The Bar Council

Online Safety Bill
Briefing for MPs – Second Reading

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Executive Summary

The Bar Council welcomes the clarity and reach of the proposed three new communications offences, Clauses 150-152 of the Bill, which, as the Explanatory Notes make clear, follow the recommendations of the Law Commission's 'Modernising Communications Offences'[1] report. The substance of the offences is broadly in line with the Bar Council's response[2] to the Law Commission's Consultation on Harmful Online Communications. In particular, the extension of all three offences to corporate offenders and the extra-territorial application.

Although the Bar Council did not support the creation of a new offence of 'cyber-flashing', in our view Clause 156 (inserting a Section 66A to the Sexual Offences Act 2003), strikes the right balance between bringing the current legislation up to date and avoiding criminalising non-intentional, juvenile or misguided behaviour with no sexual purpose.

The Bill

Upon a closer look at the drafting of the communication offences, we make the following observations:

Intention or Recklessness

The Bar Council remains of the view that the fault element of the harmful communications offence (Clause 150(1)(b)(ii)) and the false communications offence (Clause 151(1)(c)) should be expanded beyond an intent to cause harm, to being reckless as to whether harm would be caused (or being aware of the risk of harm when it was unreasonable to take that risk). This approach appears to have been endorsed by many, but not all, of those who responded to the Consultation (see the Law Commission's Report pp.48-54). As drafted, there will inevitably be fewer prosecutions with the consequence that the criminal law may play only a limited role in changing

[1] Law Commission's Report No.399: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/07/Modernising-Communications-Offences-2021-Law-Com-No-399.pdf

[2] https://www.barcouncil.org.uk/uploads/assets/9f258bd1-913a-456e-aaf6a887cca4cb77/Bar-Council-response-to-the-Law-Commission-consultation-on-Harmful-Online-Communications.pdf

societal behaviour. The Law Commission (Report §2.180-181) ultimately proposed that the lacuna can be safely left to the Government to address through an anticipated regulatory regime.

Statutory Defence

Each of the three offences provides that a defendant is not to be convicted if he acted reasonably in prescribed circumstances. For the harmful and false communication offences (Clause 150(1)(c) and (5); Clause 151(1)(d)) it is for the prosecution to prove that the defendant had no reasonable excuse for sending the message. There is no initial evidential burden on the defendant to prove a sufficiency of evidence (or similar) establishing the excuse. In contrast, there is an express statutory defence to the threatening communication offence (Clause 152(3)(4)); it appears to provide for an evidential burden on the defence to adduce evidence sufficient to raise an issue relevant to the statutory defence of making the threat of serious financial loss to reinforce a reasonable demand. The legal burden then transfers to the prosecution to prove that the defence is not made out.

We suggest however that, to give effect to the evidential burden, the wording of Clause 152(4) should read: "If the person adduces evidence which is sufficient…". As currently drafted ("If evidence is adduced which is sufficient…"), there is some ambiguity as to whether in fact there is a burden on the defence at all. Our proposed amendment would be consistent with existing drafting practice in respect of a shifting burden in respect of proof of a statutory defence – see for example Section 118(1)(2) of the Terrorism Act 2000 ('TA 2000'). The current wording, in contrast, follows that for a different scenario, namely assumptions being made, or facts established, unless a particular matter is proved (see Section 118(3)(4) TA 2000).

The Law Commission (Report §3.132) does not directly address the issue of the shifting burden, but the terms of the defence sensibly mirror the proviso to the assumption (or established fact) that a demand with menaces is 'unwarranted' in the offence of blackmail (Section 21(1)(a)(b) of the Theft Act 1968 ('TA 1968')). It may be that the Section 21 TA 1968 assumption would be better suited to the special evidence provision in Section 118(3)(4) TA 2000, and accordingly the wording in 118(4) TA 2000 has been adopted for the Clause 152 statutory defence. But there is a fundamental difference between a proviso to an assumption (Section 118(3)(4) TA 2000/Section 21 TA 1968) and a statutory defence (Section 118(1)(2) TA 2000/Clause 152) – for the former the burden remains on the prosecution throughout (albeit there must be sufficient evidence to justify the application of the provision, which the prosecution has to disprove); for the latter there is an initial evidential burden on the defendant.

We are not aware of the principle behind the current drafting to Clause 152. It seems that the matters contained within the statutory defence are anticipated to be within the knowledge of the defendant and therefore placing the burden on him of adducing some evidence (whether through cross-examination of prosecution witnesses or through defence evidence) is appropriate.

It is of concern that the Explanatory Notes[3] to the Bill at §642 state:

> *"With respect to threats of serious financial loss, it is a defence for a person to show that, first, the threat was used to reinforce a reasonable demand and, second, that they reasonably believed the threat*

[3] https://publications.parliament.uk/pa/bills/cbill/58-02/0285/210285en.pdf

was a proper means of reinforcing the demand. This is similar to the defence contained in section 1(2) of the Malicious Communications Act 1988."

This explanation demonstrates that it is the intention of Parliament that there is a burden of proof on the defendant, but does not reflect the shifting burden as drafted, and, in that regard, the defence is not similar to that in Section 1(2) of the Malicious Communications Act 1988, in which the legal burden of proving the defence rests on the defendant (on the balance of probabilities), subject to any successful challenge to its compliance with Article 6(2) of the European Convention on Human Rights.

Harm

The harmful communications offence defines "harm" as "psychological harm amounting to at least serious distress" (Clause 150(4)). In contrast, the false communications offence defines "harm" as "non-trivial psychological or physical harm". The general definition of 'harm' in Clause 187 does not apply to the communication offences. If this distinction is intended, the reason is not immediately apparent (it is not directly addressed in the Law Commission's Report). If not, then it may lead to confusion, and arguments of varying degrees of merit as to whether "non-trivial" harm presents a higher or lower bar than harm causing at least "serious distress". We therefore suggest that, whatever formulation is adopted, there should be consistency between the harmful and false communications offences.

The Bar Council
April 2022