



HARMFUL ONLINE COMMUNICATIONS: ENGLISH PEN CONSULTATION RESPONSE

Introduction

English PEN is the founding centre of PEN International, an organisation with a ninety-nine year history of promoting literature and defending freedom of expression. English PEN is a company limited by guarantee (reg. no. 5747142) and a registered charity (reg. no. 1125610). We are an Arts Council England National Portfolio Organisation, and supported by grant giving trusts, donations from the publishing, media and legal sectors, and general membership subscriptions.

English PEN runs a number of human rights and literary programmes aimed at breaking down all barriers to literature. We run a major translation grant-giving programme, a programme of literary events and campaign for writers at risk all over the world, and for freedom of expression in the United Kingdom too.

Our UK work on freedom of expression laws and policy is informed by our international advocacy. Human rights protections in the UK are important in their own right, but we are acutely aware of how British laws can set an example overseas. The efficacy and credibility of British efforts to defend free speech world-wide (whether through the FCDO or human rights NGOs) depends on the example set by the laws we enact domestically. Ensuring that the laws that govern expression are fit-for-purpose is of vital importance.

We therefore welcome the Law Commission's proposals to update the laws concerning harmful and malicious communications. English PEN has criticised the wording of these laws in the past, and met with the Crown Prosecution Service in 2014 to discuss the operation of the Communications Act 2003 c.21, s.127(1) offence.

We have responded to most (but not all) of the questions in the consultation. Our position is summarised as follows:

- **We welcome the abolition of offences based on concepts of 'offence.'** Although we have reservations about the introduction of new speech offences, a 'harm based' offence is preferable to the alternatives.
- **We support the principle that what is legal offline should be legal online too.**
- **Regardless of whether a channel is online or offline, we believe that there is a crucial distinction between communications that are addressed to or otherwise targeted at known, named individuals; and messages posted broadly to an audience that can opt-in or opt-out of receiving messages.** Measures that might be appropriate when regulating the first, narrow kind of communication are likely to present a disproportionate infringement to freedom of expression when applied to the second, broad kind of

communication. The Law Commission's proposals attempt to bring both kinds of communication into the scope of the same offence, with no clear delineation between the two. We strongly recommend that the Commission restructure its proposals to account for this distinction.

- We are concerned that the threshold for criminality in the new offences might be set too low, and, without sufficient safeguards, could chill freedom of expression. In particular, we believe that the 'serious psychological distress' standard is both broad and ambiguous, and likely to cast a chill on free speech.
- To adequately address and minimise this 'chilling effect,' the *actus reus* of an offence must be drawn narrowly, regardless of any strong *mens rea* requirements or 'excuse' defences elsewhere in the law. This is because it is the conduct element of a communication that triggers complaints and criminal investigations. Such investigations are themselves a significant interference with freedom of expression.
- We question whether a new offence to criminalise sending false messages is necessary when other parts of the law (or proposed laws) deal with almost all problematic communications of this kind.
- We support a new law to prosecute threats, but oppose 'glorification' offences.

Consultation Question 1.

7.1. We provisionally propose that section 127(1) of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 should be repealed and replaced with a new communications offence according to the model that we propose below. Do consultees agree?

We support the repeal of the two offences, for the reasons set out in the consultation paper. In particular, that 'offensive' communications should not be criminalised (paragraphs 3.113-3.124) and that communications offences should be 'technology neutral' (paragraphs 5.14-5.39). The law should be somewhat 'future proof' and what is legal offline should be legal online.

We believe that any sanctions on expression (whether civil or, as in this case, criminal) can only be justified under Article 10(2) ECHR when such expression can be shown to infringe on other rights. Therefore, if a new communications offence is to be introduced, we support the inclusion of a 'harm' principle into its construction.

However, as we outline in the answers below, we have concerns that the particular model proposed in the consultation paper will cast a disproportionate chill on freedom of expression.

Consultation Question 2.

7.3. We provisionally propose that the offence should cover the sending or posting of any letter, electronic communication, or article (of any description). It should not cover the news media, broadcast media, or cinema. Do consultees agree?

Yes. We believe that what is legal offline should be legal online, and support a 'technology neutral' approach (Question 1).

We also support the exclusion of the news media, broadcast media, and cinema from the scope of the new law.

