



**Law Commission Consultation on Reform of the Communications Offences
December 2020**

ARTICLE 19's submission

Q1: 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that section 127(1) of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 should be repealed and replaced with a new communications offence according to the model that we propose below.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?

1. ARTICLE 19 agrees that section 127 (1) of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 should be repealed. Indeed, we have been calling for the repeal of these provisions for several years: we intervened in the *DPP v Chambers* case¹ and subsequently took part in a number of consultations about social media offences and CPS consultations on their guidance on the topic.² Specifically, we have long argued for the removal of the terms “grossly offensive”, which in our view is highly subjective and therefore open to broad interpretation with disproportionate consequences for human rights.
2. ARTICLE 19 also recognises that communications online raise serious challenges for human rights protection. In particular, some communication can prevent others from speaking up, silence marginalised groups or have some serious consequences offline (e.g. lead to violence or harassment or violations of privacy). Nonetheless, we are concerned that the new offence proposed by the Law Commission, whilst well-intentioned, is also unduly broad and could have a very serious chilling effect on freedom of expression. In our view, the Law Commission should re-think the scope of the proposed offence entirely.
3. We note that the new proposed offence contains some elements that can help protect freedom of expression, including: (i) the reference to intent; (ii) the mention that courts must have regard to the context in which the communication was sent or posted. Unfortunately, we believe that these elements are insufficient to outweigh the significant concerns raised by the other elements of the proposed offence:
 - (i) *Likelihood of harm*: In our view, likelihood of harm is an unduly broad criterion. To begin with, the definition of harm itself is too broad. It includes both physical and psychological harm. The Law Commission says that psychological harm would have to reach the level of “serious emotional distress.” Given the nature of conversations on Twitter, it is easy to imagine that this level would be reached easily. For instance, JK Rowling has engaged on transgender issues on Twitter, which resulted in vitriolic comments on both sides of the debate and many people felt harmed.³ Conversations

¹ See ARTICLE 19's submission in the case, 22 June 2012, available at

<https://www.article19.org/data/files/medialibrary/3352/12-06-27-SUB-twitter.pdf>.

² See ARTICLE 19's response to the CPS consultations, 12 March 2013, available at

https://www.article19.org/data/files/medialibrary/3657/Social-media-prosecution_ARTICLE-19-response.pdf

³ See e.g. BBC, JK Rowling responds to trans tweets criticism, 11 June 2020, available at <https://www.bbc.com/news/uk-53002557>; or Forbes, Harry Potter Stars And Fan Community Reject J.K. Rowling's Statement On 'Trans Activism' And Gender Identity, 23 June 2020, available at <https://www.forbes.com/sites/emmapocock/2020/06/23/harry-potter-stars-fan-community-reject-jk-rowlings-statement-on-trans-activism-and-gender-identity/?sh=a259d7d295d3>.

online can be especially robust. It is also entirely possible to imagine that the tone of an email thread amongst co-workers could lead to complaints about mental health issues in the workplace. For example, when Suzanne Moore criticised certain advocacy positions within the transgender community, some staff members in The Guardian considered her articles deeply distressing.⁴ Speech offences must be extremely narrow in order to comply with international standards on freedom of expression. Criminalising speech that could cause psychological harm is a recipe for chilling speech that some find offensive or critical. For this reason, we generally do not recommend including the likelihood of psychological harm in these kinds of offences.

