

Free Speech Union briefing

The Law Commission's Proposed Changes to the Communications Act 2003 and Malicious Communications Act 1988

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FSU
FREE SPEECH UNION

Executive Summary

In July 2021 the Law Commission published plans to replace Sections 127(1) and 127(2) of the Communications Act 2003 and Section 1 of the Malicious Communications Act 1988.¹ The Free Speech Union (FSU) agrees that these provisions need to be repealed, but we believe that some of the Commission's proposals for replacement offences would create new problems for freedom of speech, including a risk of self-censorship by the public online.

The Law Commission proposes:

- (1) **a new “harm-based” communications offence** to replace offences within section 127(1) of the Communications Act 2003 and the Malicious Communications Act 1988;
- (2) **a new offence of encouraging or assisting serious self-harm;**
- (3) **a new offence of cyberflashing; and**
- (4) **new offences of sending knowingly false communications, threatening communications, and making hoax calls to the emergency services** to replace section 127(2) of the Communications Act 2003.

We commend the Law Commission's recognition that freedom to speak only inoffensively is not worth having; its decision not to propose a new offence of glorifying violence and violent crime is also welcome. However we wish to raise concerns in relation to proposals 1–3, especially the new “harm-based” communications offence in proposal 1. (We do not regard the proposal for a specific offence for hoax calls to be a serious concern.)

We do not believe that the Government should take up recommendation 1 as it stands. It should instead simply repeal Section 127(1) of the Communications Act and Section 1 of the Malicious Communications Act; or, if it is inclined to take up the Commission's recommendations, we believe that they will need to be heavily amended to protect freedom of speech. (Suggested amendments are

¹ Law Commission, [Modernising Communications Offences: A final report](#), 21 July 2021.

outlined below.) Among other concerns, the concept of “psychological harm” that informs the proposed offence is too vague, subjective and open to interpretation.

If the Government is minded to take up any of the Law Commission’s proposals, any new offences would have to require proof of serious harm, as well as the intention to cause harm to a realistically defined “likely audience”, and allow a very broad public interest defence. It will need to ensure the prosecution threshold is high. The Commission believes that the proposed offence would be prosecuted even more rarely than existing offences. This would be most welcome, but care should be taken that loose wording does not result in an offence that is broader than intended. We recommend consideration of the following:

- (1) **Intent to cause harm to a likely audience:** The FSU has outlined in a consultation response to the Commission that any new offence would need, among other requirements, to be an offence limited to an intent to cause (serious) harm to a likely audience, with the term “likely audience” carefully defined so identity groups could not use the new offence to censor their critics;
- (2) **Reasonable excuse:** The definition of “reasonable excuse” needs to be wide enough to allow for the fullest range of discussion and debate;
- (3) **The “public interest defence”:** The “reasonable excuse” element of the offence should be reinforced by the self-standing “public interest” element. However, the current interpretation of “public interest” is liable to be too narrow and would need to be defined more broadly so as to encompass views deemed unreasonable or perverse, including when expressed at inopportune times, and views that are offensive to specific groups and public figures, even if these cause distress.
- (4) **Likelihood of causing harm and proof of harm:** Making distressing comments about other people should never be an offence. Robust speech often carries a risk of offence, or distress, including to the highly sensitive. Forceful speech cannot be criminalised, which would create a “heckler’s veto”. Irrefutable proof of serious harm should be required (see below).

With respect to the Law Commission's second and third proposals, while we appreciate concern over cyber-flashing, we are worried that a specific offence to combat this activity would risk criminalising consenting behaviour between couples, and the FSU is against criminalising the encouragement of acts which are not themselves criminal, and therefore does not agree that there should be a specific offence of encouraging self-harm.

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What are the problems in the Communications Act 2003 and Malicious Communications Act 1988?

Communications Act 2003: Section 127

Section 127(1) of the Communications Act 2003 criminalises the sending, via a “public electronic communications network”, of a message which is “grossly offensive or of an indecent, obscene or menacing character”; Section 127(2) criminalises sending a message which is known to be false for the purpose of causing “annoyance, inconvenience, or needless anxiety” to another. These are as follows:

Improper use of public electronic communications network

- (1) A person is guilty of an offence if he—
 - (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
 - (b) causes any such message or matter to be so sent.
- (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—
 - (a) sends by means of a public electronic communications network, a message that he knows to be false;
 - (b) causes such a message to be sent; or
 - (c) persistently makes use of a public electronic communications network.

