



Consultation on draft guidance on the management of controversial material in public libraries

The Museums, Libraries and Archives Council (MLA) is seeking comments on the content of draft guidance for Public Library Authorities on the selection and management of controversial material in public libraries.

Introduction

In November 2007 the government commissioned the MLA to produce guidance for public libraries on the management of extremist and inflammatory material.

MLA is the government agency for museums, galleries, libraries and archives. We deliver strategic leadership in England and in each of its regions and we collaborate with partners across the UK. Our research identifies good practice, which we use to promote improvement. We offer advice, support and resources to funding bodies and other groups to incentivise innovation. Our aim is to raise professional standards and champion better services for users and readers of all ages and backgrounds, whether residents or visitors.

Purpose

This consultation is aimed primarily at public library managers and heads of local authority cultural services. Discussions with library managers and sector bodies have demonstrated a desire for guidance to:

- highlight duties and responsibilities
- advise on relevant legislation, consultation and engagement
- share best practice within a context of local independence and accountability.

Other libraries, community and faith groups may also be interested in this draft guidance.

How to respond

The closing date for making responses to this consultation is Monday 7 April 2008. If you would like to respond to this consultation using the questions set out below, please email your response to libraryconsultation@mla.gov.uk

If you prefer, you may submit a hard copy by post to:
John Dolan

Head of Library Policy
Museums, Libraries and Archives Council
Victoria House
Southampton Row
London WC1B 4EA

If you have any queries about this consultation you can contact the Libraries Team at the above address or by telephone on 020 7273 1441.

However, if you have any questions or complaints about the process of consultation on this paper, please contact Clare McGread, Consultation Co-ordinator, Museums, Libraries and Archives Council, Victoria House, Southampton Row, London EC1B 4EA. Email: clare.mcgreed@mla.gov.uk

A summary of consultation responses, as well as copies of all responses, will be made available on the MLA website within three months after the consultation has closed. It is assumed, therefore, that your reply can be made publicly available. In addition, all information in responses, including personal information, may be subject to publication or disclosure under freedom of information legislation. If a correspondent requests confidentiality, this cannot be guaranteed and will only be possible if considered appropriate under the legislation. Any such request should explain why confidentiality is necessary. Any automatic confidentiality disclaimer generated by your IT system will not be considered as such a request unless you specifically include a request, with an explanation, in the main text of your response.

Consultation questions

Please answer 'YES' OR 'NO' to each question and then add further comment as necessary.

Q1. Does the guidance meet the needs of library managers and staff in the selection, presentation and promotion of material in the context of a wider stock policy?

Q2. Does the guidance help libraries to fulfil their role as access points to publicly available information?

Q3. Does the guidance help to promote community cohesion through the provision of a balanced range of information, learning and cultural resources?

Q4. Do you feel that further guidance or clarification is needed?

Q5. If you have worked with other groups in creating your response please describe who has been involved in the process.

Draft guidance on the management of controversial material in public libraries

1. Introduction

1.1. Public libraries in England house millions of publications that reflect an experienced and expert methodology of selection. Librarians and public library staff select from material published in the UK and overseas to meet the needs and interest of local communities. In doing so, they have built a unique, free and open public collection.

1.2. Britain is a diverse, multi-faith, and increasingly secular society with an extensive range of views. To fulfil the democratic traditions within libraries of free access to information, ideas and freedom of expression, they accommodate a wide spectrum of opinions and belief.

1.3. Within this diverse society the selection and management of stock and donations has become a complex responsibility. This guidance is designed to help provide good and consistent practice.

2. Background

2.1. In November 2007 the Government commissioned the Museums, Libraries and Archives Council (MLA) to produce guidance for public libraries on the management of controversial – inflammatory and extremist – material.¹

2.2. Despite considerable good work by librarians in this area, discussions with library managers and sector bodies has demonstrated a desire for guidance to highlight duties and responsibilities, advise on relevant legislation, consultation and engagement and the sharing of best practice within a context of local independence and accountability.

3. First principles of the guidance

3.1. Free expression and open libraries remain essential to British democracy. Each local library authority selects library material, subject to local consultation and accountability, within its statutory duty to provide library services.

3.2. Libraries operate within the law to provide free access to a diversity of information, opinion and ideas in a neutral and hospitable environment. In exceptional circumstances they manage access to material regarded as culturally or morally extreme. Each library must be able to justify such action to their communities and local authority within the principles of free access.

