



December 2020

# Reform of the Communications Offences: A consultation paper - NSS response

*Submitted by email to: [online-comms@lawcommission.gov.uk](mailto:online-comms@lawcommission.gov.uk)*

## About the National Secular Society

This submission is made by the National Secular Society (NSS). The NSS is a not-for-profit non-governmental organisation founded in 1866, funded by its members and by donations. We advocate for separation of religion and state and promote secularism as the best means of creating a society in which people of all religions and none can live together fairly and cohesively. We seek a diverse society where all are free to practise their faith, change it, or to have no faith at all. We uphold the universality of individual human rights, which should never be overridden on the grounds of religion, tradition or culture. We promote free speech as a positive value.

## Summary

The NSS welcomes the opportunity to respond to the Law Commission's consultation on reform of the communications offences. The NSS recognises that many online communications are harmful and that in some cases, the harms are sufficient to warrant criminal sanction. We also recognise the difficulty in formulating laws that criminalise online abuse whilst protecting freedom of expression, especially as harassment is often intended to silence its victims.

Throughout our 150-year history, the NSS has always championed freedom of expression. We campaign for a secular democracy where freedom of expression is not restricted by religious considerations, as stated in our Secular Charter.<sup>1</sup>

When answering the questions, we have focussed on circumstances where discussion and criticism of religion could be criminalised. However, we note that the proposed legislation could have effects that go far beyond the NSS remit and the issues we raise can be applied to any sensitive subject.

Our main concerns with the proposals are:

- i. Uncertainty – it is hard to judge whether a communication is criminal based on the legislation.
- ii. The law seeks to capture both personal harassment and public online posts not directed at anyone. The result is that its scope is too broad.
- iii. The mental element only requires awareness of a risk of harm, which is a very low threshold.

We have not answered questions that are outside our remit.

---

<sup>1</sup> The full charter can be read here: <https://www.secularism.org.uk/the-secular-charter.html>

### 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.

We do not agree. The proposed legislation is imprecise, meaning that it is difficult to tell whether a communication would be criminalised until the matter is tested in a court of law. This alone has the potential to chill free speech as most people would not want to risk the stress and disruption to their lives that a criminal trial would bring.

The Law Commission must also allow for the possibility that some reports of harmful content will be made by people who wish to silence political opponents or punish anyone perceived to be disrespectful towards their religion. If the law is unclear, it will be possible for laws intended to protect the public from online bullying to be used to harass and intimidate others into silence.

If the communication is published publicly online, a likely audience could include any person with access to the internet. When the subject matter is emotive, it is often likely that some people will find it distressing to hear views with which they disagree.

For example, religion is notoriously a very sensitive topic. A person's religion often shapes their worldview. Religious belief can be deeply personal, and it is often connected to racial and cultural identity. For the observant, religion is also a major part of their family and social life. It can be deeply distressing to believers when that worldview is challenged or ridiculed. When people publicly engage in critical discussion of religion, whether from a religious or non-religious perspective, it is always possible that someone who sees it will be seriously distressed.

The Law Commission might respond that discussion of theology is a reasonable excuse for posting material that is likely to be distressing as it is in the public interest to discuss philosophical questions. However, it must be noted that not every contribution to the debate is sophisticated and respectful

and it can be difficult to judge where the boundaries of the reasonable excuse lie until the matter is tested in court.

The Racial and Religious Hatred Act 2006 s.29J provides that:

*“Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”*

The law, therefore, already recognises that religion should not be shielded from criticism. No similar protection for freedom of expression exists in the proposed legislation. It seems possible that a communication could be outlawed under the proposed legislation that was protected under the religious hatred laws.

We are concerned that the proposed legislation could act as a modern blasphemy law where harsh and disrespectful communications on religion are criminalised because of the distress they cause to believers. For example, it is well-known that many Muslims are deeply distressed by depictions of the Islamic prophet Mohammed. It seems possible that cartoons of Mohammed could be outlawed under the proposed legislation, especially if the cartoonist’s intention was to satirise Islam.

The conviction of *Gay News* and its editor for blasphemous libel in 1977 is now widely regarded as an absurdity. *Gay News* was prosecuted for publishing a sexually explicit poem about the crucifixion of Jesus. While publication of the poem in question could now be justified by its historical significance, we are concerned that the same cannot be said for modern works of art, literature or comments that are extremely disrespectful to religion or present religious figures in a manner that religious believers find upsetting. Under the proposed legislation, such material might be outlawed on the basis that it is likely to cause serious emotional distress to religious believers. The question of whether the person responsible for sharing the material had a reasonable excuse may in practice depend on their sophistication. For example, a professional artist can always be said to be provoking debate, even when their material is extremely offensive while a member of the public drawing a crude cartoon might not be able to rely on the same excuse.

### **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?**

We agree that freedom of expression should be protected for news media, broadcast media and cinema. However, we are concerned that this approach gives freedom of expression to those who can present their views in newspapers or on television whilst denying it to members of the public who lack such a platform and instead use YouTube or a personal blog. Likewise, it would protect film studios but not artists who create low-budget productions and share them via social media. This is an elitist approach and could lead to a situation where a news outlet can lawfully publish an article but a person who shares it on social media and echoes the sentiments expressed therein could face prosecution.

### **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?

As stated above, we are concerned that when the communication is posted publicly on the internet, the likelihood of its being seen by someone who would be distressed by it is high. This is especially true if person posting it already has a large 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?

We acknowledge that providing proof of harm would place a burden on victims and that this would prevent action from being taken until the harm was done. However, we are nevertheless concerned that the harm-based approach is both vague and too broad.

#### **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”?

We question the suitability of a single harm-based offence for the reasons stated in our response to Question 1.

#### **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?

We agree that the court should have regard for context. There should be a distinction between communications posted publicly, for example on a personal blog, and communications directed towards an individual or group. We also recognise that the characteristics of the likely audience are relevant.

#### **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?

We recognise that those who harass others often exploit their victim’s personal vulnerabilities by saying things that might have little effect on a hypothetical reasonable person but are very distressing for the victim. However, we are concerned that this law applies to communications not intended as harassment or targeted towards any individual or group. The lack of a reasonable person test means that the threshold for harm is very low.

#### **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?

As discussed in our response to Question 1, when a communication on a sensitive topic is posted publicly on the internet, there is always a risk that someone who sees it will experience emotional distress.

The Law Commission's example on this section includes a situation where one person sends a colleague a joke in extremely poor taste not knowing that it will cause the recipient harm. It is suggested that the sender is aware of the risk, although this seems doubtful. While we recognise that intent can be difficult to prove, we are also concerned that the law could presume awareness where none exists.

#### **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?

Awareness of a likelihood of harm would be a stronger threshold than awareness of risk. However, when the communication is public, it might still be argued that there is a likelihood of harm if any person can find it.

#### **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?

We cannot see any benefit to this approach. For reasons outlined above, we consider awareness of risk to be too low a threshold.

#### **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?

As discussed above, we think that awareness of a risk of harm is a very low threshold.

#### **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?

We agree that the court should have regard to whether the communication was intended as a contribution to a matter of public interest.

**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.

The new offence is so imprecise that it is difficult to judge what kinds of communication would be captured by the legislation. If the law is unclear, there will be a detrimental effect on freedom of expression. The vagueness of the offence, coupled with the low threshold for *mens rea* also increases the probability of a conviction that is later found to be a violation of the defendant's right to freedom of expression.

**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.

While we are primarily concerned with public communications, the imprecise nature of the law could also have implications for private messages.