- (ii) *Likely audience*: The fact that the offence is directed to a 'likely audience' is also concerning and overly vague. As currently drafted, someone posting an opinion on a contentious issue, whether political or otherwise, could well cause 'serious emotional distress' to a person they are not targeting in any way, simply because that person had decided to follow them or that opinion had been re-tweeted by someone else they knew. The Law Commission says that a likely audience would include "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". Given how recommender systems work, how people often follow other social media users they might disagree with or how people might look for opinions they know they will be offended by, we are concerned that the various elements of the offence would be rapidly made out. This would ultimately have a chilling effect on freedom of speech.
 - (iii) *Intent to harm or awareness of the risk harming a likely audience*: We are concerned that the intent lacks specificity since it is not limited to intent to cause physical harm. It is also enough to be aware of the *risk* of harming. In practice, this means that someone who knows that a particular topic is controversial but goes ahead and uses robust language that they know may upset others to a high degree could get caught. It is also unclear how significant the risk needs to be for this particular element of the offence to be triggered. In our view, mere awareness of harm is too low a threshold for a speech offence and could have a serious chilling effect on freedom of expression.
 - (iv) *Without reasonable excuse*: A reasonable excuse "defence" is not sufficient to protect freedom of expression: this effectively means that speech must be justified by default. Under international law, freedom of expression is a fundamental right that can be restricted only in exceptional circumstances. This effectively turns this principle on its head. It would also mean that individuals must have a 'reasonable' excuse to engage in debate or dissent, i.e. they must have an excuse to exercise their fundamental right to freedom of expression. The fact that the courts must have regard to the question whether what was said contributed to a 'matter of public interest' is somewhat positive but it is also reflective of a very narrow view of freedom of expression, one that is limited to speech that is considered to have more value (see also our more detailed response below).
4. It is unclear the extent to which the new proposed offence would be significantly different from the offences under section 127 (1) of the Communications Act 2003 or section 1 of the Malicious Communications Act 1988 in terms of its impact on freedom of expression.
 5. Finally, we would like to draw the Law Commission's attention to the fact that the creation of this new offence would have far-reaching applications. In practice, it could well involve the loss of immunity from liability for social media companies. Every time an abusive tweet

⁴ See, e.g. BuzzFeed, Hundreds Of Staff At The Guardian Have Signed A Letter To The Editor Criticising Its "Transphobic Content", 6 March 2020, available at <https://www.buzzfeed.com/patrickstrudwick/guardian-staff-trans-rights-letter>

is reported, they would also feel compelled to remove a great deal more content than they already do. Moreover, a forthcoming Online Harms Bill could require social media companies to report notices they receive of alleged criminal conduct. If that were to be the case, the police would likely be flooded with complaints and cases to investigate. In our view, the Law Commission should be mindful of the potential ramifications of adding such an offence to the statute book.

Consultation Question 2. 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?

6. ARTICLE 19 considers that the carve-out proposed by the Law Commission for news media, broadcast media, or cinema is indicative of the central problem with the proposed offence, i.e. that it will have a serious chilling effect on freedom of expression. In our view, it would be highly problematic if it were acceptable for e.g. the Daily Mail to post highly distressing views on e.g. immigrants, whereas their readers could be held criminally responsible for posting the same material online. We note that some news content can generate particularly heated debates. The Charlie Hebdo cartoons are an obvious example of this. As currently drafted, the proposed offence would almost inevitably chill the freedom of expression of those who would want to engage on this issue: they would have to worry about the possibility of prosecution and the likelihood of causing 'harm'.
7. We do not suggest that media outlets or cinema should be prosecuted if their content causes offence or distress among their readers or their audience. But we note that the protection of speech is not a privilege and should not depend solely on the nature of the speaker. Anyone should be able to engage in public debate and heated exchanges of views. Moreover, speech should not be protected only when it is in the public interest. In *Scottow v CPS* [2020] EWHC 3421 (Admin), Justice Warby criticised the reasoning of the judge at first instance, who had found that a prosecution under section 127 (2) (c) of the Communications Act 2003 was warranted. In particular, Justice Warby considered:

43. (...) The prosecution argument failed entirely to acknowledge the well-established proposition that free speech encompasses the right to offend, and indeed to abuse another. The Judge appears to have considered that a criminal conviction was merited for acts of unkindness, and calling others names, and that such acts could only be justified if they made a contribution to a "proper debate".
8. Rather than proposing carve-outs for the press, broadcast media and cinema, the Law Commission should rethink the entire scope of the proposed offence.

Consultation Question 3. 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?