4. Stock policy and practice

4.1. Stock is selected from all published material in print plus other media including audio-visual. Current practice recognises:

¹ Extract from the Prime Minister's National Security statement, 14/11/07 – "The Secretary of State for Culture, Media and Sport is working with the Museums, Libraries and Archives Council to agree a common approach to deal with the inflammatory and extremist material that some seek to distribute through public libraries, while also of course protecting freedom of speech."

- academic freedom
- the rights of individual citizens to access published material
- the independence and duties of the librarian.

4.2. Library authorities should have a publicly available stock policy.

4.3. Library material should be chosen for its literary and cultural merit or for its information and learning value. Librarians should aim for balanced stock, ensuring:

- a range of material that reflects the demography of the area and the policy priorities agreed for the library service
- a diversity of information, opinion and inspirational literature on any topic from the material available
- the quantity of any one publication should be moderated while an overall balance should be maintained with representative views across the total stock.

4.4. Donated material should be subject to the same policy with donors advised of the criteria. Any decision on the acceptance, display and promotion of specific publications should remain with the responsible staff.

4.5. Material does not need to be rejected because it is controversial. A good library should encompass controversial issues and different perspectives in the interests of democracy and discovery.

4.6. Over time publications covering controversial subjects may become matters of historical interest. Catering for future historical significance will require:

- a comprehensive collection policy
- alternative ways to providing access to controversial material that are sensitive to diverse opinion.

5. Expertise, independence and quality assurance

5.1. IFLA/FAIFE² furthers free access to information and freedom of expression in all aspects related to libraries and librarianship and monitors the state of intellectual freedom within the library community worldwide.

5.2. Stock should be selected objectively, not determined by the personal view of the librarian. CILIP's ethical principles³ offer guidance on the responsibilities of librarians.

5.3. In order to capture the diversity of language, culture and belief of today's Britain, librarians will frequently work in partnership with others, such as:

- non-library partner agencies that have an insight into community cultures, needs and interests
- local residents, community groups and representatives
- stock suppliers (regional, national or specialist consortia) with a language or cultural expertise responding to an informed brief from the librarian.

5.4. Partners must be aware of the legal obligations of the library authority and the library's stock policy.

5.5. Community engagement in stock selection encourages closer involvement of local people in library choices and should increase the sensitivity and insight with which stock

² IFLA is the International Federation of Library Associations. FAIFE is its **Committee on Free Access to Information and Freedom of Expression** <http://www.ifla.org/faife/>.

³ <http://www.cilip.org.uk/policyadvocacy/ethics/principles.htm>

is chosen. This can add to the library's standing in the community and build positive relations supporting community engagement and cohesion.

5.6. In all circumstances stock policy remains the responsibility of the library authority. Librarians should be alert to the potential for material to contravene stock policy and the need to assess potentially competing considerations, therefore should delegate choice with care in order to monitor selection closely.

6. Presentation, promotion and access to library material

6.1. Material should be catalogued and information about holdings available in the catalogue, both in-library and remotely, accessible to all.

6.2. In the case of controversial material, librarians may choose to introduce 'managed access' – eg for reference only or restricting use by children. Library authorities must be able to justify such actions to their communities and local authority.

6.3. Interlending facilities and network allows for a book to be requested at any library and supplied from other public, college and university libraries, or the British Library. Liaison between library sectors is essential to promote a common understanding of stock policies and systems.

6.4. The British Library's policy on lending and public access to its collections is to exercise no censorship or moral view of what its readers access or borrow from its collections. Very occasionally, works within the Library's collections are found to be illegal (under criminal and/or civil law). In such cases, the Library will retain the work but it is suppressed until such time as legitimate access may be given. Public libraries are most likely to operate interlending services in accordance with this practice.

6.5. Libraries promote holdings on topics of current interest to raise awareness, improve accessibility and increase usage. This is not to promote a particular view but to enable people to follow an interest in a topic using library resources.

6.6. Librarians should be alert to local and wider sensitivities and the legal implications thereof. While they may highlight a spectrum of views, they must not knowingly incite a person to undertake an illegal activity. Library staff who are concerned should have access to policy and/or legal advice to help resolve uncertainty and promptly identify an appropriate course of action.

6.7. Local authorities may have policies that override library stock policy in regard to the promotion of political or religious views. This may limit the presentation of events or the use of community facilities.

6.8. The library has a responsibility to the local community to actively and positively promote resources for learning, education, cultural inspiration and community cohesion. It is important that all sectors of the community feel able to play a full part in community life and not feel intimidated, marginalised or ignored.

