CBA Response to the Law Commission's consultation paper entitled "Harmful Online Communications: The Criminal Offences"

January 2021

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

4. This is the Criminal Bar Association's response to the law Commission's consultation paper on "Harmful Online Communications: The Criminal Offences".

5. By way of general response, the CBA agrees with the Law Commission's assessment of the problems with the current communications offences and the need for reform. The lack

of cohesion between the existing potential offences and the difficulty in bringing prosecutions under those provisions so as to protect users of social media from growing levels of abuse and hatred give rise to a compelling case for reform.

6. Whilst there is need to address under-criminalisation of certain online conduct, we have approached this consultation from the perspective of those who may prosecute or defend any charges brought under the proposed new offences.

7. In a time where public debate is increasingly carried out in posts of 200 words or less and there are vocal and impassioned arguments to censure and/or exclude others from public debate or to attack to different degrees not just the opinions, but those who express them, dividing lines are sometimes difficult to identify generally and in particular on the issue of regulation. Those who engage in legitimate public debate may post messages which in part constitute legitimate public debate or opinion, but also in part contain personally abusive content.

8. Inevitably, this is an area which will continue to develop and grow.

9. The Commission has rightly identified the importance of debates on important public issues and we stress the importance of those matters set out by the Commission at paragraphs 1.5 to 1.7 and paragraphs 2.7 to 2.10 of the consultation paper.

The Convention

10. Although Article 10 and Article 8 of the Convention protect different rights and have a different emphasis, we do not consider that the difference between the two brings a material difference to the legality of the proposed offence. We consider that the proposed offence could meet the criteria of Article 10 (2) and Article 8 (2), subject to the question of proportionality and the matters we raise below. We consider that of the two, the Article 10 considerations are most operative.

11. The question of where the line can properly be drawn between that large space and variety of communication which should be protected under Article 10 and that which should not, may be as much or more a political one rather than a legal one.

12. Judgments from the European Court of Human Rights shows how the criminal law has previously been used to criminalise conduct in the field of public date, in breach of Article 10. As an example, in Bowman v the United Kingdom, judgment of 19 February 1998, a violation of Article 10 was found in relation to a prosecution following distribution of leaflets by an anti-abortion campaigner prior to general election.

13. The paper rightly identifies non-legal measures to address the growing trends, which may yet be reversed. Non-legal measures would by far been the more preferable and further reaching means to tackle harmful communications; what it really needed, is a degree of cultural change.

Particular sensitivities

14. The paper and the proposed new offence (at sub paragraph (5)) address the potential complication arising in circumstances where a group may have a particular sensitivity. Where a group claim a particular sensitivity, sub paragraph (5) of the proposed new offence may have the effect of lowering the threshold of criminality in terms of conduct where such a group are a likely audience. It may also be the case that communications that may offend that group would bring in this lower threshold where they form a particular part of audience (rather than the target audience) who may see or receive the communication.

15. It is very difficult in the modern context to target with any precision or boundary any particular group. More importantly, the question that would arise is how one measures the sensitivity of that group? As the paper recognises at 2.34 and 2.35 the need for sufficient forseeability, quoting at 2.35 from Akçam v Turkey (2011) 62 EHRR 12 (App No 27520/07) at [91], that the Court "must ascertain whether [the provision] is sufficiently clear to enable a person to regulate his/her conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail". Subsection (5) increases the risk of an accidental offence being committed or the blurring of the line between legal and criminal communication.

16. Further, the inevitable consequence is that the group will or may, themselves, play a part in establishing where the threshold for criminality may begin. We understand the desire to make sure that the views of people who are affected by harmful language inform the

decision to define such language as harmful: however, we do not consider it wise to allow individual groups to *determine* what constitutes 'criminal communication' entirely subjectively without reference to wider social norms including the reasonable person.