9. No. As noted earlier, we believe that the "likely audience" criterion is overly broad, particularly when coupled with other elements of the new proposed offence. In particular, it is not uncommon for people to seek out or follow the views of people they might strongly disagree with. This means that they put themselves in the position of potentially being 'harmed' by what they see or read. In *Miller v (1) the College of Policing and (2) the Chief Constable of Humberside* [2020] EWHC 225 (Admin), the High Court was considering the lawfulness of police operational guidance under which the police had visited the claimant at his workplace to speak to him about tweets that had been reported to them as transphobic. Among other things, the claimant argued that his treatment by police violated

his Article 10 (1) rights under the European Convention of Human Rights. Justice Knowles considered:

279. The Claimant's tweets were not targeted at Mrs B, nor even the transgender community. They were primarily aimed at his 900-odd Twitter followers many of whom, as I said earlier, can be assumed to be of a like mind. Mrs B chose to read them. Until she got involved, there is no evidence anyone had paid any attention to the Claimant's tweets. No-one had been bothered by them. No-one had responded to them. No-one had complained about them. Some of them were so opaque I doubt many people would have understood them even if they had read them.

ARTICLE 19 is concerned that a great many individuals could fall foul of the new offence merely for expressing views that are offensive to others such as to cause serious emotional distress in circumstances where the speech at issue was not remotely targeted at the victim or even a particular audience (See also Law Commission's report at 7.70).

10. Equally, we note that Internet users might come across deeply upsetting content as a result of recommender systems on platforms, quite apart from any intent on the part of the speaker. Given that the mental element of the offence is mere awareness that the content might cause harm, we wonder whether this means that the speaker should factor in that its speech may travel well beyond its intended audience. It is unclear how the proposed would work in this context. It also means that it is likely to penalise individuals with a large number of followers or other social media platforms.
11. We further note that the Law Commission itself acknowledges that the proposed offence does not specifically address the problems raised by 'doxing', outing or other forms of sharing of deeply personal content. In our view, it is inappropriate for the criminal law to try to cast the net so widely without at least attempting to address the more specific 'harmful' behaviour it has identified as being problematic. In any event, we note that even any new potential 'outing' offence would need to consider very carefully its implications for freedom of expression (e.g. a politician keeping his or her sexual orientation private whilst taking public positions that may appear inconsistent with that orientation).
12. Overall, we have serious concerns that the use of the 'likely audience' criterion would have a significant chilling effect on free speech.

Consultation Question 4. 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?

13. No. ARTICLE 19 believes that the mere likelihood of subjective harm is too broad and fails to protect freedom of expression. Insofar as the Law Commission is trying to address verbal abuse directed at individuals, we believe that 'actual harm' should be established. It is difficult to understand why someone should be criminalised and potentially sent to prison if the harm itself is merely possible but remains unknown or has not been established. As currently drafted, the new proposed offence enables for someone to be sent to prison without any actual victim.

Consultation Question 5. "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? 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

14. No. As previously noted, ARTICLE 19 believes that defining 'harm' by reference to subjective notions of emotional or psychological 'harm' are likely to lead to undue restrictions on freedom of expression, particularly offensive speech. For instance, it is highly likely that someone sharing the Charlie Hebdo cartoons online would be causing a great deal of serious emotional distress to many adherents of various religions (in particularly Muslims). Sharing the cartoons might also lead to physical violence. The upshot of this is that a great many people could get caught in the new proposed offence.
15. Freedom of expression protects the right to say things that offend, shock or disturb the State or any sector of the population.⁵ This is especially the case of information, which is true. In *Rhodes v OPO and Anor* [2015] UKSC 32, Lady Hale and Lord Toulson held:

Freedom to report the truth is a basic right to which the law gives a very high level of protection. (See, for example, *Napier v Pressdram Ltd* [2009] EWCA Civ 443, [2010] 1 WLR 934, para 42.) It is difficult to envisage any circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort for wilful infringement of another's right to personal safety. The right to report the truth is justification in itself. That is not to say that the right of disclosure is absolute, for a person may owe a duty to treat information as private or confidential. But there is no general law prohibiting the publication of facts which will cause distress to another, even if that is the person's intention.