7. The internet

7.1. The issue of internet access in libraries is not addressed in detail in this guidance.

7.2. Libraries are a key source of public information and provide up to date material for personal and community use. The internet now gives access to a

global, largely uncontrolled, resource of information. It would be counter-productive to restrict anything other than the demonstrably illegal. For best practice purposes:

- library services should have an internet use policy
- the library user retains responsibility for acting within the law when using the internet
- parents are responsible for children's use of the internet
- library staff may be instructed to intervene if they are aware of potentially illegal activity.

8. Legislation

8.1. Selection, provision and access to library material is informed by legislation on terrorism, race relations, equality, local government, freedom of expression and human rights. **Appendix A** outlines current relevant legislation.

9. How to monitor and review this guidance

MLA will review this guidance on an annual basis in consultation with other key partners.

Annex A: Relevant Legislation

1. Introduction

This note summarises the key legislation⁴ affecting the provision of extremist publications in public libraries, though not necessarily all of it. It is intended to be used as an outline for guidance purposes only.

The law reflects the tension between the need to safeguard national security (including the attempt to tackle terrorism) on the one hand, and the need to discourage discrimination and protect human rights on the other. As a result, in deciding whether or not to stock a particular publication, competing interests may have to be considered. To be weighed up are:

- the general obligation to “a comprehensive and efficient library service” (section 2.1 below)
- the risk, perhaps small, of commission of an offence under the Terrorism Acts 2000 and 2006 (section 2.2 below)
- the requirements of race relations legislation (section 2.3 below)
- the impact of the Human Rights Act 1998 (section 3 below)
- the involvement of local persons under the Local Government and Public Involvement in Health Act 2007 (section 4 below).

2. General Legislative Framework

2.1 Duty of Library Authorities

Public Libraries and Museums Act 1964 (section 7)

General duty of library authorities

Sub-section 7(1) of the 1964 Act states:

“It shall be the duty of every library authority to provide a comprehensive and efficient library service for all persons desiring to make use thereof . . .

“Provided that although a library authority shall have power to make facilities for the borrowing of books and other materials available to any persons it shall not by virtue of

⁴ This note focuses on legislation, ie statute law as opposed to the common law. The law of negligence has not been considered and, save for illustrative purposes, case law has also been omitted.

this subsection be under a duty to make such facilities available to persons other than those whose residence or place of work is within the library area of the authority or who are undergoing full-time education within that area.”

In fulfilling this (primary) duty, library authorities also have, among various (secondary) obligations, the obligation to have regard to the desirability of securing a sufficient number, range and quality of books (and other library materials) “to meet the general requirements and any special requirements of adults and children”.

Although there is no guidance as to what a “comprehensive” service entails, these duties may present problems for libraries located in areas that contain a high proportion of residents with radical beliefs. If, for example, local residents want their library to stock particular literature, the library is seemingly bound to do so to ensure its service is comprehensive enough to meet the requirements of the locality.

Subsequent Case Law and Legislation

The stringent nature of these obligations was highlighted in 1987 in *R v London Borough of Ealing and others ex parte Times Newspapers Ltd and others* (“the Ealing Case”). A number of local authorities banned *The Times* and other publications from their public libraries to support print workers in an industrial dispute. The court held that the library decision to ban the newspapers had been taken on purely political grounds - an ulterior motive which was an irrelevant consideration. Therefore, the ban had been an unlawful abuse of the libraries’ powers (granted under the 1964 Act).

However, key legislation has been implemented since the 1964 Act and the Ealing Case (including in particular the Human Rights Act 1998 and the Terrorism Act 2006), and library authorities and librarians now have other competing considerations to bear in mind when stocking certain literature.

2.2 Terrorism

2.2.1 Application of Terrorism Act 2006 to Library Authorities

Section 18 of the Terrorism Act 2006 provides that where an offence is committed by a “body corporate” and is proved to have been committed with the consent or connivance of a director, manager, secretary of other

similar officer of the body corporate (or a person purporting to act in any such capacity), both s/he and the body corporate will be guilty of the offence and be punished accordingly.

As a result of this provision, librarians and other individuals involved in the decision making process relating to publications (henceforth “Librarians”), as well as the library authorities (as a “corporate body”) need to ensure that the provisions outlined below are not breached because responsibility could be attached to both parties.