It is useful to interrogate *why* a carve-out for newspapers, broadcast and cinema seems intuitively correct. It is not, we suggest, entirely due to a respect for freedom of the press (paragraph 5.67). Also relevant is the broader relationship between the publisher/sender of the message, and the recipient.

In the case of news media, broadcast and cinema, the people who create the communication have little control over the likely audience. Recipients of the message will be broad and diverse and, crucially, they are able to opt-in or opt-out of receiving the message. The communication is *published* to the world at large.

By contrast, letters, telephone calls, emails and instant messaging are *private* in nature. They are addressed to specific individuals who have little chance to avoid the communication (at least once a channel has been opened). The intended recipient is almost guaranteed to read the message.

Social media messages and online forum posts can take on the characteristics of *either* communication. A generic post into one's timeline is akin to a broadcast or newspaper article, and there is no guarantee that even one's friends/followers/subscribers will see it. Meanwhile, tagged Facebook posts or Twitter @ 'mentions' are more like a direct communication. There is a high probability that the person so tagged will read the message.

We suggest that the mischief/harm that the proposed communications offence seek address are almost always contained within 'targeted' messages, rather than 'broadcast.' This was definitely the case when the current laws were enacted (Malicious Communications Act 1988 c.37, and the Communications Act 2003, c.21) because there were very few ways for a citizen to broadcast a message without using the mainstream media as a conduit.

The current impetus for reform has come about due to the prevalence of abuse and threats *directed at individuals*, social media harassment and the rise of phenomena such as cyber-flashing. Even when these involve large number of communications, they are all acts that involve messages targeted narrowly, at named (or at least, known) recipients.

As we discuss in the answers to several questions below, we believe this distinction is of crucial importance when considering 'likely audience' and 'likely harm.' For 'broadcasted' social media posts, the audience and harm are difficult to foresee. By contrast, for tagged/targeted social media posts the 'likely audience' and 'likely harm' are much easier to predict, just as they are with emails and telephone calls.

We therefore recommend that the proposed new law acknowledges and develops this distinction, imposing fewer curbs and a higher harm standard on 'broadcast' messages, (where the person will have little information about the nature of their audience) compared to 'targeted' messages (where the person will have a much better idea of what might cause harm to the recipient).

This could be potentially achieved by:

- Adding blog posts and 'broadcasted' social media posts to the list of exemptions, alongside broadcast media and newspapers;
- Introducing a provision requiring that a recipient or group of recipients be known or specified;
- Introducing a presumption against prosecution when the communication is a 'broadcasted' message; or
- Adding 'whether any recipient of the communication was specified' as one of the contextual factors a court must consider when considering the 'likely audience' and 'likely harm.'

Consultation Question 3.

7.4 We provisionally propose that the offence should require that the communication was likely to cause harm to someone likely to see, hear, or otherwise encounter it. Do consultees agree?

We support the observance of a 'harm-based model' in the new offence. The European Convention on Human Rights, Article 10(2) provides for curbs to freedom of expression rights on a number of grounds, *inter alia* the protection of the rights of others. We accept that this is appropriate in cases where a communication threatens an individual or causes provable and significant harm.

Questions 3 to 7 are interlinked, and suggest two differing conceptions of the new offence. Our answers to all these questions depend on the approach that the Government chooses if/when it introduces a draft Bill.

One conception leans towards an objective test for harm. It considers harm that is *likely* to cause harm to someone *likely* to see it. We assume that under this approach, a Court would consider the affect of the communication on a reasonable person in the likely audience.

There are several benefits to such an approach:

- It will provide a degree of certainty as to whether a communication would come within scope of the new offence. This is likely to reduce the chill on freedom of expression.
- It would discourage vexatious complaints, and would not allow for a situation where an investigation could be triggered against someone by ideologically-opposed activists claiming to be 'distressed.'

However, the 'likely' approach raises some problems too.

- As a 'conduct' offence (not a 'results' offence) it does not require an actual victim. In theory, a message that was not seen by anyone could nevertheless result in a criminal conviction, because the message had the quality of one that was likely to cause harm. This seems unjust.
- Since a victim is not required, prosecutions could be initiated by people who were not the intended recipient of a communication, including by someone proactively searching online platforms for messages that could potentially fit the offence. As worded, the proposals offer an opportunity for the police, or political activists, to target an individual with investigations and complaints.