Whilst the Rhodes case arose in the context of tort liability, we believe that the same principle should apply in the context of the criminal law.

16. If, notwithstanding our overall position, the Law Commission proceeds with the proposed offence, it is imperative to establish a high threshold for such emotional or psychological harm. Whilst 'serious emotional distress' may appear to set such a threshold, ARTICLE 19 remains concerned that the proposed offence may still catch a range of behaviour such as bullying amongst children or teenagers, which should not warrant criminal prosecution. Given the potentially blurry line between emotional distress and serious emotional distress, a non-exhaustive list of factors would be helpful.

Consultation Question 6. 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?

17. ARTICLE 19 does not support the new proposed offence as currently drafted. If the Law Commission proceeds, however, taking into account the context of a communication and the characteristics of a likely audience are vital elements that should be taken into account. To the extent that this speech offence may be compared with 'hate speech' (the advocacy of national, religious or racial hatred inciting to discrimination, hostility or violence under Article 20 para 2 of the International Covenant on Civil and Political Rights), it is consistent with elements that must be taken into account in determining whether the content at issue should be prohibited.

Consultation Question 7. 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?

18. ARTICLE 19 believes that the concepts of harm and reasonableness are fundamentally different. Whether a person suffers harm has nothing to do with how reasonable they are.

⁵ *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49

It is odd that the Law Commission is considering it given that the purpose of the new offence (which we do not support) is to protect people's feelings in reaction to speech.

Consultation Question 8. 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?

19. No. For reasons stated above, we believe that the mental element of any speech offence should be intent rather than mere awareness of risk of harm, which is a much lower threshold. As noted above, it would have a significant chilling effect on public conversations on contentious topics since the risk of harm and therefore awareness of that risk would be inherent to the topic. To give an example, an ordinary user sharing disturbing footage about a terrorist attack for journalistic purposes would almost inevitably upset victim's families. The truth can often be seriously distressing. In our view, the proposed carve out for the press and requirement to have regard to the context are insufficient to remedy the chilling effect that this provision would have on free expression since speakers would constantly have to watch out lest they might face prosecution for what they say if they don't fall into one of the exceptions or have a 'reasonable excuse'. We also note that the proposed carve-out suggested earlier seems to be aimed at particular categories of users (i.e. newspapers, broadcast media etc.) rather than the nature of the content itself, which significantly reduces its scope. In our view, journalism should be understood as an activity or function that anyone can engage in rather than by reference to some recognised body of training or affiliation with a news entity or a professional body.

20. We also reiterate that the proposed mental element ignores the well-established principle recently reiterated by Justice Warby in *Scottow v CPS*, namely that "*free speech encompasses the right to offend, and indeed to abuse another*".⁶ We therefore do not agree with the Law Commission that example 3 is the kind of abusive communication that should be criminalised, as despicable as it is.

Consultation Question 9. Rather than awareness of a risk of harm, should the mental element instead include awareness of a likelihood of harm?

21. No. We believe that this mental element could also give rise to a chilling effect on freedom of expression (e.g. announcing bad news to someone) but it would be less problematic than mere awareness of a risk of harm since as the Law Commission itself notes, it would be harder to prove. ARTICLE 19 remains deeply concerned that the Law Commission's proposed offence is unduly broad and that an unduly high number of individuals will be prosecuted for posting communications that, while upsetting, should be considered legitimate.

Consultation Question 10. 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?

22. As noted above, ARTICLE 19 does not agree that any such offence should include awareness of a risk of causing harm as a mental element. That said, the second option

⁶ *Op.cit.*

would at least recognise that this offence, if it is adopted, should be considered as less serious and therefore attract lower sanctions.

Consultation Question 11. 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?

