

# **BIG BROTHER WATCH**

## **Big Brother Watch Response to the Law Commission's Consultation on Harmful Online Communications: The Criminal Offences**

**December 2020**

## **About Big Brother Watch**

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous technological change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

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## Introduction

Big Brother Watch believes that free and open discussion should be promoted and only restricted if it incites violence or would otherwise exceed the limitations under Article 10 of the European Convention on Human Rights. Freedom of expression is vital for the development of ideas and human fulfilment.

Many of our existing communications offences fail to adequately protect freedom of expression. Both the Malicious Communications Act 1988 and the Communications Act 2003 have intolerably low thresholds unto which an offence could be committed. Both Acts criminalise the sharing of communications which are “grossly offensive” or “indecent”, for example. It is important to remember, as per *Sedley LJ in Redmond-Bate v Director of Public Prosecutions (1999) 7 BHRC375, [20]*:

“Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative(...) Freedom only to speak inoffensively is not worth having (...)”

As the Law Commission observes, section 127 of the Communications Act criminalises the sharing of “indecent” communications, meaning that adults sharing sexual messages consensually could fall foul of the law.<sup>1</sup> Meanwhile the Act has come under wider criticism for its criminalisation of sharing communications which are “grossly offensive”. In 2018, the YouTuber Mark Meechan was found guilty under the Communications Act of “grossly offensive” communications aggravated by religious prejudice after he shared a video of his dog raising its paw, characterised as a “Nazi salute”, following the words “gas the Jews” and “Sieg Heil”. In the video, intended as a joke intended to irritate his girlfriend, Meechan said because his girlfriend was “raving about how cute and adorable her wee dog is” he would “turn him into the least cute thing I could think of, which is a Nazi.”. Meechan was fined £800 for the offence following a trial at Airdrie Sheriff Court in April 2018.<sup>2</sup> In our view, this episode demonstrates the overbearing nature of Communications Act which is so broad as to allow the criminalisation of satire if it can be deemed offensive. The conviction was rightly condemned by British comedians, including David Baddiel, Shappi Khorsandi and Ricky Gervais, and free expression organisations including Index on Censorship. After a number of attempts to appeal the conviction domestically failed, Meechan stated his intention to submit an application to the European Court of Human Rights

We share the Law Commission’s view that these Acts unduly restrict freedom of expression. However, the Law Commission’s proposed harm-based communications offence bases prospective offences on a loose harm framework which is undefinable, creates a low threshold

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<sup>1</sup> Law Commission, *Harmful Online Communications: The Criminal Offences Consultation Paper*, 2020, p. 60, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf>

<sup>2</sup> MacDonald S. *Mark Meechan: Man fined over pet dog’s Nazi salute takes appeal to Europe*, Times Online, 2020 <https://www.thetimes.co.uk/article/mark-meechan-man-fined-over-pet-dogs-nazi-salute-takes-appeal-to-europe-ltshb6lxk>

for an offence to be committed and could have serious unintended consequences for freedom of expression.

In particular, offences for communications which cause “emotional harm” are far too vague.

We also have serious reservations about the Law Commission’s proposed ‘false communications’ offence. While we agree with the Law Commission’s assessment that existing offences in this area are overly broad and threaten free expression, we do not believe that this proposal would adequately protect the right to freedom of expression.

The Law Commission also identifies a number of areas where it argues existing offences under-criminalise certain types of behaviour. We believe that these should be considered individually. We support the updating of offences to allow for technological neutrality in order to ensure parity between cyber-flashing and non-communications-based offences of a similar nature. However, we do not believe a new offence for “uncoordinated pile-on harassment” would be practicable or without impeding the right to freedom of expression. Further, we oppose any new offences which would criminalise the so called “glorification” of violent crime or self-harm content online. Such offences could risk criminalising self-expression, journalism and art in these subject areas in a way that does not apply to other media. Such offences could result in the censorship of those suffering ill mental health or people adversely affected by crime, and would be a disproportionate interference with Article 10.

For the purposes of our response, we have addressed each of the Law Commission’s proposals in turn.