2.2.2 Dissemination of Terrorist Publications: Terrorism Act 2006 (section 2)

Librarians run a greater risk of committing the section 2 offence than the section 1 offence (encouragement of terrorism, which is consequently dealt with below). Although there is a defence of innocent dissemination, it does not apply to publications that could be ‘useful’ in the commission of terrorist acts, eg practical manuals and explicit instructions in the making of a device (as opposed to a book on the history of the munitions industry, for example).

(i) Definition of “Terrorist Publication”

A “publication” means any article or record or any description that contains any of the following or a combination of them: matter to be read, matter to be listened to, matter to be looked at or watched (s.3(1)). In other words, it is not confined to books.

A publication will be a “terrorist publication” if it contains a matter in it that is likely:

- (a) to be understood by some or all of the actual or potential recipients as a direct or indirect encouragement or inducement to commit, prepare or instigate terrorist acts; or
- (b) to be useful to those ends and to be understood by some or all of those persons as being wholly or mainly useful to them (s.2(3)).

Matters within the publication that are likely to “indirectly” encourage the commission or preparation of acts of terrorism include any matter:

- (a) which glorifies the commission or preparation (whether in the past, future or generally) of acts of terrorism; and

- (b) from which a person could reasonably be expected to infer that what is being glorified is being glorified as conduct that he should emulate in existing circumstances (s.2(4)).

It is irrelevant whether a person is in fact encouraged or induced to commit, prepare, or instigate acts or terrorism by the publication, or actually uses the publication in the commission or preparation of terrorist acts (s.2(7)). The focus is therefore on the content of the publication, not its actual effect.

The definition does not require the entirety of a publication to be dedicated to encouraging a reader to commit a particular or general act or terrorism. Rather, it may only contain a small part or “matter” that encourages terrorism, whether through urging the reader to emulate the terrorist act or otherwise.

However, the question of whether a publication is a terrorist publication must be determined:

- (a) at the time of the particular conduct; and
- (b) having regard to both the contents of the publication as a whole and to the circumstances in which the conduct occurs (s.2(5)).

Therefore, historical accounts that could be interpreted as glorifying terrorism may be stocked if there is little to no possibility that a current reader would try and emulate the acts described.

(ii) Elements of the Offence

For the offence to be committed there must be both a “guilty act” *and* a “guilty mind”. The burden falls on the prosecution to prove that these elements are both present.

The “guilty acts” for the purposes of the offence are as follows (s.2(2)):

- (a) distribution or circulation of a terrorist publication;
- (b) giving, selling or lending such a publication;
- (c) offering such a publication for sale or loan;
- (d) providing a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan;

- (e) transmitting the contents of such a publication electronically; or
- (f) the possession of such a publication with a view to its becoming the subject of conduct falling within (a) to (f).

The individual will only commit the offence if he also has the requisite intention (“guilty mind”) that (s.2(1)) he/she:

- (a) intends an effect of his conduct to be a direct or indirect encouragement or inducement to the commission, preparation or instigation or acts of terrorism;
- (b) intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts; or
- (c) is *reckless* as to whether his conduct has an effect in (a) or (b).

Librarians and other individuals involved in the dissemination of publications in libraries (henceforth “Librarians”) will not commit an offence unless both ‘guilty act’ and ‘guilty mind’ are proven. While the nature of libraries as a service provider of publications (whether for loan or sale and whether in hard copy or electronically) means that much of Librarians’ conduct will fall squarely within most (if not all) of the “guilty act” provisions, a Librarian is only likely to intend the provision of certain literature to encourage or induce acts of terrorism in the most rare and exceptional cases.

Recklessness

A Librarian may nevertheless commit an offence if he commits a guilty act, and is “reckless” as to the effect of his conduct. However, recklessness is not the same as carelessness or negligence. Recklessness means the taking of an unreasonable risk of which the risk-taker is aware: a person acts ‘recklessly’ with respect to a circumstance when he is aware of a risk that did or would exist, and acts recklessly with respect to a consequence when he is aware of a risk that it will occur, and, in either case, it is, in the circumstances known to him, unreasonable to take the risk.

(iii) Defence

A Librarian will have a defence if he can prove that the terrorist publication did not express his views or have his endorsement and that it was clear in all the circumstances that the matter did not express his views or have his

endorsement⁵. (s.2(10)). In effect, this defence allows, to a limited extent, for innocent dissemination by Librarians.

The defence can only be raised if the accused is proved:

- (a) not to have intended an effect of his conduct to encourage or induce terrorist acts (ie – he can use the defence if he has been reckless); and
- (b) the terrorist publication contained matter that is likely to be understood as an encouragement or inducement to commit, prepare or instigate acts of terrorism (but not one that would be “useful” in the commission or preparation of such acts).

