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Reform of the Communications Offences - Consultation Response to the Law Commission

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QUESTION 1

We agree that there is a pressing need for reform of s127(1) Communications Act 2003 and s1 Malicious Communications Act 1988 so that they are effective, fit for purpose, and adequately capture the nature – and impact – of problematic communications in 2020 and beyond. It is a matter of significant concern that there are a number of gaping holes in the current communications provisions, especially given that this framework does not adequately address online violence, online text-based abuse,¹ nor in particular, online violence against women & girls.² There is – and has been for a number of years – a particularly pressing need to “offer realistic and meaningful opportunities to tackle online text-based abuses”³ but as yet, these have not manifested themselves into specific legislative reform. Our concerns persist in respect of the current offences, not least given the criticism of the, almost impossible to satisfy, prosecution threshold which must be satisfied.⁴

However, while we agree that there is a need for reform of the current provisions, we are not in full agreement as to the proposed model offered by the Law Commission. It is our expert opinion that while this model has some merits, including the recognition that there is a need to address the communication offences in England & Wales, that there are some significant flaws within the model proposed.

Our specific concerns are as follows:

- 1) The model proposed distinctly lacks clarity.
- 2) The model is not sufficiently comprehensive despite the claim that it is based on harm.
- 3) The suggestion that harm is emotional or psychological is far too narrowly conceived. The potential harms referred to in (4)(c) of the proposed model narrowly construe harm, but also overlook the other elements of harm which may occur, and which are significant, but which do not generate psychological harm. The model proposes that emotional distress is always the outcome, and the *only* outcome. There is, for example, no recognition of other forms of distress which could stem from – or be caused by – emotional or psychological harms.⁵

¹ K Barker & O Jurasz, ‘Online violence against women as an obstacle to gender equality: a critical view from Europe’ *European Equality Law Review*, EELR 2020(1) 47-60.

² K Barker & O Jurasz, ‘Text-based (sexual) abuse and online violence against women: towards law reform?’ (in J Bailey, A Flynn and N Henry, *Technology-Facilitated Violence and Abuse – International Perspectives and Experience* (Emerald Publishing, 2021)

³ K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019), 122.

⁴ Council of Europe Parliamentary Assembly Committee on Equality and Non-Discrimination, ‘Ending Cyberdiscrimination and Online Hate, Report by Rapporteur Marit Majj’ (13 December 2016) Doc 14217

<<http://semanticpace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL-1hSZWYvWDJILURXLWV4dHluYXNwP2ZpbGVpZD0yMzIzNCZsYW5n-PUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdc9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmIsZWlkPTIz-MjM0>> para 32.

⁵ See for example the typology, and number of harms identified in K Barker & O Jurasz, ‘Text-based (sexual) abuse and online violence against women: towards law reform?’ (in J Bailey, A Flynn and N Henry, *Technology-Facilitated Violence and Abuse – International Perspectives and Experience* (Emerald Publishing, 2021).

- 4) The public interest inclusion in (6) of the proposed offence suggests that this element must always be considered. While there is a justifiable element of consideration to give to public interest, it is our opinion that this should not be listed as part of the offence itself, but rather operate as a clear defence, and be listed separately.
- 5) The proposed offence seems to pay little attention to the potential cross-over with hate crime, especially online hate crime, and the proposed hate crime reform project in England & Wales. The proposed offence also seems to overlook the inevitable interplay with the long-awaited Online Harms Bill.

In sum, while we are supportive of the need for reform, we remain unconvinced about the proposed model suggested here, and believe it needs more thought. Specific attention must be paid the conception of harm, and the harms envisaged to operate as the basis of the proposed offence.

QUESTION 2

We have some concerns about the retention of the sending element of the offence, given that this is likely to result in significant volumes of content that could be captured within the scope of the provision.⁶ If the sending basis is retained,⁷ how does that address situations where potential recipients – especially named or targeted recipients – do not see the communication? If the communication offence is one of sending, and the sending occurs, but the recipient does not see the communication, we have doubts that this could translate into a prosecutable harm, especially given the narrowly construed harm that is proposed to form the basis of the new offence.

We agree that there is a need to exclude some forms of media, but only if these forms of media are already adequately regulated (such as press regulation). If these forms of media are regulated outside of the communications framework, then they should be excluded here. However, this exclusion should not extend to content shared or posted by employees of these media entities where that content falls within the parameters of the potential offence.

QUESTION 3

No. We disagree with this as an aspect retained from the Public Order Act provisions.⁸ These provisions, while of some limited use, are not designed to fit with e.g., online communications. Unless the Public Order Act offences are destined for repeal / reform, we advocate for making a clear distinction so that the Public Order Act offences are not used interchangeably with the communications offences. There must be a clear divide unless there is criminal behaviour which would warrant separate charges under both regimes.