As we noted above (Question 2) there is a significant conceptual different between a message posted to a social media platform writ large, and a message specifically targeted to an individual (either via post, email, or by 'tagging' an individual in a social media post). In the latter case, the 'likely audience' will be identifiable individuals, and there will be certainty to this element of the offence. But in the former case, 'likely' audience is extremely difficult to predict in advance. This brings uncertainty, and therefore a 'chill.'

Consultation Question 4.

7.5 We provisionally propose that the offence should require that the communication was likely to cause harm. It should not require proof of actual harm. Do consultees agree?

We discuss the benefits and drawbacks of the 'likely to' approach above (Question 3). These apply as much to 'likely harm' as to 'likely audience.'

An evidential hurdle that requires proof of *actual* harm would undoubtedly discourage some

frivolous investigations, and thereby offer additional protection for freedom of expression. As such, we prefer its inclusion in any proposed offence.

However, we ask whether the corollary of this approach is that questions of what constitutes the 'likely' audience would be rendered moot? If there was a requirement for 'actual harm,' would it not be the case that the effects on the audience that actually received the communication would be considered instead? If so, it could lead to situations where messages that found their way to an *unlikely* audience could be criminalised. This would, we believe, be an unjust infringement on free speech rights. It would also increase uncertainty, and exacerbate the chill.

We also ask whether the 'egg-shell skull' rule (confirmed by the Court of Appeal for criminal law cases in *R. v Blaue* (1975) 61 Cr App R 271) applies to this offence? This would be an extremely problematic outcome when the behaviour to be tackled is the use of *words* that cause distress. The proposed offence as constructed implies that an innocuous phrase that caused distress to an unusually sensitive person would be within the scope of the new offence, if that person were in the 'likely audience.' Such communications should not be caught by the *actus reus* element of the offence, regardless of any *mens rea* or 'excuse' defences provided elsewhere in the proposed offence.

We note again the importance of a distinction between 'broadcast' and 'targeted' social media messages. If the Commission were to revise their proposed offence to take account of this distinction, then an 'actual harm' requirement would be far more appropriate and workable in the case of 'targeted' messages, where the audience would be known in advance, and identifiable after the fact.

Consultation Question 5

7.6 "Harm" for the purposes of the offence should be defined as emotional or psychological harm, amounting to at least serious emotional distress. Do consultees agree?

As stated above (Question 3) we support the introduction of a 'harm' element into the law, as an appropriate justification for curbing Article 10 rights. We accept that for communications offences this must be a form of *psychological* harm to an individual. Incitement to physical violence is dealt with elsewhere in the criminal law, and 'harm' to society is dealt with in hate crime laws (the subject of a parallel Law Commission project).

We are concerned that the harm threshold is defined as 'emotional or psychological harm, amounting to at least serious emotional distress.' This is lower than the 'recognised medical condition' standard found in: civil claims for negligence; the tort established in *Wilkinson v Downton* [1897] 2 QB 57; and for criminal offences against the person.

We would recommend the same threshold be applied to the proposed new offence, for two reasons.

- First, there is a virtue in adopting a standard that the law already recognised, and for which common law rules are already developed.
- Second, it adds a crucial element of objectivity to the standard. This will prevent trivial or vexatious complaints, just as it does in civil law.

If a 'likely to' approach is to be adopted (see Question 4), we are unsure how a Court would be able to assess 'distress' without recourse to accepted clinical standards. We fear that in such cases, the 'serious emotional distress' standard will become indistinguishable from 'grossly offensive' or evidenced by unrepresentative outrage observed in the tabloids or on social media.

Similarly, if the 'actual harm' alternative were adopted, the proposed 'serious emotional distress' definition would allow the conduct element of the new offence to be made out, purely on the (unfalsifiable) assertion of a would-be victim. It would allow an effective veto of controversial or offensive content by anyone willing to claim that they are 'seriously distressed' by it. This would be an intolerably wide prohibition on speech that has the potential to "offend, shock or disturb" and which should be protected under Article 10 (*Handyside v UK* (1976) 1 EHRR 737).