Nor can the defence be raised if the individual has not complied with a section 3 notice (see “Application to Internet Activity” below).

(iv) Sentence

If convicted on indictment a guilty party will be liable to imprisonment for a maximum of 7 years and/or a fine. If summarily convicted the guilty party will be liable to imprisonment for a maximum of 6 months (soon to be increased to 12 months) and/or a fine. (s.2(11)).

2.2.3 Encouragement of Terrorism (section 1)

Librarians are less likely to commit the section 1 offence than the section 2 offence, because the defence of innocent dissemination is wider (see below).

A criminal offence will be committed if a person publishes, or causes another to publish a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or inducement to commit, prepare or instigate acts of terrorism or Convention offences⁶, providing he has the requisite intention (“guilty mind”).

Publishing a statement means publishing in any manner to the public, including providing any electronic service by which the public can access the statement, or using a service provided by another (eg Internet access

⁶ Convention offences are listed in a schedule to the Act. Broadly speaking they are specific terrorist acts.

or a search engine) so as to enable or facilitate access by the public to the statement (s.20(4)). Providing a service includes making a facility available. In providing library users with computers that have internet access, for example, libraries are “publishing” statements.

There is therefore, technically at least, scope for commission of the section 1 offence by Librarians. However, the prosecuting authorities are in practice likely to focus on the actual source of publication, rather than intermediaries (such as Librarians), unless those intermediaries acted knowingly or recklessly. In other words, the intermediary must, at the time he published or caused the statement to be published, either have:

- (a) intended members of the public to be directly or indirectly encouraged/induced to commit, prepare or instigate acts or offences of terrorism; or
- (b) been reckless as to whether members of the public would be directly or indirectly encouraged/induced to commit prepare or instigate the acts or offences. In a public library, for example, allowing library users access to “terrorist” sites could be construed as reckless.

Indirect encouragement of terrorism includes statements that “glorify” the commission or preparation of terrorist acts or offences, providing that the public could reasonably be expected to infer that the glorifying conduct should be emulated by them in existing circumstances. The contents of the whole statement and the circumstances (in this case a library) and manner of publication will be taken into account.

It is irrelevant whether anyone is in fact encouraged or induced to commit, prepare or instigate any terrorist act(s)/offence(s) (whether general or otherwise) as a result of the statement. Therefore, as with the dissemination offence, the focus is on the content, not whether a terrorist act actually occurs.

Fortunately, where it is not proved that the offence was committed intentionally (for example, if the offence was committed recklessly), it is a defence for the Librarian to show that the statement did not express his views or have his endorsement and that it was clear in all the circumstances of the statement’s publication that it did not express his views or have his endorsement. However, this defence cannot be raised if

the individual has not complied with a section 3 notice (see “Application to Internet Activity” below).

If found guilty, a person is liable on indictment to a maximum of 7 years imprisonment and/or a fine; or on summary conviction to a maximum of 6 months imprisonment (soon to be increased to 12 months) and/or a fine.

2.2.4 Application to Internet Activity: Terrorism Act 2006 (section 3)

Sections 1 and 2 of the Act (above) provide the accused with a defence if (among other things) he can show that the statement or publication did not express his views and did not have his endorsement. If, however, a person is *providing* or *using* an electronic service in relation to the above offences, section 3 deems him to have endorsed the statement or publication if he received and failed to comply with a section 3 “notice”.

Therefore, as a provider of Internet access within a library, the Librarian and/or library authority will have to be vigilant to ensure that if a notice is issued, it is complied with.

The notice is a declaration by a police constable that the statement, article, or record is unlawfully terrorism-related. In other words, it either contains matter that is likely to be understood as direct or indirect encouragement or inducement of terrorism or Convention offences, or it contains information which is likely to be useful in the commission or preparation of terrorist acts and is in a form or context likely to be understood as wholly or mainly useful for that purpose.

When the notice is issued, the person to whom it is addressed must, within 2 working days, stop making the matter available to the public (for example, block an offending website), or modify it so it complies with the Act.

2.2.5 Collection of Information: Terrorism Act 2000 (section 58)

A person commits an offence if he:

- (a) collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism; or
- (b) possesses a document or record containing information of that kind.

A “record” includes a photographic or electronic record.