⁶ See below, answer to Question 4.

⁷ See critique of sending offences in respect of offensive & abusive communications in K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019) at pp68-75.

⁸ See critique of Public Order Act offences in respect of offensive & abusive communications in K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019) at pp48-56.

It is unclear how this proposal is designed to fit with the harm element – does this refer specifically to bystander harm?

We also have concerns over how this proposal fits with the proposed likelihood of harm test. Similarly, given the harm-based model proposed here, we have concerns as to its workability given the indicative list of harms in the Online Harms White Paper.⁹

QUESTION 4

We have some concerns over the proposal that there is no need for proof of harm. The proposal to not require proof of harm is likely to open the floodgates for allegations of offences, and prosecutions, and we have significant concerns over its workability here. As such, we retain our concerns over the basis of the proposed model resting in the offence of sending.¹⁰

As such, while we agree that there should not be proof of harm per se we suggest that there is a need to differentiate between the likelihood of harm, and the possibility of harm. Similarly, there is a need to differentiate between the likelihood of harm, and the possibility of harm to a bystander, and for example, someone who is targeted.

QUESTION 5

The current proposal adopts a very narrow concept of ‘harm’ in the context of communication offences.¹¹ It presupposes that harms arising are solely emotional or psychological in nature, but also ignores the issue of the online-offline transference of harms. As we demonstrated in our research,¹² the range of online harms arising from abusive online communications is in fact much broader and should be reflected as such in the law. We have thus far identified 10 categories of such harms, with a possibility of further categories being added.¹³

Furthermore, judicial remarks in cases such as *R v Nimmo and Sorley* [2014] and *R v Viscount St Davids* [2017] have been an early indicator of the diverse range of harms arising from abusive online communications as well as its profound impact on the recipient(s) of such communications. That said, there has been a very slow progress in giving legal / judicial recognition to the wide range of harms, despite the clear need for them to be reflected in modern law.

⁹ HM Government, *Online Harms White Paper* (8 April 2019) 31 (outlining the list of 23 harms).

¹⁰ See above, answer to Question 2.

¹¹ See above, answer to Question 1.

¹² K Barker & O Jurasz, ‘Text-based (sexual) abuse and online violence against women: towards law reform?’ (in J Bailey, A Flynn and N Henry, *Technology-Facilitated Violence and Abuse – International Perspectives and Experience* (Emerald Publishing, 2021)); K Barker & O Jurasz, ‘Online harms and Caroline’s Law – what’s the direction for the law reform?’, SCRIPTed, 13 April 2020, <https://script-ed.org/blog/online-harms-and-carolines-law/>.

¹³ K Barker & O Jurasz, ‘Text-based (sexual) abuse and online violence against women: towards law reform?’ (in J Bailey, A Flynn and N Henry, *Technology-Facilitated Violence and Abuse – International Perspectives and Experience* (Emerald Publishing, 2021)).

QUESTION 6

We agree that the context in which the communication was sent or posted needs to be given due consideration – not least in order to assess the nature and the full extent of its impact, including harmful impact, on the recipient. However, we find the proposed phraseology of ‘including the characteristics of a likely audience’ problematic. The language used here strongly suggests considerations akin to the assessments required in hate crime legislation where the (protected) characteristic of the person and hateful conduct arising because of it, is a key factor. It remains unclear whether the ‘characteristics of a likely audience’ proposed here is to follow the five protected characteristics under the law of England & Wales. If so, it would appear to be problematic for – at least – two key reasons:

- i) Whilst hate crime legal frameworks differ across the devolved nations, the communications provisions apply UK-wide. There will therefore be a significant discrepancy between what constitutes a protected characteristic in England & Wales, Scotland, and Northern Ireland. The ongoing reform of hate crime legislation in all three jurisdictions suggests disparate approaches to the understanding of protected characteristics and the willingness as well as perceived need to incorporate them into the legal framework.
- ii) There are significant differences between the rationale for legislating in relation to hate crime and communications offences. Whilst there are significant overlaps and areas which would benefit from less legislative fragmentation¹⁴, viewing the harmfulness of communications offences solely through the lens of hate crime (i.e. the protected characteristics) poses significant conceptual limitations. In particular, it presupposes that only particular groups can be harmed in the context of online communications, which – whilst relevant for hate crime framework – is not, nor should it be, of primary consideration in the context of online harms.

