UNIVERISTY OF DERBY

A critical evaluation of criminal laws governing online communication offences and how they protect individuals in today's society/technological age

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M100: Bachelor of Laws (Honours)

Independent Study: 6LA520

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5th May 2020

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INTRODUCTION

Technological advancement has reshaped the way criminal offences are committed, with once offline offences now translating to the online medium. Consequentially, questions surfaced regarding whether a gap had begun to develop between the current scope of criminal law and online offences. A primary reason for such being that there are currently *"up to thirty different statutes which could potentially be used to punish online behaviour…with none of it aimed specifically at tackling online hate".*[1] This is because the laws originate from pre-existing offences, which have been adapted to include online offences as opposed to being specifically tailored to them. In today society with the *"boundaries between online and offline aspects of everyday life increasingly disappearing in the context of modern societies, online abuse is more likely to be a constant harmful presence in a victim's life",*[2] which display's how imperative it is to ensure the laws in place have and will keep pace and provide adequate protection for victims in today's technological age.

Due to the sheer breadth of online offences, the parameters of this essay will draw specific focus to online communication offences under the Communications act 2003 (CA 2003) and the Malicious Communications Act 1988 (MCA 1988), exploring whether online communication offences are sufficiently criminalised under the current law as this is heavily debated. On one side of the debate Professor David Ormerod stating *"criminal law is not keeping pace with these technological challenges"*[3] and on the other side the House of Lords Select Committee proposes the law is *"generally appropriate for the prosecution of offences".*[4] These perspectives will be analysed comparatively to explore whether there is a common reasoning behind these opposing views. As such the first chapter of this essay will comparatively assess the current law governing online communications offences (CA 2003 and the MCA 1988) highlighting any issues, or gaps within the law. The second chapter will

[1] Chara Bakalis, www.parliament.co.uk: Online Abuse and the Experience of Disabled People, <https://publications.parliament.uk/pa/cm/201719/cmselect/cmpetitions/759/75907.htm>
[2] Abusive and Offensive Online communications: A scoping Report [2018] 3.71
[3] The Independent (1st November 2018) accessed 14th November 2019 < https://www.independent.co.uk/news/uk/crime/abuse-online-law-police-social-media-harassment-review-commission-criminal-offences-a8610811.html >
[4] Social Media and Criminal Offences, Report of the House of Lords Select Committee on Communications (July 2014) HL [37]

build on this looking more specifically into the relationship between freedom of expression and online communications and the restraints this can place on the law. The third and final chapter will focus on assessments and reports on the law, its regulation and the proposed reforms, with a specific focus on the White Paper for Online Harms and the Law Commissions Scoping Report on Abusive and offensive Online Communications. An analysis will be undertaken on the issues they identify and the proposed steps they see as effective in dealing with these issues and whether in fact, they are enough. Ultimately this will culminate in the conclusion that the current law in broad terms is sufficient to criminalise majority of online communications offences in its current state, but this is not to say more cannot be done as their remain prevalent issues in clarity and due to the evolutionary nature of online offences, new emerging offences are falling through the gaps of the old law and need to be addressed.

CHAPTER 1: THE LAW

The rapid growth of online communication offences has created a host of problems for legislators, law enforcement and individuals. The problems and their impact will be evaluated throughout this chapter, along with the overall effectiveness of the current legislation.

Offensive online communications within criminal law are regulated under two legal Acts. The Malicious Communications Act 1988 (MCA 1988) and the Communications Act 2003 (CA 2003). These laws were not created explicitly with online offences in mind and had to be adapted to accommodate them. As a result, the law governing online offences is often labelled a *"patchwork of legislation".*[5] Firstly, looking at the *actus reus* for both pieces of legislation. Under the MCA 1988 a person is guilty of an offence if s.1(a) is met:

> s.1(a) Any person who sends to another person, 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

Similarly, under the CA 2003 a person is guilty of an offence if s.127(1)(a) is met:

> s.127(1)(a) Sends by means of public electronic communications network a message or other matter that is grossly offensive or indecent, obscene or of a menacing character

s.127(1) of the CA 2003 carries a broad meaning of how a message can be sent. It provides that any communication must be sent over a public communications network, which is a feature not mentioned in s.1 MCA 1988. The MCA 1988 instead is restricted to three types of communication: a letter, electronic communication or article. Arguably, both pieces of