17. Where there is an intention to cause harm to a particular group and such harm is caused by reason of a particular sensitivity, the offence would be made out and any particular vulnerability of the group may be taken into account on the issue of sentence. In other circumstances, it would be more difficult to predict the point at which an offence may be committed and the risk of being arrested or prosecuted would increase significantly and this would have a potentially chilling effect on what might otherwise be legitimate communication (see below). We consider that to be a real risk which should be avoided. We have removed this part from the potential offence in our revised draft below.

Particular dangers

18. The balance between legitimate expression and criminal expression will inevitably be seen differently by different individuals. We note that the consultation proposals have sought to strike a balance between those examples "which are unlikely to result in an offence" and those which "will result in an offence".

19. However, in addition to the binary question of whether an offence may have been considered, the issues also need to be viewed in terms of the risk of arrest and prosecution.

20. That someone may be vindicated by a jury following trial and therefore not criminalised, fails to take into account both the emotional costs the individual by reason of being arrested and potentially prosecuted in the first place and secondly the chilling effect that such arrests or prosecutions and the risk of such arrests or prosecutions may have on others.

21. In principle we accept that the proposed offence will constitute a better and clear version of the current legislation and will do more to protect free speech than existing legislation. Balanced against that will be an increase, we consider, of people contacting the police to complain about speech they find offensive to a degree they claim to be harmful. Any

definition (in guidance, such as that currently in force by the CPS) must make plain that the offence will not be committed by language that is merely insulting or offensive.

22. Anecdotal examples show how arrest and prosecution decisions can be made capriciously or without the sensible and objective assessment assumed in the consultation paper.

23. A useful parallel is the much debate application of section 5 of the Public Order Act 1986. Some years ago, an individual was prosecuted for calling a Police horse 'gay'. In another instance, a student was arrested for labelling the Church of Scientology a cult and in yet another, a café owner was arrested for displaying passages of the Bible on a TV screen. More recently, homeowners have been caused by the Police to remove Christmas decorations from the outsides of their homes because they were deemed to be offensive. These are but a few examples.

24. Although these incidents were not communication offences, they relate to the use of the criminal law to address undesired expression. The threshold for making complaint seems to have diminished, with serious offence being claimed with relative ease for minor conduct. Unfortunately, these complaints do sometimes get acted upon by the police and the fact or arrest or threat of prosecution can constitute an unacceptable inhibitor of proper free speech.

25. In terms of how that might be guarded against, we suggest tightening a little the wording of the offence (we suggest replacing risk with recklessness), removing the qualification suggested in the proposal to take into account in specific instances the vulnerability of particular group, and a strong steer towards clear guidance which is as necessary for the purpose of those issuing indications as it is to those making prosecutorial decisions.

26. Any guidance should make clear that the criminal investigation and prosecution process should be reserved to those instances when a clear or high threshold has been met. The guidance should explicitly recognise the potential costs to both individuals and the ability of society as a whole to engage in proper debate if people are arrested and/or prosecuted for matters which should be within the sphere of free speech, even if the arresting officer disapproves.

27. Although we raise these significant concerns, we do not wish to diminish the positive steps taken in this proposal is and what will, with the suggestions we have made, lead to an improvement in the law and the potential to protect individuals when there are clear cases of attack harassment persecution or threats. It is really in those instances where direct threats are made or implied that people need most of all protection of the law.

28. We further consider that there should be time limit within which the conduct is actionable, which would assist in maintaining proportionality as required by Article 10.

"Risk" or "recklessness"

29. We are unpersuaded that the proposed new offence should contain, as an alternative to intended harm, that there is a 'risk' of harm. The paper has addressed directly the alternative of a second limb of recklessness. There are two main strands advanced in the paper in favour of using 'risk' rather than 'recklessness'.

30. First, that the legal test for recklessness (currently the Cunningham test) may at some point in the future be changed by the Courts (as dishonesty has been since Ivey, after the earlier test was contemplated when the Fraud Act 2008 was passed). Secondly, the further element of 'without reasonable excuse' is considered to be broad enough to mitigate there being too low a bar in practice for criminality to be made out.