Malicious Communications Act 1988: Section 1

This section of the Malicious Communications Act criminalises the sending of a letter or other communications which are grossly offensive or threatening, or to cause distress, as follows:

Offence of sending letters etc. with intent to cause distress or anxiety.

- (1) Any person who sends to another person—
 - (a) a letter, electronic communication or article of any description which conveys—
 - (i) a message which is indecent or grossly offensive;
 - (ii) a threat; or
 - (iii) information which is false and known or believed to be false by the sender; or
 - (b) any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature,

is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.

These provisions may sound sensible, but Section 127(1) in particular has led to prosecutions simply for making provocative jokes or being rude. This section began life in the 1930s as a way to deal with the specific problem of young men using telephone boxes to call female operators and make obscene comments to them.² It is now being applied to online speech, yet there is nothing inherently special about the internet that requires otherwise unusual restrictions on what we can say, when these limits would not also apply to other means of communication.

The Law Commission report³ argues that offences based on what it calls “universal standards” such as “gross offensiveness”, as in the Malicious Communications Act, rely on fundamentally subjective

2 Andrew Tettenborn, “[Freeing Speech](#)”, *The Critic*, 27 July 2021.

3 Law Commission, [Modernising Communications Offences: A final report](#), 21 July 2021.

judgements. As individuals differ about what constitutes gross offensiveness, there is too little clarity and certainty as to when an individual is likely to incriminate him or herself. The Commission proposes instead an objective test of “likeliness to cause harm to a likely audience”. The FSU agrees that subjective tests of offensiveness need to be repealed. However, we believe that some of the Law Commission’s proposals for replacement offences will, unless carefully revised, create new problems for freedom of expression.

Which prosecutions have resulted from these provisions?

Paul Chambers and the Twitter joke trial (2010)

In January 2010, flights were cancelled at Robin Hood Airport in Yorkshire because of the snow that was causing disruption across the north of England. On 6 January, 26-year-old Paul Chambers was planning to fly to Northern Ireland to see his then-girlfriend (later wife). He posted the following message on his Twitter account @pauljchambers:

Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!!

A whole week later, an off-duty manager found the message while doing an unrelated computer search. Although airport management considered the message to be “not credible” as a threat, Chambers was arrested by anti-terror police at his office, his house was searched, and his mobile phone, laptop and hard drive were confiscated.

The police could simply have pointed out to Chambers that it was unwise to make jokes about blowing up airports: instead, he was arrested under antiterrorist legislation in front of his colleagues, with “four more antiterrorist officers... waiting in reception”. Not fully grasping what was happening, when asked whether he had weapons in his car, he joked that he had some golf clubs in the boot. “But they didn't think it was funny,” he said. “I kept wondering, ‘When are they going to slap my wrists and let me go?’ Instead, they hauled me into a police car while my colleagues watched.”⁴

The Crown Prosecution Service (CPS) initially wanted to charge Chambers under legal provisions against bomb hoaxers, but this was not possible – there had been no hoax, no panic, and no intention to

4 Nick Cohen, “[Twitter and a terrifying tale of modern Britain](#)”, *The Guardian*, 19 September 2010.

cause a panic. Indeed, the tweet had gone essentially unnoticed until a week later. Yet the CPS still did not drop the matter. Under the “menace” provision of Section 127(1) of the Communications Act, Chambers was charged with “sending a public electronic message that was grossly offensive or of an indecent, obscene or menacing character contrary to the Communications Act 2003”, and on 10 May 2010 was found guilty at Doncaster Magistrates’ Court, fined £385 and ordered to pay £600 costs. The CPS successfully persuaded the judge that his tweet should be taken as a genuine threat, whether or not he was joking and regardless of the airport’s lack of knowledge of it. He also lost his job at a car parts company.

The conviction was widely condemned as a miscarriage of justice, although it took three appeals to overturn it. The actor and presenter Stephen Fry offered to pay Chambers’s fine and legal bills; other critics of the conviction included television writer Graham Linehan; and the journalist Nick Cohen compared the conviction with Milan Kundera’s anti-communist novel *The Joke* in which a young man tries to impress a woman with a joke at the expense of the authorities.⁴

Chambers lost an initial appeal against his conviction, as another judge and two magistrates decided that his tweet contained “menace”. Thousands of Twitter users reposted his Tweet with the hashtag #iamspartacus. Another appeal to the High Court in 2012, entirely on points of law and the correct interpretation of section 127(1) of the Communications Act 2003, was inconclusive.

