



The Bar Council

Bar Council response to the Law Commission consultation on Harmful Online Communications

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's consultation on Harmful Online Communications¹.
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Chapter 5

Overview

4. Chapter 5 sets out details of the proposed new communications offence to replace s.127(1) of the Communications Act 2003 and the Malicious Communications Act 1988 (§5.40). The justification for a new offence is dealt with elsewhere. The offence

¹ [Consultation paper](#)

is confined to individuals (§1.9) and therefore misses the opportunity to deal with the issues arising from communications published or hosted by corporate, and especially trans-national and extra-territorial, entities. For example, if a malicious group of individuals create a company to distribute harmful communications, so that they can hide behind the corporate veil, it might be difficult for a prosecution to attribute responsibility for any particular communication. The criminal law can play an important part in changing societal behaviour. Here, the, often anonymous, targeting of individuals and groups will ultimately only be successfully challenged if those individuals are deprived of the platforms to publish their 'malicious communications'.

5. Among the issues examined are *"the meaning of "obscene", "grossly offensive", and "indecent", as well as the definitions of "publish", "display", "possession", and "public place" and of how we can best achieve clarity and certainty of the law for people communicating online"* (§1.12(b)). The adjectives used to describe a criminal communication must be sufficiently defined both in scope and semantics to satisfy Art.7 ECHR.

6. The new "harm" has to be confined to what is appropriate for the criminal law. Defamation ought not to be included unless it crosses a threshold into obvious criminality. Competition law protects those whose commercial activities harm competitors other than by cartel activity. Misleading advertising, short of offences under the Fraud Act, are caught by other legislation, as is the publication of a false prospectus in connection with the issue of securities.

7. The Law Commission had to grapple with the fundamental problem of definition – what is meant by "digital" and "online" (§5.27).

Question 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?

8. The ingredients of the proposed offence are set out in Question 1 as follows (no draft statutory provision is included in the report) –

(1) The defendant sends or posts a communication that was likely to cause harm to a likely audience;

(2) *in sending or posting the communication, the defendant intended to harm, or was aware of a risk of harming, a likely audience; and*

(3) *the defendant sends or posts the communication without reasonable excuse.*

(4) *For the purposes of this offence, definitions are as follows:*

(a) *a communication is a letter, electronic communication, or article of any description;*

(b) *a likely audience is someone who, at the point at which the communication was sent or posted by the defendant, was likely to see, hear, or otherwise encounter it; and*

(c) *harm is emotional or psychological harm, amounting to at least serious emotional distress.*

(5) *When deciding whether the communication was likely to cause harm to a likely audience, the court must have regard to the context in which the communication was sent or posted, including the characteristics of a likely audience.*

(6) *When deciding whether the defendant had a reasonable excuse for sending or posting the communication, the court must have regard to whether the communication was, or was meant as, a contribution to a matter of public interest.*

9. In principle, we agree with the creation of an offence to suit contemporary modes of communication. Comments on specific aspects of the proposed offence are contained in responses to the remaining questions in Chapter 5.

Question 2: 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?

10. We agree, subject to identification of what is meant by the “media”. Would the exclusion include a communication in the form of a newsletter from a malicious group intent on disseminating false, alarming and foreseeably harmful information?

Question 3: 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?

11. We agree. This is dependent on the qualifying second element, namely that the defendant “*intended to harm, or was aware of a risk of harming, a likely audience*”. Without that intention or knowledge it would be too wide and uncertain. An entirely

hypothetical test (which would be the result of deleting the words “*likely to see ... etc*”) would be too wide to satisfy Art.7 EHRC.

Question 4: 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?

12. We agree. A requirement to prove actual harm would potentially result in need to find individuals who would testify that they suffered some harm as a result of reading the communication, and who would then be cross-examined on their personal susceptibility. That is not likely to achieve the purpose of this measure.

Question 5: “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? 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”?

13. We wonder whether the test should also include physical harm caused by shock or alarm. A person may send a communication knowing that the recipient is particularly vulnerable or fragile with intent to cause a harmful physical effect – for example where a victim is known to have a heart condition, or severe asthma. The requirement that the defendant intends harm or knows of the risk of harm to the likely audience will exclude remote or unexpected injury. Otherwise we agree with the minimum threshold of harm suggested.

Question 6: 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?

14. We agree. See paragraph 13 above. If adopted, there must be room within the sentence provided to include any aggravating feature inherent in the context.

