

Harmful Online Communications

Joint submission of the Open Rights Group and Preiskel & Co LLP

1. This is a short joint submission to the Law Commission's Harmful Online Offences consultation. This submission is by the Open Rights Group and Preiskel & Co LLP solicitors (the latter were the successful appeal solicitors in the leading case on section 127 of the Communications Act 2003 and social media, *Chambers v DPP*¹).
2. We make three broad submissions.

Opposing the new offence

3. We do not support the Law Commission's proposed offence. We are concerned with its breadth. We echo and adopt Article 19's submissions in this regard.
4. The threshold of a "likelihood to harm" appears to be very broad, and it could include many communications which could cause distress to readers, as the result of their strongly-held religious, political or cultural beliefs, but be legitimate discourse.
5. The "Intent to harm or awareness of the risk of harming a likely audience" compounds this. "Risk" as a threshold seems very low. It appears to open up prosecution to anyone whose postings can be related to someone who has experienced mental distress as a result of reading those communications.
6. "Likely audience" again is in our view vague and open to interpretation. Making communications "without reasonable excuse" reverses the normal burden for speech: speech, protected as a fundamental right, is permissible unless it is unlawful. Speech should not be confined to that which courts feel is most socially useful, and therefore defensible under a "reasonable excuse" defence.
7. In short, by attempting to capture a wide range of behaviours within a single online offence, with a highly malleable concept of mental distress and wide potential audiences, the offence opens up the potential for a wide range of legitimate communications to be deemed criminal.
8. Additionally, the problems we identify with the new potential offence may be made worse by the government's proposed Online Harms framework, which will impose a legal duty over Internet Society Services to exercise a "duty of care" over their users. Given that "mental distress" is very personal and driven by context, this ambiguity could exacerbate the legal uncertainties inherent within the "duty of care" expectations. If the legal test for the point where

1 <https://www.bailii.org/ew/cases/EWHC/Admin/2012/2157.html>

mental distress triggers criminal liability is difficult to understand, or to assess content against, this is likely to create an incentive for companies to remove legal content that is found in the grey areas of “likely audiences” experiencing a “risk” of mental distress in order to successfully carry out their legal duties, and avoid direct risk of regulatory action.

There should be no substantive difference between Public Order Act offences and online offences

9. Currently there are two sets of offences in respect of speech acts that are likely to cause harm.
10. There are the standard public order offences, such under sections 4², 4A³ and 5⁴ of the Public Order Act 1988 as amended. These are offences which are usually used in 'physical space' situations, as in the street and other public places. These offences deal with alarm, distress, threatening behaviour and harassment.
11. Then there are then also specialist online offences, such as section 127 of the Communications Act 2003⁵ and section 1 of the Malicious Communications Act⁶.
12. As is widely known, the section 127 offence was originally a telecommunications offence, dating back to before the second world war. The intention was to protect those using the telephones, such as in exchanges, from unwanted content.
13. There is no good reason for these two separate sets of substantive offences. Although the practical application of the offence to technology will be different, the relevant tests of intention and harm should be no different. In effect, there should not be special offences just for electronic or online offences but a recasting of the normal offences so that they work on social media and in respect of electronic communications. There should be a single law of the land for all threatening behaviour likely to cause alarm, distress and harassment – regardless of the medium (or lack of medium) used.
14. If a thing would be an offence (all over things being equal) in a public space under the Public Order Act 1988 then it should be an offence if the same is

2 <https://www.legislation.gov.uk/ukpga/1986/64/section/4>

3 <https://www.legislation.gov.uk/ukpga/1986/64/section/4A>

4 <https://www.legislation.gov.uk/ukpga/1986/64/section/5>

5 <https://www.legislation.gov.uk/ukpga/2003/21/section/127>

6 <https://www.legislation.gov.uk/ukpga/1988/27/section/1>

done online, and vice versa. If a person feels threatened or alarmed or intimidated, it should not matter whether it is being done in a face-to-face confrontation or by a social media communication – by a placard or by an email. The substantive offence should be the same, with same standard of harm. A person should not be more likely to be criminally liable if they have done a thing with the same intent to harm and the same consequence online rather than offline.

15. Creating separate offences, depending on whether the intimidation has come personally or via an electronic communication risks creating a false distinction which is not only inappropriate but may not even be sustainable as technology develops.
16. Our suggested approach would also make it easier for busy police, judges and lawyers to understand in practice, as they will be already aware of the Public Order Act tests. That will also lessen the scope of injustices because of police, judges and lawyers being unfamiliar with social media and specialist legislation.
17. We would therefore recommend that sections 4, 4A and 5 of the Public Order Act simply be amended to cover online communications.

Section 127 should be repealed in any case

18. Section 127 of the Communications Act 2003 is an 'accidental' offence in respect of the internet. It was only because the EU framework directive was implemented in a certain way, and there were new definitions were adopted for what was an ancient and unlitigated telecommunications offence, that the offence suddenly applied to a 'public electronic communications network' and thereby the internet. There was no parliamentary debate nor official intention.
19. The offence made some sort of sense in respect of 'bilateral' communications, such as telephone calls, telegrams, faxes and even emails. But for posts on social media, where there could be hundreds or thousands of readers and recipients, an offence which is made out on transmission (as held by the House of Lords in *Collins*⁷) makes no conceptual or practical sense.
20. As there is no sensible way to amend section 127 so that the offence is made out with the (potential) harm to the intended recipient, then there seems to us to be no alternative to straight repeal.

⁷ <https://www.bailii.org/uk/cases/UKHL/2006/40.html>