The consultation paper itself presents a worrying hypothetical example of the broadness of the 'serious emotional distress' standard. At paragraph 6.83 (in the example of Ruby and Mohammed, detailing the workings of the proposed 'pile-on' offences) the Commission suggests that political criticism might provoke 'serious emotional distress.' Notwithstanding that the law provides a 'reasonable excuse' defence (discussed below), a standard of harm (and therefore, a conduct element) that includes non-abusive criticism *at all* within its basic definition must, surely, be calibrated incorrectly.

We think that a 'serious emotional distress' standard would become unworkable when messages have been broadcast to the world at large. When the 'likely audience' is a broad swathe of the citizenry, the standard is likely to be unhelpful. Limiting the proposed new offence only to deliberately targeted/addressed communications might add coherence to the 'serious emotional distress' harm standard, while limiting the reach of the proposed offence.

7.7. If consultees agree that "harm" should be defined as emotional or psychological harm, amounting to at least serious emotional distress, should the offence include a list of factors to indicate what is meant by "serious emotional distress"?

We do not agree with the proposed definition of harm (see above). However, if the standard were adopted, then we agree that a list of factors should be included. Clarity in this regard is vital, to increase certainty around the operation of the law and to reduce the chilling effect caused by ambiguity. Setting out a list of factors would give parliament an opportunity to guide the Courts, the police and citizens towards a high standard for psychological harm.

Consultation Question 6.

7.8 We provisionally propose that the offence should specify that, when considering whether the communication was likely to cause harm, the court must have regard to the context in which the communication was sent or posted, including the characteristics of a likely audience. Do consultees agree?

Context is crucial and must be considered by the court. The argument in the consultation paper (at para 5.119) is that a simple requirement on the Courts, to have regard to the context in which the communication was sent, should allow for sensible decisions. Coupled with the special protections for freedom of expression set out at section 12 of the Human Rights Act 1998, c.42, it is not unreasonable to assume that the Courts will deliver adequate protection for human rights, when presented with a case at trial.

However, this approach will not alone be sufficient address the 'chill' on freedom of expression. The proposed new law has the potential to engage the Article 10 rights of millions of individuals on a daily basis. As such, citizens should not have to wait for the contours of the law to be revealed through emerging common law rules. Citizens (and police investigators) must be able to refer to the statute itself and to predict with some certainty whether a communication is lawful or not. With this in mind, we suggest the proposed new law should carry further guidance as to relevant contextual factors.

We repeat the suggestion above, that whether a person has been proactively addressed/targeted with a communication is highly relevant context. Where a communication has been published to no-one in particular, the presumption should be against prosecution.

The characteristics of the likely audience are also relevant. However, as discussed above we are wary about the overdue sensitivity of the audience being a critical factor in a prosecution.

Consultation Question 7.

7.9 We provisionally propose that the new offence should not include a requirement that the communication was likely to cause harm to a reasonable person in the position of a likely audience. Do consultees agree?

Again, we note that the proposed offence has very different implications, depending on whether the message is addressed/targeted to specific people, or whether it is broadcast indiscriminately on social media or a blog.

The reasoning at paragraph 5.131-5.132 of the paper seems to elide the fact that a reasonableness test for the 'likely audience' is different to a reasonableness test for the population as a whole. If the 'likely audience' were a targeted, narrow group that usually includes people of a particular sensitivity (for example a group of children, or a bereaved family) then the 'reasonable person' — in whose mind the court places itself when forming a view of likelihood — would be from among that group, and so assumed to share those sensitivities.

Conversely, if the 'likely audience' were generic social media audience, then holding a communication to the standard of the most sensitive audience member would be unfair and a disproportionate infringement on freedom of expression.

We therefore disagree with this proposal. The enhanced objectivity associated with a 'reasonable person' test will add certainty to the offence, and so reduce its chill on free speech. If 'likely harm' and 'likely audience' are to be part of the new offence, then a reasonable person test should be included.

Consultation Question 8.

7.10 We provisionally propose that the mental element of the offence should include subjective awareness of a risk of harm, as well as intention to cause harm. Do consultees agree?

We agree that there should be a mental element to the proposed new law. When a message has been targeted or addressed to an individual, then it would be appropriate to include a 'recklessness' limb as an alternative to direct intent.

However, when a message is broadcast to the world on a blog or social media, an 'awareness of risk' or 'recklessness' limb would be inappropriate. Due to the high likelihood that controversial or offensive messages can cause 'serious emotional harm' to *someone* on the internet, a 'risk of harm' limb would become trivial to prove, and effectively turn the offence into one of strict liability.