23. ARTICLE 19 notes that the “defence” of reasonable excuse is an important element of the proposed offence that protects freedom of expression. Nonetheless, we still have serious concerns that under the Law Commission’s proposals, freedom of expression becomes the exception rather than the norm and it would be left to the prosecution and judges to determine whether a defendant had a good reason to say what they said. This is not what freedom of expression is about. We further note that the use of the concept of ‘reasonable excuse’ appears to have been used chiefly in the context of terrorism i.e. serious offences. It is very worrying that a similar approach is considered in the context of merely abusive communications. People say a great many abusive, sometimes hurtful things in the spur of the moment and using emotive language. In the context of a domestic argument, the intent may well be to cause harm. What then would be the reasonable excuse in this context? We further note that in France, a proposed offence of accessing ‘terrorist’ material without reasonable excuse was found unconstitutional by the French *Conseil constitutionnel*, particularly in light of a lack of intent to commit a terrorist act.⁷ The *Conseil constitutionnel* concluded that the proposed offence was a disproportionate interference with freedom of expression.

Consultation Question 12. 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?

24. ARTICLE 19 understands that the proposal to include a requirement for the courts to have regard to the question whether the communication was meant as a contribution to a matter of public interest is aimed at protecting freedom of expression. This proposal goes some way towards achieving that aim. In our view, however, it is insufficient.

25. In *R v Central Independent Television plc* [1994] Fam 192, 202-203, Hoffmann LJ said:

[A] freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.”

26. In *Redmond-Bate v Director of Public Prosecutions* ([1999](#)) 7 BHRC 375, [20], Sedley LJ said:

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

27. We wholeheartedly agree. Freedom of speech should not be understood as the freedom to say what judges or prosecutors believe to be in the category of ‘public interest’ or things

⁷ See Decision No. 2017-682 QPC, 15 December 2017, available at <https://www.conseil-constitutionnel.fr/decision/2017/2017682QPC.htm>

that have a 'reasonable excuse'. Matters of public interest are often much narrower than what is of interest to the public. Similarly, people often say trivial things or engage in low level speech that ought not to be criminalised because of a mere 'likelihood of harm'. Even if some abusive communications fall outside the scope of protection of Article 10 of the European Convention on Human Rights, it is difficult to see how this could not encroach on the protection of ideas that may cause alarm or distress. People often express ideas in ways which are thoughtless, callous or indifferent to people's feelings. The Law Commission should be very wary of proposing a new offence that would criminalise everyday expression almost by default.

Consultation Question 13. We invite consultees' views as to whether the new offence would be compatible with Article 10 of the European Convention on Human Rights.

28. As noted above, we believe that despite the various safeguards proposed by the Law Commission, the proposed offence would have a serious chilling effect on freedom of expression. In our view, a number of terms are insufficiently defined so that they would fail the legality test under Article 10 of the European Convention on Human Rights. We also remind the Law Commission that under the legality test, the law must be of a certain quality, i.e. sufficiently precise so that individuals may know how to regulate their conduct and so that its effect are foreseeable. In our view, this is not the case with the proposed offence for the reasons outlined above.

Consultation Question 14. We invite consultees' views as to whether the new offence would be compatible with Article 8 of the European Convention on Human Rights.

29. This is not strictly speaking our area of expertise, but in our view, the proposed offence does not strike an appropriate balance between freedom of expression and the right to privacy. In our view, the proposed offence is a disproportionate restriction on freedom of expression.

Consultation Question 15. In addition to our proposed new communications offence, should there be a specific offence covering threatening communications?

30. ARTICLE 19 believes that it would be worth investigating a specific offence relating to credible threats of bodily harm if it is not already criminalised.

Consultation Question 16. Do consultees agree that the offence should not be of extra-territorial application?

31. Yes. In our view, the extra-territorial application of such an offence would lead to other countries applying their unduly vague laws beyond their borders, which would have a significant chilling effect on freedom of expression. Moreover, it would be practically very difficult to prosecute individuals based overseas.

Consultation Question 17. We provisionally propose that section 127(2)(c) should be repealed and replaced with a specific offence to address hoax calls to the emergency services. Do consultees agree?

