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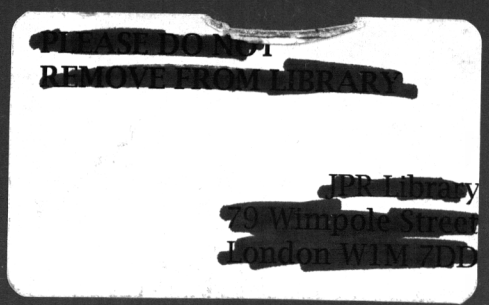
Combating Holocaust denial through law in the United Kingdom

Report of the JPR Law Panel



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Contents

Foreword 1
1 Introduction 3
2 The nature of Holocaust denial 4
3 Current legislation tackling racial hatred 7
4 The proposal to criminalize Holocaust denial 11
5 Arguments for and against the criminalization of Holocaust denial 12
6 Possible legal remedies 21
7 Conclusion 23
Appendix A JPR Law Panel inquiry: list of expert witnesses 25
Appendix B Laws against Holocaust denial: summary of features 26

Prior to publication, the contents of this report were formally presented by JPR to the Rt Hon Jack Straw MP, Home Secretary.

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Civil society strengthens conditions in which minority interests, groups and cultures will thrive. JPR's Civil society programme includes work on antisemitism, racism and human rights.

Foreword

This report was completed within a few weeks of the judgment in what has become known as the 'Holocaust denial trial'. The denier David Irving had sued the historian Deborah Lipstadt, complaining that she had defamed him in her book *Denying the Holocaust*. He said that her description of him as an antisemite, a Hitler partisan and a bogus historian (I summarize) was libellous.

After the trial, which lasted just over two months and during which a number of historians gave expert evidence against Irving, the judge concluded that Professor Lipstadt was right. In a judgment that runs to over 300 pages, Mr Justice Gray rejected every single aspect of Irving's case for denial.

The deniers themselves are thinking fast to discredit the judgment. Their websites are thick with excuses and explanations: Irving was not given a fair trial; the judge was an 'establishment figure'; oppressive tactics brought the doughty Irving down. Deniers cannot be convinced of either the wickedness or the idiocy of their cause. For them, the Jews are devils who have bewitched the world; and they, the deniers, are the white magicians who can lift the spell. This is about as close as deniers get to a reasoned defence of denial. It is fanciful, inconsequential stuff, pernicious only if taken seriously. Irving and other antisemites take it seriously. The question is whether anyone else does, or is likely to.

The conclusion that the Law Panel reached in the following report is that the present risk that Holocaust deniers pose can best be dealt with by education. Existing race hate laws, if appropriately modified, together with a drive to raise public awareness of the nature of the Holocaust is sufficient to deal with the threat that the deniers pose. They are small, benighted people. Their work does not represent a challenge to historians. They are few in number, and that number is not growing. The response to denial should be proportionate to its menace.

This report is the outcome of lengthy deliberations by the members of the JPR Law Panel as well as an extensive consultation process involving many experts. It is therefore the work of many hands whose contribution I would like to acknowledge.

First of all, I would like to thank my fellow members of the JPR Law Panel, who gave generously of their time and expertise, and all those who made submissions to the Panel, whose names are listed in the appendix.

My gratitude goes also to: Jessica Jacobson for drafting the text of the report; Antony Lerman for his guidance; Jacqueline Sallon for overseeing the work of the JPR Law Panel in the first eighteen months of its existence, and for organizing the Inquiry Day together with Lena Stanley-Clamp, who also saw the report through its final stages; Adrian Marshall-Williams for undertaking additional research; and Karen Rosen and Mark Sellman who helped with the writing of minutes and the compilation of documentation.

It has been a privilege to chair this panel and I commend this report.

Anthony Julius
London, June 2000

1 Introduction

Holocaust denial is an especially pernicious form of antisemitism. Claims that the Holocaust did not happen imply that the idea of the Holocaust is a myth created by Jews for their own ends. Holocaust denial is therefore not the expression in good faith of a legitimate interpretation of history; it is designed to engender hostility against Jews, and is insulting and offensive to Jews, other victims of the Holocaust and all who value truth and the lessons we can learn from history.

Current laws on incitement to racial hatred in the United Kingdom do not have the effect of prohibiting the activities of Holocaust deniers. This report addresses the question of whether legislation should be introduced in Britain which would make the denial of the Holocaust a criminal offence.

At the present time, laws against Holocaust denial exist in six European countries—Austria, Belgium, France, Germany, Spain and Switzerland—and in Israel. In March 1997 Mike Gapes MP tabled the Holocaust Denial Bill in the House of Commons which would have amended existing incitement to hatred laws to criminalize Holocaust denial in England and Wales. The Bill received some cross-party support, but was given insufficient parliamentary time to proceed beyond the committee stage. The present Labour government has undertaken to examine the case for introducing Holocaust-denial legislation.

The Institute for Jewish Policy Research (JPR) established the Law Panel to look at the implications of criminalizing Holocaust denial, and thereby to contribute to current debates and to assist the government's consideration of the subject. The Panel received written and oral submissions from experts who provided insight into a wide range of issues relating to Holocaust denial and attempts to outlaw it. The Panel's conclusions are presented in this report.

The report comprises five main sections. The first sets the context of the discussion, including an examination of the nature of Holocaust denial and the extent of such activity in Britain today. The second section looks at the scope and efficacy of current legislation relating to racial hatred; and the third at the proposal for a specific law criminalizing denial contained in Gapes's Holocaust Denial Bill. The fourth section considers the range of arguments for and against such legislation—concerning, for example, the issue of free speech and the consequences of denial legislation in other jurisdictions—and concludes that the introduction of a Holocaust-denial law in the United Kingdom would be inadvisable. The fifth section looks at the possibility of amending current race-hate laws in order to enhance their effectiveness in dealing with Holocaust denial. Finally, the report concludes with a brief consideration of the broader question of how to improve and preserve the general public's knowledge about the Holocaust.

2 The nature of Holocaust denial

What is Holocaust denial?

The phenomenon of Holocaust denial can be traced back as far as 1945. Denial materials became more conspicuous, however, from the 1970s onwards. Holocaust denial takes a variety of forms and presents a variety of arguments, as was made clear by Roger Eatwell in his submission to the Panel. In Box 1 (page 5) the spectrum of Holocaust denial material is described. The material produced by Holocaust deniers includes glossy magazines and pamphlets, seemingly 'academic' books and journals, websites on the Internet and shoddy photocopied flyers.

Holocaust denial is not offensive solely to Jews and members of other groups that were victims of Nazi crimes. It is offensive to all who are informed about the facts of the Holocaust. But there is an inherent antisemitism in Holocaust denial, although it may not necessarily be obvious or immediately apparent. This is because Holocaust denial does not always encourage hostility to Jews in an *explicit* way, in comparison to cruder forms of antisemitism which allege, for example, that Jews are engaged in a plot to control global financial institutions, the media or the world; that Jews are to blame for communism or capitalism; that Jews slaughter Christian children for use in their rituals; or that Jews poison wells. In contrast, to state that the Holocaust did not happen, or that 500,000 rather than 6 million Jews died in the Holocaust, may not, on the surface, appear to be an expression of hatred of Jews.[1]

However, Holocaust denial has an *implicit* intent to engender hatred. Its insidious antisemitism is evident in its clear implication that the Holocaust is an invention of Jews or their agents. Jews are thus depicted as manipulative and powerful conspirators who have fabricated myths of their own suffering for their own ends. According to the Holocaust deniers, by forging evidence and mounting a massive propaganda effort, the Jews have established their lies as 'truth' and reaped enormous rewards from doing so: for example, in making financial claims on Germany and acquiring international support for Israel.

Holocaust denial is antisemitic not only because of the negative image of the Jew it implicitly depicts, but also because of its direct impact upon the feelings of Jews: it produces immeasurable offence and anger, and can cause those who are directly targeted by the material to feel fearful and intimidated.

Holocaust denial can be a particularly insidious form of antisemitism precisely because it often tries to disguise itself as something quite different: as genuine scholarly debate (in the pages, for example, of the innocuous-sounding *Journal for Historical Review*). Holocaust deniers often refer to themselves as 'revisionists', in an attempt to claim legitimacy for their activities.