Consultation Question 9.

7.11 Rather than awareness of a risk of harm, should the mental element instead include awareness of a likelihood of harm?

We prefer the slightly higher standard of “likelihood of harm” rather than mere “risk.” However, the concerns we set out in our answer to Question 8 (above) are not alleviated by the introduction of a slightly higher threshold.

We note that what constitutes “likelihood of harm” will depend on how *harm* is defined by the statute. Too low a harm threshold would mean, in turn, that the “likelihood” test would also be set too low — to the detriment of freedom of expression rights.

Consultation Question 10.

7.12 Assuming that there would, in either case, be an additional requirement that the defendant sent or posted the communication without reasonable excuse, should there be:

- (1) one offence with two, alternative mental elements (intention to cause harm or awareness of a risk of causing harm); or**
- (2) two offences, one with a mental element of intention to cause harm, which would be triable either-way, and one with a mental element of awareness of a risk of causing harm, which would be a summary only offence?**

We repeat our concerns with the inclusion of the ‘awareness of risk’ mental element (Question 8, above).

If such an element is to be included, then we prefer option (2). Where there is no direct intent, a summary-only offence, with an associated reduction in punishment compared to either-way offences, would marginally reduce the chill on freedom of expression.

At paragraph 5.158 the Commission expresses concern that ostensibly egregious cases might be charged with the lower offence, when intent is difficult to prove. We see this as a positive by-product of a two-offence approach: since the offences criminalise *words*, the bar to prosecution should be set high, with cases of ambiguous intent being charged with the lower-level offence, or not at all.

Delineating between the two offences in this way will also yield better statistics, allowing Government, parliament, the CPS and the public to observe whether prosecutions for the first or second kind of offence are more prevalent.

Consultation Question 11.

7.13 We provisionally propose that the offence should include a requirement that the communication was sent or posted without reasonable excuse, applying both where the mental element is intention to cause harm and where the mental element is awareness of a risk of harm. Do consultees agree?

The requirement is essential for limiting the scope of the law. If sub-section (3) were absent, the proposed law would amount to a disproportional interference with Article 10.

We recommend that examples of ‘reasonable’ excuse be set out within the offence, or within a schedule.

The Law Commission’s parallel consultation on hate crime analyses the explicit protections for

freedom of expression afforded by the Public Order Act c.64, at s.29J and s.29JA. The proposed new communications offence should include an analogous provision.

Consultation Question 12.

7.14 We provisionally propose that the offence should specify that, when considering whether the communication was sent or posted without reasonable excuse, the court must have regard to whether the communication was or was meant as a contribution to a matter of public interest. Do consultees agree?

We insist on the inclusion of a 'public interest' sub-clause (6) in any new law. In the journalistic and publishing context, there will be many cases where content that has the potential to cause distress should nevertheless be communicated by one of the channels in scope. The law should provide a clear lane through which such communications may pass unhindered.

Consultation Question 13.

7.15 We invite consultees' views as to whether the new offence would be compatible with Article 10 of the European Convention on Human Rights.

Demonstrable harm is a legitimate reason to limit rights, as provided for by Article 10(2). Used sparingly in cases where a communication has been targeted at individuals, and where an intent mental element has been made out, we believe the offence would be compatible with freedom of expression rights.

However, if the offence were utilised too broadly, or it resulted in too many complaints and investigations into communications that did not meet the standard for prosecution, it could represent a disproportional interference with Article 10 rights.

We note that the Human Rights Act 1998 c.68 requires that Courts give due consideration to freedom of expression (s.12) and freedom of belief (s.13). We hope, therefore, that phrases such as 'likely to' and 'serious emotional distress' would be construed narrowly by the Courts. The statutes should assist the judiciary as much as possible in this matter, perhaps by explicitly drawing attention to HRA 1998 s.12, or repeating that provision in the new statute.

Consultation Question 14.

7.16 We invite consultees' views as to whether the new offence would be compatible with Article 8 of the European Convention on Human Rights.

We believe that the law as proposed would sufficiently protect the Article 8 rights of people who might suffer psychological harm as a result of a communication.

We further believe that our proposals for modifying the proposed law, to focus on communications addressed to or directly targeted at recipients, would not interfere with Article 8 rights, but rather ensure that the law keeps a focus on the rights of actual individual victims, rather than broad categories of a hypothetical audience.

