SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS
Call for evidence: Freedom of Expression

Evidence submitted by: Professor Alan Sokal, University College London
25 January 2021

Q: Does hate speech law need to be updated or clarified . . . ?
Q: Is greater clarity required to ensure the law is understood and fair?

A: Yes. Precise proposal in #13 below.

1. I am a Professor of Mathematics at University College London (UCL) and a Professor Emeritus of Physics at New York University. I have written extensively on the public understanding of science and on the need for an evidence-based approach to public policy — an approach that can work properly, however, only if there is freedom for dissenting views to be expressed, publicised and serenely debated.

2. I am also a member of the UCL Academic Board's Working Group on Racism and Prejudice, in which we have extensively studied the UK legislation that affects discussion of controversial issues, in the universities and beyond, and its ramifications for academic freedom and the freedom of expression. (I stress, however, that the views expressed in this submission are solely my own.)

3. Among the relevant legislation are the Public Order Act 1986 [as amended by the Racial and Religious Hatred Act 2006, the Criminal Justice and Immigration Act 2008, and the Marriage (Same Sex Couples) Act 2013], the Equality Act 2010, and the Protection from Harassment Act 1997.

4. When Parliament was debating the Racial and Religious Hatred Act 2006, it was mindful of the strong passions that can be excited, on all sides, by religion and religious ideas; and it was therefore also mindful of the potential negative effect of the proposed legislation on freedom of expression. Parliament therefore took great care to limit the offence to "us[ing] threatening words or behaviour, or display[ing] any written material which is threatening", and it furthermore required *intent* to stir up religious hatred as a required element of the offence (§29B(1)). Even more importantly, Parliament inserted an extremely strong and explicit protection for the freedom of expression:

> **29J Protection of freedom of expression**
> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

5. When Parliament, as part of the Criminal Justice and Immigration Act 2008, created (§74 and Schedule 16, ¶14) a new offence of inciting hatred on the grounds of sexual orientation, it included the same limitation to threatening words or behaviour, and the same requirement of intent. Furthermore, Parliament again inserted an explicit protection for the freedom of expression:

> **29JA Protection of freedom of expression (sexual orientation)**
> (1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

6. When Parliament adopted the Marriage (Same Sex Couples) Act 2013, it took care to protect the freedom of expression of those who might be opposed to this legislation by adding the following text to Section 29JA:

> (2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

7. The Equality Act 2010 provides important protections against discrimination, harassment and victimisation related to so-called "protected characteristics": age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (including colour, nationality, and ethnic or national origins), religion or belief (including a lack of religion or lack of belief), sex, and sexual orientation.

8. The definition of harassment (EqA §26) is of necessity somewhat generic, and involves some elements that are inherently subjective:

> (1) A person (A) harasses another (B) if–
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of–
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

The legislation further provides that

> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

but gives no guidance as to which "other circumstances of the case" are relevant, or how the three required factors are to be weighed.

9. Social changes over the past few years have increased the danger that discussion of certain controversial *ideas* will be curtailed by people alleging that the mere expression of those ideas "violates their dignity" or "creates an intimidating, hostile, degrading, humiliating or offensive environment" for them. For example, the submission to this Call for Evidence by Professor Alice Sullivan *et al.* (submission reference MRJ832175) points out that

> a prominent strand of gender identity ideology holds the view, asserted vociferously by campaigners and activists, that it is "transphobic" merely to assert that sex exists as a meaningful category, distinct from people's self-declared "gender identity". ... Gender identity activists have adopted the slogan and hashtag #nodebate, claiming that debate constitutes "real harm" or even "literal violence".

10. The fear that the Equality Act 2010 could be used to curtail freedom of expression on controversial social and political subjects is not merely speculative. In the recent case of *Maya Forstater v CGD Europe and others* [2019], the Employment Tribunal held (¶84) that

> Claimant's view [that sex is biologically immutable], in its absolutist nature, is incompatible with human dignity and fundamental rights of others.

and made the following shocking comment (¶85):

> The Claimant's position is that even if a trans woman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman. *That belief is not worthy of respect in a democratic society.* It [namely, the belief *per se*, not merely certain actions hypothetically predicated on it] is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act. [emphases and comments mine]

The decision went on (¶87) to make explicit reference to the Equality Act 2010:

> Calling a trans woman a man is likely to be profoundly distressing. It may be unlawful harassment. Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others [*sic*] dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Unfortunately, the judge in this case failed to state clearly whether, in his view, a trans person's dignity is violated only by statements individually directed at him/her/them ("X is really a man"), or also by generic statements of social, political, scientific or philosophical belief ("trans women are really biologically male"). This lack of clarity — made worse by the hint that the latter is indeed the judge's intention — poses a clear and unmistakable danger to the freedom of debate on an important social and political question.

11. Although this particular decision may be reversed on appeal, the vagueness and ambiguity of the definition of harassment in the Equality Act 2010 (§26) pose a permanent danger to the freedom of expression.

12. Similar dangers to the freedom of expression arise from the vagueness and subjective nature of the definition of harassment in the Protection from Harassment Act 1997 (§1 and §7(2)). These dangers are partially mitigated, but not eliminated, by the case law cited in *Hayden v Dickenson* [2020] EWHC 3291 (QB) ¶44.

13. In view of these dangers — which are not limited to the particular issue arising in the *Forstater* case, but apply to many controversial social and political questions — the Equality Act 2010 and the Protection from Harassment Act 1997 should be amended to include an explicit protection for freedom of expression, modeled on those of sections 29J and 29JA cited above. I would propose the following wording:

> **Protection of freedom of expression**
>
> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of ideas or opinions on social, political, historical, scientific, philosophical or artistic questions, in the absence of threatening or abusive words or behaviour directed at an individual or a group, or disorderly behaviour.

A clause of this type would not resolve the question of whether it constitutes harassment under the Equality Act 2010 to say, *of a specific individual*, that "X is really a man" — an issue on which I must refrain from expressing an opinion, for lack of competence. But this clause would ensure, at the very least, that debate on important social, political, historical, scientific, philosophical and artistic issues is not curtailed by allegations, by people who disagree profoundly with certain ideas, that their dignity has been violated by the mere expression of them.