31. Taking the first of these, it is not evident that the Fraud Act 2008 would have been drafted differently had it been drafted post the decision in Ivey. The term 'recklessly' is commonly used in the definition of criminal offences[1]. As an example, section 1(1) of the Criminal Damage Act 1971 states:

> (1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

32. Subsection (2) contains a like offence in relation to endangerment of life. The offences under the Criminal Damage Act 1971 provide for both intentional and reckless conduct and the potential safeguard of "without lawful excuse" – which would arguable be the

[1] In addition to which, see for example section 20 of the Offences Against the Person Act 1891.

same as a matter of practice as the saving "without reasonable excuse" in the proposed new offence.

33. Insofar as possible, the new offence should be consistent in language to existing criminal offences.

34. Further, the use of 'risk' in the proposed offence is unhelpful as it does not connote any degree of risk and omits any degree of foreseeability – it is a hazardously low threshold in an area in which there should be significant hesitation before conduct should be potentially classed as criminal.

35. If the application of the provision is applied in stages, once a risk is identified, no matter how low, the focus then turns to reasonable excuse absent which an offence will be assessed to have been committed.

36. Whilst we recognise that the commission have worked hard to give the proposed defence flexibility it needs whilst also giving sufficient protection to avoid unwarranted prosecution, the way the consultation is drafted does not consider or at least sufficiently protect against the risk that many offences will be charged and/or prosecuted where the fundamental issue between the parties turns on a matter of judgment.

37. Prosecutorial decisions can be challenging enough where there is large or high public pressure to bring a prosecution. The use of 'recklessness' as an ingredient rather than 'risk' will help protect or at least mitigate to some degree against the risk of over criminalisation and would, we suggest, make the borders of the offence more easily discernible by those who wish to engage in public debate.

38. We accept that merely raising potential difficulties and risks may be unhelpful, where there is some consensus that reform is required. To that end, we set out below a proposed amended offence.

The proposed offence

39. We suggest the offence be amended as follows:

    (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~~ reckless as to whether harm would be caused to ~~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 (including a post), 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.

(7) Any prosecution of an offence under this section must be brought:

a. before the end of the period of 3 years beginning with the day on which the offence was committed, and
b. before the end of the period of 6 months beginning with the day on which evidence comes to the knowledge of the prosecutor which the prosecutor considers sufficient to justify proceeding".

(8) A certificate of a prosecutor as to the date on which evidence described in subsection (7)(a) or (7)(b) came to his or her knowledge is conclusive evidence of that fact

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.

Paragraph 5.50

Answer to Question 1:

We agree. Comments are made on the individual elements below. We agree the existing offences identified under the Communications Act and Malicious Communications Act should be repealed and agree with the concerns about basing criminal liability on what is grossly offensive or indecent, including the ECHR concerns.

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?

Paragraph 5.68

Answer to Question 2:

Yes – technologically neutral definition with news/broadcast media excluded.
Reference is made in the consultation to the exclusion of news media etc being achieved 'by way of a carve out if necessary'. We would suggest that it is necessary for a term excluding these forms of communications from being covered by the offence to be in the Act itself.

We would also suggest that the exclusion should be broad enough to cover communications that are not necessarily intended for broadcast in the form in which they have been sent: that is, a journalist who sends to a news corporation via email some working document/reports or a series of videos designed to provide an editor with background material, but not intended for broadcast in the form sent, should not be caught by this offence. We would suggest that an explicit statement of the type of materials/situations the new offence is not intended to cover should be made, rather than causing journalists to have to consider if they have a reasonable excuse in relation to briefing materials in each individual case.

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?

Paragraph 5.82

Answer to Question 3:

Yes, we agree.

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?

Paragraph 5.91

Answer to Question 4:

Yes

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"?