There are, of course, a great many scholars engaged in historical debates about the Holocaust whose work should not be confused with the output of the Holocaust deniers. Debate continues about such subjects as, for example, the extent and nature of ordinary Germans' involvement in and knowledge of the policy of genocide, and the timing of orders given for the extermination of the Jews. However, the valid endeavour of historical revisionism, which involves the re-interpretation of historical knowledge in the light of newly emerging evidence, is a very different task from that of claiming that the essential facts of the Holocaust, and the evidence for those facts, are fabrications.

The connections, allegiances and record of those who propagate Holocaust-denial material testify to the fact that these individuals are engaged in something other than serious-minded academic research: their links to other antisemites and manifestations of antisemitism are telling. There are two major political forces behind the production and dissemination of Holocaust-denial material in the United Kingdom: namely, various factions of the far right and certain Islamist extremists.

To date, the activities of the former—whose propagation of Holocaust denial is usually one element of a wider racist or neo-Nazi agenda—have received the most attention from commentators. According to Michael Whine's submission to the Panel, the far right finds, in pursuing its aim of resurrecting Nazism, that 'to gain political acceptability it has to confront the Nazis' greatest crime, which of course it cannot, and therefore it seeks to belittle the Holocaust or deny it completely'. For extreme Islamists, on the other hand, Holocaust denial is used to further the campaign against Israel, for 'to negate the destruction of European Jewry is to remove one of the moral planks on which the

1 Antony Lerman, 'Combating Holocaust denial through the law', briefing paper prepared for the Labour Party, February 1997, privately circulated by the Institute for Jewish Policy Research (JPR), 1997.

Box 1: Forms of Holocaust denial

A wide range of literature can be broadly described as Holocaust-denial material.

At one end of the spectrum, the crudest Holocaust-denial material simply states that no genocide took place, and is likely to be linked to the most blatant form of antisemitism. A sample one-page leaflet shown to the Panel contained the words 'holocaust was a HOAX, let's make it REAL'.

At the other end of the spectrum is literature that incorporates relatively sophisticated argumentation. This material may not be overtly antisemitic, but frequently alludes to vested interests of Jews in perpetuating the 'myth' of the Holocaust. The 'sophisticated' Holocaust deniers adopt the idiom of scholarly debate, and generally refer to themselves as historical revisionists. An example of this kind of literature is *The Leuchter Report*,[2] which argues that forensic evidence proves that Auschwitz could not have operated as a gassing facility.

Holocaust-denial publications vary not only in terms of their claims to academic respectability and the explicitness of their antisemitism, but also in terms of the arguments that are both put forward and emphasized. The kinds of assertions made in Holocaust-denial material include the following:

- Several hundred thousand rather than approximately six million Jews died during the war.
- Scientific evidence proves that gas chambers could not have been used to kill large numbers of people.
- The Nazi command had a policy of deporting Jews, not exterminating them.

  Some deliberate killings of Jews did occur, but were carried out by the peoples of Eastern Europe rather than the Nazis.
- Jews died in camps of various kinds, but did so as the result of hunger and disease. The Holocaust is a myth created by the Allies for propaganda purposes, and subsequently nurtured by the Jews for their own ends.
- Errors and inconsistencies in survivors' testimonies point to their essential unreliability.
- Alleged documentary evidence of the Holocaust, from photographs of concentration camp victims to Anne Frank's diary, is fabricated.
- The confessions of former Nazis to war crimes were extracted through torture.

2 London: Focal Point 1989.

foundations of the state of Israel was built; that is, the provision of a refuge for the survivors.'

What is the extent of Holocaust denial in the United Kingdom?

A number of individuals and organizations are active in the propagation of Holocaust denial in the United Kingdom. The British National Party appears to be behind the publication and distribution of a significant amount of material; and other, smaller groups on the far right such as Combat 18 also produce articles and leaflets. Holocaust-denial material has been promoted on occasion by the extreme Islamist organizations Hizb ut-Tahrir (Islamic Liberation Party) and al-Muhajiroun (The Emigrants). Leaflets published by the California-based Institute for Historical Review have been distributed in some mosques and schools in Britain by Muslim teenagers, demonstrating a link between the extreme Islamist and far-right manifestations of Holocaust denial.[3]

Pseudo-academic Holocaust-denial material is not available in mainstream British bookshops, but can be acquired through the book clubs and reading lists associated with the kinds of groups named above. Such literature is not published in Britain on a large scale, although Cromwell Press and the Historical Review Press, both run by Anthony Hancock, are active in this sphere, and are distributors of much American and continental European material.

Campaigners against racism and antisemitism can no longer afford to focus their attention solely on books, magazines and leaflets, but must also consider electronic means of disseminating offensive ideas. The Internet has proved to be a most useful tool for extremist groups: it is inexpensive; it has a global reach; the number of users is expanding rapidly; and it is extremely difficult to police. The Internet, furthermore, is an arena within which connections can be easily established between groups of different kinds that share an antisemitic agenda. Holocaust-denial material appears on the Internet on the websites of far-right organizations as well as on websites devoted entirely to the subject.[4]

It is not easy to reach general conclusions about the extent and influence of Holocaust denial in the United Kingdom today. Certainly, Holocaust-denial activity is ongoing—and any such activity is too much. The promotion of Holocaust denial by certain extreme Islamist groups is a particularly worrying aspect of the problem, since the association of denial with Middle Eastern opposition to Israel brings it close to mainstream political debate. Another cause of special concern is the growing use of the Internet by the deniers.

On the other hand, the effort to establish the most effective means of combating Holocaust denial in Britain must not proceed on the basis of an exaggerated notion of its significance. There is no clear evidence to suggest that there has been an increase in denial activity in recent years. In fact, data gathered by the JPR for its annual *Antisemitism World Report* and by the Board of Deputies of British Jews indicate that there may have been a slight decrease in the distribution of Holocaust-denial material in the United Kingdom in the 1990s.[5] Gerry Gable reported to the Panel that in his view 'there are no more than about 30 active antisemites at the heart of the writing, production and distribution of hate material directed at the Jewish community'. Doubtless, the continuing marginalization of the far right in British politics is a factor that severely inhibits Holocaust-denial activity.

It follows that the impact of Holocaust denial upon public attitudes in Britain is likely to be limited. Roger Eatwell suggested to the Panel that 'there is little evidence that Holocaust denial arguments can appeal significantly outside the fringes', although they may have the effect of strengthening pre-existing ideas about 'Jewish power'. Eatwell cited the findings of a 1993 opinion poll which found that only 7 per cent of British respondents said that it was possible that Nazi extermination did not happen, with a further 9 per cent of respondents replying 'don't know' to the question.[6] Even among those who express some degree of doubt about the Holocaust, of course, a simple lack of information or education is likely to have had a greater influence than the activities of Holocaust deniers.

3 As reported by Michael Whine in his submission to the Panel.

4 The issue of Holocaust denial on the Internet was raised by Roger Eatwell, Gerry Gable and Michael Whine in their submissions to the Panel.

5 The *Antisemitism World Report* was published by JPR from 1992–7, when it was relaunched as an on-line resource, *Antisemitism in the World Today* (www.jpr.org.uk/antisem/index.shtml). Data from the Board of Deputies cited in Lerman, 'Combating Holocaust denial'.

6 Jennifer Golub and Renae Cohen, *What Do the British Know about the Holocaust?* (New York: American Jewish Committee 1993).

3 Current legislation tackling racial hatred

The components of current legislation

The criminalization of Holocaust denial has been proposed because current legislation against hate speech has not had the effect of prohibiting the production and dissemination of denial material. As set out in Box 2 (page 9) the major legislation dealing with racial hatred is contained in Part III of the Public Order Act 1986.[7] Section 18 outlines the principal offence, which is that of incitement of racial hatred through words, behaviour or the display of written material. The Crime and Disorder Act 1998, the Malicious Communications Act 1988, the Protection from Harassment Act 1997 and the Race Relations Act 1976 also have certain provisions which can have some bearing on hate speech (again, noted in Box 2).

The relevant sections of the Public Order Act appear to have greater potential for tackling Holocaust-denial activity than the other pieces of legislation named in Box 2, which seem to have very limited, if any, application in this regard. However, no one has been prosecuted under the Public Order Act specifically for producing or disseminating Holocaust-denial literature, despite the assertions of the attorney-general and successive home secretaries that prosecution would take place where denial material is published with the intention of inciting racial hatred. Indeed, prosecutions for incitement of racial hatred of any kind have been rare since this was first made an offence in 1965. It appears that the legislation is framed in such restrictive terms that it discourages the prosecuting authorities from taking action other than in cases where the incitement to hatred brings a clear threat of violence or disorder.

