# Prosecuting Communication Offences: Interpreting the Harms Model

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# Abstract

# This article explores the Law Commission’s 2021 paper -  *Modernising Communications Offences: a final report*. The Commission recommends replacing the Malicious Communications Act 1988 and section 127(1) of the Communications Act 2003 with a new offence based on a harms-based model to control unlawful communications. The article contextualises the problems with current communication law, discusses the Harmful Digital Communications Act 2015 in New Zealand (the inspiration behind the Commission’s proposal and final recommendations) and the use of the terms “likely harm”, “likely audience” and “reasonable excuse”. The article concludes by suggesting that the Law Commission’s recommendations for this area of the law are inadequate and do not overcome many of the issues previously highlighted (in the Commission’s own Scoping Report) with the application of communication law in the 21st century, running the real risk of the overcriminalisation of speech.

# Introduction

The regulation of communications between sectors of society is not a new phenomenon. Since as early as 1883 the criminal law has been used to regulate private communications, with the enactment of the Post Office Protection Act which criminalised the sending of grossly offensive material *via* the postal system. However, as technology has evolved so have the ways in which we communicate with others. Today, with the help of the internet, messages can be sent in an instant and broadcast across the world in a matter of seconds.

Never has the internet dominated society as much as it has in present times. Following the global COVID-19 pandemic, internet usage soared as individuals turned to the likes of WhatsApp, Facebook and Twitter to keep in contact with loved ones and to conduct business and general communications.[[2]](#footnote-2)

With the unprecedented power and prevalence of new technologies, however, has come new forms of social shaming – which transcend geographical boundaries. And as the Law Commission recognised in its 2018 Scoping Report, current communication law has become outdated and unable to keep pace with the advancement of new technology.[[3]](#footnote-3) In September 2020, the Commission set out its provisional proposals to address the issue, proposing a new offence to control online communications founded on “the harms-based model”.[[4]](#footnote-4) The Commission published its final report in July 2021,[[5]](#footnote-5) recommending a new offence for a person to send or post

“a communication that is likely to cause harm to a likely audience; (2) in sending or posting the communication, the defendant intended to cause harm to a likely audience; and (3) the defendant sends or posts the communication without reasonable excuse.”[[6]](#footnote-6)

The discussion in Part A will briefly outline the offences in both the Malicious Communications Act 1988 (MCA) and section 127(1) of the Communications Act 2003 (CA). The discussion will then examine the difficulties that have arisen with these two legal provisions. Part B addresses the impact of the protections of freedom of expression and the overcriminalisation of speech. In Part C, the article scrutinises the initial proposals made by the Commission in September 2020, the Harmful Digital Communications Act 2015 (HDCA) in New Zealand (the inspiration behind the Commission’s harms-based model)[[7]](#footnote-7) and provides an outline of the Law Commission’s final recommendations. It will be contended in Part D that the recommendations endorsed by the Law Commission, though an improvement on its initial proposal, are inadequate and do not overcome many of the issues previously highlighted (in the Commission’s own Scoping Report) with the application of communication law in the 21st century.[[8]](#footnote-8)

# The Problems with the Present Law

As noted above, the Law Commission recommends replacing both the MCA and section 127(1) of the CA. Both these provisions have come under heavy criticism for their failure to meet the challenges of offensive and abusive communications sent online.[[9]](#footnote-9) Under section 1 of the MCA, it is an offence to send

“(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 of electronic communication which is, in whole or part, of an indecent or grossly offensive nature …”.[[10]](#footnote-10)

In essence, it is an offence to send a communication which can be labelled as either grossly offensive, indecent, threatening or known to be false. The actus reus is in the sending of the message. As highlighted in the Act itself, it is sufficient if just part of the message falls within one of the categories above, i.e., the whole communication does not need to be grossly offensive for an offence to have occurred contrary to the MCA. However, the prosecution must prove that the **purpose** on behalf of the sender was to cause anxiety or distress upon the receiver, though anxiety or distress does not need to be felt by the intended recipient.[[11]](#footnote-11)

Similarly, section 127(1) of the CA makes it an offence to send

“(a) 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.”

Like the MCA, the culpable conduct lies in the sending of a message – in this instance via an electronic communications network – which is considered as a grossly offensive or of an indecent, obscene or menacing character. As with the MCA, the offence is in the conduct of “sending” the communication, meaning that even if the message is intercepted by a third party, the conduct may still be contrary to section 127(1).[[12]](#footnote-12) Despite these similarities, there are some subtle differences between the two provisions. For instance, as noted by Lord Bingham in *Director of Public Prosecutions v Collins*,[[13]](#footnote-13) the MCA covers all forms of communication, including the postal system. Whereas section 127(1) of the CA only covers electronic communications over a public system.

Both provisions also differ in terms of the mental elements of the offences. Under the MCA, the intention on behalf of the sender must be to cause anxiety or distress upon the receiver. In contrast, on its face, section 127(1) of the CA does not contain a mens rea element. Adopting traditional interpretative techniques and applying the principles laid out in *Sweet v Parsley*,[[14]](#footnote-14) the House of Lords in *Collins* read a mens rea element into section 127(1) of the CA, arguing that it would be illogical for there to be no mens rea present:

“… Parliament cannot have intended to criminalise the conduct of a person using language which is, for reasons unknown to him, grossly offensive to those to whom it relates, or which may even be thought, however wrongly, to represent a polite or acceptable usage. On the other hand, a culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender.”[[15]](#footnote-15)

For an individual to be held liable under section 127(1) of the CA, it must be proven that a grossly offensive, menacing, indecent or obscene message was sent to another **intentionally** (i.e. with intent **only** in the sending of the message rather than as to the nature of the content of the message) or that the sender was aware or recognised that the message sent was of a grossly offensive, menacing, indecent or obscene nature. This was reaffirmed by the High Court in *Chambers v Director of Public Prosecutions*.[[16]](#footnote-16)

Despite the subtle differences between the 1988 and 2003 Acts, it is clear that there are significant similarities between them, acknowledged by the Law Commission in its 2018 Scoping Report.[[17]](#footnote-17) Issues have arisen not only with the interrelationship and overlaps of the two offences,[[18]](#footnote-18) but also as to the meaning and interpretation of terms such as “menacing” and “grossly offensive” as contained in these provisions. Neither of these terms, “menacing” or “grossly offensive”, are defined in either Acts, with judicial efforts being insufficient to clarify their meaning. It is therefore not always clear when a message goes from one being of an offensive nature, to one so grossly offensive the criminal law should intervene, or as to when an ill-thought-out joke warrants criminalisation. This has led to confusion for the police,[[19]](#footnote-19) the Crown Prosecution Service (CPS),[[20]](#footnote-20) and the judiciary[[21]](#footnote-21) as to when the sending of a communication constitutes a criminal offence, under either of these two statutory provisions; acknowledged by the Law Commission which recognised that current communication offences create “… interpretative challenges for police, prosecutors, judges and juries.”[[22]](#footnote-22) In fact, for the Law Commission, the current use of both the MCA and section 127(1) of the CA in criminalising online communications, is not necessarily compatible with the right to freedom of expression.[[23]](#footnote-23)

1. **Freedom of Expression and the Overcriminalisation of Speech**

## Though not an absolute right, the right to speak freely is considered the bedrock of any democratic society and given specific protection under several legal provisions, including

## Art 10(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) which states that:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …”.