Paragraph 5.115

Answer to Question 5:

Yes. A list of factors may be useful, but we consider that may be best left to guidance than the wording of the offence. We did not understand from the paper that it was envisaged that there would be medical evidence in all or even many of the cases which the Court may have to deal with. The Court would therefore have to make a judgment call.

The consultation paper suggests that a list may be unnecessary as tribunals regularly decide what is "serious" in OAPA offences and offences relating to coercive and controlling behaviour. "Serious emotional distress" will be more open to interpretation than bodily harm which can be judged based on physical appearances e.g. was there a bruise. Similarly, as noted, the coercive and controlling behaviour offence the "serious effect on the victim" which then defined as causing them to fear violence or requiring a substantial effect on day to day life – again, the harm/effect can perhaps be more concretely measured when it is defined in this way – did the person change their route to work/leave their job etc; did they take measures to avoid the defendant. Both OAPA and controlling and coercive behaviour offences therefore do have either some additional definition or relate at least in part to physical harms or physical effects on someone's life, which may be easier to assess than "serious emotional distress." As the proposed new offence does not require actual harm to eventuate, it may be even harder to a tribunal to assess if a message would cause serious emotional distress rather than more minor distress or offence, unless some guidance is provided.

Without further definition of the meaning of serious emotional distress, there is a risk that the sense that the Law Commission wish to communicate of this being a 'big sizeable harm', as explained in the consultation paper, may be lost. A non-exhaustive list of factors to consider would assist – the Court should have regard to the intensity and duration of the likely distress and how it would likely manifest itself – for example, whether it would have an impact on day to day activities/sleeping-patterns/appetite etc – before concluding that serious emotional distress was likely. This would add the Court to make more objective decisions in cases which may involve inferring the extent of likely distress. A list would also be useful in reducing the risk of unnecessary or inappropriate arrest or intervention by the Police and may enable a more robust and arguably more objective view to be taken regarding a complaint, even in the face of strong pressure by a complainant.

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?

Paragraph 5.130

Answer to Question 6:

Yes, we agree that the context should be taken into account, for instance where information is shared among a group of friends. We do not agree that the 'context' should include the characteristics of a likely audience. See below answer to question 7

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?

Paragraph 5.135

Answer to Question 7:

The desire to avoid a defendant who targets a particularly vulnerable audience falling outside the scope of the legislation is understood. The defendant, in choosing to target an audience, should calibrate their message to that audience, even if/particularly if his targeted audience were more susceptible to harm than a 'reasonable person' – for example, the message that a defendant knows will represent the straw that breaks the camel's back being sent to the

defendant's vulnerable ex-partner on the anniversary of a bereavement or similar. Such a person will be 'caught' by the offence as currently drafted because they will have intended to harm.

However, we disagree with the suggestion in 5.133 that any defendant who sends a message aware of a risk of harming a likely audience by causing them serious emotional distress, but who genuinely and correctly believes that this risk is highly improbable to materialise for most reasonable people, should still be convicted because a tribunal concludes that his likely audience was more susceptible to emotional harm that he in fact realised. In a message sent 'to the World' on a social media platform, a defendant must be aware that many, many people could see it, particularly if the defendant is a celebrity of some kind. How many particularly susceptible people need there be in a likely audience for it be said such a communication was likely to cause harm?

Currently, social media is not currently studiously neutral and it may be thought that a chilling effect is far-fetched – but if those commentators/public figures who want to comply with the law feel that they must adjust their content based on the most sensitive person in the likely audience, lest in hindsight their understanding of the make-up of their audience be questioned, it may mean that more responsible public figures start to limit the extent to which they ask provocative or satirical questions for fear of distressing an unusually susceptible person in their audience. Such public speech, particularly satire, may be the precursor to a debate about matters of public importance, or may generate a debate, but it may not easily fit within the definition of a 'contribution to a matter of public interest'.