The limitations of current legislation

One of most significant limitations of the existing incitement to hatred legislation arises from the requirement that the prohibited material must be 'threatening, abusive or insulting'. This emphasis on the explicit tone of the language used by racists, rather than on the implicit effects of their messages, has acted as a bar to prosecution in a great many cases. The phrase 'threatening, abusive or insulting' strongly suggests that there must be blatant aggressiveness in what is being said or published; therefore material presented in a somewhat subtle or moderate manner, but with highly offensive content, is excluded. This limitation is particularly relevant to a great deal of Holocaust-denial material which, as has already been noted, is often cloaked in the language of reasoned, even academic debate.

The wording of the 'incitement to hatred' offence is limiting in other ways also. The requirement for material or conduct to 'stir up . . . hatred' or to cause 'hatred . . . to be stirred up' is demanding: both because 'hatred' is an extreme emotion, and because the verbal phrase 'stir up' is suggestive of active provocation.[8] Jonathan Cooper suggested to the Panel that it can be difficult to prove that Holocaust-denial material has the effect of stirring up hatred, and that 'the more level-headed the recipient or the more apparently innocuous the literature, the more difficult [this] will be'. Similarly, Barbara Cohen argued that the test of 'hatred' may be too high, given that 'the harm to society occurs where words stir up racial vilification or hostility'.

Thus it can be argued that the current definition of 'incitement to hatred' severely restricts the capacity of the legislation to counter Holocaust denial—and, indeed, many other forms of antisemitism and racism. Another major limitation, the relevance of which is again not restricted to Holocaust denial, arises from the very concept of incitement. The assumption underlying the incitement offence is that hate speech should be regulated by the law insofar as it has implications for public order, and not with respect to any direct impact it might have on the feelings of the victims.[9]

A distinction is thereby made between indirect hate speech, which may be deemed unlawful, and direct hate speech, which is not prohibited. This kind of distinction was outlined by the majority of the Canadian Supreme Court in the case of *R v Keegstra* (which concerned the prosecution of a high school teacher for the use of antisemitic material, including Holocaust denial, in his history classes),[10] and can be elaborated as follows:

7 This applies only to Great Britain, not Northern Ireland.

8 As is argued in the Board of Deputies of British Jews' report 'Group defamation. Report of a working party of the Law, Parliamentary and General Purposes Committee', February 1992.

9 These issues were raised by Frances D'Souza and David Feldman, among others, in their submissions to the Panel.

10 [1990] 3 SCR 697.

- Direct hate speech: A's hate speech is directly communicated to victim group C. This does not require C actually to hear the speech, but can include C becoming aware of the existence of the speech.

- Indirect hate speech: A's hate speech is communicated to B, encouraging B to hate victim group C and to carry out acts based on that hatred.

The prohibition, in English law, of incitement to racial hatred rather than of hate speech *per se* arises from concerns about the legitimacy of restricting free speech in a democratic society. The rationale for the distinction between indirect and direct speech which follows can, however, be questioned. It seems to be an anomaly that a neo-Nazi can be prosecuted if he harangues an audience of fellow neo-Nazis, but not an audience of Jews, on the subject of the Holocaust. Gerry Gable recounted to the Panel his experience of being 'told by the police, the Crown Prosecution Service (CPS) and successive attorney-generals . . . that no action can be taken when hate material [involving Holocaust denial] is sent to Jews, as Jews cannot be turned into antisemites'. And yet, the direct impact of hate speech upon its victims can be extremely harmful, as the *Keegstra* judgment made clear:

> [W]ords and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group. A response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance.[11]

Furthermore, there appears to be a certain lack of logic in the provision of an incitement to hatred offence. 'Incitement' of any criminal offence has always been a criminal offence, the justification of this being that it is equally morally culpable to attempt to bring about an offence as it is to carry it out. In the case of incitement to racial hatred, however, 'that which is incited (that is, the feeling of racial hatred), is not itself a criminal offence'.[12]

Alongside the definitional and conceptual limitations of the incitement to hatred legislation, a number of other, less fundamental, problems may also have played a part in restricting its general effectiveness. These include its restriction to conduct inciting 'hatred against a group . . . defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins' (section 17). The Jewish minority is deemed to be encompassed by the phrase 'ethnic origins'; that is, in this context Jews are defined as comprising an ethnic and not a religious group. Arguably, however, this is unsatisfactory, given that there may be an element of religious hatred in the perpetration of some antisemitic crimes, such as desecration of synagogues. There is also abundant evidence of hate crimes with a religious dimension being suffered by other minorities such as Muslims in Britain.

There are a number of issues relating to the enforcement of the racial hatred legislation that are a cause of concern to anti-racist campaigners. For example, the consent of the attorney-general to prosecution is required, and this is rarely granted (the Commission for Racial Equality has submitted many requests to the attorney-general which have been refused). The requirement for consent, furthermore, generates an extra level of bureaucracy which adds delays to the process of prosecution, and may discourage the CPS from putting cases forward. Police investigations of cases of incitement to hatred can be hindered by restrictions on powers of arrest and powers of search.[13] Another issue relating to enforcement is that the maximum sentence for offences under Part III of the Public Order Act is two years' imprisonment, which is arguably an inadequate penalty for the severe harm that can be caused by offenders.

Avrom Sherr referred the Panel to the 'dwelling exemption' provided by the incitement to hatred legislation. Under section 18, there is no offence where behaviour is carried out by a person in a dwelling which is not seen or heard except by others in that or another dwelling. This exclusion is too sweeping, Sherr argued, since it means that there is no recourse to the law in situations where racial hatred is stirred up during disputes between neighbours (for example in multiracial housing estates).

11 Ibid., at 748–9.

12 This objection to the incitement to hatred legislation was noted by Ivan Hare, who did, however, caution that it may be overstated.

13 Alan Learner pointed out to the Panel that offences under sections 21, 22 and 23 of Part III of the Public Order Act have no power of arrest, and that there are no powers to stop and search a person suspected to be in possession of any material contravening the incitement to hatred legislation.

Box 2: legislation dealing with racial hatred

Public Order Act 1986, Part III
Section 17 defines 'racial hatred' as 'hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins'.
Section 18 makes an offence of inciting racial hatred through the use of words or behaviour or the display of written material:

18(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if
(a) he intends to stir up racial hatred
(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

18(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

18(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

...

18(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

...

Sections 19 to 22 also deal with acts intended or likely to stir up racial hatred: namely, publishing or distributing written material (s. 19), public performance of a play (s. 20), distributing, showing or playing a recording (s. 21), broadcasting a programme (s. 21).
Section 23 prohibits the possession of racially inflammatory material: i.e. material which if shown or displayed would constitute an offence under sections 18 to 22.
Section 24 allows powers for the police to enter and search premises if there are reasonable grounds of suspecting an offence under section 23.
Section 25 gives a court the power to order the forfeiture of material which contravenes sections 18, 19, 21 or 23.

Malicious Communications Act 1988
This creates an offence where a person sends to another person (which includes delivering or causing to be sent) hate mail. The offence, which has not been widely used, is focused on the direct injury caused to the recipient by the sender of hate mail. The Act does not make any specific mention of the sending of racist material.

Protection from Harassment Act 1997
Under Section 1 it is an offence to pursue a course of conduct amounting to harassment of another where the harasser knows or ought to know that it amounts to harassment. Section 4 is concerned with harassment which puts the victim in fear of violence. The Crime and Disorder Act 1998 adds to these two new offences where either harassment or putting someone in fear of violence is 'racially aggravated', but it seems likely that racial aggravation will be difficult to prove as required by the Act.

Race Relations Act 1976
Under this Act, which does not create criminal sanctions, racial harassment can constitute racial discrimination where it is significant enough. In this context, harassment is conduct based on race which affects the dignity of men and women at work. In practice, only a small proportion of racial harassment cases succeed because they are often difficult to prove.

Finally, it can be argued that problems arise from the fact that the law has, to date, tackled racial hatred in a piecemeal fashion. As noted above, legislation relevant to hate speech in a broad sense is contained not only in the Public Order Act, but also in a range of other Acts, including the Race Relations Act 1976 and the Crime and Disorder Act 1998. This may have the effect of complicating further an already highly complex set of issues.

4 The proposal to criminalize Holocaust denial

The above discussion indicates that current legislation is inadequate for countering the harms caused by those who deny the Holocaust. The introduction of a specific law that criminalizes Holocaust denial has been seen by some as the most appropriate means of confronting these inadequacies.