QUESTION 7

We have some concerns over the understanding of a ‘reasonable person’ in this context – especially the articulation of the test of reasonableness. For instance, what is the test that would be applied in a situation of a significant misogynistic abuse committed via online communications? Following from Question 6, we view the context in which the communication was sent **and received** equally important. A part of this consideration are – inherently – individual characteristics (and ‘sensitivities’) of the recipient which may not be shared by a ‘reasonable person in a position of a likely audience’.

The notion of ‘unusual sensitivity’ outlined in the Consultation Paper appears to be conflated with the notion of ‘vulnerability’ which would further benefit from being clarified and distinguished. We remain unconvinced that this element of the proposal has been fully considered.

¹⁴ K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019) 112.

QUESTION 8

The two mental elements of the offence (i.e. 'subjective awareness of a risk of harm' and 'intention to cause harm') are questionable. It is also unclear whether the subjective awareness refers to the awareness of the person receiving the communication or the person sending it.

The subjective element is problematic in that it is likely to be used to evade responsibility for causing harm as a result of a sent communication. As the lack of awareness of a given law does not lead to avoiding liability (*Ignorantia legis neminem excusat*), the lack of awareness of a risk of harm should not lead to avoiding liability for the harm caused. Therefore, we suggest that the test applied here should be an objective one.

QUESTION 10

There should be two offences, as per model (2) outlined in the question. This split would enable the capturing – in legal terms – of the different levels of seriousness of the communications offences. As such, it would take account of differing levels of – nonetheless harmful – abuse perpetrated via online communications and create workable avenues for manageable case loads and court hearings.

QUESTION 11

The scope of what would constitute 'reasonable excuse' is unclear here. If applied, 'reasonable excuse' should be a defence rather than a part of the proposed offence. However, we would caution against too broad or too vague conceptualisations of 'reasonable excuse' – perhaps limiting it to public interest only.

QUESTION 12

Please see our answer to Q11.

QUESTION 15

Yes. Threatening communications should be specifically included so as to address some of the concerns relating to the likelihood of harm and targeted recipients.¹⁵ The flaws in the proposal in respect of this should be addressed pre-emptively with a specific offence of threatening communications.¹⁶

¹⁵ K Barker & O Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019) at pp47-53.

¹⁶ K Barker & O Jurasz, *Gendered Misinformation & Online Violence Against Women in Politics* Co-Inform (March 2020) <https://coinform.eu/gendered-misinformation-online-violence-against-women-in-politics-capturing-legal-responsibility/>.

QUESTION 16

No. While we agree that there is a need to adequately address harms, the offence should focus on the place of the harm, rather than the place of the sending.¹⁷ The suggestion that the offence is not of extra-territorial application is likely to cause significant issues in light of the absence of the need to receive the communication.

Given the proposal here, and the lack of clarity in the consultation paper in respect of what is taken to mean extra-territorial application, we believe this aspect of the proposal needs further thought, especially of the potential ramifications for recipients of potentially criminal communications.

QUESTION 17

We agree. However, the proposal should not fall within the communications framework, and should instead fall within specific legislation dealing with protections for the emergency services and their staff.

QUESTION 22

The inference as to what is meant by 'group' lacks clarity here.

If the question refers to encouraging harassment of a group, then yes. However, if the reference to group means the likely audience, our answer differs. If the group in the question refers to the encouragement of a group to cause harassment, no. The latter should not require a specific offence, but rather, the consideration of the harm – and victim impact statements should be the predominant considerations, rather than a specific offence.

QUESTION 23

Yes. The creation of a specific offence of 'pile-on' harassment would be welcome. Such legislative development would allow for further conceptualisations of online harms, which takes into consideration the reality of online abuse, its scale (including cross-jurisdictional spread), the speed with which it is committed, and – most importantly – the impact it has on the victim(s). In our research, we have criticised the current efforts to reform the law on online harms as representative of an incredibly fragmented and selective approach¹⁸ whilst advocating for a conceptually broader understanding of online harms.¹⁹ We would strongly support the amendment of the law in this direction.

¹⁷ This remains part of our broader concerns about the proposed harm model being advanced in the consultation paper.

¹⁸ K Barker & O Jurasz, 'Online harms and Caroline's Law – what's the direction for the law reform?', SCRIPTed blog, 13 April 2020, <https://script-ed.org/blog/online-harms-and-carolines-law/>.

¹⁹ K Barker & O Jurasz, 'Text-based (sexual) abuse and online violence against women: towards law reform?' (in J Bailey, A Flynn and N Henry, *Technology-Facilitated Violence and Abuse – International Perspectives and Experience* (Emerald Publishing, 2021)).