[5] Hickman and Rose Solicitors, 'Social Media Offences: Genevieve Reed and Thomas White argue that clearer government guidance is needed', Criminal Law & Justice Weekly (Vol.178, September 13th, 2014) [1]

legislation use broad terms to ensure they cover a wide range of communications. Due to this, there can be overlap between the offences and in theory, a message sent over a public communications network could fall within the realms of the MCA 1998 due to there being little difference between electronic communications and a message sent on social media or over a mobile network. However, although this is possible it generally does not occur due to the CPS guidelines which dictate that for communication offences the *"starting point is s.127(1)(a)".*[6] The reason for this is that the CA 2003 covers communications sent specifically via a public communications network, which covers the internet and mobile networks alongside social media, as such it is usually adequate to encapsulate the majority of communications brought forth and comply with s.6 of the Crown Prosecution Service, which requires the charge to reflect the seriousness of the offence. However, if a case arises where the CA 2003 does not apply, for instance, a malicious communication sent via a letter or article, then it is likely the MCA 1988 will step in. In a sense, this makes the MCA 1988 slightly redundant in respect of online communications, due to the fact the CA 2003 is the first point of call for a case of this nature.

A consequence of the similarities between the legislative pieces is that a conviction under one is also possible to be a conviction under the other, due to the lack of a single legislative piece. This issue of broad similarity is best displayed in the case of Caroline Criado-Perez in 2013. Mrs Criado Perez was subjected to a vile campaign of abuse at the hands of Mr Nunn, who through social media sent her daily threats of a vulgar nature. Under the Protection from Harassment Act 1997 (PHA) which covers communication harassment online as opposed to specific incidents of offensive communication, there was a clear case under which all the necessary criteria were met by the actions of Mr Nunn. Under the PHA he could have been liable for a prison term of up to six months but ultimately, he was charged under s.127 CA 2003 receiving a *"six-week custodial sentence"*[7] to the dismay of Mrs Criado-Perez. This *"illustrates the continued problems the criminal justice system experiences when*

[6] CPS, Social Media – Guidelines on prosecuting cases involving communications sent via social media [13] <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media> accessed 20th January 2020

[7] Laura Bliss, 'The Protection from Harassment Act 1997: Failures by the criminal justice system in a social media age' (2019) The Journal of Criminal Law 83(3), 217-228

it comes to labelling an incident as cyber harassment"[8] or an offensive communication falling under the CA 2003. This is because the broadness of the legislation, in an attempt to cover all forms of online communication, has led to *"considerable overlap…in the online context",*[9] which has created offences that are *"difficult to use".*[10] Subsequently, it has left us with laws that are *"fragmented and do not capture the true nature of internet hate or provide adequate protection to victims".*[11] This is a notion backed by the Law commission who recognised *"the existing criminal offences do not fully reflect the scale of online abuse and the degree of harm it causes".*[12] The reason for this, it is argued, is because *"the core of the offence lies not in the protection of victims but rather in the need to safeguard public communications systems from being abused".*[13] This disconnect between the law and victims is a principle reason why people are rallying for the law to be reformed in order to take better account of victims and the specific harms online offences hold. However, some argue the law does not need reform believing that the *"existing criminal law is generally appropriate for the prosecution of social media offences".*[14] This is supported by the Big Brother Watch who were set up to challenge policies that threaten our privacy and civil liberties. They argue *"that we have more than enough law to deal with potential criminal offences on social media"*[15] and the problem, in fact, lies with such law being *"scattered over legislation placed on the statute book between 1861 to 2003, which has led to confusion and inconsistency".*[16] This supports the notion that maybe new laws don't need creating but merely the pre-existing ones need to be consolidated, clarified and updated.

The Acts governing online communications offences overlap, but this does not leave them without their differences. One instance in which they differ is concerning how a message is

[8] Ibid
[9] HMIC, Real Crimes: A study of digital crime and policing (December 2015), 4.148
[10] Chara Bakalis 'Rethinking Cyberhate Laws, Information and Communications Technology Law' [2017], I & C.T.L.2018, 27(1)
[11] Ibid
[12] Lizzie Dearden, 'New laws could be drawn up to protect victims from online abuse and punish perpetrators' (The Independent, 1st November 2018) <https://www.independent.co.uk/news/uk/crime/abuse-online-law-police-social-media-harassment-review-commission-criminal-offences-a8610811.html> accessed 14th December 2019
[13] (N 10) [105]
[14] (N 5) [2]
[15] John Cooper QC, 'Big Brother Watch, Careless Whispers: How speech is policed by outdated communications legislation' (February 2015) [2]
[16] Ibid

required to be sent. S.1(3) of the MCA 1988 requires "delivering" and "transmitting" but it does not require the communication to be received, only that *"it must be sent to another person"*[17] for who there is *"no need to identify".*[18] Therefore, a message sent under the MCA 1988 which is grossly offensive and sent to another person is enough to establish liability. Under the CA 2003 however, there is no requirement that the message be sent to a particular person at all, but instead the impact it may have by those who see it need be assessed. This was highlighted in the case of *Chambers v DPP*[19] which stated, *"a message which does not create fear or apprehension in those whom it was communicated or who might be reasonably expected to see it, fell outside of s.127(1)(a)".*[20] This recognises the impact a communication can have under s.127(1)(a) can be more widespread due to social media platforms, which increases the audience of who may see the communication. As a result, the courts will take into account this wider spectrum of individuals when assessing the impact and harm caused by an electronic communication.