As stated at the outset of this report, in February 1997 a Private Member's Bill was tabled in the House of Commons by Mike Gapes, Labour MP for Ilford, which would have inserted an additional clause into section 18 of the Public Order Act to make it an offence to deny the Holocaust in writing or orally. The Holocaust Denial Bill enjoyed some support from Conservative as well as Labour MPs. However, the view of the then Conservative government was that such a law might play into the hands of the deniers by giving them publicity, although Holocaust denial was rightly subject to prosecution where it formed part of a wider antisemitic message. Gapes's Bill received an unopposed First Reading in the House of Commons, and subsequently passed its committee stage. However, as had been generally expected, it was not allowed sufficient parliamentary time to proceed any further.

The full text of the Holocaust Denial Bill is contained in Box 3 below. While the original draft of the Bill referred to the denial of 'the policy of genocide against the Jewish people committed by Nazi Germany', it was subsequently redrafted to include reference to 'other similar crimes against humanity' so as not to overlook Nazi crimes against other groups such as Gypsies. The tabling of the Bill provoked conflicting responses, ranging from the supportive to the highly critical, from representatives of Britain's Jewish population.

At the time that Gapes's Bill was introduced, Tony Blair (then leader of the Labour opposition) expressed his view that there was 'a very strong case' for criminalizing Holocaust denial, and stated that the Labour Party was giving 'active consideration' to the question of how best to achieve this. The present Labour government has undertaken to examine the issue further.

Box 3: Holocaust Denial Bill, 1997

A Bill to make it a criminal offence to claim, whether in writing or orally, that the policy of genocide against the Jewish people committed by Nazi Germany did not occur.

1(1) The Public Order Act 1986 is amended as follows.
1(2) In section 18 there shall be inserted the following subsection—
5 (a) For the purpose of this section, any words, behaviour or material which purport to deny the existence of the policy of genocide against the Jewish people and other similar crimes against humanity committed by Nazi Germany ('the Holocaust') shall be deemed to be intended to stir up racial hatred.

2(1) This Act may be cited as the Holocaust Denial Act 1997.
2(2) This Act extends to England and Wales only.

Arguments for and against the criminalization of Holocaust denial

In considering whether the most appropriate response to the phenomenon of Holocaust denial is its criminalization, the Panel examined a wide range of issues. These issues, and the Panel's overall view on them, are summarized below.

Freedom of expression and international law

One of the most fundamental questions raised by the proposal to criminalize Holocaust denial is whether this would amount to an unjustifiable infringement of the right to freedom of expression. Freedom of expression is a primary right guaranteed by all major human rights treaties, as it is seen as an essential component of democracy. It applies no less to expressions that are offensive than it does to others; indeed, it applies *especially* to expressions that are offensive, disturbing or shocking: 'such'—according to an oft-cited judgment of the European Court of Human Rights—'are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"'.[14] Thus the right to freedom of expression imposes a duty of toleration on others.

However, this is not a right that is perceived as absolute. All jurisdictions impose some kinds of limits on expression: for example, in the form of libel laws, laws on obscene publications and legislation against speech which harms minority groups. The most celebrated law relating to freedom of expression is probably the First Amendment to the United States Constitution, which permits restrictions on free speech only when it leads to a 'clear and present danger'. Laws prohibiting race-hate speech would therefore be unconstitutional in the United States unless they were restricted to hate speech that incited imminent violence.

In the domestic law of the United Kingdom, where human rights law has to date been relatively undeveloped, there is no explicit guarantee of freedom of expression or, conversely, a coherent rationale for restricting the right to free speech. Freedom of expression has sometimes been treated as a common law right, or is deemed to exist by default. Restrictions on this freedom in the context of hate speech have generally been developed—as noted above—with reference to the need to maintain public order.[15] The context in which laws against hate speech are elaborated and enforced is, however, likely to change as a result of the Human Rights Act 1998. This makes the European Convention on Human Rights (ECHR) binding in domestic law, and means that courts in Britain will have to adjudicate between conflicting human rights.

International and European human rights law strives to strike a balance between the necessity of free speech in democratic society and the importance of minimizing the harms caused by certain forms of speech. As can be seen from Box 4, Article 19 of the UN International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the ECHR guarantee the right to freedom of expression, but also (in paragraphs 3 and 2 respectively) permit certain restrictions on this right. In both cases, these include restrictions for the purpose of protecting the rights and reputations of others, and thus clearly allow for the prohibition of forms of hate speech.

Further scope for prohibiting hate speech is provided by the right to live free from racial discrimination, recognized by the ICCPR in Article 20, which prohibits the advocacy of racial hatred, and Article 26, which asserts the right to equality. Also relevant in this regard is Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, of which the United Kingdom is a signatory, and which requires states to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred . . .'

Thus the question that the Panel has had to address is the following: Would Holocaust-denial legislation be consistent with Britain's human rights obligations under domestic and international law? Since Holocaust-denial literature can be said to attack the reputation of Jews, or to foster hatred of or discrimination against Jews, restrictions on its production and dissemination may be justified. This view is supported by two recent cases. In *Faurisson v France*,[16] the United Nations Human Rights Committee held that the French Gayssot law, which

14 *Handiside v United Kingdom*, Series A, No. 24, Paragraph 49.

15 The stance of English law on freedom of expression was discussed by Jonathan Cooper, David Feldman and Geoffrey Marshall in their submissions to the Panel.

16 UN Doc. CCPR/C/58/D/550/1993 (1996); 2 BHRC 1.

Box 4: international and European law on free speech and racial hatred

UN International Convention on Civil and Political Rights (1966)

Article 19

1 Everyone shall have the right to hold opinions without interference.
2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3 The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order, or of public health or for morals.

Article 20

1 Any propaganda for war shall be prohibited by law.
2 Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

. . .

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

UN Convention on the Elimination of All Forms of Racial Discrimination (1966)

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:

a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law . . .

European Convention on Human Rights (1950)

Article 10

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

prohibits Holocaust denial, was a justified interference with Article 19 rights of free speech. In 1998 the European Court of Human Rights clearly sanctioned laws prohibiting Holocaust denial with its decision in the case of *Lehideux and Isorni v France*.[17] The court referred to Article 17 of the ECHR which provides that 'nothing in this Convention may be interpreted as implying . . . any right to engage in any activity . . . aimed at the destruction of any of the rights and freedoms set forth herein'. It then stated that there is a category of clearly established historical facts such as that of the Holocaust whose negation or revision would be removed from the protection of Article 10 by Article 17.

However, these decisions do not guarantee that a denial law in the United Kingdom would not fall foul of the right to freedom of expression. In both *Faurisson* and *Lehideux* it was made clear that free speech restrictions must be a proportionate response to a problem. In the former case, the proportionality was deemed to lie in the fact that Holocaust denial was the 'principal vehicle of antisemitism in France'.[18] In Britain it is not likely that a specific denial offence would be seen as proportionate, since Holocaust denial does not threaten to become a very significant problem and is not the major manifestation of antisemitism. There would therefore be doubts over the legitimacy of the legislation: doubts which would be all the more pressing given that the attempt to proscribe certain forms of speech on the basis of their content rather than their context or possible effects 'would mark a novel development in English law'.[19]

A denial law's focus on the content of the speech it would be aiming to curtail has another implication for the free speech debate. In specifically prohibiting the deniers' distorted versions of history, such legislation would effectively entail 'setting right' the historical record. The notion that, in a democratic society, the historians' task of determining the facts of history can appear to be taken on by the law is highly problematic.

Holocaust-denial legislation in other jurisdictions

An argument that is sometimes made in support of the introduction of Holocaust-denial legislation in the United Kingdom is that such laws are already in existence in a number of other countries. This issue was raised by Mike Gapes MP in his submission to the Panel: he voiced his concern about the lack of consistency between European jurisdictions in terms of responses to Holocaust denial, which could lead to material being published in one country for dissemination in another. The Panel was interested in what can be learned from the experiences of those jurisdictions which have banned Holocaust denial about the potential benefits and pitfalls of such legislation.

Holocaust denial has been prohibited in six European states—Austria, Belgium, France, Germany, Spain and Switzerland—and in Israel. (Details of the legislation in each of these countries are summarized in Appendix B, pp. 26-7.) There is no single model of Holocaust-denial legislation that has been applied in these various states: the specifics of the offences prohibited vary from place to place. In Austria, for example, the offence is the public denial, gross trivialization, approval or justification of the National Socialist genocide and other crimes against humanity; in Germany the focus is on the insult to the victims and their relatives caused by the offence; and in Israel the offence requires proof of intent to defend or express sympathy for the perpetrators of the Nazi crimes. The Holocaust-denial laws also vary in terms of the legislative context within which they are set, the provisions that are made for bringing prosecutions and hearing cases, and the penalties provided for.