## Proposed harm-based offence

### Harm-based framework

According to the Consultation Summary Document, the Law Commission's proposed harm-based offence is as follows:

- 1) The defendant sends or posts a communication that is likely to cause harm to a likely audience;
- 2) in sending or posting the communication, the defendant intends to harm, or is aware of a risk of harming, a likely audience; and
- 3) the defendant sends or posts the communication without reasonable excuse.<sup>3</sup>

Further, it is stated that:

"c) harm is emotional or psychological harm, amounting to at least serious emotional distress"<sup>4</sup>

This definition resembles an offence brought into law in New Zealand, where harm is defined as "serious emotional distress"<sup>5</sup>. The Law Commission's model includes any emotional or psychological harm, provided it is at least as serious as 'serious emotional distress'.

The Law Commission takes this slightly different approach on the basis that they "do not want to rule out communications likely to cause serious emotional or psychological harm of a kind that may not accurately be described as "distress""<sup>6</sup>. We are concerned that a communication which causes "distress", that is, "a feeling of great worry or unhappiness"<sup>7</sup>, is similar in effect to one which causes "gross offence", and similarly suffers from vagueness and subjectivity. Indeed, the consultation summary document states that "many communications will be both offensive and harmful"<sup>8</sup>. Ultimately, this could result in prosecutions where a communication has been entirely non-threatening but nevertheless resulted in a recipient or viewer being distressed. This is quite likely to apply, for instance, to some forms of comedy.

Under the proposed offence, the prosecution would not need to show that the communication was likely to cause a medically recognised psychiatric condition. The Law Commission explains that:

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<sup>3</sup> Law Commission, *Harmful Online Communications: The Criminal Offences* Summary of the Consultation Paper, p.8, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Harmful-Online-Communications-Consultation-Paper-Summary-1.pdf>

<sup>4</sup> *Ibid.*

<sup>5</sup> Law Commission, *Harmful Online Communications: The Criminal Offences* Consultation Paper, p. 109, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf>

<sup>6</sup> *Ibid.*, p.120

<sup>7</sup> Oxford Learner's Dictionary Online, *distress*, [https://www.oxfordlearnersdictionaries.com/definition/english/distress\\_1](https://www.oxfordlearnersdictionaries.com/definition/english/distress_1)

<sup>8</sup> Law Commission, *Harmful Online Communications: The Criminal Offences* Summary of the Consultation Paper, p.9, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Harmful-Online-Communications-Consultation-Paper-Summary-1.pdf>

“‘serious emotional distress’ lies between minor emotional distress and a medical condition (...) that being said, by ‘serious’ we do not simply mean anything more than minor. Rather, we mean a big, sizeable harm.”<sup>9</sup>

In our view this is too vague. We believe “serious emotional distress” is subjective, highly relevant to an individual’s pre-existing emotional and psychological condition and difficult to quantify. Ultimately, this would create a very low threshold for prosecution and result in the criminalisation of speech which is little more than distasteful. Balancing the importance of preventing distress and the importance of protecting free expression, Big Brother Watch believes the proposed offence would disproportionately inhibit free expression.

### Conduct element – “likely harm”

We are concerned about the conduct element of the proposed offence. In contrast to the offence adopted in New Zealand, the Law Commission’s proposed offence can be incurred by the non-occurrence of harm as it only requires the prosecution to show “likely harm” to the “likely audience” and not actual harm.

The consultation paper puts forward what it considers to be two main advantages to this approach:

1. The offence is capable of covering communications that have the potential to cause harm, but did not actually cause harm, or where it is not known whether they caused harm; and
2. The victim does not have to go through the potentially re-traumatising process of producing evidence that they were harmed.<sup>10</sup>

Adding an element to an offence which makes that offence easier to prosecute does not mean that the element is justified. Given the already sweeping definition of emotional harm, adopting a “likely harm” threshold substantially broadens the scope of the offence which would be likely to result in over-criminalisation. The likelihood threshold is used in other legislation, such as the Public Order Act 1986, but in relation to communications that are also threatening or abusive. The likelihood threshold in the proposed offence effectively determines the offence itself – it is not underpinned by any essential quality of the communication that would reasonably render it unlawful. For such hypothetical emotional harm to be able to constitute a criminal offence would quite clearly have a chilling effect and interfere with the right to freedom of expression.