32. In principle, ARTICLE 19 would be supportive of a specific offence to address hoax calls to the emergency services as long as it is sufficiently clearly and narrowly defined so as to protect freedom of expression.

Consultation Question 18. We provisionally propose that section 127(2)(a) and (b) of the Communications Act 2003 should be repealed and replaced with a new false communications offence with the following elements:(1)the defendant sent a

communication that he or she knew to be false;(2)in sending the communication, the defendant intended to cause non-trivial emotional, psychological, or physical harm to a likely audience; and (3)the defendant sent the communication without reasonable excuse (4)For the purposes of this offence, definitions are as follows: (a)a communication is a letter, electronic communication, or article (of any description); and(b)a likely audience is someone who, at the point at which the communication was sent by the defendant, was likely to see, hear, or otherwise encounter it. Do consultees agree?

33. ARTICLE 19 supports the repeal of section 127 (2) (c) of the Communications Act 2003; however, we believe that the new proposed offence is insufficiently defined. Whilst we do not support the broader offence proposed earlier by the Law Commission (Q1), we are concerned that the new proposed offence under Q18 does not include a likelihood of 'harm' occurring. In the Law Commission's example of someone telling people to inject antiseptic to cure coronavirus, it is unclear whether it should warrant prosecution in circumstances where the vast majority of people would recognise such a suggestion as entirely bogus.

34. We further note that the concepts of "non-trivial" emotional or psychological harm are not defined. In our view, it would be unwise to introduce new concepts without first setting out where the boundary lies between them and the more established concepts of "alarm" or "distress".

35. As noted above, ARTICLE 19 believes that a reasonable excuse "defence" is insufficient to protect freedom of expression. It is unclear for instance whether most judges would accept 'bad' humour as a 'reasonable excuse.'

36. The Law Commission's proposed offence seeks to contribute to addressing the issues raised by disinformation. However, it is unclear that criminalising malicious disinformation in this way would address those issues, in circumstances where malicious disinformation is more likely to come about as a result of state sponsored operations⁸ and concerns around conspiracy theories stem from the spread of misinformation and some people believing them.

Consultation Question 19. We provisionally propose that the conduct element of the false communications offence should be that the defendant sent a false communication, where a communication is a letter, electronic communication, or article (of any description). Do consultees agree?

37. Please see our response to Question 18.

Consultation Question 20. We provisionally propose that the mental element of the false communications offence should be: (1)the defendant knew the communication to be false; and(2)the defendant, in sending the message, intended to harm a likely audience, where harm is defined as any non-trivial emotional, psychological, or physical harm. Do consultees agree?

38. Please see our response to Question 18.

Consultation Question 21. We provisionally propose that the false communications offence should include a requirement that the communication was sent without reasonable excuse. Do consultees agree?

⁸ For a recent example, see Facebook's takedown of a recent 'coordinated inauthentic behaviour' operation carried out from France and Russia: <https://about.fb.com/news/2020/12/removing-coordinated-inauthentic-behavior-france-russia/>

39. Please see our response to Question 18.

Consultation Question 22. Should there be a specific offence of inciting or encouraging group harassment?

40. In the absence of a clearly defined offence of group harassment (see our response to the next question), ARTICLE 19 is concerned that putting forward a related incitement offence is premature. We also query whether the issues raised by group harassment could not be better addressed through legislation or other policy measures on anti-discrimination or harassment in the workplace. In general, we would recommend any incitement offence to take due account of the treaty language of Article 20 (2) of the ICCPR and the Rabat Plan of Action to determine whether such incitement has indeed taken place.⁹

Consultation Question 23. Should there be a specific offence criminalising knowing participation in uncoordinated group (“pile-on”) harassment?