It is in France and Germany, which have had Holocaust-denial laws on their statute books for longer periods than the other European states, that the most active use has been made of this legislation. The Panel received submissions from Roger Errera and Georg Nolte on the experiences of these two countries respectively.

In France the 1990 Gayssot law makes it an offence to question publicly the existence of the crimes tried at Nuremberg. This legislation is part of a wider law prohibiting all racist, antisemitic or xenophobic acts. The Gayssot law has been used successfully against several notorious deniers, including the influential Robert Faurisson. Roger Errera informed the Panel that in his view the effective way in which the law has been enforced is due to its precise wording, which has meant that problems of interpretation have been avoided.

However, Errera stated that he believes the act to be unnecessary, since civil and administrative responses to instances of Holocaust denial have proved to be

17 Judgement of 23 September 1998.
18 Paragraph 9.7.
19 As argued by Jonathan Cooper in his submission to the Panel.

more effective and flexible. Furthermore, he feels that, as a matter of principle, it is inappropriate for the negation of a fact—even the fact of the genocide of the Jews by the Nazis—to constitute an offence. It has been noted elsewhere that several prominent figures in France have strongly criticized the Gayssot law.[20] These include Simone Veil, a Holocaust survivor and former president of the European Parliament, who opposes the law on the grounds that it provides publicity for the deniers, allows them to appear as martyrs and converts debate about Holocaust denial into debate about free speech.

Holocaust denial was first outlawed in Germany in 1985 as a form of criminal defamation which was an 'insult' to the personal honour of Jews living in the country. In 1994 legislation was passed to make Holocaust denial an offence under the incitement to racial hatred law (article 130 of the criminal code). The new law prohibited the approval, denial or minimization, in public or in an assembly and in a way that can disturb the peace, of the actions of the Nazi regime. Georg Nolte reported to the Panel that there were twenty judicial decisions under the Holocaust-denial law in 1996. Sixteen of these cases concerned adults, of whom ten were convicted.

Nolte brought to the Panel's attention the particular social and political context within which the German legislation operates. A substantial minority of the German population holds far-right views, and there is a small but active neo-Nazi scene. At the same time, the greater part of the German public reacts to neo-Nazi activity and Holocaust denial with particular abhorrence. It is Nolte's view that in this context Holocaust-denial legislation is inappropriate.

The are two main grounds for this opinion. First, the introduction of the 1994 legislation appears to have been a consequence of the public's general desire to see Holocaust denial singled out as a special form of incitement to hatred, rather than a reaction to a perceived increase in denial activity. As the provision was not enacted on the basis of an assessment of some kind, it might not comply with the constitutional guarantee of freedom of expression. Second, since Holocaust denial can take many and varied forms, the legal system may constantly be provoked into broadening the definition of prohibited speech. Thus the denial law may eventually create self-proclaimed free speech martyrs and delegitimize itself. Nolte stressed that in a state in which the general public has a profound wish to dissociate itself from anything that can be interpreted as Holocaust minimization, the judiciary has a special responsibility to ensure that convictions for Holocaust denial can be justified.

In considering whether the consequences of Holocaust-denial legislation in other jurisdictions support the case for introducing it in the United Kingdom, the Panel has had to address the following two questions:

- How effectively has legislation elsewhere been enforced?
- What impact has the legislation had on levels of Holocaust-denial activity?

As far as the first question is concerned, there have been some successful prosecutions in France and Germany. On the other hand, looking at the countries with such legislation as a whole, it appears that the total number of prosecutions is very small. Furthermore, it has been argued that in almost all the cases 'the evidence would equally have supported a charge of racial incitement instead of a specific offence of Holocaust denial'.[21]

The second of the above questions is extremely difficult to address, not only because assessing the extent of Holocaust denial is not a straightforward task, but also because many factors other than legislation, such as public events that have a bearing on race relations, can affect levels of activity. Lerman has noted that Holocaust denial has reportedly declined in some of the countries (for example, Switzerland and Belgium) that have prohibited it, but it has by no means ceased.[22] At the same time, there has been no corresponding increase—in fact, as noted above, there may have been a slight decrease—in Holocaust-denial activity in the United Kingdom, where there has been no law against it to date. In analysing the impact of legislation upon denial activity it must also be borne in mind that the laws can have the effect of changing, rather than eradicating, the forms that denial takes—sometimes to the benefit of the deniers. For example, D'Souza pointed out in her submission to the Panel that Jean-Marie Le Pen arguably had greater success in recruiting members

20 Lerman, 'Combating Holocaust denial'.

21 G. Bindman 'Outlawing Holocaust denial', *New Law Journal*, 466-8, March 28 1997.

22 Lerman, 'Combating Holocaust denial'.

to the Front national after being forced to moderate his message by French law.

In sum, there appears to be little in the experiences of other jurisdictions which strongly bears out the calls for specific Holocaust-denial legislation in Britain. Furthermore, it is simplistic to assume that the legislation which exists in certain other European states would necessarily have a place in the United Kingdom. Antisemitism and Holocaust denial take different forms in different countries, and thus demand different remedies. For example, it has already been noted that in the United Kingdom Holocaust denial cannot be described as the 'principal vehicle of antisemitism', as was claimed to be the case in France in justification of the Gayssot law (in the *Faurisson v France* case). At a more abstract level, for countries that directly experienced Nazism—including those that were occupied by the Nazis—Holocaust-denial laws may have an important symbolic function. In these countries, the laws entail a public recognition of the facts of the Holocaust, which were played out to varying extents on their own soil; simultaneously, the laws help to distinguish the present from that never-to-be-repeated past.

Holocaust denial from a religious perspective

The submission to the Panel of Rabbi Dov Oppenheimer considered the issues of Holocaust-denial legislation and freedom of expression from the perspective of Jewish law (the Halacha). Rabbi Oppenheimer pointed out that, clearly, religious law cannot regulate what non-Jews say about Jews. However, he suggested that from a rabbinical perspective Holocaust-denial legislation 'might be perfectly consistent with the spirit of the strict limitations on freedom of speech which the Torah imposes on Jews to protect the feelings and reputations of others'.

On the other hand, throughout their history Jews have been urged by their religious thinkers not to adopt a confrontational stance in the face of antisemitism, other than in situations that appear life-threatening. The introduction of a Holocaust-denial law in the United Kingdom would be contrary to this non-confrontational approach, especially since the most serious manifestations of antisemitism can be dealt with by existing anti-racist legislation, and would have the effect of enhancing anti-Jewish sentiment within the small minority already prone to such an attitude. Moreover, Rabbi Oppenheimer noted that the lesson from elsewhere in Europe is that Holocaust-denial laws can provide the deniers with the opportunity to claim, before the highest constitutional courts, that their human right to freedom of expression is being violated.

Policing the Internet

It has been noted above that the Internet is used to disseminate Holocaust denial and other related material. This problem raises the large, complex and rapidly evolving issue of Internet regulation. It is well beyond the remit of the Panel and this report of their deliberations to explore the immense practical difficulties associated with Internet legislation or, for that matter, the broader philosophical questions surrounding the subject (some insist that the very effort to regulate the Internet is a negation of its fundamental value as the last sphere of cultural and political life that is free of governmental controls). However, the significance of the Internet for many far-right and neo-Nazi organizations is such that it is important to touch upon the issue here.

The concern of campaigners against antisemitism and racism with the presence of hate material on the Internet is fully understandable, especially given the ease with which the Internet is used and with which usage is liable to expand over the next few years. However, the exploitation of the Internet by Holocaust deniers is clearly not in itself grounds for criminalizing denial. Holocaust denial on the Net does not raise the question of whether there should be a specific denial offence; rather, it highlights the need for methods of controlling all forms of undesirable Internet use by individuals and organizations. Holocaust denial on the Internet can in practice only be dealt with to the same extent and in the same manner as other material deemed highly offensive, such as child pornography and other manifestations of racism.

Governments in Europe have now committed themselves to the development of strategies for Internet regulation. By virtue of the very nature of the Internet as a global network, such strategies can only be effective if they involve international co-operation both in the legislative process and in enforcement. In the case of the effort to combat Holocaust denial in Britain, the international dimension of Internet usage is particularly apparent, since the great majority of denial material on the Net originates from overseas.