Looking next at the *mens rea* element for offensive online communications. The *mens rea* remains an essential element to the courts as it helps to provide further clarity to the context of the communication. Although between the MCA 1988 and the CA 2003 there are varying standards of what is required to satisfy the *mens rea*, the MCA 1988 under s.1(b) provides that a communication be sent to "cause distress or anxiety to the recipient or to another person whom he intents that it should be naturally be communicated". Lord Justice Dyson on this matter outlined that an individual would, therefore *"not be guilty of the offence unless it was proved that his purpose was also to cause distress or anxiety".*[21] Whereas the CA 2003 under s.127(2) holds that a communication must be sent with the purpose "of causing annoyance, inconvenience or needless anxiety"**,** in addition, it was outlined that an offence under s.127 is one of *"basic intent",*[22] which provides that the *mens rea* can be either intention or recklessness to commit the *actus reus*. This separates it from the MCA 1988 which is an offence of specific intent which as previously stated requires the

[17] [2018] Preston Crown Court (Unreported)
[18] Ibid
[19] [2012] EWHC 2157 (Admin), [2013] 1 W.L.R. 1833
[20] Ibid [1] (Lord Chief Justice of England and Wales)
[21] Connolly v DPP [2007] EWHC 237 (Admin) [3] (Dyson LJ)
[22] Chambers (N 13) [26]

defendant to intend to cause distress or anxiety. The fact that the CA 2003 is a basic intent crime is supported by the case of *DPP v Collins*[23] which suggested when talking about the scope of s.127 CA 2003 that *"the defendant must intend his words to be grossly offensive to those whom they relate or be aware that they may be taken to be so".*[24] This highlights that intention for a communication to be grossly offensive is needed, as is the same with the MCA 1998. But it also shows, recklessness can suffice. This can be shown by an individual sending a message of which he is aware contains words of an offensive nature but proceeds to send it regardless of the impact it may cause. In this circumstance, the individual must be aware that a communication they send may be taken to be grossly offensive. However, this is usually pursued because it is usually clear from the case law present whether the mens rea element is satisfied by the individual's purpose and intention.

One of the other issues regarding the legislation is sentencing. It is recognised that the law is *"not able to deal with the full spectrum of internet hate"*[25] and as such, online communications that fall just outside the realm of "grossly offensive" are not criminalised when they can be just as impactful' to victims as those that are grossly offensive. This is due to the online nature of the communication, which coupled with the highly prevalent nature of online communication networks in people's lives, can make individuals *"feel as though the abuse is inescapable".*[26] One of the reasons why it can make individuals feel like this is due to the sentencing. Firstly, both the MCA 1988 and the CA 2003 *"cannot be aggravated by hate or hostility"*[27] as they were not created for the specific purpose of online offences. As such this needs to be *"taken into account during sentencing",*[28] which can be seen as a big issue. Furthermore, there lies a big disparity between the sentencing under the MCA 1988 and the CA 2003. Under s.127(3) of the CA 2003, the maximum sentence is "six months or a fine not exceeding level 5" whereas under s.1(4) of the MCA 1988 the maximum sentence on indictment is "two years or a fine" or on a summary conviction it is

[23] [2006] UKHL 40, [2006] 1 W.L.R. 2223
[24] Ibid [10] (Lord Bingham)
[25] (N 10) [87]
[26] Jess Phillips MP, 'Report of the criminal law needed to protect victims from online abuse says Law Commission'(Law Commission, 1st November 2018) <https://www.lawcom.gov.uk/reform-of-the-criminal-law-needed-to-protect-victims-from-online-abuse-says-law-commission/> accessed 16th December 2019
[27] (N 10) [97]
[28] Ibid

"12 months of a fine". This displays that prosecutions under the MCA 1988 can carry a higher sentence than those under the CA 2003, even though they both criminalise the same severity of offence communication. The Select Committee on Communication addressed the call to increase the severity of sentence by outlining that they *"favour increasing the courts discretion…but…would be reluctant for Parliament to require more cases be tried in the crown court due to the implications for workload".*[29]

