Response to the Law Commission Consultation on Reform of the Communications Offences

Dr Elizabeth Tiarks and Dr Marion Oswald, Northumbria University Law School.

Consultation Question 1.

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that section 127(1) of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 should be repealed and replaced with a new communications offence according to the model that we propose below.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

We agree that there is need for reform, but do not agree with the current framing of the new offence, as per our responses to the other consultation questions below. In providing our response, we have focused only on consultation questions 1-9.

Consultation Question 2

7.2 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?

We would suggest that clarity is needed in respect of the term 'sending' in the context of digital and internet communications to ensure that, to potentially fall foul of the new offence, any digital communication would need to have been posted so that it was viewable by others, and not merely sent to the communications platform provider, for instance to be held as a draft. We would also suggest that consideration be given to whether the moderated or semi-moderated comments sections of online news media, and also the linking of broadcast media to hashtags (thus encouraging or making social media comment), should be specifically subject to the offence.

Consultation Question 3.

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

We accept the need to broaden the scope of the existing offence under s.1 MCA 1988, but are concerned that the proposed offence goes too far by the inclusion of the words "or otherwise encounter it". The "likely audience" requirement does not achieve the stated aim of ensuring the offence is not overly broad, as it covers cases where the communication was passed on. Particularly with electronic communications, this allows for such a broad conception of "likely audience" that it is not significantly different to "any person".

The removal of the words "or otherwise encounter it" would narrow the offence to a more reasonable scope. This does not leave indirect victims without redress, as there are alternative methods of tackling indirect harms to "information subjects" through civil law, and specifically the tort of misuse of private information and data protection remedies, which may well be more appropriate to example 1 on page 113 of the consultation document.

Furthermore, it is unclear how the definition of "likely audience" would be interpreted in the case of closed, semi-closed or targeted internet groups, say of like-minded individuals, where the online conversation – while not illegal – may be offensive to those who did not share the expressed views. Others may become aware of those communications (because of the nature of the internet, communications are easily copied and disseminated) but would they be the likely audience?

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?

The rationale for preferring "likely harm" over "actual harm" is understood. There is a difficulty however with the pairing of "likely harm" with "likely audience", which means that there are two vague and rather wide terms of reference used together, resulting in a very broad remit for the offence. If "likely harm" is to be used, the offence as a whole may need to be more narrowly focused. This could be achieved by: a narrower framing of "likely audience", as recommended above; using an objective test to determine whether a reasonable person in the position of someone in the "likely audience" was likely to be harmed (similar to the NZ offence under s.22 HDCA); and including a list of possible factors for the court to take into account, as has been considered. It will be important in these factors to reflect recent case-law which has thrown doubt on whether even considerably offensive, irritating, provocative, contentious or abusive communications should be subject to criminalisation (*Scottow* [2020] EWHC 3421 (Admin); *Miller* [2020] EWHC 225 (Admin)). We would suggest that examples 1, 2 and 3 in the consultation – while of course offensive and misguided - do not meet the serious threshold for criminalisation, especially as other remedies are available, such as the torts of misuse of private information and defamation, action by the employer and action by the online platform for breach of its terms of use. Would it not be better to focus on any underlying criminal issue to which the communication may be contributing e.g. glorifying terrorism, soliciting grievous bodily harm etc?

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?

We agree that criminal law can be applicable to actions which cause serious emotional distress, although it is an ill-defined concept. We are uncertain about the inclusion of "**at least**" (serious emotional distress), as it is unclear what is envisaged as harm going beyond this and what would and would not be included.

The difficulty with the use of "serious emotional distress" in this proposed offence is that it is used to refer to *likely* harm rather than actual harm. The lack of clarity is therefore more problematic, but could be partially remedied by the inclusion of factors, as identified.

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"?

Yes, we agree that a list of factors would be useful to guide courts and to ensure that the offence is not applied too broadly. It may be useful to consider including both a list of factors that are likely to support a finding of serious emotional distress, as well as factors which would mitigate such a finding. The list of factors in the NZ offence are helpful. It will be important in these factors to reflect recent case-law which has thrown doubt on whether even considerably offensive, irritating, provocative, contentious or abusive communications should be subject to criminalisation (*Scottow* [2020] EWHC 3421 (Admin); *Miller* [2020] EWHC 225 (Admin)).

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?

Potentially, although it would require a narrower conception of "likely audience", as suggested above in our response to Question 4.

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?

No, we disagree. A "reasonable person" requirement, which takes into account the position of someone in the likely audience is needed. The proposed wording of "likely to cause harm to a likely audience" is otherwise too broad in scope and raises issues in relation to Article 10 ECHR bearing in mind recent case-law as mentioned above. The scope of what might be considered harmful could be viewed as insufficiently precise, especially when "likely audience" remains so broad. A "reasonable person" requirement at least partially delimits this. It would also provide a more concrete basis for demonstrating the proportionality of any interference with the Article 10 right.

Consultation Questions 8 and 9.

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

While we understand the need for the offence to cover circumstances other than where there was a clear intention, we believe that awareness of a 'risk of harming' is again too low a threshold. The risk (in the sense of likelihood of something happening and the impact if it does) could be very low, but a person's actions could still fall within the mental element. We would suggest that it would be more appropriate for a second mental element to be based around **recklessness** in respect of a **significant** risk of harm (subject to our comments about the definition of harm set out above).