At the most basic level, the complexities of regulating the Internet have been outlined by Michael Whine, who has written of the difficulty of determining who 'you indict, the site provider who

will surely claim his position is analogous to that of a common carrier, and not a publisher; the sender of the message who lives in another jurisdiction; or the one who downloads the material with the intention to distribute it'.[23] European governments appear to have accepted the principle that service and site providers carry liability for the contents of the sites they carry. However, there remain a great many practical and technical difficulties in imposing controls on the many-tiered, multinational and dynamic activity that is the Internet.

From the perspective of efforts to combat Holocaust denial, it is to be hoped that three broad principles are followed in the elaboration of strategies for Internet regulation. The first of these is that the problem of Holocaust denial is recognized, in order that the presence of denial material on the Net is treated with as much seriousness as is the presence of other kinds of offensive material. Again, this is not dependent on there being a specific law that criminalizes Holocaust denial, but only requires the recognition that denial is an especially offensive form of antisemitism.

The second principle is that strategies should not be informed by exaggerated assessments of the extent and influence of those propagating antisemitic and related ideas. Although antisemitism on the Internet is undoubtedly a worrying phenomenon and should be kept in check wherever possible, it is clear that it comprises no more than a tiny fraction of the total, enormous volume of material on the Internet. There is no evidence to date that Internet antisemitism has had success in increasing support for neo-Nazi and other far-right groups. And of course such groups are not alone in being able to utilize the Internet: campaigners and activists against antisemitism and racism can use it to keep track of many of their opponents' activities, as well as to put their own messages across. Michael Whine has made the interesting point, moreover, that the emergence of electronic forms of antisemitism does not threaten to make other forms redundant: 'In fact, the largest use of the Internet has been to advertise the sale of non-Internet related white supremacist material such as books, audio tapes and videos.'[24]

The third, and more general, principle that should be followed in the development of strategies for Internet regulation is that the law must apply to material on the Net in the same way that it does to other media of communication. This is a view that has been endorsed by the present British government. It follows from this principle that, as is true of laws on hate speech in general, legislation relating to the Internet must seek to strike a balance between the right to freedom of expression and the rights of minorities to be protected from discrimination and hatred.

The risks associated with Holocaust-denial legislation

Several issues raised by the discussion thus far indicate that Holocaust-denial legislation, if introduced in the United Kingdom, would be problematic in various respects. A closer examination of these problematic aspects suggests, indeed, that in some ways the introduction and operation of a denial law could be counter-productive, in that it would work to the advantage of those it would be aiming to penalize.

The seemingly straightforward question of how to define Holocaust denial for the purpose of legislation brings its own problems.[25] As has already been demonstrated, Holocaust denial is a phenomenon that takes many forms; and some of the potentially most harmful forms seek to disguise themselves as something different—that is, as the products of genuine scholarly research. Hence, to be effective the legislation would have to define 'denial' broadly enough to encompass a wide range of very different kinds of material: for example, to include the trivialization of Nazi crimes, as do the denial laws of some other jurisdictions. However, the broader and vaguer the definition, the greater the chance that it could be said to impinge on the work of real historians, and be deemed an illegitimate infringement on the right to free speech. It can only be of assistance to Holocaust deniers if they are able to draw on concerns about freedom of expression, and hence ally themselves with a legitimate cause, in seeking to evade prosecution under a Holocaust-denial law.

23 'Anti-semitism and Holocaust denial in the Internet era', *Justice*, June 1997, 21–6. See also David Capitanchik and Michael Whine, *The Governance of Cyberspace: Racism on the Internet*, Policy Paper no. 2 (London: JPR 1996). In *Godfrey v Demon*, decided in 1999, the High Court has held that a service provider can be liable for the content of its site, at least once it has been given notice that it is carrying unlawful material and fails to remove it.

24 Whine, 'Anti-semitism and Holocaust denial'.

25 The definitional problems relating to Holocaust denial legislation were noted by Geoffrey Bindman and David Pannick, among others, in their submissions to the Panel.

Legislation based on a narrower definition would have the virtue of greater clarity and might lessen (but not eliminate) the risk of 'free speech' challenges; but it would exclude from its remit a great deal of denial material and thus appear somewhat arbitrary in its operation. If 'denial of the existence of a Nazi policy of genocide' was to be the offence, for instance, claims that the gas chambers could not kill large numbers of Jews, or that 500,000 rather than 6 million Jews were murdered, might not be encompassed. Another problem with basing legislation on a narrow definition of Holocaust denial is that this permits deniers to stay on the right side of the law by slightly moderating or otherwise reformulating their claims, which can even—as has been observed above with reference to Le Pen's response to the French Gayssot law—help them to broaden their support base.

The criminalization of Holocaust denial in the United Kingdom would doubtless cause many to query the rationale for prohibiting Holocaust denial as a special case of hate speech. It is clear that this is a form of antisemitism that must be regarded with the utmost seriousness: because of the particular offence it causes, and because it is sometimes a masked manifestation of hatred of Jews, and because of the part it plays in the politics of the far right and certain extreme Islamist groups. However, it does not automatically follow from this that the law should deal with Holocaust denial differently from other especially damaging forms of hate speech.

Roger Errera reported to the Panel that in France there has been a debate about how the law should respond to the denial of other atrocities: such as the genocide of the Armenians by the Turks, and those carried out in Stalin's Russia and Pol Pot's Cambodia. In Britain, where Jews comprise but one of a large number of diverse minority groups, the existence of a Holocaust-denial law might likewise be expected to provoke calls for it be extended to cover other instances of denial. If such calls were heeded, it is difficult to imagine where and on what basis the limits of the law would eventually be set. If, conversely, the law continued to restrict itself to Holocaust denial, British Jews would face the accusation that they were demanding and receiving special treatment.

The prosecution of cases under Holocaust-denial legislation would bring its own risks. The most obvious of these is probably the danger that cases would provide valuable publicity for the Holocaust deniers. In defending themselves in court, deniers will have the opportunity—whatever the eventual outcome of the cases—to make their opinions known to a far wider audience than they would otherwise have access to. This threat is amply illustrated by the trial of Ernst Zundel in Canada in the 1980s. He was convicted of the offence of 'spreading false news' with the publication of his pamphlet *Did Six Million Really Die?* Zundel's views were given a great deal of media coverage as the case proceeded; and in the end his conviction did not even stand, as in 1992 it was declared by the Supreme Court to be an unconstitutional violation of freedom of expression, and the law in question was struck down.

This case also demonstrates that the problem of publicity is not simply a matter of the public airing of the views of the Holocaust deniers. In his defence Zundel attempted to prove that the Holocaust did not take place: with the result that the very facts of the Holocaust were put on trial. If courts become forums in which Holocaust deniers are given space to argue with survivors and historians about the reality of the Holocaust, this in itself could appear to support the deniers' claims that such debate is meaningful—that there is something worth debating. This situation can perhaps be avoided if judicial notice is taken of the facts of the Holocaust at an early stage in court proceedings; however, there is no guarantee that a court would take this step, or that such a step would go unchallenged.

Even if prosecutions under some kind of British Holocaust-denial law were successful, there would be a danger that (as mentioned above, with reference to the situations in France and Germany) the guilty parties would gain sympathy and recognition as martyrs to their cause or, more worryingly, to the cause of free speech. If, on the other hand, prosecutions failed—perhaps because of shortcomings in the law itself—the Holocaust deniers would have the opportunity to present themselves as having triumphed.[26]

26 The way in which this can happen is illustrated all too clearly by the failed prosecution, in 1967, of four members of the Racial Preservation Society for the distribution of the *Southern News* in East Grinstead (a case cited by both Ivan Hare and Avrom Sherr). It was alleged that the publication, which advocated a 'humane solution to the problem of coloured immigration', was likely to stir up racial hatred. The defendants were found not guilty, and subsequently published a 'souvenir edition' of 'the paper the Government tried to suppress'. An account of the case, *R v Hancock*, can be found in Anthony Lester and Geoffrey Bindman, *Race and Law* (Harmondsworth: Penguin 1972), 369–71.