Question 7: 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?

15. We agree. This would apply to sub-paragraphs (1) and (2) of the proposed offence. It might lead to absurdity if the likely audience consists of unreasonable people.

Question 8: 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?

16. We agree; coupled (as is proposed) with a knowledge of the likely, as well as intended, audience.

Question 9: Rather than awareness of a risk of harm, should the mental element instead include awareness of a likelihood of harm?

17. To require the prosecution to prove “likelihood” would place too great a burden on them. It is sufficient that it must be proved that the defendant was aware of a risk.

Question 10: 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?

18. We suggest that the better solution is a single offence which can be committed with either of the two states of mind. We agree that to distinguish between them by way of mode of trial would be unhelpful. In most cases the prosecution would charge both in the alternative in any event. That will lead to unnecessary complications for a jury which will have to distinguish between the two, with the anomalous risk that, if they cannot all (or a sufficient majority) agree on which version, they would have to acquit. However, if it is to be proposed that an offence committed with intent should result in a different maximum penalty from one committed with awareness then separate offences will be necessary.

Question 11: 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?

19. We agree. The circumstances should make this obvious in most cases. Where a potentially reasonable excuse exists (or is raised in evidence by the defence) it must be for the prosecution to disprove it. The Law Commission point out in §5.163 the type of communication which foreseeably causes distress but is a necessary part of social

life, such as a doctor's assistant notifying a person that their child has been diagnosed with a serious illness. By making a reasonable excuse part of the offence to be excluded by the prosecution, the proposed definition avoids causing unnecessary invasion into personal lives (and so avoids offending against Art.8 ECHR).

Question 12: 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?

20. We agree. The eradication of historic evils such as slavery and child labour has required the sending of communications showing and describing their horrors.

Question 13: We invite consultees' views as to whether the new offence would be compatible with Article 10 of the European Convention on Human Rights.

21. Yes – see Questions 2 and 12.

Question 14: We invite consultees' views as to whether the new offence would be compatible with Article 8 of the European Convention on Human Rights.

22. Yes – see Question 11.

Question 15: In addition to our proposed new communications offence, should there be a specific offence covering threatening communications?

23. We are not sure that it is correct to say that threatening or menacing communications are sufficiently covered elsewhere (§5.210). For example, sections 4A and 5 of the Public Order Act 1986 would not apply to a communication directed to and received by the recipient in a private dwelling. In many cases it will be chance whether the recipient sees the threatening communication when on public transport, in a bar or at home. Since it is the intention of this new provision to replace s.127(1) of the Communications Act (see §1 above), the justification for not including threats in the new provision (§5.206) seems misplaced and we would invite the Law Commission to reconsider.

Question 16: Do consultees agree that the offence should not be of extra-territorial application?

24. We do not agree. The proposal to base jurisdiction on when the defendant "sends or posts" the communication, and therefore where he then is (§5.212) will cause difficulties. A message sent via one of the social media platforms is sent to that platform and (so we understand) by that platform to the recipient. Many of these

platforms are off-shore. In the absence of the police finding the communication on the defendant's digital device, tracing an offending message back from the recipient to the offender may be problematic. A production order against an off-shore platform may yield no results. A text message (which it is intended to include in this provision – see §5.65) can be evidence obtained from the mobile phone communication provider. But other digital communications can be difficult to trace, as those who have been concerned in terrorism trials know. We suggest that jurisdiction is based on either where the message is sent from or received. Any complications concerning possible overseas investigations and potential extradition has been made uncertain by Brexit, but that should not be a reason to prevent the prosecution using the recipient's location as the simplest basis for jurisdiction. That would make it easier for the police to justify investigating reports of such offences in circumstance where the suspect's location at the time of the communication is then unknown.

Chapter 6

Question 17: 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?