Freedom of expression underpins all other human rights, allowing societies and communities to progress, whilst also allowing citizens to challenge state authority. Without the right to speak freely, democracy cannot exist. For Raz, freedom of expression lies at the heart of humanity.[[24]](#footnote-24) It is for these reasons; such emphasis is placed on the importance of freedom of expression.

Indeed, it’s only in very defined circumstances that our right to freedom of expression can be lawfully constrained:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”[[25]](#footnote-25)

## Accordingly, the law, and particularly the criminal law, should tread carefully when it comes to limiting and restricting forms of expression, in which a restriction needs to take the least intrusive method possible to render the law compatible with the ECHR. As this was so potently put by the European Court of Human Rights (ECtHR):

## “Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”[[26]](#footnote-26)

The importance of taking a restrictive approach to circumstances in which the law impinges our right to freedom of expression is even more prominent when those restrictions are imposed by the criminal law.

The importance of the principle of minimal criminalisation generally has been well put by Husak. For Husak, the criminal law is special, in that it subjects people to punishment and, in turn, too much criminal law creates too much punishment.[[27]](#footnote-27) The criminal law cannot be used to redress every growing problem within society. But where criminal sanctions are needed, the law should be drafted using the least intrusive means possible. The argument is obviously even stronger when proposed criminal law provisions will restrict fundamental rights such as the right to freedom of expression.[[28]](#footnote-28) There is an enhanced need for precision and clarity to ensure that, in application, the law will not only be compatible with the ECHR, but also guard against the likelihood of the law being used arbitrarily and the overcriminalisation of speech. For Husak, there are clear limits in the use of the criminal law to control the behaviours of citizens within a given society, especially considering, we currently have too much criminal law.[[29]](#footnote-29)

The importance of reducing the likelihood of the overcriminalisation of speech, particularly online speech, is ever more important because of the increased demand currently being placed on the criminal justice system in England and Wales, following a rise in abusive communications being sent or posted online.[[30]](#footnote-30) In October 2017, the BBC discovered that between 2015 and 2016, there had been an increase of 36,462 police reports involving malicious communications being sent online in England and Wales.[[31]](#footnote-31) Yet, as candidly accepted by Essex Police Chief Constable Stephen Kavanagh, the current research into online abuse is only “the tip of the iceberg”, with police forces unable to cope with the sheer volume of complaints.[[32]](#footnote-32) It is no surprise then that for some, like Newman, when it comes to restricting speech, the criminal law should only be invoked as a matter of last resort.[[33]](#footnote-33)

It is for these reasons, and those discussed above, that the Law Commission wished to reform this area of the criminal law. For the Commission, current communication offences generate a real threat to freedom of expression and risk the overcriminalisation of speech. [[34]](#footnote-34) The Commission aims to target the problem and provide the necessary safeguards against Art 10 infringements by the “harms-based model”. However, as will be contended in Part D, the new offence endorsed by the Commission still poses such a significant threat to freedom of expression, it cannot be said that the issues previously highlighted in the Commission’s own Scoping Report, and its initial proposal, are overcome.

# The Law Commission’s Provisional Recommendation and the New Zealand Model

The HDCA in New Zealand, the inspiration behind the Commission’s harms-based model, aimed to tackle the most serious instances of bullying and harassment and was built on two principled premises: (1) to deter, prevent and mitigate harms associated with online abuse and (2) to provide a quick and efficient means of redress for those subjected to online abuse.[[35]](#footnote-35) In an attempt to provide adequate safeguards and limit the use of the criminal law in this sphere, the HDCA contained both civil and criminal provisions, with emphasis placed on the ideal that criminal sanctions should be a matter of last resort.[[36]](#footnote-36) To do this, the Act created a scheme for the Governor-General to appoint an “Approved Agency” with the power to, amongst other things

“receive and assess complaints about harm caused to individuals by digital communications, investigate complaints [and] to use advice, negotiation, mediation, and persuasion (as appropriate) to resolve complaints.”[[37]](#footnote-37)

The emphasis behind the HDCA was to attempt to resolve the complaint, before resorting to the criminal law, with the approved agency acting as a triage service to filter out superfluous complaints.[[38]](#footnote-38)

Taking inspiration from the HDCA, the Commission, in its initial proposals, suggested the replacement of current communication provisions with the following offence where:

“(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.”[[39]](#footnote-39)

Put simply, under the Law Commission’s provisional proposal it would have been an offence to send or post a communication that was likely to cause some form of harm, amounting to at least “serious emotional distress”, to anyone who was likely to “hear, see or otherwise encounter” the message.[[40]](#footnote-40) The proposal was broad and lacked precision in drafting – there was, for example no definition of “serious emotional distress” given in the proposed reform even though that was at the core of the offence. The only guidance offered by the Law Commission was that “serious emotional distress”, fell somewhere between minor emotional distress and a medical condition.[[41]](#footnote-41) Declining to include a precise definition in the proposed offence, or a list of factors that could aid prosecutors, the courts and juries in establishing when a communication could be considered as likely to cause “serious emotional distress” was a significant flaw in the proposal.[[42]](#footnote-42)

The actus reus of the proposed offence would have been satisfied by the sending or posting of a letter, article, or electronic communication that was objectively “likely” to risk causing this level of harm – albeit undefined. The proposed mens rea was that D intended or was aware of a risk of causing harm to another. At its widest, this was proved by an awareness of a risk that any person who might be likely to see the message might be harmed in this undefined way. Consequently, had the Commission maintained its original stance, the sending of a message which could be defined as non-trivial, could have resulted in an offence, so long as the sender was aware that there was **some** risk that someone could have been harmed by the message. The Law Commission also included a further requirement on the prosecution: the communication must have been sent without reasonable excuse.[[43]](#footnote-43)

The Law Commission attempted to set the boundaries of the proposed offence by limiting its application to letters, articles, or electronic communications and in some instances at least, by defining key terms within the provision. Nevertheless, even with the parameters outlined by the Law Commission, the proposed model had significant width and flexibility, such that the boundaries of the offence remained too broad, posing issues with future interpretation. This is rather surprising given that the Commission originally criticised this approach in its full scale 2018 Scoping Report:

“If an offence contains vague language, then its practical application is often determined by prosecutorial discretion. If it is interpreted widely, as many of the vague concepts discussed in this Report [grossly offensive, menacing etc] are, then there is an increased likelihood that offences will overlap and their application will be confusing, difficult and uncertain.”[[44]](#footnote-44)

The ambiguous nature of the proposed offence was acknowledged by the Law Commission in its final report following a period of public consultation.[[45]](#footnote-45) In particular, issues were raised with the meaning of “serious emotional distress”,[[46]](#footnote-46) the mens rea of the offence[[47]](#footnote-47) and how “reasonable excuse” should be interpreted.[[48]](#footnote-48) In July 2021, the Commission released its final report and, in some cases, addressed the concerns raised during the consultation period.