Arguments against denial legislation: an overview

The Panel reached a unanimous decision, on the basis of the issues discussed above, that the introduction of specific Holocaust-denial legislation in the United Kingdom would be an inappropriate response to the problem of Holocaust denial. It seemed to the Panel that there were four major and compelling arguments against the criminalization of denial:

1 *The legislation could be seen as an illegitimate infringement on the right to freedom of expression*

International human rights treaties acknowledge freedom of speech to be a necessary component of democratic society, but at the same time they clearly permit certain restrictions on this freedom, including for the purpose of protecting the rights and reputations of minority groups. In 1998 the European Court of Human Rights, in its ruling on *Lehideux and Isorni v France*, explicitly sanctioned Holocaust-denial legislation, with the statement that the 'negation or revision' of the Holocaust would not be protected by the free speech provision of the European Convention on Human Rights.

Nevertheless, it is quite possible that a successful 'free speech' challenge to denial legislation would be mounted in the United Kingdom, on the grounds that the problem of Holocaust denial in this country is not a great one, and therefore its prohibition cannot be deemed a proportionate response. A denial law would in any case be highly controversial in Britain, as it would be a new departure for the law to penalize a form of hate speech effectively on the basis of its content rather than its context and potential impact.

The Holocaust deniers themselves would doubtless have much to gain from any serious disputes over the legitimacy of a denial law. In entering into these disputes and allying themselves with free speech campaigners, the deniers would be able to claim a spurious respectability for their cause.

2 *The evidence from other jurisdictions is unconvincing*

In those countries where Holocaust-denial legislation is already on the statute books, the law does not appear to have had a marked effect. Although there have been a number of successful prosecutions in Germany and France, the total number of prosecutions under Holocaust-denial laws is very small. There may be evidence of a decline in denial activity in some of the countries that have outlawed it; but there is no definitive proof that any such decline is necessarily linked to the legislation. An apparent small decline in denial activity in Britain over a similar period, in the absence of any denial legislation, provides further cause to question the impact of the legislation in other jurisdictions.

Doubts can also be raised about the applicability of any of the other jurisdictions' Holocaust-denial laws to the very different context of the United Kingdom. In France and Germany, for example, the significantly higher levels of far-right and antisemitic activity, and even these countries' direct historical experiences of Nazism, mean that their respective denial laws have much greater operational and symbolic meaning than would any British equivalent.

3 *Conceptual problems would delegitimize the legislation*

There are no clear answers to the question of how best to define Holocaust denial—a multifarious and sometimes disguised phenomenon—for the purposes of legislation. A law that employed a broad definition would run the greatest risk of facing challenges on the grounds of free speech, and any vagueness in the definition could cause problems in the prosecution of cases. A narrow, more precise definition would exclude from the law's remit a large amount of denial activity, and would lead to an apparent arbitrariness in the law's effect.

Another conceptual problem associated with denial legislation is that there are no self-evident logical reasons for prohibiting the denial of the Holocaust but not the denial of other atrocities. Since the introduction of such legislation would be justified in terms of social and political rather than legal arguments, it could provoke accusations of 'special pleading' by Jews.

4 *The prosecution of cases under a denial law could work to the advantage of the deniers*

The prosecution of cases under Holocaust-denial legislation would provide valuable publicity for Holocaust deniers, as media coverage of these cases would have the effect of disseminating their opinions to a wide audience. Moreover, the deniers' aim of casting doubt on the essential facts of the Holocaust would be accorded a certain legitimacy if they were able to have these facts disputed in court as part of their defence.

Even successful prosecutions of deniers could be counter-productive if they generated a large amount of publicity and the guilty parties managed to portray themselves as martyrs to the cause of free speech. If a Holocaust-denial law had serious shortcomings arising from potential free speech infringements or definitional problems, the danger would be that many or most prosecutions would fail. The unavoidable consequence of this would be that numbers of deniers would have the opportunity to proclaim their victories over the state that tried to silence them. It can thus be concluded that an ineffective Holocaust-denial law would be considerably more damaging to the Jewish population of Britain than no law at all.

6 Possible legal remedies

While agreeing that the introduction of specific Holocaust-denial legislation in the United Kingdom would not be appropriate, the Panel felt that there may be grounds for amending current laws against racial hatred with the aim of making them more effective in dealing with hate speech in general and Holocaust denial in particular. The question of how the legislation can best be amended was clearly outside the Panel's remit, and can be properly addressed only through further research. It was clear to the Panel, however, that any such research must proceed on the basis that, notwithstanding the harms inflicted by hate speech, freedom of expression is a primary right in democratic society and—as has already been stated—applies *especially* to speech that is offensive, disturbing or shocking. In other words, the duty of toleration imposed by the right to free speech must not be forgotten in the efforts to use the law to impede the activities of racists and antisemites.

In the Panel's view, the following three principles should be adopted in the consideration of possible amendments to the existing hate speech laws:

- The term 'hate speech' is understood to cover words, written material and behaviour which attacks the dignity of its victims and contravenes their right to live free of discrimination.

- Laws against hate speech should be consistent with Britain's obligations under international law and take account of the changing nature of human rights protection in the United Kingdom.

- Hate speech laws should be coherent and complete, and should be capable of commanding support across the spectrum of mainstream political opinion.

On the specific question of how the current hate speech laws might be amended, the Panel raised two possibilities. First, the condition of the existing incitement to hatred offence that the prohibited behaviour or material must be 'threatening, abusive or insulting' (in addition to being intended or likely to stir up racial hatred) could be removed. The removal of this condition would allow the incitement offence to encompass many of the more 'subtle' or 'sophisticated' manifestations of Holocaust denial, and indeed of other forms of antisemitism and racism.

The second, and more contentious, possibility raised by the Panel was that a 'direct hate speech' law could be introduced to complement the incitement to hatred offence. Such a law would cover instances where the intention or effects of hate speech is to expose the target group to hatred, vilification, hostility or contempt. Some members of the Panel, however, believed that such a law would amount to a disproportionate infringement of freedom of expression, as it would mark a radical shift away from the emphasis of current legislation on the public order implications of hate speech. Others argued that a direct hate speech law would be a welcome resolution of the current discrepancy whereby the law can intervene when racist or antisemitic material is sent from one racist or neo-Nazi to another, but fails to provide any protection against racist insults targeted directly at the victim group.

Both the possible amendments noted above would have the effect of granting hate speech laws greater applicability to Holocaust denial, while avoiding many of the problems associated with specific denial legislation. There would be no requirement for a special case to be made regarding the harms and dangers of Holocaust denial, or for an identification of what exactly comprises Holocaust denial. More importantly, the offences would continue to be based on the intended or likely impact of hate speech rather than its content. Thus there is no danger that the law could be accused of seeking to legislate on the historical record. Furthermore, in the absence of any 'truth' defence to hate speech offences (as is currently, and correctly in the Panel's view, the case), there would be little risk that the prosecution of a Holocaust denier would lead to the facts of the Holocaust being disputed in court.

In the opinion of the Panel, a number of other issues raised in the discussion of the limitations of current legislation also require further consideration as part of any general research on reforming hate speech legislation. (Some of these issues, indeed, are already the subjects of research by other bodies.) These include: the question of whether groups defined by reference to religion should be protected by hate speech laws; the appropriateness of the current 'dwelling exemption' provided by the hate speech laws;[27] the requirement of consent from the attorney-

27 William Macpherson, in his report on the Stephen Lawrence case, recommended review of this exemption (*The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny . . . February 1999* (London: The Stationery Office 1999) (Cm 4262-I)).

general to prosecution; the adequacy of the maximum sentence for hate speech offences; and the adequacy of current powers of arrest and stop-and-search in relation to these offences.

Some broader issues that also merit investigation, with a view to determining the most appropriate ways of extending the scope and effectiveness of hate speech legislation, include: public attitudes to hate speech legislation; the impact of direct hate speech upon its victims; interpretations of the ECHR's and ICCPR's restrictions on free speech in other jurisdictions; and the implications of a rights-balancing approach to hate speech legislation in the United Kingdom.

7 Conclusion

The Panel reached the unanimous view that the criminalization of Holocaust denial in the United Kingdom would be inadvisable. This report has outlined the Panel's reasoning on this issue, and has also considered some ways in which existing laws on racial hatred can be amended, in order to improve their effectiveness in dealing with expressions of racism and antisemitism, including Holocaust denial.

It seems appropriate to make the point, in conclusion, that whatever the extent to which the law might be used to penalize those who propagate Holocaust denial, the law should not be regarded as a tool for countering general ignorance about the Holocaust. The criminal court is not a proper place for the teaching of history: it is the responsibility of other institutions to raise awareness of the Holocaust, and thereby invalidate the distortions of the deniers.