Finally, the problem of why online communication legislation is seen as failing individuals is further exacerbated by the way law enforcement handle such offences. The first point of call for many individuals is the police to which offensive online communications present *"unique challenges",*[30] such as the *"analysis of devices, number of trained digital media investigation's, knowledge in relation to the process for requesting information and insufficient training".*[31] These are specific challenges raised by the growth of social media, which is more prevalent now than they were before, due to the cuts to the police force by *"19% since 2010".*[32] As a result, there is now a reduced force trying to deal with an unprecedented number of incidents. Chief constable Kavanagh outlined the *"levels of abuse that now take place on the internet are on a level we never really expected".*[33] He went on to state that from this stems the issues that *"often victims don't know how to articulate what happened to them and they aren't clear what offence it is if there is one…when they get an ambiguous response from the police it undermines their confidence about what happened".*[34] This puts forth that the problems with the law are not solely rested in the legislation but also in its regulation. Therefore, ensuring the law is effective is only one part of the problem, with a greater need for training, obligations and rules to be placed on those whose job it is to regulate such offences, to ensure individuals receive adequate protection under the law.

[29] (N 4) [49]
[30] (N 2) 2.64
[31] (N 9), 7.22
[32] Vikram Dodd, 'Criminals going unpunished because of cuts, says police chief' (The Guardian, 2 May 2019) <https://www.theguardian.com/uk-news/2019/may/02/criminals-going-unpunished-because-of-cuts-says-police-chief> accessed 21 February 2020
[33] S Laville, Online Abuse: "Existing law too fragmented and doesn't serve victims" (4 March 2016) <https://www.theguardian.com/uk-news/2016/mar/04/online-abuse-existing-laws-too-fragmented-and-dont-serve-victims-says-police-chief> accessed 19th December 2019
[34] Ibid

CHAPTER 2: ARTICLE 10 & ONLINE COMMUNICATIONS

This chapter will examine the relationship between the legislation governing online offences and Article 10 of the European Convention of Human Rights (ECHR). Assessing the impact, the interrelation has on the overall effectiveness of legislation and the different academic perspectives.

Due to the breadth of the provisions governing online communications in the MCA 1988 and the CA 2003, it would be assumed the number of prosecutions would be high, as the provisions encapsulate such a wide variety of offensive communications. However, in practice, this is not the case, as *DPP v Collins* noted both the MCA 1988 and the CA 2003 are burdened by *"high thresholds",*[35] which result in many offensive communications falling short of prosecution. Furthermore, the CPS provides *"prosecutors should only proceed if they are satisfied there is sufficient evidence the communication…is more than…Offensive, shocking or disturbing",*[36] therefore a communication must be grossly offensive, menacing or obscene in nature to satisfy the requirements in the guidelines. The reason for this is to *"protect the integrity of the public communication system"*[37] as a place where *"everyone has the right to freedom of expression… without interference by public authority"* which is noted under Article 10(1). However, academic Chara Bakalis takes the view, that as a result of the high threshold caused by free speech, the law *"is not able to deal with the full spectrum of internet hate".*[38] The reason for this is because, many communications which fall short of the threshold may have the same detrimental effect as those that cross it, as what each individual may regard as grossly offensive may be different from the next and as such *"a comment that may seem insignificant to one person might cause significant distress to another".*[39]

When determining whether a message is grossly offensive, obscene or menacing the courts *"must apply the standards of an open and just multicultural society… and the words must be*

[35] (N 23) [27] (Lord Bingham)
[36] (N 6) [28]
[37] (N 23) [27] (Lord Bingham)
[38] (N 10)
[39] Mariya Rankin, 'Law Guides: Internet Trolling and Cyberbullying Law' (The Lawyer Portal) <https://www.thelawyerportal.com/blog/law-guides-internet-trolling-cyberbullying-law/> accessed 14th December 2019

judged taking into account… their context".[40] The case of *Chambers v DPP* builds on this providing an example of how online communications should be analysed in the context of social media. The case concerned whether a tweet by Mr Chambers was covered under Article 10 or crossed the threshold to be prosecutable. The Tweet in question read: *"Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!".*[41] The courts on appeal assessed this communication *"objectively",*[42] looking at the language used and taking into account its unserious tone. They also carried out an assessment on how members of the public would have read the communication, ultimately concluding it fell short of being grossly offensive and was a mere *"a poor joke in bad taste",*[43] even though it caused the airport both apprehension and anxiety. The subsequent case of *Stocker v Stocker*[44] agreed with the case of *Monroe v Hopkins*[45] providing a current clarification on the reasoning for this ruling, stating online communications should be analysed in the context of social media *"taking into account the casual nature of the medium in the nature of conversation rather than carefully chosen expression".*[46] Furthermore, they added that the court's role is to *"focus on how the ordinary reasonable reader would construe the words",*[47] as opposed to how a dictionary may define their meaning. The case of Stocker helps to solidify a modern objective approach to the assessment of online communications over social media. Foregoing the dictionary definitions and applying the test of a typical reader helps the court to interpret the message the communication was intending to convey, as opposed to the one the dictionary definitions may construe, which may be an entirely different construct holding a different meaning. This display's, that while there is a high threshold associated with what is deemed grossly offensive, there is a more open and relaxed threshold for what is considered an offensive communication protected under article 10. This disparity raises concerns as to who in fact the law is protecting.

