

## LAW COMMISSION CONSULTATION ONLINE COMMUNICATION

Closing date 18 December 2020

### QUESTIONS

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that section 127(1) of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 should be repealed and replaced with a new communications offence according to the model that we propose below.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

7.2 By way of summary (though we make separate proposals in respect of each of these below), the elements of the provisionally proposed offence are as follows:

(1) The defendant sent or posted 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 sent or posted the communication without reasonable excuse.

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

(a) a communication is a letter, article, or electronic communication;

(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.

No. As argued below, the proposed model does not adequately address the issues it sets out to resolve and creates a fresh set of problems that are in some ways more serious. The proposed model provides no legal certainty. Only the court can make the final determination as to the emotional or psychological distress caused by a communication. It is unreasonable to expect everyone expressing views on social media to imagine how these views may affect the most over-sensitive person in the likely audience.

Our organisation is accused of causing such distress on a daily basis, for instance by asserting the dictionary definition of “woman” as “adult human female” and by asserting that lesbians do not have penises. Maya Forstater was dismissed from her job for challenging the view that a person can change sex. We are therefore “aware” of the risk that some will find such assertions emotionally or psychologically distressing. We nonetheless assert our right to make these statements because they are true.

We consider the proposal that an “excuse” is necessary to contribute to public debate is an unacceptable assault on the 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?

No. The distinction made here is artificial and unhelpful. Many journalists communicate through media such as Twitter. Conversely, non-journalists may express views through news or broadcast media. This distinction serves no useful purpose.

**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?

Clearly no compassionate person would wish to cause harm. However, the term ‘harm’ is open to personal interpretation and people should not be required to modulate their language in order to avoid upsetting the most sensitive person in their audience. LGB Alliance is frequently told on Twitter that our communications cause harm to trans people. When we state biological facts (humans are a sexually dimorphic species; it is not possible to change sex; someone with a penis is not a woman; a man cannot become a lesbian) we are told that these communications seek to eliminate trans people from the face of the earth; that they are hate speech that deny the existence of trans people. This means that the ‘likely to cause harm’ test causes serious problems in the defence of scientific fact, women’s rights, and LGB rights. Enacting legislation that would suppress discussion of such issues in the ‘public square’ would have a chilling effect on public debate. It could also have the effect of forcing gays and lesbians back into the closet and allowing unscientific theories to go unchallenged.

As Christopher Ferguson, Professor of Psychology at Stetson University, Florida, puts it: “These emotional attempts to suppress controversial or unpopular speech have increasingly made use of what I call the “Mourner’s Veto”—individuals will say that a speaker or a piece of writing has caused them to become distressed or sad or angry or frightened, and they will support these claims with allegations of “harm” or even threats to their “right to exist.” Reasonable debate and discussion then becomes impossible as activists make unfalsifiable but furiously emotive claims about alleged threats to their safety and wellbeing amid much weeping and claims of exhaustion and mental fragility. It is not healthy for the limits of permissible speech to be dictated by the most sensitive person in the room, nor to allow emotional appeals to supplant robust argument as the most effective strategy in a debate.’ <https://quillette.com/2020/12/03/resisting-the-mourners-veto/>

**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?

No. See the reply to point 7.4 above. The subjectivity of 'harm' is highly problematic, and these problems will be much amplified if there is no need to prove any sort of impact on a single person.

**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?

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"?

The law already provides protection from malicious communications that provoke serious emotional distress. What arises here is a major problem in the potential for claims of distress from those who are distressed by factual assertions, such as that only women menstruate, only women get pregnant, and that mothers breastfeed.

The reasonableness of the distress must surely be part of this. If anyone can claim 'serious emotional distress' with tears, claims of suicidal ideation and other responses that are not open to verification, such a clause is likely to become a tool of censorship. See the quotation from Ferguson at Question 3.

**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?

While this may seem reasonable, it creates major difficulties on such platforms as Twitter which are open to all. The likely audience is everyone in the world. Given the ease of mass communication, it is a simple matter for a lobby group, such as those asserting the importance of gender identity theory, to organise as part of any audience – making them a 'likely' part of that audience. If they so desire, they can assert the right of transwomen to be potential partners for lesbians and claim that those who disagree are harming them. This is not a fictitious example: it occurs on a regular basis.

**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?

This question highlights the problems inherent in this proposal. Even the adjective ‘reasonable’ no longer has an agreed meaning. Some will say it is reasonable for a person to be able to declare whether they are a man or a woman, regardless of biology. Others (such as LGB Alliance) find that completely unreasonable. We again refer you to the quotation from Ferguson in our response to Question 3.

**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?

No. Again, there is far too much subjectivity here, and far too much potential for censorship and the weaponizing of a perceived “victim” status.

**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?

No. The only sensible ‘mental element’ would be a clear and demonstrable intention to cause harm.

**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 cannot answer this since we reject the premise that a ‘reasonable excuse’ should be required.

**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?

**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?

Clearly a remark on a matter of public interest deserves more protection than a personal comment aimed at an individual. Those posting malicious comments aimed at individuals can already be prosecuted under existing legislation.

We are very concerned by the Commission's example regarding the tweets posted by JK Rowling further to 5.185:

'We do not doubt that these Tweets had the capacity to cause distress, especially to transgender people. For example, the LGBT+ organisation GLAAD responded to J K Rowling saying: "We stand with trans youth, especially those Harry Potter fans hurt by her inaccurate and cruel tweets."'

The Commission's comment that 'a court would very likely find that [these tweets] were sent or posted with reasonable excuse' is shockingly timid. This is a serious step towards draconian censorship. We strongly object to any attempt to stifle perfectly reasonable views because they are met with reactions we consider irrational and frankly absurd.

**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.

Article 10 of the ECHR protects freedom of expression. It is our view that the proposed criminalisation would not be compatible with Article 10.

**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.

**Consultation Question 15.**

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

This is the only addition that we feel would be a helpful step forwards. People in high-profile positions, especially parliamentarians and academics and especially women, receive rape and death threats on a daily basis. Although these are already covered by existing legislation, we do think it is worthwhile considering adding a specific offence covering such threats.

**Consultation Question 16.**

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

We oppose the general tenor of the proposed offence. But given the international nature of social media such as Twitter, we believe that ruling out extra-territorial application makes no sense.

**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?

**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.
- (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?

**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?

**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 have already answered this question in the replies to questions 8 and 9.

**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?

No. The notion that communications that may upset someone must have a 'reasonable excuse' amounts to censorship.

**Consultation Question 22.**

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

No. This would be far too difficult to prove

**Consultation Question 23.**

7.25 Should there be a specific offence criminalising knowing participation in uncoordinated group ("pile-on") harassment?

See the reply to question 22.

**Consultation Question 24.**

7.26 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?

Yes. We consider this a sensible proposal.

**Consultation Question 25.**

7.27 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?

**Consultation Question 26.**

7.28 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?

7.29 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?

**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?

Yes. Women known abusively as 'TERFs' are frequently targeted with violent images and words seeking to glorify such violence. A very large number of examples are catalogued at <https://terfisaslur.com/>

**Consultation Question 28.**

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

**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?

**Consultation Question 30.**

7.33 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.