### The “likely audience” element

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<sup>9</sup> Law Commission, *Harmful Online Communications: The Criminal Offences Consultation Paper*, p.120, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf>

<sup>10</sup> *Ibid.* p.116

The Law Commission proposes that the offence be based on the harm, or likely harm, to a “likely audience”. This remarkably broad framing is justified on the basis that the harm of online communications can extend beyond those towards whom the communications is directed. Two relevant types of “bystander” who may be harmed are cited:

1. Those who share the characteristics of those towards whom the communication is directed
2. Those who come across hateful material or watch as online hate unfolds<sup>11</sup>

The paper argues that those in both categories can be harmed, even if they are not directly targeted by or involved in the communication.

Once again, the scope of the audience in question here is overly broad. On a public platform the “likely audience” is indiscriminate and can include anyone. Accounting for bystanders and individuals who “come across” the communication as part of a “likely audience” would effectively criminalise the general expression of views that anyone responds to with emotional distress.

This proposal is a significant divergence from the current focus in hate speech law both in the UK and internationally, which generally focuses on protected characteristics. Such a broadening of speech offences to any potential audience that reacts in a negative way means that criminality could arise simply on the basis of individuals’ actual or potential responses to speech, rather than arise directly from the content of the speech itself. This is a deeply unsatisfactory legal construction in a democratic society and would seriously undermine freedom of expression.

The Commission also argues that the offence must encompass doxing and outing as forms of online abuse. Doxing refers to retrieving and publishing, often by hacking, a person’s personal information.<sup>12</sup> Outing is a type of doxing whereby information about an individual’s gender identity or sexuality is revealed against their will. However, the construction of an expansive censorship law based on subjective harm is the wrong approach to deal with these issues. Rather, existing communications laws dealing with hacking, abuse and harassment, where necessary, can apply to these activities.

The Commission also seeks to encompass the sharing of sexual images without consent in this broad proposal. However, it would be more appropriate to target the act of breaching privacy rather than creating an offence that occurs as a result of distress or only in relation to a likely audience. The sharing of sexual images without consent should be prohibited, in our view, regardless of any likely audience. The Law Commission in fact suggests that violating an individual’s right to privacy in this way may be better tackled separately. We agree with this suggestion. The consultation paper states:

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<sup>11</sup> Law Commission, *Harmful Online Communications: The Criminal Offences Consultation Paper*, p.112, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf>

<sup>12</sup> Ibid. p. 78

“The proposed offence does not necessarily reflect the nature of the harmful conduct, which may be better understood as, for example, a privacy violation. While a victim of such conduct will often be likely to see the communication, we accept that this is not necessarily the primary harm. Therefore, it may be that – at least in some cases, such as the sharing of sexual images without consent – there is a need for a better-targeted offence.”<sup>13</sup>

We agree that there is a need for a targeted offence to deal with the non-consensual sharing of sexual imagery.

Requirement to consider “the context in which the communication was sent or posted, including the characteristics of a likely audience”

According to the consultation paper:

“The proposed new offence specifies that, in determining 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.”<sup>14</sup>

This means that communications posted in a publicly accessible online environment would need to account for the likelihood of subjective emotional harm to every possible audience.

It also means that an individual could be liable even if, on an objective analysis of the facts, the likely audience was unusually sensitive or prone to serious emotional distress. Absent the fault element, this places an unfair burden on individuals: they might send or post a message that would have caused no harm to the majority of people, yet they risk being prosecuted because it is determined that those likely to see, hear, or otherwise encounter the communication happened to include people who were unusually sensitive to the content. A reasonableness test would be neither appropriate nor effective here – the construction is fundamentally vague, subjective and in our view faulty.

Mental element – aware of a risk of harm

Under section 1 of the MCA 1988 and New Zealand’s equivalent law, the mental element is intent. However, in the Law Commission’s proposal, intent is not a factor – the harm-based offence can be made when the prosecution establishes that the defendant was merely *aware* of a risk of likely emotional harm to a likely audience. This substantially broadens the scope of the offence. The awareness of the risk of harm or probable consequences has a precedent in law, but not where there the harm or consequence in question is merely the possibility of another individual’s emotional distress, *and* there is no other material quality of the act in question that affects the criminality. These thresholds combined are prohibitive to an

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<sup>13</sup> Law Commission, *Harmful Online Communications: The Criminal Offences Consultation Paper*, p.113, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf>

<sup>14</sup> *Ibid.* p.122



environment in which free expression can be enjoyed. Were such a law passed in the UK, it is reasonable to expect that significant amounts of comedy and art would be criminalised.