Consultation Question 15.

7.17 In addition to our proposed new communications offence, should there be a specific offence covering threatening communications?

Yes. So long as measures are proportionate, we believe that preventing threats to individuals is an appropriate reason to curb Article 10 rights — threats of violence represent a significant interference with an individual's Article 5 right to security and the Article 8 right to a private and family life.

Such an offence would need to be drafted to take into account the infamous 'Twitter joke trial' (*Chambers v Director of Public Prosecutions* [2013] 1 All ER 149), which the Court of Appeal acknowledged should not have been prosecuted. This could be addressed with a strong *mens rea* element that rules out jokes and unfocused rants that happen to include threatening language.

Once more we note how a message 'broadcast' over social media to no-one in particular is conceptually different to a message addressed to a particular recipient. This is what distinguishes the *Chambers* case from the prosecution of Matthew Wain (discussed at paragraphs 5.207-5.208).

Consultation Question 16.

7.18 Do consultees agree that the offence should not be of extra-territorial application?

Yes. Such a law would be almost impossible to enforce. Even if some prosecutions were possible, it is unlikely that the offence could be prosecuted with any consistency.

Consultation Question 17.

7.19 We provisionally propose that section 127(2)(c) should be repealed and replaced with a specific offence to address hoax calls to the emergency services. Do consultees agree?

Yes.

Consultation Question 18.

7.20 We provisionally propose that section 127(2)(a) and (b) of the Communications Act 2003 should be repealed and replaced with a new false communications offence with the following elements:

- (1) the defendant sent a communication that he or she knew to be false;
- (2) in sending the communication, the defendant intended to cause non-trivial emotional, psychological, or physical harm to a likely audience; and
- (3) the defendant sent the communication without reasonable excuse.

For the purposes of this offence, definitions are as follows:

- a) a communication is a letter, electronic communication, or article (of any description);
and
- b) a likely audience is someone who, at the point at which the communication was sent by the defendant, was likely to see, hear, or otherwise encounter it.

We agree that the s.127(2) offence is too narrow and requires reform. However, as the consultation paper notes, a great deal of the 'mischief' that this section seeks to address can be dealt with through other areas of the law:

- The torts of defamation and malicious falsehood.
- The tort established in *Wilkinson v Downton* [1897] 2 QB 57
- The Protection from Harassment Act 1997 c.40
- Common law rules developed for the Offences Against the Person Act 1861 (discussed in paragraphs 6.49 to 6.58).

We think it is appropriate to ask whether, if a communication does not fall within *any* of the existing provisions set out above, it should be subjected to a criminal sanction. We are averse to the creation of “low level” communications offences which “may not often result in actual emotional, psychological or physical harm” (paragraph 6.57). Such communications might be a “social ill” but censorship and punishment would be a disproportionate curb on freedom of expression.

If an offence is to be created, in order to capture the kinds of message described, we support the proposal to raise the threshold from “annoyance” to the wording set out at (2).

The conceptual difference between ‘broadcasted’ and ‘targeted’ messages that we have highlighted in our answers above is particularly salient with regards to this law. While false messages ‘targeted’ to individuals could be dealt with through other areas of the law, the problem of misinformation and disinformation might not. However, such messages are conceptually very different to the other kinds of communications discussed in the consultation paper. We believe they are better dealt with through proportional and accountable social media platform polices; and potentially the forthcoming Online Harms regulatory framework.

Consultation Question 19.

7.21 We provisionally propose that the conduct element of the false communications offence should be that the defendant sent a false communication, where a communication is a letter, electronic communication, or article (of any description). Do consultees agree?

We note that what is ‘false’ is often difficult to ascertain. The Commission will be well aware of the complex precedents and provisions in defamation law regarding ‘substantial truth’ and ‘justification,’ how the Courts determine whether something is fact or opinion, and whether an innuendo is an assertion of fact.

However, we also note that a version of this offence is already in operation at s.127(2) and that prosecutions under this law are for palpably false claims that can be proven to be so. We assume a narrow definition of falsity will continue to be employed by police and the Courts, and the offence will not be used as a way to litigate what should properly be settled through defamation law.

Consultation Question 20.