[40] (N 23) [9] (Lord Nicholls)
[41] (N 19) [1]
[42] Brown (Roy) v McPherson [2016] SAC (Crim) [32]
[43] (N 19) [38]
[44] [2019] UKSC 17; [2019] 2 WLR 1033; [2019] 4WLUK 27(SC)
[45] [2017] WLR 68
[46] (N 44) [43] (Lord Reed DPSC)
[47] Ibid [35] (Warby J)

Looking next at what communications are classed as falling outside the realms of being grossly offensive, Lord Chief Justice in *Chambers v DPP* summarised that: *"Satirical or iconoclastic or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour even if distasteful to some or painful to those subjected to it should not attract criminal sanction".*[48] This is because per *Karsten v Wood Green,*[49] *"the courts need to be very careful not to criminalise speech which, however contemptible was no more than offensive",*[50] due to the strong need within today's society to *"protect freedom of expression".* [51] Academic Laura Bliss commented on this arguing that the *"threshold associated with free speech puts further disadvantages on victims of cyber harassment".*[52] The case of *Burris v Azahani*[53] supported this adding the *"respect for the freedom of the aggressor should never lead to the court to deny necessary protection to the victim".*[54] Moreover Akhtar[55] posed that the criminal justice system when assessing online conduct had *"titled"* [56] too much towards the protection of freedom of expression, as opposed to protecting victims of online communication offences.

The case of *Vereinigung Bildender Künstler v Austria*[57] adds further support to Akhtar's claim, outlining that Article 10 *"applies 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",*[58] Showing the wide spectrum of communication that can be deemed to fall within the safety of free speech. This also displaying why the court put so much focus on the threshold of grossly offensive, as they have to be certain such a communication falls outside of those protected under free speech. Moreover, the courts in the case of *Redmond-Bate v DPP*[59] contributed that *"free speech includes…the*

[48] (N 19), [28] (Lord Judge CJ)
[49] [2014] EWHC 2900 (Admin)
[50] Ibid, [21] (Laws J)
[51] (N 5) [28]
[52] (N 7) [3]
[53] [1995] 1 W.L.R. 1372
[54] Ibid [1380]
[55] Z Akhtar, "Malicious Communications, media platforms and legal sanctions (2014) 20(6) computer and telecommunications law review 179-187
[56] Ibid [180]
[57] [2008] 47 E.H.R.R. 5
[58] Ibid [26] (The President) (Judge Rozakis)
[59] [1999] 7 BHRC 375

inoffensive…provided it does not tend to provoke violence",[60] outlining that offensive communications which provoke or threaten violence can, given the context constitute a grossly offensive communication. A further example of this is displayed in the case of *DPP v Smith,*[61] in which the defendant sent four messages attached to YouTube videos perpetuating threats of violence, with the phrase, *"I'd slice his throat"*[62] being stated. The courts at first instance, on an assessment of the communication, held the messages were within the realms of free speech but upon appeal, it was held the judge had erred in his assessment and the messages were considered to be grossly offensive, conveying sufficient menace to allow the court to prosecute and set aside his Article 10 right. This highlights the confusion surrounding the courts when assessing whether a communication is or is not sufficient to constitute revoking an individual's Article 10 right. While there is a strong need to protect freedom of expression, *Connolly v DPP*[63] also made clear the fact that *"the public have a right to be protected from material intended to cause them distress or anxiety whether in the privacy of their own homes or the workplace".*[64] It is obvious from on this that the courts are tasked with a tough balancing act, through which they have to be seen to uphold important personal rights such as Article 10, while so being seen to be being tough on communications crime. Therefore, it would be unfair to classify this problem as specific to the current governing legislation, as it is evident this would be an issue to an extent even in the presence of a specific legislative piece. However, subsequent reforms could help to make the current law both clearer and more adept to be able to handle other problems raised in the legislation. But given the challenges article 10 poses to legislators and the courts, it begs the question of whether a new piece of legislation, if ever brought into existence could deal with this specific issue better, or whether we are in a place in society now, where such offensive communications which are not grossly offensive become more common place due to freedom of speech.

[60] Ibid (Sedley LJ) [382-3]
[61] [2017] EWHC 359 (Admin)
[62] Ibid [11]
[63] (N 21)
[64] Ibid [28] (Dyson LJ)

CHAPTER 3: THE REFORMS

This chapter will evaluate the debate surrounding, whether there is a need for a reformation of online communications laws, with a specific focus on the Law Commission's 2018 report and the HM Governments White Paper on online communications. The proposals put forth in both the report and paper will be analysed concerning their practicality and ability to deal with the challenges facing online communication laws and their enforcement.