We would therefore submit that the reference to the characteristics of the individual or group should be removed from the definition of the offence. Particularly sensitive people who are targeted will be protected because defendants who target them will have intended to cause harm; further reference to characteristics is unnecessary. We considered the addition of a reasonable person test but wished to leave open to the Court the possibility of convicting an offender who targets someone who is particularly vulnerable (who intended to cause them harm). We consider that reference to the reasonable person test in cases where harm was not intended should be included in the guidance for this offence.

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?

Paragraph 5.148

Answer to Question 8:

Yes, we agree that some subjective element is necessary and we understand the offence as currently drafted requires D to be subjectively aware of a risk of harm as defined in the section i.e. serious emotional distress, not just a risk of any harm. We consider for the reasons set out above (see paragraphs 29-38) that the

subjective awareness of risk of harm necessary for an offence to be committed should be expressed as 'recklessness' rather than mere 'risk'.

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?

Paragraph 5.153

Answer to Question 9:

See comments at paragraphs 29 to 38 on replacing risk of harm with recklessness.

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?

Paragraph 5.160

Answer to Question 10:

We agree with the concern expressed in the Consultation Paper about how a two offence approach may result in prosecutors selecting the lower charge in circumstances which do not merit it out of an abundance of caution. We also agree that there may be cases where serious actual harm was caused but not intended which may merit a higher sentence that a case where harm was intended but did not result. We would agree that the difference in culpability between intention and recklessness could be reflected in sentence. We understand the concern about the potential increase in the number of Crown Court trials for relatively low-level offences if defendants elect jury trial: however we do consider that the right to a trial by jury is of greater importance in relation to offences which relate in part to making a statement about standards of behaviour in a democratic society, and for example, consideration of what counts as contributing to a matter of public interest.

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?

Paragraph 5.179

Answer to Question 11:

Yes, we agree. This is a crucial safeguard.

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?

Paragraph 5.189

Answer to Question 12:

Yes, we agree. This is a crucial safeguard.

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.

Paragraph 5.190

Answer to Question 13:

We consider that the new offence, as a provision, would be compatible with Article 10 of the Convention and capable of compliant application. However, it is important that appropriate guidance is issued to minimise the risk of the offence being used in individual instances in a way which is disproportionate and in breach of 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.

Paragraph 5.205

Answer to Question 14:

We consider that the new offence, as a provision, would be compatible with Article 8 of the Convention and capable of compliant application. However, it is important that appropriate guidance is issued to minimise the risk of the offence being used in individual instances in a way which is disproportionate and in breach of Article 8.

Consultation Question 15.

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

Paragraph 5.211

Answer to Question 15:

No. We consider that this proposed offence would be sufficient to obviate the need for a further offence. Should there be significant feedback to suggest that such an offence is desirable, it would be possible to add a further subsection to provide for an aggravated form of the offence.

Consultation Question 16.

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

Paragraph 5.215

Answer to Question 16:

Yes.

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?

Paragraph 6.18

Answer to Question 17:

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.

(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?

Paragraph 6.32

Answer to Question 18:

Yes.

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?

Paragraph 6.38

Answer to Question 19:

Yes.

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?

Paragraph 6.64

Answer to Question 20:

Yes.

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?

Paragraph 6.67

Answer to Question 21:

Yes, we agree. This is a crucial safeguard.

Consultation Question 22.

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

Paragraph 6.99

Answer to Question 22:

No. Intention to cause harm or knowledge that harm was likely to be caused and reference to the context would enable the new proposed offence to be used to combat group harassment. We do consider that guidance accompanying the offence should specifically address this form of conduct, as such behaviour is increasingly observed on social media platforms, but the new proposed offence and the panaply of existing inchoate offences should provide sufficient protection.

Consultation Question 23.

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

Paragraph 6.105

Answer to Question 23:

No (as per response to Question 22).