1. **The Final Report**

In its final report, the Law Commission adopted an approach similar to that in its provisional proposal. Continuing to be inspired by the HDCA in New Zealand, the Commission’s final recommendation is for an offence to send or post

“a communication that is likely to cause harm to a likely audience; (2) in sending or posting the communication, the defendant intended to cause harm to a likely audience; and (3) the defendant sends or posts the communication without reasonable excuse.”[[49]](#footnote-49)

Like the Commission’s initial proposal, the actus reus would be in the sending or posting[[50]](#footnote-50) of a communication that is likely to cause “harm” to a “likely audience”, which is sent without “reasonable excuse”, with the Commission reemphasising in its final report that this element of the offence will be for the prosecution to prove, rather than operating as a the defence.[[51]](#footnote-51) However, whereas the original proposal would be satisfied by an intention or a mere awareness of the likely harm to a likely audience, the Commission in its final report has narrowed down the offence to one of intent only.[[52]](#footnote-52) This is an attempt to reduce the scope and reach of the offence, and to crystalise the meaning of harm. It is argued below that it is doubtful that it succeeds in doing so.

Scrutinising the offence by taking each of the elements of the Law Commission’s recommended offence in turn, the discussion below illustrates the continued threat the recommended offence poses to freedom of expression. Concerns are raised with the use of the terms “likely harm”, “likely audience” and “reasonable excuse”. In essence, the discussion below will illustrate how, even with the changes put forward by the Commission since its original proposal, the harms model, if enacted in its current format, still renders a real risk of the overcriminalisation of speech.

# *Likely Harm & Serious Distress*

As previously noted the Commission based the harm element in its proposal on the HDCA. It defined harmful as amounting to at least “serious emotional distress”, directly mirroring the language of the HDCA.[[53]](#footnote-53) Throughout the consultation period concerns were raised as to the meaning of “serious emotional distress”,[[54]](#footnote-54) which had been left so ill-defined. The lack of clarity given by the Commission as to what would render a communication sufficiently harmful meant that it would have been lawful to send a message that caused “emotional distress”, but unlawful to send a communication that caused “serious emotional distress”. This posed a similar problem to the Commission’s own concerns raised against the use of current communication law – where currently it is lawful to send a communication that is “offensive”, but unlawful where a communication can be defined as “grossly offensive”. Where the line lies between either of these two concepts is not easily identifiable. In a bid to curtail the scope of the offence, and to address concerns raised as to the meaning of “serious emotional distress”, the Commission has attempted to redefine the meaning of “harm” in its final report – though, surprisingly no specific definition is given.

Under the Commission’s final recommendation, the prosecution must prove that the actions of the defendant created the **possibility** of causing “emotional or psychological harm amounting to at least serious distress”.[[55]](#footnote-55) Though somewhat of an improvement on the original proposed offence, in that “serious distress” is a term readily used throughout the criminal justice system, the simple removal of the term – “emotional” – still renders issues with ensuring consistency; guaranteeing that only behaviours which pose a genuine public wrong are criminalised.[[56]](#footnote-56) Though, as discussed below, the Commission remain of the opinion that current definitions of “serious distress” should not be written into the offence.[[57]](#footnote-57)

To maintain a balance between the criminal law and personal autonomy, for Husak, the law should only intervene where the harm under question prohibits a behaviour which can be defined as a non-trivial harm, and the conduct of the D can be considered as somewhat “wrongful”.[[58]](#footnote-58) Yet, the meaning of the level of harm in the Law Commission’s recommended reform – “serious distress” – is never specifically defined by the Commission. Instead, there just needs to be a “… real or substantial **risk** of harm”.[[59]](#footnote-59) Consequently, without a clear understanding as to what is actually meant by “serious distress”, particularly in the context of speech, how does the criminal justice system ensure that trivial harms are not criminalised and, in turn, ensure the right to freedom of expression is not infringed? Harm is inherently subjective when it comes to speech. In fact, in *Scottow v Crown Prosecution Service,* the Divisional Court stated “… that free speech encompasses the right to offend, and indeed to abuse another.”[[60]](#footnote-60) A concept reinforced in the jurisprudence of the ECtHR.[[61]](#footnote-61)

The concept of serious distress is of course known to the criminal law. Section 4A of the Protection from Harassment Act 1997 and section 76 of the Serious Crime Act 2015 (SCA) provide examples. However, surprisingly, although the Commission justifies its decision to define harm as “serious distress” as “[a]dopting a known standard”,[[62]](#footnote-62) it also refutes the idea that the existing definition from those offences should be applied to the new offence, stating that it is

“… not recommending that all existing definitions of “serious distress” be copied immutably … [into] … the offence – it is a different offence, and importantly one based on *likely* harm …”.[[63]](#footnote-63)

The problem of an inadequate definition is particularly acute because on the drafting there is no need to prove that any harm to any person was caused to that level. It is enough that this level of harm was likely to be caused to anyone likely to see the message. With some forms of communication on the open internet that could mean that it is enough that the most vulnerable person who might have seen it would be seriously distressed, so long as the message was sent with intent. That would appear to be a threshold that is very easily met. How do we ensure that the law is used to criminalise only behaviours which can be considered as non-trivial, if the D’s conduct (exercising a right to expression) needs only to produce the possibility of causing some “likely harm” to someone who is “likely” to see the message without adequately defining the meaning of that “likely harm”?

To be fair to the Commission, it is right to note that speech is wholly different to harassment and coercive behaviour. It may be inappropriate to adopt the definitions from those quite distinct areas. But, that it is not to deny the need for a definition in this context. Indeed, in the context of speech which is the foundation of any democratic society[[64]](#footnote-64) greater precision is needed. Any restriction on the right to freedom of expression needs to be clearly defined, to ensure the law is not being applied arbitrarily and to reduce the likelihood of the overcriminalisation of speech because “[i]njustice is more glaring when defendants are sentenced for conduct that should not have given rise to criminal liability at all …”.[[65]](#footnote-65)

In a further bid to bring additional clarity to the meaning of “serious distress”, the Law Commission has recommended the inclusion of a non-exhaustive list of factors to guide prosecutors, judges, and juries, as to what could constitute “serious distress” – contained in guidance documents, rather than enshrined in legislation, as recommended by consultees during the consultation period.[[66]](#footnote-66) This approach was expressly rejected in the provisional proposal. Although this may seem to be a positive amendment to the reforms, it has dangerous implications. It is a well-recognised tenet of good criminal drafting that the offence should be clearly and precisely defined in the offence making provision. Creating overly broad offences and relying on prosecutorial guidance or other soft law guides to ensure certainty is deeply undesirable. The Commission itself had previously noted, this concern with reference to current prosecutorial guidelines:[[67]](#footnote-67) “it’s not satisfactory to have to rely on prosecutorial discretion to limit, in practice, the scope of an offence that is itself over-broad.”[[68]](#footnote-68) Despite the Commission’s efforts to follow recommendations made by consultees, there seems to be a lack of recognition that current prosecution guidance on social media complaints are failing to bring clarity to this area of the law.[[69]](#footnote-69) It is difficult to imagine how this would be improved under the harms-based model which is so heavily reliant on guidance.