7.22 We provisionally propose that the mental element of the false communications offence should be: (1) the defendant knew the communication to be false; and (2) the defendant, in sending the message, intended to harm a likely audience, where harm is defined as any non-trivial emotional, psychological, or physical harm.

Do consultees agree?

We question the need for this offence (see Question 18, above). However, if a new offence is to be introduced, we support the proposed wording, for the reasons set out in paragraphs 6.42 and 6.46. Knowledge of falsity is a crucial addition that will limit the scope of the offence in a way that will protect individual rights to express opinions and share information.

Consultation Question 21.

7.23 We provisionally propose that the false communications offence should include a requirement that the communication was sent without reasonable excuse. Do consultees agree?

We question the need for this offence (see Question 18, above). If a new offence is to be introduced on these terms, then a 'reasonable excuse' requirement is essential for limiting the scope of the law. If sub-section (3) were absent, the proposed law would amount to a disproportional interference with Article 10.

Consultation Question 22.

7.24 Should there be a specific offence of inciting or encouraging group harassment?

We acknowledge the phenomenon of social media harassment and note that these activities involve, by definition, messages targeted at an individual who is likely to see them.

Although such harassment might be described as a form of expression (the participants are using social media, after all) we note that they also engage and interfere with the free speech rights of the target/victim. The 'pile-ons' render the social media platform unusable by the individual, and many are forced to avoid using the platform altogether.

However, we are wary about introducing a new offence to criminalise something which is very often impromptu and where the boundary between outrage and harassment is indistinct.

The consultation paper itemises a list of existing laws under which the organisers of group harassment might already be prosecuted. We suggest that these methods continue to be used to address the most serious offences.

Where a course of action is not already caught by an existing offence, we suggest that the law err on the side of freedom of expression, rather than introduce a measure that could encompass legitimate political organising. In general, we counsel against the introduction of new laws in order to capture 'edge cases' as seems to be the case here.

We note that technological innovation could offer sufficient protections to deal with the problem of online harassment. For example, Twitter introduced new features in 2020 to give users more control over who can reply to, or target a message at their account; and email software can be set up to filter abuse or unsolicited messages.

Terms of service and the forthcoming online harms regulations could also be deployed to deal with such issues, without involving the criminal law.

Consultation Question 23 to 26

These questions concern sexual offences. This is not our area of expertise and we have chosen not to comment.

Consultation Question 27.

7.30 Should there be a specific offence of glorification of violence or violent crime? Can consultees provide evidence to support the creation of such offence?

We are extremely concerned by the recent prosecutions of rappers for producing 'Drill' music, and the Criminal Behaviour Orders preventing others from performing such music. We consider these

interventions a disproportionate interference with freedom of expression rights.

We welcome the Commission's acknowledgment in the consultation paper that such music and associated videos are susceptible to misunderstanding and 'street illiteracy' and that such content "represents, rather than endorses violent crime." Such representation is a window into a segment of British society that is often marginalised, and is therefore in the public interest. It should be contextualised, not be criminalised.

We support the Commission's implied suggestion a paragraph 6.159 that only communications/videos that meet the threshold of incitement to commission of criminal conduct should be criminalised. Where no intent to incite a specific offence can be shown, and where the communication is not captured by the proposed harm-based offence (paragraph 6.163), such messages should not be prosecuted.

We support the points made in defence of freedom of expression at paragraphs 6.170-6.174 of the consultation paper, questioning the efficacy and proportionality of a 'glorification' offence.

Consultation Question 28.

7.31 Can consultees suggest ways to ensure that vulnerable people who post non-suicide self-harm content will not be caught by our proposed harm-based offence?

We do not have expertise on this matter and are therefore wary of making firm recommendations. However, we welcome the Commission's acknowledgment that communications platforms represent an important source of support for vulnerable people, which should be recognised and protected in law.

Consultation Question 29.

7.32 Should there be a specific offence of encouragement of self-harm, with a sufficiently robust mental element to exclude content shared by vulnerable people for the purposes of self-expression or seeking support? Can consultees provide evidence to support the creation of such an offence?

As above (Question 28) we do not have expertise on this matter and are therefore wary of making recommendations.

Consultation Question 30.

7.33 (1) We welcome consultees' views on the implications for body modification content of the possible offences

(2) glorification of violence or violent crime; and glorification or encouragement of self-harm.

We share the Commission's aversion to new glorification offences.