We do observe though, that if such activity is charged under the new proposed offence the court should take into account when considering the facts of such a case that there may be in fact greater attached to those who send messages later in time in a pile-on as they had greater opportunity to be aware of the harm likely to be caused in the circumstances of them adding to the numbr of messages/posts alreasy sent/posted; a pile-on by definition becomes more harmful the longer it goes on and the more messages (/people) are involved.

The courts could find that the relationship between the defendants' messages was 'similarity of **impact'** or 'similarity of [general] **intent'** – e.g. defendant 1's message may be homophobic, defendant 2's message may be fat-phobic, in the context of a pile-on both messages are capable of being harmful (similarity of impact) and are being sent with the general intent to be offensive/cause distress/cause harm etc (similarity of intent).

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?

Paragraph 6.133

Answer to Question 24:

Yes, we agree.

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?

Paragraph 6.143

Answer to Question 25:

Unsolicited pictures of male genitalia (commonly referred to as "dick-pics") are often sent to women via the private messaging functions on social media sites and also on dating sites, these incidents are often shocking and harmful to the recipients whether or not the unsolicited image, e.g. of an erect penis, is known to be to that of the sender's or some other person's erect penis, especially in the context of conversation the platforms these pictures are often sent i.e. social media and dating sites. Further, such images are often accompanied by sexually suggestive text/messages; the shock and / or harm caused by the sending/receipt of these messages and images is generally caused by the nature of the image and any accompanying text and the fact of their unsolicited sending.

In our view it is also often the case that photos and videos sent in the context of unsolicited cyber-flashing are often are cropped so that only the genitals are shown; these images differ in this sense from pictures commonly referred to as "nudes" which can be characterised as fully naked pictures of the sender of such a picture, taken by the sender in a way that their identity is clear not concealed, and shared by mutual consent with another.

We think that any extension of the law of exposure to deal with cyber-flashing should also include sending images or video recordings of the genitalia of another. This would avoid circumstances where an accused would be otherwise able to rely on the fact that the picture / video sent was not of their own genitalia as a defence to any such charge, and where it may prove difficult to prove otherwise if the image/video was cropped and only showed for e.g. an erect penis that in all other ways was indistinguishable.

The shock and / or harm caused to the recipient of such an image / video is not lessened by the fact that the face or identity of the sender is not seen or cannot be established from the image/video and likewise the intent to cause such shock or harm appears to us to be the same whether a person sends an unsolicited picture of their own genitalia or that of another, in those circumstances the law should reflect this by ensuring those circumstances attract the same culpability.

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?

Paragraph 6.150

Answer to Question 26:

7.28 – Because the circumstances and context of an instance of cyber-flashing, as well as the nature of the images/videos themself can vary greatly so that, for example, the sender of an image may perceive the sending of an image of genitalia to be funny or in keeping with what they may have thought was a flirtatious conversation, whilst the recipient may find the image to be sexually threatening or intimidating in the circumstances whereas another recipient in similar circumstances may find the image distasteful but not particularly "harmful", given the wide ranging circumstances of the sending and receipt of such images in this digital age we think for any cyber-flashing offence, the mental element of the offence could / should be expanded beyond a defendant intending to cause alarm or distress:

One possibility could be to expand the mental element to include recklessness:

". "a person (A), will be guilty of an offence, if he sends an unsolicited image of his genitalia or that of another person (e.g. B), to another person (C) intending to cause (A) [shock,] alarm or distress or being reckless as to whether (A) would be caused [shock,] alarm or distress";

*When considering [intention or recklessness of A], the court **must** have regard to the circumstances and context in which the image / video was sent, which **may** include:*
(i) consideration of the characteristics of (A);
(ii) consideration of the characteristics of (C);
and
(iii) the relationship between the parties;

Another possibility is to consider impact rather than intention:

E.g. "a person (A), will be guilty of an offence, if he sends an unsolicited image of his genitalia or that of another person (e.g. B), to another person (C), in circumstances that were such as would cause [(C) / any reasonable person receiving the image in those circumstances], to be alarmed or distressed"