25. This proposed law reform is motivated by what the Law Commission identifies in this consultation as the need to legislate for harm-based offences (§6.3). Existing legislation is intended to cater adequately – and comprehensively – for the mischief and misconduct of a person making a hoax call to police. The offence of wasting police time, contrary to section 5(2) of the Criminal Law Act 1967, is a type of public justice offence for which the Crown Prosecution Service has published specific and current guidance for Crown Prosecutors entitled 'Public Justice Offences incorporating the Charging Standard' (guidance revised on 01 July 2019). We invite the Law Commission to consider whether this summary-only offence remains fit for purpose: it has a statutory maximum sentence of six months' imprisonment that envisages different types of offending. The Crown Prosecution Service guidance as it applies to this offence states as follows:

Wasting Police Time - section 5(2) Criminal Law Act 1967

The offence of wasting police time is committed when a person causes any wasteful employment of the police:

- *by knowingly making to any person a false report orally or in writing tending to:*

- *show that an offence has been committed; or,*
- *give rise to apprehension for the safety of any persons or property; or,*
- *show that he has information material to any police inquiry.*

It is a summary only offence carrying a maximum penalty of six months' imprisonment and/or a level 4 fine.

Proceedings may only be instituted by or with the consent of the Director of Public Prosecutions: s.5(3). Consent may be granted after charge but must be before a plea of guilty is entered or summary trial. Consent must be obtained before proceedings are started by way of summons.

Examples of the type of conduct appropriate for a charge of wasting police time include:

- *false reports that a crime has been committed, which initiates a police investigation;*
- *the giving of false information to the police during the course of an existing investigation.*

The public interest will favour a prosecution in any one of the following circumstances:

- *police resources have been diverted for a significant period (for example 10 hours);*
- *a substantial cost is incurred, for example a police helicopter is used or an expensive scientific examination undertaken;*
- *when the false report is particularly grave or malicious;*
- *considerable distress is caused to a person by the report;*
- *the accused knew, or ought to have known, that police resources were under particular strain or diverted from a particularly serious inquiry;*
- *there is significant premeditation in the making of the report;*
- *the report is persisted in, particularly in the face of challenge.*

There are statutory offences which involve wasting police time and which should be used instead of s.5(2) when there is sufficient evidence. For example:

- *perpetrating a bomb hoax - s.51(2) Criminal Law Act 1977;*
- *false alarms of fire - s.49 Fire and Rescue Services Act 2004;*
- *fraudulent insurance claims based on false reports of crime - deception.*

There is an overlap between the offence of wasting police time and other, more serious offences. Regard must be had to the factors outlined in General Charging Practice,

above in this chapter and Charging Practice for Public Justice Offences, above in this chapter, which help to identify conduct too serious to charge as wasting police time, when consideration should be given to a charge of perverting the course of justice.

26. We doubt that the offence specified by section 5(2) is a complete answer to the conduct discussed in the consultation:

- (i) The offence is directed at 'wasteful employment' rather than the harm caused by the hoax itself – ie public fear and inconvenience. What if a hoax call is made and a public place is evacuated with one tannoy announcement which is shortly afterwards cancelled because the hoax is quickly revealed? The police time wasted may be minimal but the 'harm' may be considerable (the Crown Prosecution Service suggests ten (10) hours).
- (ii) The offence in section 5(2) only relates to wasting police time. What if a hoax caller rings up a school or a branch of a department store or rings a fire rescue service? The police will almost certainly, but not inevitably, become involved before the hoax is uncovered.
- (iii) Section 5(2) is not a bespoke communications offence whereas the existing offence for which section 127(2)(c) provides is and presently covers hoaxes too. So there is already an element of overlap.

We invite the Law Commission to consider this. If a new communications offence is necessary, the Bar Council agrees with the Law Commission's proposed approach.

Question 18: 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) emotional, psychological, or physical harm to a likely audience; and in sending the communication, the defendant intended to cause non-trivial harm (3) the defendant sent the communication without reasonable excuse. (4) 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. Do consultees agree?

27. We agree that knowingly sending false information intending to harm a likely audience should be criminalised, as the Law Commission suggests in its formulation of a new offence. That mischief covers a range of communications other than hoax calls: for example, where a person sends the sort of message outlined in the consultation at §6.41 and §6.48 (specified in the third example). We think it is informative that the Law Commission has identified in this consultation, at §3.107, that the Crown Prosecution Service used section 127(2) in nine (9) cases out of a total of twenty-six (26) cases for non-hoax offences.

Question 19: 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?

28. We agree that there is a place for a new offence to replace section 127(2)(a) and (b).

Question 20: 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. Do consultees agree?

29. We agree.

Question 21: We provisionally propose that the false communications offence should include a requirement that the communication was sent without reasonable excuse. Do consultees agree?