The question: 'do online communications laws need reformation' is avidly debated. On one side of the argument, the House of Lords Select Committee on Communications held, *"the criminal law in this area…is generally appropriate for the prosecution of offences committed using social media",*[65] which is supported by the Committee on Standard of Public Life who agree the law is *"sufficient and should remain as it is".*[66] The reason for such views is a result of the broad nature of the MCA 1988 and the CA 2003. This broad scope, in theory, helps to cover a wide spectrum of online communications, although in practice it has caused both overlap and ambiguity within the law. The Select Committee on Communications acknowledged this overlap exists among offences but did not wish to remove it, as in their eyes *"overlap does not necessarily imply duplication"*[67] and it is *"usually necessary to provide for different circumstances"*[68] in which offensive online communications may appear to the court. However, the Law Commission found that *"many of the applicable offences are not constructed and targeted in a way that adequately reflects the nature of offending behaviour".*[69] They believe such is the case because the law predates the modern nature of the way offences are now perpetrated. However, in this instance the Select Committee is not denying that the law doesn't reflect the nature of the offending behaviour, but they are outlining that due to the nature of the law being adapted to fit these new offences the breadth of the provisions is needed to ensure that as much of the offending behaviour is criminalised as possible and, in fact, they are arguing that removing such and clarifying

[65] (N 4) [37]
[66] Intimidation in Public Life: A Review by the Committee on Standard of Public Life (December 2017) Cm 9543, [60]
[67] (N 4) [17] [p9]
[68] Ibid
[69] (N 2) 13.10

provisions could potentially restrict the scope of the legislation in the future and could cause more harm than good to the law.

In support of reforms, the Select Committee on Home Affairs declared *"the government should review the entire legislative framework governing online hate speech, harassment and extremism to ensure that the law is up to date".*[70] As the law predates online offences, there remains a constant worry regarding the sufficiency of the law in today's environment. The Law Commissioner, Professor David Ormerod QC responded to public and academic concern, commenting that *"criminal law is not keeping pace with these technological challenges".*[71] In response to this, the Law Commission in 2018 sought to assess online communication laws to identify the prevalent issues and suggest possible reforms, in order to ensure the Prime Ministers goal to make the *"UK the safest place in the world to be online".*[72] In their report, they *"identified several challenges in enforcing current criminal law",*[73] which included *"the scale of offending behaviour",*[74] *"investigative challenges"*[75] and *"balancing the application of the criminal law with the qualified right to freedom of expression".*[76] The challenge of balancing application with freedom of expression ultimately stems from the fact, *"ambiguous terms such as grossly offensive, obscenity and indecency don't provide the required clarity for prosecutors"*[77] and this can lead to *"inconsistent outcomes"*[78] in judgements. However, whether the Commission will attempt to further clarify these terms will be seen when 'Phase 2' of their report comes out. However, in reality, it remains probable clarification will not be pursued, as one of the noted benefits of having broad definitions is that the *"flexible wording…allows their use across a wide range of conduct and means they can adapt to changing forms of communication, as social media*

[70] Hate Crime: abuse, hate and extremism online, Report of the Select Committee on Home Affairs (May 2017) HC 609 [p19]
[71] The Independent (1st November 2018) accessed 14th November 2019 < https://www.independent.co.uk/news/uk/crime/abuse-online-law-police-social-media-harassment-review-commission-criminal-offences-a8610811.html >
[72] Matt Hancock DCMS Secretary of State, Gov.UK: Government outlines next steps to make the UK the safest place to be online, accessed 17th November 2019< https://www.gov.uk/government/news/government-outlines-next-steps-to-make-the-uk-the-safest-place-to-be-online >
[73] (N 2) 2.65
[74] Ibid, 2.65(5)
[75] Ibid, 2.65(4)
[76] Ibid, 2.65(1)
[77] Ibid, 5.89
[78] Ibid 13.18

develops, and evolving forms of harm",[79] which helps to future proof the existing law. However, some argue a phrase such as *"grossly offensive is highly subjective and causes more problems than it solves"*[80] and *"without a clear definition it is very difficult to ensure a standardised approach"*[81] to policing such offences. By this, they propose any subsequent legislation introduced should be for the purposes of clarification of such terms, which are vital to standardising the threshold for offensive online communications. Furthermore, its believed that if such is not achieved *"then it is most inevitable that there will be further individuals, who are arrested, charged and prosecuted unnecessarily under these laws".*[82] This was the case in *Chambers v DPP* which involved a joke tweet, by which, due to the subjectivity of the term grossly offensive on first instance he was charged with an offence but on appeal, this was quashed in the name of free speech. This case highlights that without a standardised definition for grossly offensive and other ambiguous terms, they may be more cases flooding the court and subsequently more cases of this nature as the lines between what can and can't be said online are increasingly blurred. However, on the other hand, it was illustrated by academic Alison Saunders that *"new legislation which is specific to social media could be rendered out-dated more quickly since it would involve specifying a particular means of committing an offence".*[83] This means that by specifying a definition in subsequent legislation, we may be narrowing down the scope of what is deemed grossly offensive and in turning this threshold into an objective medium it could lead to more communications falling through the net of the law, and also could increase the already high threshold for communications to pass.

