite widespread condemnation by the establishment. The Society has continued to support human rights, for example women's rights and gay rights.

- The Society has been prominent since its inception through to the current day in campaigning for freedom of expression and against blasphemy laws. Because of concerns about freedom of expression, the NSS took a leading roll in opposing the Racial and Religious Hatred Act and previous attempts to introduce these measures. Significantly, we were working alongside several prominent religious groups who shared our concerns. Parliament was persuaded, against the Government's will, to introduce significant additional safeguards for freedom of expression into the Racial and Religious Hatred Act.

- In recent years, the Society has made numerous submissions to Government ministers, departments and agencies, of which one of the most relevant to this has been on the Employment Equality (Religion or Belief) Regulations 2003 and Employment Equality (Sexual Orientation) Regulations 2003.

- The principal concerns we expressed related to excessive religious exemptions and we were successful in bringing about some modest limitation to these through prompting an amendment to be moved in the EU Parliament to the wording of the relevant EU Directive.

- We secured a new section, Section 55, in the Education and Inspections Act to give older pupils the right to opt themselves out of Collective Worship. This was done on Human Rights grounds; some of them were even adults.

- We have given both written and oral evidence to the Wakeham Commission on the Reform of the House of Lords and to Select Committees of both Houses of Parliament. Our submissions and oral evidence to the (Commons) Education and Skills Select Committee and (Lords) Committee on Religious Offences were both on Human Rights related issues. The latter largely focussed on how to frame Incitement to Religious Hatred legislation and on whether the Common Law Offence of Blasphemous Libel should be abolished.

- The Society's Honorary Associates include Human Rights campaigners Sir Ludovic Kennedy, Claire Rayner, Joan Smith and Polly Toynbee; Profs. Peter Atkins and Richard Dawkins; Dr A C Grayling and Dr David Starkey – as well as a number of prominent parliamentarians from both UK houses and the European Parliament.

## APPENDIX 2

Mr Ken Macdonald QC  
Director of Public Prosecutions  
CPS Headquarters  
50 Ludgate Hill  
London EC4M 7EX  
United Kingdom

23 July 2004  
c.c. Mr Séamus Taylor, Head of Diversity

[SENT BY EMAIL]

Dear Mr Macdonald

### Our Meeting on 27 July 2004

We are pleased to have an opportunity to discuss matters of common concern and in particular, given your having already met religious representatives, for us to express a balancing secular view. Thank you for sending us background information. We thought it would enable our time together to be used more effectively if we gave an advance indication of our main concerns. We hope you find this helpful and look forward to meeting you and your staff.

#### A. Consultation of Stakeholders

1. The extent to which it is appropriate when consulting religious groups over religious matters in the public sphere to include balancing views from those coming from a secular or similar standpoint. We note that according to the new subsection (5) of section 28 of the *Crime and Disorder Act 1998* a 'religious group' is 'a group of persons defined by reference to religious belief or **lack of religious belief.**' (our emphasis). We consequently believe that, in respect of that legislation, a secularist group should have been consulted on identical terms to the various religious groups which were consulted. We note that 'engaging diverse communities and stakeholders... in framing key equality policies on racist, religiously aggravated, domestic violence and homophobic crime' was listed as part of the CPS's 'substantial progress on equality and diversity' in the DPP's speech to the NBPCA in March this year. We also note that the CPS was chosen as a Best Practice case study on aspects of diversity, 'in particular our work on engaging communities in framing key policies'. Clearly, the CPS attributes great importance to this work. We will therefore be asking about the rationale for the NSS or similar organisations not being consulted (if that was the case) in respect of the policy relating to religiously aggravated crime.

2. Your view on the passage in the Home Office's *Working Together* (5.3.7):
  - What do our faiths say about restorative and reparative justice, and about redemption?
  - Can there be a role for religious groups in advising the Criminal Justice System on sentencing?

## **B. Religiously Aggravated Crime**

1. Whether religion and race can be treated identically
2. The extent to which belief itself is, or will be, protected
3. The steps taken to raise awareness of and promote the application of the new religious aggravated sentences, and what guidance is given about when this is appropriate and about maintaining even-handedness and proportionality - given the severe maximum sentence. We would also appreciate being provided with copies of guidance and training material covering this area.
4. We are concerned about the degree of scrutiny and safeguards in the decision to prosecute religiously aggravated crime. The Code for Crown Prosecutors sets out the Shawcross dictum that it has never been the rule that suspected criminal offences must automatically be prosecuted (6.1), and that the public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction (6.2). One of the factors to increase the need to prosecute is if 'the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs or sexual orientation or the suspect demonstrated hostility towards the victim based on any of those characteristics' (6.4.9). This wording is so close to that of s.28 Crime and Disorder Act 1998 ('at the time of the offence (or shortly before or after) the offender demonstrates hostility based on the victim's membership (or presumed membership) of a racial or religious group'), that it is hard to see how the public interest test could fail to be met once the evidential test for an offence using this definition has been satisfied. This runs the risk of coming close to automatic prosecution and endangers, in our view, the discretion entrusted to the CPS.
5. In addition, the CPS Code on *Racially or Religiously aggravated Crimes* appears to lay down that such charges will always be proceeded with where basic evidential requirements are met and it specifically states that 'The Director has encouraged prosecutors to be robust in the prosecution of these cases.' That, we submit, comes close to laying down that the standard applied in these cases should be different from that used in the general run of criminal charges, which is (to quote the *Code for Crown Prosecutors*) that 'a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged' i.e. 'a realistic prospect of conviction' with no requirement of 'robustness'. We are only addressing here religiously aggravated offences, and so far as concerns those,

we take the view that discretion rather than robustness should be urged on those taking the decision whether to prosecute.