41. No. ARTICLE 19 recognises that ‘pile-on’ harassment is a significant issue for public debate online and that it tends to target particularly vulnerable or marginalised groups or individuals. However, we are concerned that such an offence would criminalise individuals getting caught for making a one-off offensive comment that would otherwise fall below the threshold for prosecution of a harassment charge. In particular, it is unclear to us how an individual would be supposed to acquire knowledge of participation in ‘uncoordinated group harassment’ and the point at which the threshold for such knowledge would be reached, i.e. how many comments would be necessary for ‘uncoordinated harassment’ to take place? It is also unclear what kinds of tweets and how many would be sufficient to amount to ‘harassment’. What should be the relationship between the tweet or comment that sparked a ‘backlash’ and the tweets or comments in response and how much should the various tweets in response correlate with one another to amount to ‘uncoordinated harassment’? More generally, we are concerned that this offence could have a chilling effect on matters of public debate where people may strongly disagree for fear that one comment, however minor, may be taken to add on to ongoing harassment of someone online.

42. ARTICLE 19 reiterates that the criminal law should only be used as a matter of last resort over other policy responses. In the case of “pile-on” harassment, other measures such as improved content moderation practices, restrictions on certain accounts or features, would likely be more proportionate and appropriate.

Consultation Question 27. Should there be a specific offence of glorification of violence or violent crime? Can consultees provide evidence to support the creation of such offence?

43. No. In our view, such an offence would be very dangerous for freedom of expression. Under international standards on freedom of expression, ‘glorification’ is generally considered too broad a term in relation to incitement to commit acts of terrorism or incitement to discrimination, hostility or violence (Article 20 ICCPR). Moreover, the glorification of ‘violent crime’ could potentially cover a very wide range of conduct that most people would not know are criminalised. It is unclear how the proposed offence would apply in several scenarios. For instance, would supporting violent police action fall within scope? What about the actions of the military which are highly likely to involve violence? Slavery is clearly an affront to human dignity. Some may argue it is a violent crime. Would those who seek to justify it fall within scope? We also note that a specific

⁹ The Rabat Plan of Action is available from here: <https://www.ohchr.org/en/issues/freedomofexpression/articles19-20/pages/index.aspx>

offence of glorification of violence could have an impact on minority groups, for instance those individuals whose sexual preferences include bondage and other sado-masochistic practices. Finally, we draw attention to a French case where a mother and an uncle were fined several thousands of euros for a similar offence in circumstances where the mother's son, named Jihad and born on 11 September, had been wearing a T-shirt saying 'I am a bomb' at the front and 'born on 09/11' at the back given by his uncle for his 3rd birthday.¹⁰ In our view, the prosecution and conviction in this case were clearly disproportionate and demonstrate how such offences have a chilling effect on freedom of speech.

Consultation Question 28. Can consultees suggest ways to ensure that vulnerable people who post non-suicide self-harm content will not be caught by our proposed harm-based offence?

44. In our view, the fact that those vulnerable people might get caught in the proposed offence is further indication that the proposed offence is overly broad.

Consultation Question 29. Should there be a specific offence of encouragement of self-harm, with a sufficiently robust mental element to exclude content shared by vulnerable people for the purposes of self-expression or seeking support? Can consultees provide evidence to support the creation of such an offence?

45. ARTICLE 19 would urge extreme caution in this area. To begin with, it is unclear that self-harm is an offence in and of itself. As the Law Commission rightly notes, criminalisation in this area could result in preventing vulnerable people from seeking help or sharing experiences with others who suffer from the same issues. It is highly unclear that it would help from a medical or mental health perspective.

Question 30. We welcome consultees' views on the implications for body modification content of the possible offences of: (1) glorification of violence or violent crime; and (2) glorification or encouragement of self-harm

46. As the Law Commission notes, it is entirely possible that some body modifications pertaining to one's self-identity may inadvertently get caught in any new proposed offence of glorification of violence or encouragement of self-harm. We would strongly discourage the Law Commission from introducing any such new offence, that in our view would inevitably be unduly broad.

¹⁰ ARTICLE 19's third-party intervention in the case is available from here: <https://www.article19.org/resources/european-court-of-human-rights-any-restriction-on-the-freedom-to-joke-including-in-bad-taste-must-meet-the-high-standard-of-necessity/>