It is perhaps not surprising that the Law Commission failed to define harm with desirable precision when it was so heavily influenced by the New Zealand model. That also fails to define the term “harm”, though under the New Zealand Act it must amount to “serious emotional distress”. This has proved to be one of the most difficult parts of the offence for the police and the courts in New Zealand to apply.[[70]](#footnote-70) However, unlike the Commission’s recommendation, there are two important safeguards in the New Zealand model, although it is not suggested that these render that scheme entirely foolproof.[[71]](#footnote-71) First, harm in the New Zealand model must be *proven to have occurred*, with significant weight given to this aspect of the offence.[[72]](#footnote-72) Secondly, what is considered as harmful is enshrined in legislation rather than guidance.[[73]](#footnote-73) And even with these safeguards, heavy reliance is being placed on case examples before the District Court of New Zealand to crystalise the meaning of “serious emotional distress”.[[74]](#footnote-74)

The leading case of *R v Partha Iyer* in New Zealand interprets “serious emotional distress” to include “… a condition short of a psychiatric illness or disorder, or distress that requires medical or other treatment of counselling.”[[75]](#footnote-75) Indeed, “grief, anguish, anxiety or feelings of insecurity” could well constitute “harm” amounting to serious emotional distress for the District Court of New Zealand.[[76]](#footnote-76) In other cases that have come before the District Court of New Zealand, reference to the complainant being upset,[[77]](#footnote-77) embarrassed,[[78]](#footnote-78) feeling violated[[79]](#footnote-79) or having difficulty sleeping,[[80]](#footnote-80) have all constituted “serious emotional distress”. This is a wide application of the term “harm” by the courts of New Zealand, but at least it requires proof that it did transpire for an offence to have occurred under the HDCA. With the Law Commission model, without any safeguards, the boundaries of the offence are more ambiguous. They relate to an unknown potential recipient who needs only be likely to exist, and even then the test is at the discretion of prosecutors, judges and juries, through guidance rather than legislation.

In its current form, if the Law Commission’s recommendation were enacted, there is a serious risk of the offence being used in cases which were never intended to fall within its scope, resulting in the overcriminalisation of speech. For example, should a strongly held religious belief shared online condemning homosexuality and calling for its recriminalisation, fall within the scope of the criminal law? Or a comment made on a platform such as Facebook calling for a ban on immigration, warrant criminal law intervention? Though there would be an obligation for the court to consider Art 10 more directly if a matter were to come before them under the “harms-based model”, there are ample examples of cases under current communication offences where arguably Art 10 should have prevailed.[[81]](#footnote-81) In fact, under the Commission’s final recommendationthose who knowingly express provocative views online, for instance, individuals who express controversial views on transgender rights, on both sides of the debate, could well find themselves falling foul of the law – concerns echoed throughout the Commission’s consultation period.[[82]](#footnote-82)

# *Likely Audience*

The concerns about the lack of a definition of “likely harm” are amplified further when examining the requirement within the recommended offence, that the “likely harm” needs to be inflicted, or the mere possibility, on a “likely audience”. “Likely audience” is defined by the Commission as anyone who is “… likely to hear, see, or otherwise encounter the message”.[[83]](#footnote-83) The harmful communication need not reach anyone. It need not cause distress to anyone. It does not need to be directly aimed at a particular individual or organisation. This is a significantly wide expansion of the law when compared to the MCA, where the communication needs to be addressed to another.[[84]](#footnote-84) Instead, to be found guilty of an offence under the recommended provision, the sender “… would have to intend harm to those who were at a real or substantial risk of ‘seeing, hearing, or otherwise encountering’” the communication – determined at the point in which a communication is sent or posted.

To establish who is likely to see, hear or otherwise encounter the communication, prosecutors, judges, and juries need to consider the context in which a communication is sent or posted. In determining whether the “likely audience” were likely to be harmed by the communication, prosecutors, judges, and juries should further consider the personal characteristics of that likely audience. For instance, the sending of a communication containing flashing imagery to an epilepsy support group is likely to be more harmful to them, than sending the same communication to a mental health charity. What one person may find harmful, another may not. This throws the net of criminal liability incredibly wide. It gives wide discretionary powers to actors within the criminal justice system to determine who falls within the likely audience element of the offence, and as highlighted by LGB Alliance during the consultation period:

“While this may seem reasonable [the use of the term “likely audience”], it creates major difficulties on such platforms as Twitter which are open to all. The likely audience is **everyone in the world** (emphasis added). Given the ease of mass communication, it is a simple matter for a lobby group, such as those asserting the importance of gender identity theory, to organise as part of any audience – making them a “likely” part of that audience. If they so desire, they can assert the right of transwomen to be potential partners for lesbians and claim that those who disagree are harming them. This is not a fictitious example: it occurs on a regular basis.”[[85]](#footnote-85)

There is a risk that the offence will overcriminalise speech. There is also a real risk that it will chill free speech. Any curtailment of speech needs to be legitimate because, as bluntly put by Raz, “[w]ords do not kill”.[[86]](#footnote-86) Now that’s not to say that there should be no limits on what we can and cannot say online, as endorsed by cyber-libertarians, but instead, the law should be drafted in such a clearly defined manner, and only criminalise behaviours that are truly worthy of criminal law intervention, that the scope for arbitrary application is minimal. As acknowledged by Duff

“… whilst we must resist the rush to criminalise whatever we find offensive, such conduct can cause such persistent disruption and annoyance that we have reason – as a last resort – to criminalise it.”[[87]](#footnote-87)

Unfortunately the Commission’s recommendation has been drafted with such breadth and flexibility, that it cannot be said that the chances of the provision being used arbitrarily, is minimal or indeed, the criminal law will only be invoked as a last resort. Under the HDCA, the inspiration behind the Commission’s proposal, that risk is somewhat mitigated, though not eradicated, by the additional elements noted above (proof of actual harm and statutory criteria to apply) and by the creation of a specialist filtering agency, which can set out and maintain its own internal standards, in an attempt to reduce arbitrary application. Though there might be legitimate reasons for not creating a filtering authority similar to New Zealand in England and Wales, such as the financial implications of doing so, it’s a concept that is never even considered by the Law Commission in either its proposal or its final recommendation.

The purpose of the proposed legislative changes put forward by the Law Commission is to ensure the creation of a coherent set of rules for communication offences to better protect freedom of expression. In fact, as discussed in earlier parts of this article, the vagueness surrounding terms such as “menacing” and “grossly offensive” as contained in the MCA and section 127(1) of the CA, is a significant driving force behind the Commission’s recommendation to replace both these provisions. For the House of Lords, citing the US case *Rayned v City of Rockford*:[[88]](#footnote-88)

“Vagueness offends several important values … A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”[[89]](#footnote-89)

Yet the Commission continues to utilise vague concepts such as “likely harm”, as discussed above, and “likely audience”. How do we measure “harm” to ensure it constitutes “serious distress” if we do not understand the parameters of the offence? And, the likely audience could well be, in some instances, anyone in the world?

As with any well-drafted criminal law, it should be drafted in such a manner that it allows individuals to govern their behaviour in accordance with clear and distinct rules.Here, a person must be seen to have been given “constructive notice” that their actions have breached the law or as potently put by Lord Bingham:

“This is not because bank robbers habitually consult their solicitors before robbing a branch of the Natwest, but because many crimes are a great deal less obvious than robbery, and most of us are keen to keep on the right side of the law if we can.”[[90]](#footnote-90)

Though the concepts of “serious distress” and “likely audience” may not be novel in criminal law, nor arbitrary per se, in combination the range of wide and ill-defined elements creates an offence with too much discretion in the hands of law enforcement, and the serious risk of chilling free speech. This is magnified further, given that the regulation of speech is overly complex, and when it comes to speech online, as noted above, under the Commission’s recommendation, ultimately the “likely audience” could well be anyone in the world.