In Chambers’s next appeal to the High Court that began in June 2012, his barrister John Cooper QC pointed out that if the tweet was “menacing”, so was John Betjeman’s line “Come friendly bombs and fall on Slough!” and asked whether Shakespeare would have been prosecuted if he had tweeted this line from Henry VI, Part 2: “The first thing we do, let’s kill all the lawyers.” Chambers’s appeal received the public support of Stephen Fry and comedian Al Murray. His conviction was quashed in July 2012. The judgement concluded: “a message which does not create fear or apprehension in those to whom it is communicated, or who may reasonably be expected to see it, falls outside this provision [of the 2003 Act]”.⁵

5 [Chambers v DPP \[2012\] EWHC 2157](#).

It is also notable that *The Guardian* [has claimed](#) it was informed by CPS staff that some of them wanted to drop the case, but were overruled by the then-Director of Public Prosecutions, Keir Starmer.

Even though the conviction was found to be in error, the case still points to the need to amend the Communications Act to prevent any more needless prosecutions.

Markus Meechan (2018) and Kate Scottow (2020)

There are two other individuals who've been needlessly prosecuted under the Communications Act: Markus Meechan in 2018 and Kate Scottow in 2020.

The case of Markus Meechan in 2018 (a.k.a. "Count Dankula and the Nazi pug") saw a man convicted for posting a video of a pug doing a Nazi salute with his paw (although at the beginning of the video, Meechan says: "My girlfriend is always ranting and raving about how cute and adorable her wee dog is so I thought I would turn him into the least cute thing I could think of, which is a Nazi.")⁶ The conviction for being "grossly offensive" under Section 127(1)(a) of the Communications Act succeeded despite the fact that this was intended as a joke, albeit one in bad taste – and Meechan was fined £800. His conviction was opposed by various comedians, including Ricky Gervais and David Baddiel. Meechan was not granted the right to appeal to Scotland's Sheriff Appeal Court and an appeal to the Supreme Court has also been rejected.

In the second case, Kate Scottow, a mother-of-two, called trans-woman Stephanie Hayden a "pig in a wig" online. Again, this unpleasant comment did not merit the arrival of the three police officers who came to arrest Scottow in front of her children for breaching Section 127(2)(c) of the Communications Act. Scottow was held for seven hours and grilled by police for an hour. The judge told Scottow that her comments were "unkind": she was convicted, given a conditional discharge and ordered to pay £1,000 in costs. Her conviction was overturned on appeal,⁷ but as we discuss below, she should not have been convicted in the first place.

6 ["Hate crime trial of YouTube user over video of dog 'taught to do Nazi salute'"](#), *The Telegraph*, 12 September 2017.

7 Sarah Phillimore, ["Freedom of speech awakens?"](#), *The Critic*, 21 December 2020.

The Law Commission's proposals

In the Law Commission's proposals for the reform of the Communications Act,⁸ it recommended the following "new or reformed" criminal offences:

- (1) **a new "harm-based" communications offence** to replace the offences within section 127(1) of the Communications Act 2003 and the Malicious Communications Act 1988;
- (2) **a new offence of encouraging or assisting serious self-harm**;
- (3) **a new offence of cyberflashing**; and,
- (4) **new offences of sending knowingly false communications, threatening communications, and making hoax calls to the emergency services**, to replace section 127(2) of the Communications Act 2003.

Regarding its recommended harm-based offence, the Commission's proposal is based on a move away from what it calls broad subjective categories of "wrongful content" (e.g. "grossly offensive") to a "context-specific analysis" that asks: "given those who are likely to see a communication, was harm likely?" Its aim is to make sure communications which it claims are "genuinely harmful" do not escape criminal sanction just because they do not fit a proscribed category such as being "grossly offensive". (However, the Commission is also keen that communications without this potential for "harm" should not be criminalised just because they may be called grossly offensive, indecent and suchlike.)

In the following quotes, the Commission summarises the criteria that would have to be met to secure a prosecution for this new harm-based offence:⁸

1. The defendant sends or posts a communication that is **likely to cause harm** to a likely audience;

⁸ Law Commission, *Reform of the Communications Offences*, comprising *Modernising Communications Offences: A final report* and *Modernising Communications Offences: Summary of the final report*, 21 July 2021.

2. in sending or posting the communication, the defendant **intends to cause harm to** a likely audience; and
3. the defendant sends or posts the communication **without reasonable excuse**.

For the purposes of this offence:

- 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.
 - c. harm is psychological harm, amounting to at least **serious distress**.
4. 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, including the characteristics of a likely audience**.
 5. When deciding whether the defendant lacked 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**.

Like section 1 of the [Malicious Communications Act] 1988, the offence would be triable either-way: it could be tried in the magistrates' court or the Crown Court, and would have a maximum penalty of imprisonment for two years.