Thus, a Librarian will commit the offence if such information is collected or is in his possession. However, the Librarian has a defence if he can prove that he has a reasonable excuse for his action or possession (s.58(3)). Although “reasonable excuse” is not defined, Librarians would be likely to rely on the defence if the information had been collected/stocked inadvertently. It is not clear whether the fulfilment of the general duty of library authorities (see section 2.1 above) would of itself amount to a “reasonable excuse”.

If convicted on indictment a guilty party will be liable to imprisonment for a maximum of 10 years and/or a fine or both. If summarily convicted the guilty party will be liable to imprisonment for a maximum of 6 months (soon to be increased to 12 months) and/or a fine. A court may also order forfeiture of any document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism.

The punitive nature of the offence does not sit easily with the library scenario. Nevertheless, Librarians and library authorities should take pre-emptive precautions to ensure that information that is likely to be useful to “terrorists” is not stocked.

2.3 Racial Discrimination

Race Relations Act 1976 (added to and amended by the Race Relations (Amendment) Act 2000)

These Acts impose both negative and positive obligations on individuals and organisations with regard to racial discrimination. Part III (which includes the regulation of discrimination by “public authorities”), IV (which includes the regulation of discriminatory practices and employers’ liability) and X (in relation to the general statutory duty of “specified authorities”) of the Race Relations Act 1976 are most relevant to library authorities and Librarians for the purposes of stocking extremist publications.

The sections illustrate that by “banning” certain extremist publications from libraries, Librarians and library authorities could be behaving in a racially discriminatory manner and/or operating a racially discriminatory practice. However, although both library authorities and Librarians should be made aware of the provisions (set out below), the Race Relations Act 1976

(s.42) has a critical overriding “disclaimer” which states that “nothing in Part II to IV [the relevant provisions] shall render unlawful an act done for the purpose of safeguarding national security if the doing of the act was justified by that purpose”.

Therefore, since the Terrorism Act 2006 (in particular) sets out offences that aim to tackle this very purpose, Librarians and library authorities should not be unduly concerned with the provisions of race relations legislation, and focus on avoidance of commission of the offences created by the Terrorism Act 2006.

It should be noted, however, that Part X (which is not subject to the s.42 “disclaimer”) obliges certain persons or bodies (specified in a Schedule to the Act), when carrying out their functions, to have “due regard” to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups (s.71). These include local authorities and hence public libraries operated by them, The British Library (and other entities which fall under the heading of “Libraries, Museums and Arts”) as well as, for example, The Museums, Libraries and Archives Council (“the MLA”) and educational institutions.

Although these bodies must bear in mind (“give due regard” to) these needs in any decision making process, it does not follow that the decision is subject to them. It is valid to take account of, and make a decision based upon, competing considerations. Thus, an organisation must nevertheless carry out its functions in compliance with other legislation (such as the Terrorism Act 2006) which might not, for example, promote good relations between persons of different racial groups, if it is obliged to do so.

Relevant provisions of the Race Relations Act 1976 are summarised below for completeness.

It is unlawful for a public authority (including persons carrying out functions of a public nature – which would include Librarians) when carrying out any functions of the authority to do any act which constitutes discrimination (s.19B).

It is unlawful for any person concerned with the provision (for payment of not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services by (a) refusing or deliberately omitting to provide him with any of them; or (b) by refusing or deliberately omitting to provide him with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in relation to other member of the public. Clearly “banning” books (for example) that it was in the interest of a particular section of the locality to stock could fall within this provision (s.20(1)).

It is unlawful to apply discriminatory practices in certain situations (s.28).

Anything done by a person in the course of his employment is treated for the purposes of the Act (except for specific offences) as done by his employer as well as by him, whether or not it was done with the employer’s knowledge of approval (s.32(1)). A similar provision at section 32(2) relates to the principal/agent relationship. Thus, the responsibility for a racially discriminatory practice would be, for example, both a Librarian’s and the Library Authority.

2.4 Racial and Religious Hatred

Public Order Act 1986 (as amended by the Racial and Religious Hatred Act 2006 and the Anti-Terrorism, Crime and Security Act 2001)

The 1986 Act creates a number of criminal offences in relation to conduct intended to incite or stir-up racial and religious hatred. “Racial hatred” means hatred of a group defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins (s.17). “Religious hatred” means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

The racial hatred offences (outlined below for completeness) stipulate that the display, distribution or possession (with a view to display or distribute) of “threatening, abusive or insulting” material is an offence if either:

- (a) the individual intends racial hatred to be stirred up; or
- (b) having regard to all the circumstances, racial hatred would be likely to be stirred up.

