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**CLSA response to Law Commission Consultation  
Harmful Online Communications - The Criminal Offences**

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

It is clear with the advent of the Internet and electronic communications that there has been exploitation by those who seek to harm others.

This consultation is on behalf of the Criminal Law Solicitors' Association and does not highlight or refer to any particular view held by the Association or its members. This is a view expressed by those who practice in court and deal with these offences on a daily basis.

However, we reiterate the sentiments expressed in the case of Redmond "FreeSpeech includes not only the inoffensive but the irritating, the contentious et cetera. "The balancing act between allowing free speech and damaging behaviour is one that must be undertaken sensitively.

The speed of technological change and the need to address the changes in technology are of course a constant source of complexity. It is noted within this consultation that this is acknowledged.

It is clear having read the consultation that a great deal of care and consideration has been given to human rights personal rights and the human rights act and other legislation. It is a well-considered document and it appears that the author of the document is intent where possible in upholding the rights of a democratic society.

The Criminal Law Solicitors' Association note with some concern paragraph 3.1 to 9 and 3.130. The inference that prosecution discretion in limiting the scope of an offence is too broad would indicate interference with the independence of the Crown Prosecution Service in their discretion as to whether a case satisfies the evidential requirements for prosecution. That is not something that should be left

to government or government body the prosecution and judiciary must remain independent

The summary of the proposed offences are long overdue.

### **Question 1**

The proposal, of the new communications offence has brought up to date the malicious Communications act. . The criminal law solicitors association see no difficulty in viewing the proposed amendment as being appropriate in the digital communications age.

The conduct element of the new offence and the proposals under paragraph 5.62 are in the view of the criminal law solicitors association long overdue and see no reason that this should not be amended to include the conduct element.

### **Question 2**

The criminal law solicitors association agree with 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. This would fetter any expression of public opinion and the sending of any documentation that some may find offensive which would in any event be necessary to deal with issues of news.

### **Question 3**

Defence should require that the communication was likely to cause harm to someone likely to see, hear or otherwise encounter it. the likelihood to cause harm is subjective, however with communications offences, as long as the intent is expressed then it becomes a matter of judicial opinion whether there is a likelihood to cause harm.

### **Question 4**

The response to this question is matched with question three. If the communication is such that it is obvious that there was a likelihood of causing harm then it is sufficient in the view of the criminal law solicitors association that there should be no proof of actual harm. It is the intent to cause harm which is relevant.

### **Question 5**

Yes

### **Question 5**

There will need to be guidance as to what is meant by serious emotional distress. Without guidance this becomes a loose and worthless term.

### **Question 6**

In considering any offence the court must consider the context in which any communication was sent, including the impact upon the likely audience. An example of this is that certain groups of a religious or sexual identity may be targeted by the use of language which would not offend those who are not a member of the before mentioned groups.

### **Question 7**

The Criminal Law Solicitors' Association are concerned with this proposal. We do not agree with this requirement. We firmly believe that the issue must be that whether a reasonable person in the position of the likely audience was likely to be caused harm. Otherwise the matter becomes too subjective.

### **Question 8**

The Criminal Law Solicitors' Association do not agree that there needs to be a subjective awareness of a risk of harm as well as an intention to cause harm. The issue of subjectivity is dangerous. There needs to be both an intent and an awareness not merely a subjective awareness.

### **Question 9**

The Criminal Law Solicitors' Association are concerned about the move towards subjectivity.

The likelihood of harm is far too subjective. A defendant should be aware of a risk of harm not a likelihood of harm this is too subjective .

### **Question 10**

Then there should never be one offence with two alternative mental elements. The division of being two offences, one triable either way and one with a summary only offence may be a more appropriate hybrid approach.

Either there is an offence made out where there is an intention to cause harm and if there is an intention to cause harm with the mental element of awareness that is a matter that should be dealt with in a higher court. There is likely to be a great deal of confusion in any court where there are two mental element. This needs to be clarified properly.

### **Question 11**

No.

### **Question 12**

This would seem to be an appropriate response to offences which are committed by certain groups.

It will allow the court to consider an argument by both a defendant in expressing their rights under the ECHR and also dealing fully with the issue of criminal culpability.

### **Question 13**

It is the view of the criminal law solicitors association that the new offence would be compatible with article 10 of the European convention on human rights.

### **Question 14**

Please see above. The criminal law solicitors association believe that the new offence would be compatible with article 8 of the European convention on human rights.

### **Question 15**

The Criminal Law Solicitors' Association believe that the new proposed communications offence would cover threatening communications. However it is conceded, that by having a specific offence covering threatening communications, it may be more appropriate as regards proposed sentencing guidelines to have a specific offence.

### **Question 16**

Yes.

### **Question 17**

It is the view of the criminal law solicitors association that there is an increasing number of hoax calls being made to the emergency services. While these can be currently addressed, it may be a proportionate approach to have this as a separate offence because of the potential for serious harm being caused by abusing the emergency services. Consequently, the criminal law solicitors association would support the making of such calls as being a separate offence with separate sentencing guidelines.

### **Question 18**

This seems to be an appropriate proposal and encompasses the need to address modern day problems caused by the abuse of technology.

### **Question 19**

The contact element is appropriate and in line with current technological advances.

### **Question 20**

The criminal law solicitors association will see this proposal as being proportionate and appropriate.

### **Question 21**

This is not contentious and is appropriate and proportionate

## **Question 22**

The Criminal Law Solicitors' Association do not see that there is a specific need for inciting or encouraging group harassment. The difficulties which would be encountered in trying to prove such an action would be immense. The criminal law solicitors association believe that this proposal is unnecessary particularly in light of the earlier proposals.

## **Question 23**

The difficulty with this proposal is that it would have to be shown that there was knowing participation in uncoordinated group harassment. We do not believe that this offence should be specified and is in fact covered by previous proposals.

## **Question 24**

The difficulty with this proposal is by being able to show a specific intent to cause alarm or distress. That intent must be shown, we are unsure that by extending or amending section 66 of the section this will achieve what is being sought.

## **Question 25**

Again, as with section 24, there are difficulties. If the conduct elements include sending images or video recordings of the genitals or another, The amendment of section 66 would have to include an intention to cause alarm or distress. We do not believe that this is proportionate.

## **Question 26**

This is far too subjective for there to be a measured response. It is the view of the criminal law solicitors association that there must be a mental element including causing alarm or distress, the subjectivity of other intended consequences are highly likely to be unenforceable and subjective.

No because this is far too subjective.

## **Question 27**

There should not be a specific offence of the glorification of violence or violent crime.

**Question 28**

This is a far too complex no

**Question 29**

There should not be a specific offence of encouragement of self-harm.

**Question 30**

We have answered this question and questions at 28