Ultimately, however, one of the conclusions the Law Commission came to in their report, was that *"in most cases, abusive online communications are, at least theoretically, criminalised to the same or even greater degree than equivalent offline behaviour".*[84] In the broad sense, they note a certain degree of parity exists between offline and online communications offences to warrant the current legislation remaining in place. One of the

[79] Ibid 13.15
[80] (N 15) [13]
[81] Ibid
[82] (N 15) [6]
[83] Alison Saunders Q17, House of Lords Select Committee on Communication, Social Media and Criminal Offence Inquiry: Oral and Supplementary Written Evidence.
[84] (N 2) 13.7

potential reasons for such as opposed to introducing a specific legislative piece are the *"concerns about new laws suppressing freedom of speech".*[85] In keeping the current law, they did, however, express the advantage reforms can have, in that *"legitimate speech that should not be criminalised would be more clearly excluded and the law enforcement would be more clearly guided as to genuinely criminal conduct".*[86] Until phase 2 of their report, it remains to be seen how they intend to achieve this and whether it is, in fact, a possibility.

Subsequentially, the HM Government in their White Paper on Online Harms expressed support for the Law Commissions proposals for clarification. The White Paper itself seeks to create proposals to advocate the best direction to take in dealing with issues surrounding the regulation of online communications, as they feel, there is a *"fragmented regulatory environment which is insufficient to meet the full breadth of the challenges".*[87] This they see adds to the problems facing online communications offences as a whole alongside the issues within the legislation. To aid in fixing this issue they provide *"the government will establish a new statutory duty of care to make companies take more responsibility for the safety of their users and tackle harm caused by content or activity on their services".*[88] This approach will place further obligations on tech and social media companies as many believe they need to take a bigger responsibility to help manage offensive online communications on their platforms. This is backed by the Select Committee on Communications who *"encourage website operators to further develop their ability to monitor the use made of their services".*[89] In particular, they suggested *"it would be desirable for… more effective real-time monitoring"*[90] of these services to ban or takedown offensive communications to help minimise the reach and impact they can have on individuals. As a result of this big social media companies, *"Facebook, Microsoft, Twitter and YouTube have agreed to a code of conduct on countering illegal hate speech online with the European Commission".*[91] This seems a positive step to ensure better regulation of offensive communication offences, however, at present *"only a relatively small group of the larger companies are engaged with*

[85] (N 1)
[86] (N 2)
[87] HM Government: Online Harms Paper, [2.5] [32]
[88] Ibid [7]
[89] (N 27) [84] [22]
[90] Ibid
[91] Pat Strickland and Jack Dent: Online Harassment and Cyber Bullying (September 2017)

the government work on online safety, even though online harms can and do occur across many websites".[92] Ultimately this results in fragmented policing with some areas undergoing more regulation than others meaning in some respects offensive communications can still be perpetuated through other online services just as they would've under others.

An international solution to this issue came from Germany in 2018 when they *"imposed punitive measures on social media companies for allowing unlawful content on their digital platforms".*[93] for instance, they require unlawful content to be taken down in 24hrs or be subject to fines. This can be seen as an influence for the White Papers proposals due to its effectiveness in Germany at minimising the reach and impact of harmful communications online. The White Paper also sought to address the issues facing victims and police by *"making it easier for the public to report online crimes through the digital contact programme",*[94] which will *"provide…a digitally accessible force with a consistent set of online capabilities to use in engaging and transacting with police services".*[95] This should in theory help to bridge the gap between individuals understanding of the offences and the polices ability to deal with them. They also wish to further aid the police by investing *"in training…designed to improve the digital capability across policing".*[96] This was an identified issue across the board, that there was a lack of understanding of digital offences among police forces. However, as these all seem like positive steps forward, they have not yet come to fruition in law or regulation and their impact remains to be seen.