The stocking of extremist literature within a library, suggests that Librarians are susceptible to falling foul of (b). However, much like s.58 of the Terrorism Act 2000 (above), this legislation does not sit easily with a library scenario.

Firstly, the sentencing for the offences is so serious/punitive that proceedings for all the offences can only be brought by, or with the consent of, the Attorney General (s. 27(1) and 29L(1)). Secondly, even if a Librarian is “caught” by the provisions, there is a defence of innocent dissemination which would cover, for example, a Librarian who has inadvertently stocked material that is “threatening, abusive or insulting” and had no reason to suspect it might be of such a nature.

Nevertheless, Librarians and library authorities would be wise to take pre-emptive precautions to avoid having to relying on a defence. If the library authorities take the decision as to whether or not to stock particular material that falls foul of the Act, both the authority (as a “body corporate”) and any officer of the body who consented to the decision will be guilty of the relevant offence and liable to be proceeded against and punished accordingly (s.28 and 29M).

All the offences outlined below carry a maximum penalty on indictment of 7 years’ imprisonment, a fine, or both; or on summary conviction, a maximum penalty of 6 months’ imprisonment, a fine, or both (s.27(3) and 29L(3)).

Display of written material (s.18)

A person who displays any written material (which includes any sign or other visible representation (s.29)) which is threatening, abusive or insulting is guilty of this offence if (a) he intends to stir up racial hatred by doing so; or (b) having regard to all the circumstances racial hatred would be likely to be stirred up.

If the individual does not have the requisite intent in (a), he will not be guilty if he did not intend the written material to be threatening, abusive or insulting and was not aware that it might be.

Publishing or distributing written material (s.19)

A person who publishes or distributes written material (to the public or a section of the public) which is threatening, abusive or insulting is guilty of an offence if (a) he intends to stir up racial hatred by doing so; or (b) having regard to all the circumstances racial hatred is likely to be stirred up.

If the individual does not have the requisite intent for (a), he will have a defence if he can prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

Possession of racially inflammatory material (s.23)

A person who has in his possession written material, or a recording of visual images or sounds, which is threatening, abusive or insulting with a view to its being displayed, published or distributed (in the case of written material) or distributed, shown or played (in the case of a recording) whether by himself or another is guilty of an offence if (a) he intends to stir up racial hatred by doing so, or (b) having regard to all the circumstances, racial hatred is likely to be stirred up.

If the individual does not have the requisite intent for (a), he will have a defence if he can prove that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

Please note: A summary of the mirroring offences in relation to religious hatred (sections 29B, C and G) has been omitted because the offences require actual intention to stir up religious hatred and (unlike the above offences in relation to racial hatred) do not have a secondary form of intention that takes account of the surrounding circumstances, which is more likely to be applicable to Librarians and library authorities.

3. Freedom of Expression and Other Human Rights

3.1 Human Rights Act 1998

Public authorities have a positive obligation to carry out their duties in accordance with the provisions of the Human Rights Act 1998, which incorporates the European Convention on Human Rights ("ECHR") (section 6(1)).

Library authorities are “public authorities” for the purposes of the Act. As a result, all the functions of the library authorities, whether of a public or private nature, must be carried out in accordance with the rights enshrined in the Act. Public librarians themselves also have to adhere to the Act when carrying out functions of a “public nature” (section 6(3)(b)), but not when carrying out functions of a “private nature” (section 6(5)). Decisions by Librarians to stock or not to stock particular extremist literature have public implications and thus will involve consideration of the Act. Academic libraries are likely to be caught by the Act also.

3.2 Freedom of Expression: Article 10 ECHR

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.”

Article 10 (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.”

The right to freedom of expression (enshrined both in the Article 10 right and the common law) therefore encompasses the right (without interference by a public authority) both to receive information, which would apply to an individual reader or learner in the community, and to impart information and ideas, which would apply to any given author. However, the right to freedom of expression is not absolute. Article 10(2) qualifies the right by making it subject to a number of competing interests such as national security.

The right, therefore, involves a balancing act. Whilst there is a need on the one hand to protect freedom of expression (whether those views be extremist or otherwise), the right may validly be restricted, providing that any restriction is proportionate.

This balancing act is illustrated in the case of obscene or pornographic material and also in the legislation discussed above in relation to racial and religious hatred. If speech, for example, incites racial hatred of a particular group, then that speech may lawfully be restricted (to a proportional degree) to protect the rights of that group.