6. What conclusions, if any, does the DPP draw from the statistics for religiously aggravated crime published in the RIMS Annual Report 2002-3? Why is the conviction rate so much lower than the general conviction rate? Are any changes being proposed for the future? We note that in the 18 cases brought to a conclusion between 14 December 2001 and 31 March 2003, ten of the victims were members of only one religion, namely Islam. Does the DPP consider that this is in proportion with the incidence of religiously aggravated crime nationally, and if not, what explanation can he offer for the fact that more than 50% of the victims in that period belong to one religion? We are also concerned that these statistics revealed that in one third of the religiously aggravated cases, the victim and the defendant were of the same religion. We see a danger that the criminal law might become a tool for warring factions in internal disputes within a religion (and for that matter between religions as has happened in Australia), and that offences designed to promote better relations between different religions may become an unjustifiable restraint on free speech, which restraint we are convinced could actually be counter-productive.

7. We have particular concerns about two cases as issues of principle, but realise that it may not be possible/appropriate to discuss individual cases in detail. (They are Alistair Scott, Exeter October 2002 and Hazel Dick, Peterborough March 2004; I attach press cuttings of both.) On the material publicly available, it is hard to accept, in the case of Hazel Dick, that the CPS applied its normal criteria of 'a realistic prospect of conviction' in deciding to proceed with this matter. We do not however purport to criticise specific decisions because we accept that an outsider cannot reconstruct all the facts and circumstances influencing the minds of those who made the decision to prosecute. We do, however, emphasise that the *impression* necessarily left among some informed observers of the Dick case is that the prosecuting authority proceeded with a hopeless case merely in an attempt to satisfy a demanding and vocal religious lobby. Such an impression does little for the furtherance of communal harmony and social cohesion and it also tends to bring the law into disrepute. We share the judge's apparent embarrassment at the ordeal of the defendant.

### **C. Blasphemy**

1. Current policy on blasphemy. We are also concerned about the preservation of the right of non-believers to criticize religion. The CPS publication *Racist and Religious Crime, CPS Prosecution Policy*, in discussing the law of blasphemy, says that although 'people are free to express anti-religious views providing they do so in a reasonable manner ... We would, however, consider carefully any future case referred to us for advice and make a decision based on the evidence available.' We are very concerned indeed that the revival of the law of blasphemy should even be contemplated and we recall that the Law

Commission recommended its abolition as long ago as 1985 (Law Com. No. 145).

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2. We would like to use as a case study a dignified public reading in 2002 of the poem that was the subject of the Gay News trial in 1976 in which prominent public figures of our own and kindred organisations each read a verse of the poem, without any amplification. (The reading was referred to by the Religious Offences Select Committee, see Appendix to this letter.) We were abused by Christian fundamentalists who had come in force with the intention of being offended and came armed with powerful public address equipment which, even when broadcast from the other side of a busy road, drowned out our reading. Would the DPP care to comment on whether, if this happened today, a prosecution for religiously aggravated crime would be likely to be brought? If not, why not? If so, would prosecutions be made against one side or both?

#### **D. Honour Killings and similar issues**

1. Scotland Yard has recently announced a review of 117 murder cases. Commander Andy Baker of the Met said this involves "looking at them, learning from them and working with agencies to prevent them in the future" (Daily Telegraph, 23 June 2004). Although the CPS can only have a limited role in prevention, we hope that it supports this important initiative. Is the CPS acting in co-operation with the police to identify these offences in order to ensure that the correct charge is brought? Identification of honour killings as such (rather than domestic accidents/manslaughter) is also important to ensure that inappropriate pleas to lesser offences are not accepted, and that a full background of relevant circumstances is available to a court in considering a defence of provocation. Is a flagging system, such as is used to identify case with a racial or religious dimension, appropriate to identify cases of honour killings?

2. We would also welcome the opportunity to discuss the work the CPS is doing to improve the protection of women and girls in respect of forced marriages and female genital mutilation (with especial reference to the prosecution rate).

Yours sincerely,

**Keith Porteous Wood**  
**Executive Director**

## **APPENDIX**

### **SELECT COMMITTEE ON RELIGIOUS OFFENCES IN ENGLAND AND WALES**

Volume I—REPORT (HL Paper 95-I, ordered to be printed on 10 APRIL 2003)  
[EXTRACT]

43. Several witnesses believed that recent unwillingness to invoke this criminal law may, at least in part, derive from the tolerance of Christian communities towards those who strongly question, criticise or insult their faith. Muslim witnesses, too, have said that their community would follow the course of tolerance so far as possible. It is however probably unwise to rely on a policy of inactivity on the part of the authorities or a commitment by the Attorney-General to take over any private prosecution (so as to offer no evidence) and to ensure that the CPS brought no prosecutions either. In the case of the former, the police were unwilling to intervene in the absence of a breach of public order when the poem “The Love That Dare Not Speak Its Name” (the cause of the “Gay News” case) was read recently outside St Martin’s in the Fields\*. But a prosecution might follow later. Thus, sooner or later a prosecution will be attempted. It does not much matter whether this arises from a perceived affront to Christian tenets or an attempt to pursue a “Satanic Verses” type case. Even if a prosecution were successful, it is likely that it would eventually be overturned on appeal, either by the higher courts in the United Kingdom or by the European Court of Human Rights on one or more of the grounds that it is discriminatory, uncertain and a law of strict liability. If this analysis is correct, the repeal might as well occur now: that would at least save the expense of proceedings which led to Strasbourg.

\* Volume II, Q 464 at page 192