## Reasonable Excuse

The final element of the offence is that of reasonable excuse. Such is the breadth of the actus reus, the requirement that the message was sent without reasonable excuse has a lot of work to do to keep the offence within appropriate boundaries. This is an element of the recommended offence which the Commission has maintained since its original proposal back in September 2020. It places a burden on the prosecution “… to prove that the communication was sent or posted without any reasonable excuse.”[[91]](#footnote-91) In essence, the sender will be entitled to be acquitted unless the prosecution proves that the sender did not have a **legitimate** or **reasonable** reason for sending a communication which may be likely to cause harm to some unidentified other. An example might be using Facebook Messenger to deliver “bad news”, such as the death of a loved one. Here, the sending of that communication is likely to cause some form of “harm” to another, but would be lawful under the recommended offence, as it would be considered to have been sent with reasonable excuse.

Like the concept of “serious distress” discussed above, the concept of “reasonable excuse” is no stranger to the criminal law. For example, the notion of “acting reasonably” is included in section 50 of the SCA, though be it as a defence element rather than forming part of the actual offence itself, and therefore places the burden on the D.[[92]](#footnote-92) However, the inclusion of reasonable excuse as forming part of the criminal *offence* has not been without its controversies. A prime example of the controversial nature of “reasonable excuse” is clearly evidenced in its interpretation by law enforcement in England, following the enactment of theHealth Protection (Coronavirus, Restrictions) (England) Regulations 2020 (HPCR), in which the term has been interpreted generously for some, and narrowly for others.[[93]](#footnote-93) For instance, Derbyshire Police had to issue an apology to two citizens who were fined for breaching the HPCR after driving 5 miles to go for a walk. This is

“… a powerful example of the problems that can arise when Parliament chooses to regulate conduct in an open-textured manner … where the boundaries of blame are not fixed by law or by generally accepted standards.”[[94]](#footnote-94)

And despite concerns over the use of vague terminology raised during the Commission’s consultation period,[[95]](#footnote-95) the Law Commission endorses, as with “likely harm” and “likely audience”, a flexible approach to what is considered a “reasonable excuse” to send a communication that was likely to cause harm to a likely audience. It is therefore difficult to see how consistency will be maintained in the criminal law – a concern often raised against current communication offences.

In 2013, following growing concerns about the lack of consistency[[96]](#footnote-96) across police forces to investigate complaints of online abuse and the case of *Chambers v Director of Public Prosecutions,*[[97]](#footnote-97) the CPS introduced prosecuting guidelines for social media offences, with the guidelines being updated in 2016 and 2018,[[98]](#footnote-98) in a bid to create some form of consistency with social media prosecutions. However, there are numerous examples, as highlighted throughout the Law Commission’s Scoping Report in 2018, where consistency has been lost, despite the guidelines.[[99]](#footnote-99) Indeed, the issue of consistency is a matter raised throughout both the Law Commission’s initial proposal and its final recommendations to revamp this area of the law, with comments throughout about the need to create legal provisions which will provide uniformity across the criminal justice system.[[100]](#footnote-100) Yet, if we cannot understand what will constitute a “reasonable excuse”, how does the recommended offence ensure consistent application across the criminal justice system to overcome current concerns with communication offences? What one police force or court may find as a reasonable excuse to send a harmful communication, another may not.

In defence of the Commission, it does recognise that the term “reasonable excuse” introduces some “uncertainty” into the offence and leaves open the possibility that this element of the offence, maybe interpreted narrowly by law enforcement, prosecutors, judges, and juries.[[101]](#footnote-101) Nevertheless, for the Law Commission during its initial proposal:

“… the proposed new offence affords better protection to freedom of expression than the existing communications offences, despite the vagueness inherent in the concept of ‘reasonable excuse.’”[[102]](#footnote-102)

An argument the Commission maintains in its final report, whilst also acknowledging that there will be some, though be it very few, difficult cases. [[103]](#footnote-103) Nevertheless, the Law Commission fails to acknowledge that the vagueness surrounding what constitutes “reasonable excuse”, coupled with a lack of a definitive definition as to the meaning of “likely harm”, and a lack of understanding as to whom would fall within the definition of a “likely audience”, fails to bring clarity to this area of the law. Consequently, the element the Commission pins its hopes on to mitigate the wide nature of the recommended offence, “reasonable excuse”, does not create a clear and distinct boundary as to when the criminal law should intervene with communications to avoid the overcriminalisation of speech. For Newman:

“Words can be hurtful. They can antagonize, they can wound. But words also inform and educate. They can dispel prejudice and reveal unanticipated affinities. We need strong laws to protect us from violence and discrimination, but laws that protect us from hurtful words tend to silence us as well as our antagonists, because they close down rather than open conversations and because they teach good citizens to call the police rather than do the hard work of combating hateful ideas.”[[104]](#footnote-104)

Though “those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in”,[[105]](#footnote-105) the offence has been drafted so significantly broad, it is difficult to see how consistency will be maintained and does not sufficiently overcome previous concerns raised against the use of current communication law. Freedom of expression not only protects individual rights, but protects and maintains a greater good – it protects wider society.[[106]](#footnote-106) It is integral to the democratic process. As acknowledged by Raz, “… bad speech is often a part of a good way of life, or at any rate one which should not be condemned by society through its official organs.”[[107]](#footnote-107)

# Conclusion

The use of the internet, in particular social media, to harass, abuse and intimidate others has been an ongoing concern for governments across the globe since the turn of the millennium. There is no doubt that current communication law is unfit for the expanding digital world and the regulation of speech is complex. However, the recommendations made by the Law Commission, do not adequately address many of the concerns previously raised (in the Commission’s own Scoping Report and in responses to the consultation on its initial proposal) against the current criminal law framework and its use to curtail inappropriate behaviour online. The Commission set out to create an offence “… that does not rely on … vague terms” such as “menacing” and “grossly offensive”,[[108]](#footnote-108) whilst also ensuring that “… any new communication offence is not overly broad.”[[109]](#footnote-109) Yet the final recommendations put forward by the Commission, though an improvement on the initial proposals, continue to utilise vague terminology and have been drafted in such a significantly wide manner, that nearly all forms of communication will fall within its scope. Consequently, interpretation will continue to be a problem, posing the real possibility of the overcriminalisation of speech.

It is likely, that without further revision if implemented, the law would take on a mind of its own and will be interpreted to criminalise behaviours which were never intended to fall within its reach. This is acknowledged by the Law Commission, which raised concerns in its original proposal that the model may result in vulnerable individuals being caught within its scope, in particular, individuals who share photos of self-harm online.[[110]](#footnote-110) As previously noted, in New Zealand under the HDCA (the inspiration behind the Commission’s recommended offence) this is somewhat mitigated by a central specialist filtering agency, that can set out and maintain its own internal standards. There may well be legitimate reasons for not creating a specialist filtering agency in England and Wales, though never considered by the Law Commission, but simply attempting to “copy and paste” some elements of a legal provision from another jurisdiction, without truly acknowledging the different objectives of each of those jurisdictions, and whether those provisions are actually adequate in balancing the harms associated with the online world and freedom of speech, poses significant problems with the drafting of the reform. In fact, for Williamson, the MCA affords better protection of the right to speak freely, than the HDCA in New Zealand.[[111]](#footnote-111)

Some of the issues highlighted throughout this paper can be resolved by further crystallising the boundaries of the offence. For instance, solidifying the meaning of “likely harm”, “likely audience” and rethinking the element of “reasonable excuse”. These are options that, is hoped, Parliament will consider more favourably if it were to move forward with revamping this area of the criminal law, to ensure future interpretation does not result in the overcriminalisation of speech. However, what should be avoided, it is contended, is relying simply on a catch-all reasonableness element to mitigate the wide nature of the proposed reform to protect freedom of expression, without creating clear and distinct rules as to when the criminal law should intervene with communications.