The point is well illustrated in the German case of *Otto E R A Remer v Germany* (1995) in which a conviction for incitement of racial hatred was upheld. The applicant had published materials denying the gassing of Jews in Nazi Germany. Although this was held to be an interference with the applicant's right to freedom of expression, it was deemed necessary in democratic society to protect the rights and reputation of others (people of the Jewish faith).

Although prior restraint of expression has historically involved careful scrutiny, there are reasons why public authorities, such as the library authorities, may validly make a decision not to disseminate particular material. Article 10 does not guarantee a right to *access* information (*R (Persy) v Secretary of State for the Environment* (2002)) or an obligation to *supply* information (*Leander v Sweden* (1987)). A library itself is not under a duty to guarantee the expression of all ideas for all people. Further, if particular literature is espousing ideas that have implications for, for example, public safety, then the Act clearly allows for the proportionate restriction of that literature.

Perhaps most importantly, since the Human Rights Act has come into force (in 2000), all newly enacted legislation must be compatible with the Act. Thus, the provisions relating to (for example) the Terrorism Act 2006 which prohibit the dissemination of certain publications can be assumed to be compatible and must be adhered to.

3.3 Freedom of Thought, Conscience and Religion: Article 9 ECHR

If a particular publication contains references to extremist beliefs, then excluding or "banning" the particular publication may also have implications in terms of Article 9 ECHR which includes the right to "manifest" one's religion or belief.

However, as with Article 10, this freedom is not absolute and is subject to limitations prescribed by law and necessary in a democratic society in the

interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Thus, it can be validly restricted for purposes prescribed in, for example, the terrorism legislation.

4. Relationship with Local Government Legislation

The Local Government and Public Involvement in Health Act 2007

The Local Government and Public Involvement in Health Act 2007 (“the 2007 Act”) amends the Local Government Act 1999 (“the 1999 Act”) and is now in force. The amendments have the effect of extending the general duty of “best value authorities” so that local persons may now be involved in the exercise of some of a particular authority’s functions.

A best value authority has a duty to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness (s.3).

The 1999 Act has now been amended so that, where a best value authority considers it appropriate to involve representatives of local persons (or of local persons of a particular description) to be involved in the exercise of any of its functions by being (a) provided with information about the exercise of the function, (b) consulted about the exercise of the function, or (c) involved in another way, it must take steps it considers appropriate to secure that such representatives are involved in the exercise of the function in that way (section 3A(1)).

However, local authorities only have to involve “local persons” in the exercise of a particular function (in this case, the stocking of certain publications) if it “considers it appropriate” to do so and if it considers that the involvement will improve that function, bearing in mind the aims of economy, efficient and effectiveness. The local authority seemingly therefore has a discretion in this regard.

However, if it does consider it appropriate to involve local persons, it *must* involve those persons, unless the authority does not have the power to do so (as a result of another statute, Community obligation or other enactment).

If the decision is taken to involve local people in stock selection, it will depend on the circumstances of the particular case as to whether the legislation discussed above will apply to the particular individual(s) or organisation(s).

Annex B: List of organisations

The consultation paper has been sent to the following organisations:

Department for Culture, Media and Sport

Communities and Local Government (Race, Cohesion and Faiths Directorate)

The Home Office

Society of Chief Librarians

Chartered Institute of Library and Information Professional (CILIP)

Association of Asian Librarians

National Acquisitions Group

British Library

SCONUL

London Museums Librarians and Archivists Group

Cooperative of Indic Language Library Authorities (CILLA)

Advisory Council on Libraries

The Reading Agency

The Network

London Libraries Development Agency

Equality & Human Rights Commission

Local Government Association

SOLACE

The Youth Agency

Bright Books

Publishers Association

Society of Authors

Annex C: Cabinet Office Code of Practice on Consultations

The consultation is being conducted in line with the Cabinet Office's Code of Practice on Written Consultation. The six broad consultation criteria are listed below, but more information can be found at:

www.cabinetoffice.gov.uk/regulation/consultation/code/criteria.asp

The Six Consultation Criteria

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy
- Be clear about who may be affected, what questions are being asked and the timescale for responses
- Ensure that your consultation is clear, concise and widely accessible
- Give feedback regarding the responses received and how the consultation process influenced the process
- Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator
- Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate

If you have any questions or complaints about the process of consultation on this paper, please contact Clare McGread, Consultation Co-ordinator, MLA, Victoria House, Southampton Row, London EC1B 4EA.

Email: clare.mcgregad@mla.gov.uk