30. We agree with this proposal on the assumption that section 5(2) does not cover the mischief which is aimed at here. The justification for the 'reasonable excuse' defence is to cater for article 10(1) of the European Convention on Human Rights ('*Freedom of Expression*') – for example, such as where a person knowingly makes a false communication, but it is in the public interest to do so. The rationale for reasoning the 'reasonable excuse' defence is identified at §5.180-188 of this consultation.

Question 22: Should there be a specific offence of inciting or encouraging group harassment?

31. We do not encourage the creation of such a specific offence: existing offences and powers of sentence upon conviction are sufficiently comprehensive and current to cover a form or forms of inciting and encouraging harassment where offending entails (whether or not targeting) a group or groups.

Question 23: Should there be a specific offence criminalising knowing participation in uncoordinated group (“pile-on”) harassment?

32. We support introducing the new proposed offence considered in Chapter Five offence [to replace section 127(1)]. Knowingly participating in uncoordinated group (“pile-in”) harassment is overly inchoate in comparison to the preferred new offence proposed in Chapter Five.

Question 24: We provisionally propose that section 66 of the Sexual Offences Act 2003 should be amended to include explicitly the sending of images or video recordings of one’s genitals. Do consultees agree?

33. We welcome the clarity that will be introduced with enactment of the newly proposed offence as outlined in Chapter Five [section 27(1)]. *Alderton* related to live exposure but the legal position at present is that it is unclear whether all forms of cyber flashing are contemplated by section 66 of the 2003 Act. We agree that this uncertainty is most directly and straightforwardly addressed by amending the statute.

Question 25: Assuming that section 66 of the Sexual Offences Act 2003 is amended to include explicitly the sending of images or video recordings of one’s genitals, should there be an additional cyber-flashing offence, where the conduct element includes sending images or video recordings of the genitals of another?

34. On balance, we consider that there is no need for an additional cyber-flashing offence, given that the behaviour is likely to be caught under the harm-based offence.

Question 26: Assuming that section 66 of the Sexual Offences Act 2003 is amended to include explicitly the intentional sending of images or video recordings of one’s genitals, should there be an additional cyber-flashing offence, where a mental or fault element includes other intended consequences or motivations, beyond causing alarm or distress? Further, should the defendant’s awareness of the risk of causing harm (whether alarm or distress, or otherwise) be sufficient to establish this mental or fault element of the cyber-flashing offence?

35. We do not consider that there is a need for an additional cyber-flashing offence, assuming the amendment to the Section 66 offence. A person's motive for cyber-flashing should be distinguished from their intent. It is difficult to conceive of circumstances of cyber-flashing, other than to an intimate, where the intention is other than to cause at the bare minimum alarm or distress. If it was a communication to an intimate, then, as suggested in the consultation, it would seem not to cross the threshold of criminality, even in the absence of express consent.

Question 27: Should there be a specific offence of glorification of violence or violent crime? Can consultees provide evidence to support the creation of such offence?

36. Existing anti-terrorism legislation (Terrorism Act 2006, ss.1 & 2 – encouragement of terrorism and dissemination of terrorist publications) caters for some types of misconduct involving glorification of violence or violent crime. We recognise, though, that the Terrorism Act 2006 does not cover all the forms of glorification cited by the Law Commission in this consultation. The most serious forms are covered by the Terrorism Act 2006. We think it important to point out that there does not appear to be an overwhelming evidential basis for creating an additional offence. In any event, the Bar Council is not in a position to inquire into, or provide, such evidence. We do register our concern as to the breadth of any additional offence.

Question 28: 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?

37. We urge caution here: the harm-based offending model will not necessarily exclude or protect a seemingly vulnerable person who posts non-suicide self-harm content from the risk of prosecution. This is of course consistent with the Crown Prosecution Service applying its guidance on sufficiency of evidence and the public interest when making decisions about whether or not the charging standard is met in an individual case.

Question 29: 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?

38. We think it is difficult to create a specific offence of encouragement of self-harm in such a way as to exclude content shared by vulnerable people for the purposes of self-expression or seeking support. In practice, were such a specific offence to be introduced, the Crown Prosecution Service would have to apply its guidance for Crown prosecutors when considering whether the charging standard is met. The Bar Council is not in a position to provide evidence.

Question 30: We welcome consultees' views on the implications for body modification content of the possible offences of: (1) glorification of violence or violent crime; and (2) glorification or encouragement of self-harm.

39. We do not propose to say anything that is additional or further to the familiar principles of law governing to what extent a person may give valid consent to modification of their body where injury is involved.

Bar Council²

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