7.29 –
This is an area fraught with potential difficulties. As an example, the extension of this offence as suggested may lead to the increased criminalisation of young people who may misjudge their actions and their audience. The consequences of doing so may be severe and disproportionate. In particular, the automatic placement on the sex offender's register may hold back, divert or marginalise young people who may in the particular circumstances have acted without malice and having caused relatively little or no harm. Neither should adults be faced with criminality when they intend no harm but merely misjudge at the relevant moment of sending and image believing that it may be well received. In order to temper this we feel that where the defendant's awareness of the risk of causing harm (whether alarm or distress, or otherwise) is deemed sufficient to establish the mental element, the court should also have to take into account among other things, the context of the sending and any specific features of the defendant (and recipient)

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?

Paragraph 6.175

Answer to Question 27:

No; we believe that an attempt at criminalising behaviour under this banner will disproportionately affect some communities or sub-cultures (as per the e.g. of [Blacks] youth who listen to or themselves create "drill" style rap). We do feel that the association of drill music with the glorification of physical violence is misguided and racially biased and we not that there are other genres of music which also have lyrics speaking of violence which are not viewed in the same way (e.g. hard rock).

In the field of art, music and artistic expression, the question of what in fact amounts to "glorification" of violence is often determined on subjective factors (e.g. the perception that drill music is fuelling violence in inner cities or is more lyrically graphic then other forms of music) this subjectivity we feel can lead to inequality in the way the law is applied to some artforms / music leading to further disproportionate criminalisation of some communities / cultures.

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?

Paragraph 6.194

Answer to Question 28:

One possible way we suggest would be to include an explicit exclusionary subsection excluding vulnerable people but, as we also say in answer to question 29 below, we feel there would be inherent difficulties involved both in defining and determining who fell into the category of a "vulnerable person".

We are conscious of the fact though that whilst a vulnerable person may share NSSH there is still a risk that a person from the likely audience may view such material and go on to self-harm to suicide, that is to say that even where a vulnerable person posts *NSSH* material there is no way of controlling how that material or post may be used or viewed by other vulnerable people who may be severely adversely affected by it e.g. to the point of self-harm to suicide. This consideration should not be addressed in the offence itself. The public interest test in any decision to prosecute has proven capable of protecting those individuals in respect of whom there is sufficient evidence to secure a conviction but it would be inappropriate or unfair to prosecute them. The offence itself should not distinguish between who may or may be capable of committing an offence in particular circumstances. A sufficient protection exists in the two part prosecution test.

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?

Paragraph 6.199

Answer to Question 29:

No. In our view, there should not be a specific offence of encouragement of self-harm. We feel there would be inherent difficulties involved in both defining and determining who fell into the category of a vulnerable person sharing or who had shared content for the purpose of self-expression or seeking support. We also are of the view that these difficulties may lead to inconsistent charging decisions and or outcomes of trials. This is a complex area and it is unlikely to be dealt with consistently, fairly and properly by reference to the terms of an offence. Each case will turn on its own facts and where a line is crossed or not will be one

of judgment and so we advise against over complicating the offence (or any specific additional offence) with prescriptive drafting, which would most likely be incapable of universally fair application.
The proposed offence specifically requires regard to be had of the context. This, in our view, along with the discretionary prosecution test, availability of inchoate offences and any accompanying guidance offers sufficient protection.

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.

Paragraph 6.207

Answer to Question 30:

We do not think the offence should be further modified. 'Glorification' is a problematic concept to tackle with the criminal law.

It is our view that any creation of offences of either glorification of violence or violent crime or glorification or encouragement of self-harm would necessarily include and thus criminalise body modification content especially in view of the case of R v BM. Therefore, unless there is a strong imperative and sufficient background evidence to justify a need to further amend the criminal law (terrorism matters aside, which are in any event outside the scope of this consultation), there should be no further offence created.

For and on behalf of the Criminal Bar Association

10 January 2021