The Law Commission discusses variations to the proposed offence to raise the threshold, including that the offender is aware of the *likelihood* of harm rather than aware of the *risk* of harm. However, a likelihood threshold is not appropriate in the context of public communications platforms and where the harm is emotional and subjective.

## False Communications

In addition to the harm-based offence, the Law Commission also proposes to replace section 127(2) of the Communications Act 2003 with a new offence based on sending knowingly false communications.

The current law applies to communications that the defendant:

1. Sends over a public electronic communications network
2. For the purpose of causing annoyance, inconvenience or needless anxiety to another.
3. And that he knows to be false.<sup>15</sup>

The Law Commission suggests that the current law should be replaced with a new offence, which can be summarised as follows:

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 an electronic communication, letter, or article; 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.<sup>16</sup>

While we agree that the equivalent offence under the MCA 1988 should be repealed or amended materially, we do not believe this proposed new offence is a suitable replacement in its current form. Once again, we are concerned that the harm threshold is intolerably low. In our view “non-trivial emotional harm” is too broad in scope.

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<sup>15</sup> Law Commission, *Harmful Online Communications: The Criminal Offences Consultation Paper*, p.146-147, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf>

<sup>16</sup> *Ibid.* p.143-144

## Specific Offences

The Law Commission contends that existing communications offences are outdated and result in under-criminalisation in certain areas. While discussing areas outside the scope of existing communications offences, page 63 of the Law Commission's consultation document states:

"In summary, there are some types of abusive online communications which ought, arguably, to be criminal but may not be adequately dealt with by the existing criminal law, including the general communications offences. These include:

- (1) uncoordinated group or "pile-on" harassment;
- (2) glorification of self-harm; and
- (3) cyber-flashing."<sup>17</sup>

Rather than creating a new catch-all offence, we believe these matters must be considered individually.

The Law Commission considers the possibility of a new offence for uncoordinated group or "pile-on" harassment but concludes that their preference would be for this to be caught within their proposed harm-based offence. We oppose the introduction of any such an offence. As the Law Commission observes, coordinated harassment is already criminalised by the Protection from Harassment Act (1997)<sup>18</sup>. The introduction of an offence for uncoordinated harassment seems to imply criminality due to the concurrent actions of others, since individual harassment is already a crime. Further, the perceived need for this offence implies that the affected communications would not involve speech that causes harassment, alarm, distress, fear or speech that is grossly offensive, purposefully annoying or distressing as such speech would already constitute an offence under the Protection from Harassment Act 1997, Public Order Act 1986, Malicious Communications Act 1988 or Communications Act 2003. Therefore, the "pile-on" offence would threaten to criminalise those who contribute to a vociferous discussion on a difficult, challenging or controversial topic. This is especially the case if the harm threshold is set as low as "serious emotional harm" in line with other proposals set out in this consultation.

The Law Commission states that it is not minded to recommend the introduction of a specific offence regarding the "glorification of self-harm". We agree that such an offence would risk censoring entirely reasonable communication regarding self-harm and could even inadvertently silence those sharing their experiences. It is important to bear in mind that self-harm strongly corresponds with ill mental health. We do not believe that the perceived problem of self-harm 'glorification' has been adequately identified or understood, and too often refers to individuals experiencing mental health problems and expressing themselves. Safety and support must be considered, but we do not believe that criminalisation is a reasonable response, nor one that is

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<sup>17</sup> Law Commission, *Harmful Online Communications: The Criminal Offences Consultation Paper*, p.63, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Online-Communications-Consultation-Paper-FINAL-with-cover.pdf>

<sup>18</sup> Ibid. p.39

likely to support the mental health of the individuals concerned, and that it also would undermine those individuals' right to free expression.

Finally, we agree with the Law Commission that either the Sexual Offences Act is amended or a new offence created to target cyber-flashing. The broad harm proposal is an inappropriate vehicle to deal with such communications, which ought to be recognised as sexual offences and incur the sentencing and other consequences associated with sexual offences, given their specific and heightened risk.