Another proposal put forth in the White Paper was for the implementation of an independent regulator to ensure companies meet their new responsibilities and enforce new standards effectively. One of the new standards would be to impose a *"mandatory duty of care"*[97] on social media companies, which would place a heavier obligation upon them to help combat offensive online communications by ensuring *"illegal content is removed*

[92] (N 83) 2.11 [37]
[93] Kingsley Napley: Policing the Internet: "Fake News" and Social Media Offences Update (5th February 2018)
[94] (N 87) [17]
[95] Ibid
[96] Ibid
[97] GOV.UK: UK to introduce world first online safety laws (8th April 2019)

quickly"[98] and if such is not done then a policy of heavy fining will be followed. This arguably places an impossible burden on social media companies due to the amount of content posted on their systems regulating such internally would be a huge undertaking without support denoting what exactly should be removed.

As a result, Ofcom was appointed the regulator to police online communications alongside the government, who will direct through legislation how companies such as Facebook and Twitter should enforce policies to tackle offensive online communications on their sites. However, the financial times criticises that these proposed steps by the white paper are *"arguably a decade too late, acting sooner would have given regulators a chance to scale up gradually",*[99] as due to the sheer volume of online communication offences it will be hard for such regulation to come into force and be immediately effective in every aspect. However, a positive of this is due to the constant evolution of such offences Ofcom has been given the power over decisions and procedures meaning *"regulation is flexible and can adapt to the rapid emergence of new harms and technologies"*[100] before legislation can, as that is an often-lengthier process. This means while the laws may predate the offences the procedures in place to handle them firstly are much more current and adapt.

But all this relies on Ofcom being effective in regulation. While they may seem a good fit as they already manage the broadcasting rules governing TV, their effectiveness to deal with online communications remains to be seen as *"its record in investigating violations of the broadcasting rules…can take months",*[101] which if the case with online communications would mean that Ofcom could easily be overridden by the sheer volume of cases which *"highlights the scale of the challenge in the potential new rule".*[102] This is backed by the challenge freedom of speech poses in the regulation process. Ofcom has stated they will not obstruct individual's freedom of expression and *"regulations will not stop adults…posting*

[98] GOV.UK: Government minded to appoint Ofcom as online harms regulator (12th February 2020)
[99] The Financial Times: Britain's online harms proposals are still lacking 'far more work is needed to turn a white paper into a workable policy' (February 16th 2020) https://www.ft.com/content/6760fade-4f5f-11ea-95a0-43d18ec715f5
[100] (N 98)
[101] (N 99)
[102] Ibid

legal content that some find offensive",[103] however, this is easier in words than in practice as due to the current legislation words remain subjective and due to the lack of no clear definition of grossly offensive by which online communications are managed it may be hard for social media companies to create rules as to what can and cannot be said on their sites, posing a significant challenge for social media companies. Moreover, at this moment in time, any of these rules or regulations are in place which leaves the law in its current state of debate and by the time they are implemented, they could be facing an already more advanced online communications offences which are ever-developing meaning they could always be overwhelmed and behind the curve.

[103] (N 98)

CONCLUSION

This essay set out to evaluate whether the criminal laws governing online communication offences provided sufficient protection for individuals in today's technological age. Based on the research into the governing legislation, reports and papers it can be concluded that in broad terms the CA 2003 and the MCA 1988 seem effective in dealing with the current communication offences present today. There are however issues caused by the broadness of this legislation, but such is viewed as essential to ensure the breadth of online communications are covered both now and in the future. This seems to be the reason why ultimately there seems to be a lack of support for a specific legislative piece, due to the fast-evolving nature of online communications there runs the risk that the legislation using specific wording may become outdated in time. At the same time the law commission in their scoping report also addressed instances where the current law was starting to form gaps, which were sub offences such as pile harassment, trolling and abusive communications which fell under the threshold therefore falling short of criminalisation. This may be the first instances of a worrying issue by which in the future, technology may further outpace the law and more offences may find themselves falling through the net of criminal law, which may require this debate to be revaluated once again. Furthermore, the white paper identified how further clarity is required on aspects of the legislation as in practice and regulation it can become confusing as to exactly where an offence lies and what the sentence should be.

Another conclusion drawn from examining the relationship Article 10 plays with online communications, is that it constantly has to be in balance with the legislation due to its importance. As such any changes to the law or specific legislative pieces would have to be careful as to not make certain communications criminal that would otherwise fall under free speech. Due to the challenge this poses it's hard for the courts to protect victims of online communications offences as they remain highly cautious not to criminalise speech protected under Article 10, which is why further clarity as to explicitly what is grossly offensive would be of great benefit to prosecutors as there stands a strongly subjective nature to this in the current law. While in the short term it seems laws are sufficient to protect victims, in the long term it remains evident that there is still work to be done in this area, which is highlighted as a driving force behind phase 2 of the law commissions report,

which will build one phase 1 analysed in this piece and seek to provide reforms to the legislation in place which will seek to make the law both clearer and more adaptable.

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