The proposed offence would not require any proof of actual harm, which the Commission believes would “unjustifiably limit the scope of the offence”, although actual harm would be taken into account at sentencing. The Commission argues, reasonably, that a requirement for actual harm, instead of objectively likely harm, would allow the hyper-sensitive to impose unjustifiable restrictions on free speech because an individual might be able to prove actual distress caused by a tweet even if, objectively, such harm was unlikely. The likely audience would also include people “likely to be shown the communication by a third party”. The proposed new offence would also cover private messaging such as on WhatsApp.

The “harm” the Law Commission has in mind is defined as:⁸

[P]sychological harm, amounting at least to serious distress. Serious distress is a high threshold. “Serious” does not simply mean “more than trivial”. It means a *big, sizeable harm*. [Our italics.]

In deciding whether the communication would be likely to cause this type of “harm” to the “likely audience”, the court must have regard to the context in which the communication is sent, “including the characteristics of those likely to see, hear, or otherwise encounter it”. The Commission states that:⁸

Characteristics might include, for example, age or gender, as well as race, religion, disability, or sexual orientation. They are not limited to “protected characteristics” under hate crime legislation.

In deciding on whether there is a “reasonable excuse”, the court must also have regard to whether the communication is intended to contribute to the “public interest”.

Concerns about these proposals

It is welcome that the Law Commission recognises the risk posed to freedom of speech by Sections 127(1) and 127(2) of the Communications Act 2003 and Section 1 of the Malicious Communications Act 1988. However, we believe its proposals may give rise to unpredictable consequences that will create new threats to freedom of speech.

We focus here especially on the Commission's proposal (1), a new "harm-based" communications offence; as well as proposal (2), a new offence of encouraging or assisting serious self-harm; and proposal (3), a new offence of cyberflashing. We do not regard the specific offence for hoax calls to be a serious concern.

A law that focuses on "harm" and attempts to deal with the "consequences" of communications creates risks for freedom of expression. Harm is taken by us to mean psychological harm, amounting at least to serious distress ("a big, sizeable harm"). But this is still a vague definition that is open to wide interpretation and abuse.

Another concern is how, in practice, a court will interpret the words "likely audience". The Commission defines it as "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". This would be helpful in the case of off-colour WhatsApp messages shared between individuals and which are subsequently shared more widely. In such cases, an individual would not be liable – he or she did not intend, or even foresee, that a wider audience would subsequently see the messages.

However, it could be argued that a Twitter user's likely audience is, in any given case, potentially the whole world, so there is always someone likely to be harmed by a provocative tweet. While the prosecution would still have to prove that the defendant *intended to harm that specific audience*, a large part of its work will have been done – if the defendant was deliberately provocative in any respect, it may not be hard to convince a magistrate or jury that the intent to

cause harm can be inferred. It might be asked: Why else would he or she have written what they did?

The effect of this would be detrimental to free speech. As the proposal stands, defendants would not know who their likely audience is and as a result they would not know how to avoid incrimination, which could lead to self-censorship. The sensible social media user would have to abandon any notion of directing posts to a community of friends or followers, and assume that all posts would be addressed to the world at large. This would impose a restraint on freedom of expression.

The Commission also says that the “characteristics” of this “likely audience” should also be taken into account, which are “not limited to ‘protected characteristics’ under hate crime legislation” but “might include, for example, age or gender, as well as race, religion, disability, or sexual orientation”. This appears to be open to abuse by religious groups, as well as activists.

In addition, when the Commission proposes that the regulated press be exempt from the “harm” offence (regulated by whom?), this risks effectively creating a society with two tiers of freedom of expression, with journalists being granted more latitude than non-journalists.

Further, the “public interest” defence is vague. It is not clear how a person could work out in advance whether or not their communication or comment could reasonably be said to be in the public interest.

Combined with the potential for two years’ imprisonment, these proposals will have a chilling effect on free speech.

What we propose instead

The Commission says it wants any new law to be restricted in its application, and avoid over-criminalisation. It envisages that few cases will satisfy all of the proposed elements of the offence. However, it would be optimistic to assume that police, prosecutors and courts will simply accept that the new law should remain largely unused and only enforced on rare occasions. The criminal justice system would likely see the new law as a tool that Parliament intended to be used and opportunities would probably be taken to exploit ambiguities in it to enforce it more widely than the Commission intends.