Thus the wider context which shapes perceptions and knowledge of the Holocaust must be considered. As must the fact that this is a changing context: for over the next few years and decades the Holocaust survivors (and the perpetrators and witnesses of the Nazi crimes) will become ever fewer in number, until the time comes when no further first-hand accounts can add to the existing stock of knowledge. However, even when the Holocaust is no longer an event in living memory, the various forces that have the effect of (at least partially) educating the public about this vast subject will in all likelihood continue greatly to outnumber and outweigh deliberate efforts to generate ignorance and misinformation.

In Britain, Europe and beyond, the facts of the Holocaust are documented and presented to the public in countless museums, historical exhibitions and memorials. The Holocaust is the subject of unending debate and research, as historians, philosophers, political and social scientists and other social commentators continue to grapple with the tasks of tracing and analysing the events, actions, causes, motivations and consequences—and even of drawing 'lessons' to be learned for humanity. All conceivable aspects of victims', survivors', relatives', perpetrators' and witnesses' experiences are explored, interpreted and reinterpreted in the works of artists, poets, novelists, playwrights and filmmakers.

Attention is also focused on the Holocaust by public commemorations which are held, and doubtless will continue to be held, on important anniversaries of the events surrounding the Second World War. In 1995, for example, the fiftieth anniversary of the liberation of the death camps was marked in much of Europe. The Home Office in London has recently announced plans to establish a British Holocaust remembrance day, the date of which (27 January) will be the anniversary of the liberation of Auschwitz. Knowledge about the Holocaust is conveyed through formal education as well: through general history and other humanities' classes at all levels of education, and through specialist courses at colleges and universities. In Britain, the facts of the Holocaust are now taught as part of the national curriculum to all children in the 11 to 14 age-range.

Public awareness of the Holocaust in Britain and elsewhere is further enhanced by various current political debates and events. For example, there has been substantial media coverage of issues relating to the restitution of property and assets taken from Jews, compensation claims made by survivors and victims' relatives against companies which benefitted from the Holocaust, and occasional trials of war criminals. As the Holocaust recedes into more distant history, such cases will become fewer and further between, and will eventually cease altogether; nevertheless, they will retain their significance as points of reference for trials of other war criminals, and attempts by victims of other crimes against humanity to seek some kind of redress.

To recognize that there are a large number of forums for education about the Holocaust is not by any means to be complacent about the harm done by Holocaust denial, or to evade the question of how the law can best deal with its expressions. In the increasingly multi-ethnic and multicultural society of Britain today, the inherent antisemitism of Holocaust denial is one of many manifestations of bigotry and hatred that can fracture relations between groups and engender intense insecurities. As such, the responses to Holocaust denial—by the law, educational establishments, and community organizations—must be informed and vigorous, and should build on and contribute to the wider endeavours of anti-racist campaigning and education.

Appendix A

JPR Law Panel inquiry: list of expert witnesses

Holocaust denial in the United Kingdom

Dr Roger Eatwell, European Research Institute, University of Bath
Gerry Gable, former editor, *Searchlight*
Michael Whine, Administrator, Community Security Trust

Freedom of expression

Professor David Feldman, University of Birmingham
Dr Geoffrey Marshall, Provost, Queens College, Oxford

Legal restrictions on freedom of speech

Jonathan Cooper, Director of European Convention Incorporation Project, Justice
Professor Dennis Davis, University of Cape Town
David Pannick QC, practising barrister, Fellow of All Souls College, Oxford
Dr Frances D'Souza, Executive Director, Article 19

Current/past race-hate legislation

Barbara Cohen, Principal Legal Officer, Commission for Racial Equality
Ivan Hare, Fellow and Director of Studies in Law, Trinity College, Cambridge
Alan Learner, Acting Detective Chief Inspector, New Scotland Yard
Professor Avrom Sherr, Woolf Professor of Legal Education, Institute of Advanced Legal Studies, University of London

Holocaust denial in other jurisdictions and proposed legislation in the United Kingdom

Geoffrey Bindman, JPR Law Panel
Professor Roger Errera, Member, Conseil d'Etat, France
Mike Gapes, Labour MP for Ilford
Dr Georg Nolte, Fellow in Comparative Constitutional Law and International Law, Max-Planck Institute, Heidelberg

Halachic perspectives on Holocaust denial and freedom of expression

Rabbi Dov Oppenheimer, Fellow of the Research Centre for International Law, Cambridge, and Associate Editor of *International Law Reports*

Holocaust survivors

Judith Hassan, Director, Services for Holocaust Survivors, Refugees and Their Families, Jewish Care

Appendix B

Laws against Holocaust denial: summary of features

Country	Date of law	Amendment or new law	Nature of offence	Incitement, denial, approval of Nazism	Penalty	Case heard by	Prosecution brought by
Austria	1992	Law no. 148, amendment of the 1945 law prohibiting the National Socialist German Workers party and advocacy of Nazi objectives	Criminal: if there is political intention, propaganda or involves the 'Auschwitz lie' Administrative: if there is no propaganda or the offence has a low impact level	Denial, gross trivialization, approval or justification, in a public manner accessible to many people, of National Socialist genocide and crimes against humanity	Criminal: 1 to 20 years in prison, which is life in Austria Admin: fine of 3,000 to 30,000 Austrian Schillings	County court (Landesgericht) with a jury of 8	State only (Staatsanwalt) Cases can be brought to the notice of the state prosecutor by anyone, but the state decides whether or not to go to court.
Belgium	1995	New law: la loi anti-négationiste	Criminal	Denial, trivialization, justification or approval of genocide committed under National Socialism during the Second World War	8 days to 1 year in prison and a fine of 26 to 5,000 Belgian francs The public display of the court's decision in a daily newspaper may be ordered.	High Court with a jury of 12 (cour d'assise)	State and associations which are legally recognized as anti-racist or representing deportees or members of the resistance
France	1990	Amendment to the law of 1881 on the freedom of press: Law 90-615 concerning the suppression of all racist, antisemitic or xenophobic acts The Holocaust denial law is Article 24b, la loi Gayssot.	Criminal	Questioning the existence of crimes against humanity which were committed either by members of an organization declared criminal or by a person found guilty of such crimes by a French or international court	1 month to 1 year in prison, a fine of 2,000 to 300,000 French francs or both The tribunal may order the public display of its decision.	Magistrates court with a panel of 3 judges	State, associations and individuals

Country	Date of law	Amendment of new law	Nature of offence	Incitement, denial, approval of Nazism	Penalty	Cases heard by	Prosecution brought by
Germany	1985, 1994	1985: Article 194, 21st law modifying the Criminal Code 1994: amendment to Article 130 dealing with incitement to racial hatred	1985: Holocaust denial is outlawed as an 'insult' to personal honour, i.e. an 'insult' to every Jew in Germany; prosecution requires consent of the victim 1994: Holocaust denial becomes a criminal offence under anti-incitement law	Denial, trivialization or approval, in public or in an assembly, of actions of the National Socialist regime The 1994 law extends the ban on Nazi symbols and anything that might resemble Nazi slogans.	1985: up to one year in prison or a fine 1994: up to 5 years in prison or a fine. A special clause in Article 130 provides for community service for offenders under 18.	Minor offences are heard in lower regional courts (Amtsgerichte) presided over by one judge and two lay officials. More serious offences are heard in the higher regional courts (Landgerichte), with 3 judges and 2 lay officials. There are no juries. The state prosecutor can order a fine without a trial if there is insufficient evidence.	State prosecutors only, although anyone can bring cases to the notice of the state prosecutor
Israel	1986	New law: Prohibition Law no. 1187	Criminal	Denial, trivialization, praise or approval of acts committed under the Nazi regime which are crimes against the Jewish people or against humanity	5 years in prison	Magistrates court with one judge or a panel of judges	By or with the consent of the attorney-general
Spain	1996	New Penal Code: Section 607 deals with denial of the Holocaust The Penal Code of 1848 had not been updated.	Criminal	Denial or justification of crimes of genocide or the advocating of regimes or institutions which favour genocidal crimes	1 to 2 years in prison and between 100,000 and 1,000,000 pesetas fine	District and local courts where the offence takes place, usually with one judge There are no juries.	State and associations
Switzerland	1994	New criminal provisions: Article 261*bis* of the Swiss Penal Code	Criminal offence punishing Holocaust denial as a breach of human dignity	Public denial, trivialization and disputation of genocide or other crimes against humanity	Maximum of 3 years in prison; fine or suspended sentence in cases of minor offences	District Police Tribunal with a panel of judges	State and individuals

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