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 [↑](#footnote-ref-1)
2. <https://www.bbc.co.uk/news/technology-55486157> [↑](#footnote-ref-2)
3. Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (HMSO, 2018), Law Com No.381 (hereafter LC 381). See also*, R. (on the application of Chabloz) v Crown Prosecution Service* [2019] EWHC 3094 (Admin); [2020] 1 Cr.App.R. 17; [2019] 10 WLUK 494 (DC) where issues arose as to whether the use of hyperlinks constituted the sending of a communication and *Katherine Elizabeth Scottow v Crown Prosecution Service* [2020] EWHC 3421 (Admin), 2020 WL 07388605 were it was held that section 127(2) of the Communications Act 2003 did not criminalise annoying communications sent *via* the use of the internet. [↑](#footnote-ref-3)
4. Law Commission, *Harmful Online Communications: The Criminal Offences. A Consultation Paper* (2020), Law Com No.248 (hereafter LC 248). [↑](#footnote-ref-4)
5. Law Commission, *Modernising Communications Offences: A final report* (2021), Law Com No.399 (hereafter LC 399). [↑](#footnote-ref-5)
6. LC 248, [5.51]. See also, Jacob Rowbottom, “To rant, vent and converse: protecting low level digital speech” (2012) 71(2) C.L.J 355; Alisdair A. Gillespie, “Twitter, jokes and the law” (2012) 76(5) J. Crim. Law 364 and Laura Bliss, “The crown prosecution guidelines and grossly offensive comments: an analysis” (2017) 9(2) J. Media Law 173. [↑](#footnote-ref-6)
7. Though comparisons are made throughout this article between the Harmful Digital Communications Act 2015 in New Zealand and the harms-based model recommended by the Law Commission, it is not contended that the Harmful Digital Communications Act 2015 represents a perfect scheme. Indeed, concerns have been raised that even with safeguards contained in the provision, as discussed further in Part C, the Act may well pose issues with freedom of expression. See, for instance, Stephaine Frances Panzic, “Legislating for E-Manners: Deficiencies and Unintended Consequences of the Harmful Digital Communications Act” (2015) 21 Auckland U L Rev 225. [↑](#footnote-ref-7)
8. LC 381. See also, Laura Bliss, “The crown prosecution guidelines and grossly offensive comments: an analysis” (2017) 9(2) J. Media Law 173. [↑](#footnote-ref-8)
9. LC 381. See also, Steve Foster, “Freedom of expression: is there a human right to make a joke?” (2012)

17(2) Cov. L.J. 97 (note); Lilian Edwards, “Section 127 of the Communications Act 2003: Threat or Menace?”