Therefore, if the Government is inclined to take up any of the Law Commission's proposals, the new harm-based communications offence should be limited to communications that actually cause very serious harm: this would need either to mean physical harm, or genuine psychological harm defined in such a way as to require some proof of trauma, and which would not allow mere offensiveness to be included in this definition of harm. The "likely audience" would also need to be carefully defined. The prosecution should be required to prove that the impugned communication was not within the public interest, as very broadly defined. If the Government is minded to follow the Commission's recommendations it will need to attach an extensive list of caveats to ensure prosecutions are rare. In particular, we suggest consideration of the following factors.⁹

Intent to cause harm to a likely audience

The FSU has outlined in response to the Commission's consultation about reforming these laws that any new offence would need, among other requirements, to be an offence limited to communications that are intended to cause (serious) harm. Even if the criminal law elsewhere penalises people for recklessness, this does not mean this principle should apply to speech. While the Law Commission acknowledges the need for intent, amendments would need to go further, as outlined below.

⁹ The following passages are derived from the FSU's response to the Law Commission's recent consultation on this area.

As we have discussed, any offence limited to intent to cause (serious) harm to a likely audience would need to further define the term “likely audience” so as not to allow identity groups to use a new offence to demand the prosecution of people who they would claim had offended or upset them, and by doing so had caused them “harm”.

Reasonable excuse

Another requirement is that the communication was sent or posted without reasonable excuse, a bar which would also need to be set very high, allowing the fullest range of freedom to speak and debate.

The “public interest” element

This should be reinforced by a self-standing requirement that the prosecution prove that the communication was not in the “public interest”, separate from the “reasonable excuse” element. The public interest would need to be defined so widely as to allow for the expression of views of even apparently unreasonable or perverse nature, including when expressed at inopportune times. Unfortunately, the current interpretation of “public interest” under existing law is narrow. For example, the jurisprudence on Article 10 of the ECHR creates a false distinction between matters of “public interest” and those which are only “of interest to the public”, granting less protection to the latter. Any discussion of any matter of interest to even a section of the public would need to be protected – including those which are offensive to other groups, as well as personal comments about the public activities of celebrities, for example, even if these cause distress.¹⁰

Likelihood of causing harm and proof of harm

That a communication is likely to cause genuine and serious harm to someone likely to see, hear, or otherwise encounter it would be another requirement, but as above, this should be an outer boundary of any offence. Making distressing comments about other people should never be an offence (although this should be understood in conjunction with the other minimum requirements outlined in this document).

Robust speech often carries a risk of causing offence, or distress, at least to some people of high sensitivities, or to some groups. Allowing

¹⁰ The FSU has also noted that in relation to criminal actions involving the press, the [CPS Code and Guidance](#) on whether prosecution is in the public interest is narrow and provides inadequate protection.

people to be brought before the courts merely because some people were severely distressed would have unfortunate effects, including:

- Undesirable criminalisation of much forceful speech;
- creating a “heckler’s veto”; and
- giving too much power to the police to tell someone to be quiet and threaten them with arrest because their opinions or depiction of other groups might be distressing to some groups, despite having no impact on most people.

A “reasonable excuse” protection would not by itself be enough to protect against such risks, because freedom of speech needs to include the right to express offensive, unreasonable, or misguided views in any circumstances.

Moreover, the communications should not simply be likely to cause harm, but irrefutable proof of this actual, serious harm should also be required. (As discussed above, this should mean either physical harm, or genuine psychological harm defined in such a way as to require some proof of trauma, and which does not allow any kind of mere offensiveness to be defined as harm.) There should be no question of the creation of a general crime of saying hurtful things simply because someone may have caused harm or because they risked causing harm in the sense of offending or upsetting someone.¹¹ The definition of harm should rule out future prosecutions comparable to those of Markus Meechan, Kate Scottow or Paul Chambers.

The authorities should also, as the Commission accepts, have to take into account the context in which a communication is sent or posted, including the characteristics of a likely audience. This would need to address the questions of personal targeting akin to harassment, but not allow prosecution for making comments or creating depictions which are offensive to certain groups.

Cyberflashing and self-harm

The Commission has proposed that a new offence should be created of the sending of images or video recordings of one’s genitals, as well as an offence involving the sending of images or recordings of someone else’s genitals. But while we appreciate the concern about this behaviour, we are not convinced that a specific offence or

¹¹ As such the speech offences under Section 5 of the Public Order Act 1986 should not be extended.

offences need be created for this activity, which would risk criminalising consenting behaviour between adults.

Likewise, we do not agree with the suggestion that there should be a specific offence of encouraging self-harm because the FSU is against criminalising the encouragement of acts which are not themselves criminal.