(2012) 23(4) SCL Journal 22 and Laura Scaife, “Social media & the right to be offensive” (2012) 12(5) E.C.L. Rep 12. Indeed, there was a general acceptance by consultees during the Commission’s consultation period that neither the Malicious Communications Act 1988 or section 127(1) of the Communications Act 2003 were fit for purpose. See, LC 248, [2.20]. [↑](#footnote-ref-9)
10. Malicious Communications Act s.1(1). [↑](#footnote-ref-10)
11. *Director of Public Prosecutions v Collins* [2006] UKHL 40[11] per Lord Bingham of Cornhill. [↑](#footnote-ref-11)
12. The High Court has also upheld that the use of hyperlinks can constitute the sending of a communication. See, *R. (on the application of Chabloz) v Crown Prosecution Service* [2019] EWHC 3094 (Admin); [2020] 1 Cr.App.R. 17; [2019] 10 WLUK 494 (DC). [↑](#footnote-ref-12)
13. *Director of Public Prosecutions v Collins* [2006] UKHL 40 [7]. [↑](#footnote-ref-13)
14. *Sweet v Parsley* [1969] 2 W.L.R. 470, [1970] A.C. 132. [↑](#footnote-ref-14)
15. *Director of Public Prosecutions v Collins* [2006] UKHL 40[11] per Lord Bingham of Cornhill. [↑](#footnote-ref-15)
16. *Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (Admin) [38] per Lord Judge. [↑](#footnote-ref-16)
17. LC 381, [4.148]. [↑](#footnote-ref-17)
18. L Scaife, *Handbook of Social Media and the Law,* (Routledge 2015), p.166. [↑](#footnote-ref-18)
19. See, for example, *R v Alison Chabloz* Westminster Magistrates’ Court 11 January 2018 (unreported). Here, original complaints to the police about Chabloz’s behaviour online, specifically a YouTube video entitled “(((Survivors)))”, which contained expressions of anti-semitic hate, were ignored by the police. As a result, Campaign against anti-semitism brought a private prosecution against Chabloz, before the limitation period under section 127(1) of the Communications Act 2003 lapsed, with the Crown Prosecution Service eventually taking over the case. See Laura Bliss, “Social Media: A Theme Park just for Fools: Case Comment” (2018) 82(4) J. Crim. Law 301. [↑](#footnote-ref-19)
20. See, for example, *Director of Public Prosecutions v Collins* [2006] UKHL 40. In this matter, the Director of Public Prosecutions appealed the decision of the lower courts in finding the defendant not guilty of sending a grossly offensive message contrary to section 127(1) of the Communications Act 2003. The House of Lords allowed the appeal but upheld the decision of the lower courts, reaffirming in their opinion the purpose of section 127(1) of the Communications Act 2003. [↑](#footnote-ref-20)
21. See, for example, *Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (Admin). At both the Magistrates’ Court and the Crown Court, Chambers was found guilty of sending a menacing message contrary to section 127(1) of the Communications Act 2003. After a second appeal to the High Court, as an agreement was unable to be reached in the first appeal, the High Court quashed Chamber’s conviction, concluding that his comments, though ill-thought-out, were intended as a joke. Seealso Laura Bliss, “The Crown Prosecution guidelines and grossly offensive comments: an analysis” (2017) 9(2) J. Media Law 173. [↑](#footnote-ref-21)
22. LC 248, [3.119]. [↑](#footnote-ref-22)
23. LC 248, [3.112]. [↑](#footnote-ref-23)
24. Joseph Raz, “Freedom of Expression and Personal Identification” (1991) 11(3) Oxf. J. Leg 303, 304. [↑](#footnote-ref-24)
25. The European Convention on Human Rights Article 10(2). [↑](#footnote-ref-25)
26. *Handyside v United Kingdom* (1976) 1 EHRR 737 [49]. [↑](#footnote-ref-26)
27. D Husak, *Overcriminalization: The Limits of the Criminal Law,* (Oxford University Press 2008), p.125. [↑](#footnote-ref-27)
28. D Husak, *Overcriminalization: The Limits of the Criminal Law,* (Oxford University Press 2008), p.123. [↑](#footnote-ref-28)
29. D Husak, *Overcriminalization: The Limits of the Criminal Law,* (Oxford University Press 2008), p.3. At the time of writing, the Joint Committee on the Draft Online Safety Bill has released its report scrutinising the Government’s Online Safety Bill. Throughout the report, significant emphasis is placed on the criminal law to combat “wrongful” behaviours online. For instance, the Committee recommend it to be an offence to promote violence against women, to knowingly distribute seriously harmful misinformation and wish to prohibit the promotion of self-harm online. See, Joint Committee on the Draft Online Safety Bill, *Draft Online Safety Bill* (2021-22, HL 129, HC 609). [↑](#footnote-ref-29)
30. <http://www.bbc.co.uk/news/uk-england-41693437> [↑](#footnote-ref-30)
31. <http://www.bbc.co.uk/news/uk-england-41693437> [↑](#footnote-ref-31)
32. <http://www.bbc.co.uk/news/uk-england-41693437> [↑](#footnote-ref-32)
33. Stephen L. Newman, “Finding the Harm in Hate Speech: An Argument against Censorship” (2017) 50(3) CJPS 679, 682. [↑](#footnote-ref-33)
34. The threat to democracy is even more apparent when considering the recommended offence within the wider political context. Currently, the Police, Crime, Sentencing and Courts Bill is being considered before Parliament. If enacted in its current form, law enforcement can impose conditions on processions and demonstrations where the noise generated may “result in the intimidation or harassment” or cause “serious unease, alarm or distress” to the community. See, the Police, Crime, Sentencing and Courts Bill 2021/22 clause 55 & 56. [↑](#footnote-ref-34)
35. The Harmful Digital Communications Act 2015 (New Zealand) s.3. [↑](#footnote-ref-35)
36. Myra E.J.B. Williamson, “Harmful online speech: An analysis of New Zealand’s Harmful Digital Communications Act 2015 to combat cyberbullying” (2018) 3(1) Kilaw Journal 65, 82. [↑](#footnote-ref-36)
37. Harmful Digital Communications Act 2015 s.8(1) (New Zealand). Though technically criminal proceedings can be brought before the court without approaching NetSafe first, it is quicker, cheaper and less intimidating to go through the complaints procedure under the civil part of the Act than to start criminal proceedings. See, Myra E.J.B. Williamson, “Harmful online speech: An analysis of New Zealand’s Harmful Digital Communications Act 2015 to combat cyberbullying” (2018) 3(1) Kilaw Journal 65, 82. [↑](#footnote-ref-37)
38. Generally speaking, if the police are investigating a complaint under the Harmful Digital Communications Act 2015 in New Zealand, Netsafe (the approved agency) will be involved. See, <https://www.police.govt.nz/advice-services/cybercrime-and-internet/harmful-digital-communications-hdc>. Initial concerns were raised that the Harmful Digital Communications Act was “… too far-reaching …” and posed a risk to free speech (Stephaine Frances Panzic, “Legislating for E-Manners: Deficiencies and Unintended Consequences of the Harmful Digital Communications Act” (2015) 21 Auckland U L Rev 225, 232) however, despite an increase in charges under the Act (Savanna Post, “Legislation Note: Harmful Digital Communications Act 2015” (2017) 1 NZWLJ 208, 212 – 213) concerns that the Act would stifle freedom of expression have been unfounded (Myra E.J.B. Williamson, “Harmful online speech: An analysis of New Zealand’s Harmful Digital Communications Act 2015 to combat cyberbullying” (2018) 3(1) Kilaw Journal 65, 86). Note, the author does not suggest that the Act is not without fault. See, David Harvey, “Case note: Police v B [2017] NZCrimLawRw 35; [2017] NZHC 526, [2017] 3 NZLR 203” [2017] 13 NZ CrimLawRW 213 (note). [↑](#footnote-ref-38)
39. LC 248, [5.51]. [↑](#footnote-ref-39)
40. LC 248, [5.51]. [↑](#footnote-ref-40)
41. LC 248, [5.110]. [↑](#footnote-ref-41)
42. LC 248, [5.114]. [↑](#footnote-ref-42)
43. Following the Commission’s original report, there was some confusion during the consultation period on how the element of “reasonable excuse” would work, with some consultees interpreting this part of the offence as a defence element. However, the Law Commission has reaffirmed in its final report that reasonable excuse will form part of the criminal offence itself for the prosecution to prove. See, LC 399, [2.204]. The continued issues with this part of the offence are discussed further in Part D. [↑](#footnote-ref-43)
44. LC 381, [2.103]. [↑](#footnote-ref-44)
45. LC 399, [2.80]. [↑](#footnote-ref-45)
46. LC 399, [2.46 – 2.80]. [↑](#footnote-ref-46)
47. LC 399, [2.159 – 2.184]. [↑](#footnote-ref-47)
48. LC 399, [2.204 – 2.232]. [↑](#footnote-ref-48)
49. LC 248, [5.51]. [↑](#footnote-ref-49)
50. As noted by the Law Commission, “[i]t is also important to clarify that ‘posted’ is intended to cover differing forms of online communication rather than the traditional posting of letters or parcels via the mail.” LC 399, [2.254]. [↑](#footnote-ref-50)
51. LC 399, [2.204]. [↑](#footnote-ref-51)
52. The recognition by the Law Commission that the mens rea of the original proposed offence was overly broad is welcomed. However, it is contended in this article that the recommended offence continues to be drafted with such ambiguity, that even with a change in the mens rea element of the offence, there still runs the real risk of the overcriminalisation of speech. [↑](#footnote-ref-52)
53. Harmful Digital Communications Act s.4 (New Zealand). [↑](#footnote-ref-53)
54. LC 399, [2.46 – 2.80]. [↑](#footnote-ref-54)
55. LC 248, [5.51]. [↑](#footnote-ref-55)
56. A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law,* (Hart Publishing 2007), p.201. [↑](#footnote-ref-56)
57. LC 399, [2.52]. [↑](#footnote-ref-57)
58. D Husak, *Overcriminalization: The Limits of the Criminal Law,* (Oxford University Press 2008), p.82. [↑](#footnote-ref-58)
59. LC 399, [2.110]. [↑](#footnote-ref-59)
60. *Katherine Elizabeth Scottow v Crown Prosecution Service* [2020] EWHC 3421 (Admin), 2020 WL 07388605. [↑](#footnote-ref-60)
61. *Handyside v United Kingdom* (1976) 1 EHRR 737 [49]. [↑](#footnote-ref-61)
62. LC 399, [2.52]. [↑](#footnote-ref-62)
63. LC 399, [2.52]. [↑](#footnote-ref-63)
64. *Handyside v United Kingdom* (1976) 1 EHRR 737 [49]. See also, Erica Howard, “Gratuitously offensive speech and the political debate” (2016) 6 E.H.R.L.R. 636. [↑](#footnote-ref-64)
65. D Husak, *Overcriminalization: The Limits of the Criminal Law,* (Oxford University Press 2008), p.11. [↑](#footnote-ref-65)
66. LC 399, [2.58]. [↑](#footnote-ref-66)
67. See, LC 381, [5.61 – 5.84]. The Crown Prosecution Service guidelines on social media offences are discussed in detail in later parts of this paper. [↑](#footnote-ref-67)
68. LC 248, [3.130]. [↑](#footnote-ref-68)
69. Chara Bakalis, “Rethinking cyberhate laws” (2018) 27(1) Inf. Commun. Technol 86. See also, Laura Bliss, “The crown prosecution guidelines and grossly offensive comments: an analysis” (2017) 9(2) J. Media Law 173. [↑](#footnote-ref-69)
70. Myra E.J.B. Williamson, “Harmful online speech: An analysis of New Zealand’s Harmful Digital Communications Act 2015 to combat cyberbullying” (2018) 3(1) Kilaw Journal 65, 107. See also, David Harvey, “Case note: Police v B [2017] NZCrimLawRw 35; [2017] NZHC 526, [2017] 3 NZLR 203” [2017] 13 NZ CrimLawRW 213 (note). [↑](#footnote-ref-70)
71. Stephaine Frances Panzic, “Legislating for E-Manners: Deficiencies and Unintended Consequences of the Harmful Digital Communications Act” (2015) 21 Auckland U L Rev 225. See also, David Harvey, “Case note: Police v B [2017] NZCrimLawRw 35; [2017] NZHC 526, [2017] 3 NZLR 203” [2017] 13 NZ CrimLawRW 213 (note). [↑](#footnote-ref-71)
72. Myra E.J.B. Williamson, “Harmful online speech: An analysis of New Zealand’s Harmful Digital Communications Act 2015 to combat cyberbullying” (2018) 3(1) Kilaw Journal 65, 108. See, also <https://www.lawsociety.org.nz/news/legal-news/cyber-law-two-years-on-not-without-controversy/> [↑](#footnote-ref-72)
73. Harmful Digital Communications Act (2015) s.19(5) (New Zealand). [↑](#footnote-ref-73)
74. Myra E.J.B. Williamson, “Harmful online speech: An analysis of New Zealand’s Harmful Digital Communications Act 2015 to combat cyberbullying” (2018) 3(1) Kilaw Journal 65, 100. [↑](#footnote-ref-74)
75. *R v Partha Iyer* [2016] NZDC 23957. [↑](#footnote-ref-75)
76. *R v Partha Iyer* [2016] NZDC 23957 [61] per Judge C J Doherty. [↑](#footnote-ref-76)
77. *New Zealand Police v Mitch Hopkins* [2016] NZDC 15579 [3] per Judge M B T Turner. [↑](#footnote-ref-77)
78. *R v Quinn* [2019] NZDC 18436 [2] per Judge P A Cunningham. [↑](#footnote-ref-78)
79. *New Zealand Police v Tim Forester* [2016] NZDC 16010 [3] per Judge A J S Snell. [↑](#footnote-ref-79)
80. *R v Tamihana* [2016] NZDC 6749 [5] per Judge D C Ruth. [↑](#footnote-ref-80)
81. See, for example, *R v Mark Seddon* Blackpool Magistrates’ Court 28 April 2016 (unreported) where Seddon pleaded guilty for the sending of a grossly offensive message in which he referred to his ex’s new partner as a “fat bellied codhead”. See also, *R v Omega Mwaikambo* Westminster Magistrates’ Court 16 June 2017 (unreported) where Mwaikambo was sentenced to 3 months’ imprisonment after pleading guilty for sending grossly offensive images following the Grenfell Tower fire. The images shared showed a body bag with the face of the deceased clearly visible in the picture. Mwaikambo maintains that the images uploaded to Facebook were sent out of anger for how the dead were being treated. See, <https://www.bbc.co.uk/news/uk-41314418>. This case has been heavily criticised by Human Rights organisations for breaching Article 10. See, LC 381 [5.77]. [↑](#footnote-ref-81)
82. See, for instance, LC 399, [2.149]. [↑](#footnote-ref-82)
83. LC 399, [5.51]. [↑](#footnote-ref-83)
84. Malicious Communications Act 1988 s.1. [↑](#footnote-ref-84)
85. LC 399, [2.149]. [↑](#footnote-ref-85)
86. Joseph Raz, “Freedom of Expression and Personal Identification” (1991) 11(3) Oxf. J. Leg 303, 304. [↑](#footnote-ref-86)
87. A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law,* (Hart Publishing 2007), p.133. Note, Duff was referring to offensive behaviour in general, not just speech. [↑](#footnote-ref-87)
88. *Rayned v City of Rockford* (1972) 408 US 104. [↑](#footnote-ref-88)
89. *Regina v Rimmington*; *Regina v Goldstein* [2005] UKHL 63, [2006] 1 A.C. 459 [31]. [↑](#footnote-ref-89)
90. T Bingham, *The Rule of Law,* (Penguin 2011), p.37. [↑](#footnote-ref-90)
91. LC 248, [5.51]. [↑](#footnote-ref-91)
92. The inclusion of “acting reasonably” in s.50 of the Serious Crime Act 2015 has been heavily criticised in the wider literature. See, for instance, D Ormerod & K Laird, *Smith, Hogan, & Ormerod's Criminal Law,* 16th edn, (Oxford University Press 2021), p.502. [↑](#footnote-ref-92)
93. <https://www.bbc.co.uk/news/uk-england-derbyshire-55625062> [↑](#footnote-ref-93)
94. <https://www.qmul.ac.uk/law/news/responding-to-covid-19/items/open-textured-legislation-in-the-times-of-covid-19-reasonable-excuse-and-legal-certainty.html> [↑](#footnote-ref-94)
95. LC 399, [2.244]. [↑](#footnote-ref-95)
96. <https://www.theguardian.com/uk-news/2016/apr/14/online-abuse-police-inconsistent-digital-crime-stephen-kavanagh>. See also, <https://inforrm.org/2012/12/23/prosecuting-social-media-the-dpps-interim-guidelines-alex-bailin-qc-and-edward-craven/> [↑](#footnote-ref-96)
97. *Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (Admin), [2013] 1 WLR 1833. [↑](#footnote-ref-97)
98. <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media> [↑](#footnote-ref-98)
99. LC 381 [5.74 – 5.84]. [↑](#footnote-ref-99)
100. See, for instance, LC 399, [2.114 – 2.137]. [↑](#footnote-ref-100)
101. LC 248. [↑](#footnote-ref-101)
102. LC 248, [5.169]. [↑](#footnote-ref-102)
103. LC 399, [2.250]. [↑](#footnote-ref-103)
104. Stephen L. Newman, “Finding the Harm in Hate Speech: An Argument against Censorship” (2017) 50(3) CJPS 679, 693. [↑](#footnote-ref-104)
105. *Knuller (Publishing, Printing and Promotions) Ltd. and Others Appellants v Director of*

*Public Prosecutions Respondent* [1972] 3 W.L.R. 143, [1973] A.C. 435, p.463 per Lord Morris. [↑](#footnote-ref-105)
106. Joseph Raz, “Freedom of Expression and Personal Identification” (1991) 11(3) Oxf. J. Leg 303, 306 – 309. [↑](#footnote-ref-106)
107. Joseph Raz, “Freedom of Expression and Personal Identification” (1991) 11(3) Oxf. J. Leg 303, 316 – 317. [↑](#footnote-ref-107)
108. LC 248, [2.48]. [↑](#footnote-ref-108)
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110. LC 248, [6.194]. [↑](#footnote-ref-110)
111. Myra E.J.B. Williamson, “Harmful online speech: An analysis of New Zealand’s Harmful Digital Communications Act 2015 to combat cyberbullying” (2018) 3(1) Kilaw Journal 65, 109. [↑](#footnote-ref-111)