[GB] The Law Commission publishes report on abusive and offensive online communications

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On 1 November 2018, the Law Commission, an independent body set up by Parliament in 1965 to promote the reform of the law of England and Wales, published its Scoping Report on Abusive and Offensive Online Communications.

The Commission reviewed the current criminal law in order to identify any gaps or deficiencies that cause problems in tackling online and social media-based abuse. Terrorism offences, liability of social media platforms, child sexual exploitation offences, online fraud and contempt of court were excluded from the scope of this review. The report analysed the scale of online offending and indicated that the groups most likely to be affected by abusive communications online include women, young people, ethnic minorities and LGBTQ individuals. The damaging impact on victims was also considered.

The Commission concluded that abusive online communications are, “at least theoretically, criminalised to the same or even a greater degree than equivalent offline offending.” However, it stressed that the current criminal law is not keeping pace with technological changes and that reforms are required to protect victims of online abuse and hold perpetrators to account.

More specifically, the report indicated that the applicable offences fail to reflect the nature of offending in an online environment and the degree of harm caused, stressing the need for more effective and proportionate criminal offences. According to the Commission, not all harmful online conduct is pursued as seriously as its offline equivalents. Several barriers were identified as impeding effective law enforcement in this context, including the wide scale of offending, the limited resources available to enforcement agencies and a persistent cultural tolerance of online abuse.

In addition, the review found that the available offences are, in certain respects, both over- and under-inclusive. For instance, although “false communications” are criminalised under, for example, public safety laws and electoral laws, there is currently no general criminal offence in England and Wales targeting the creation or spreading of false information under the guise of news reporting. This is despite the fact that the proliferation of “fake news” is recognised as an increasingly serious public danger. The Commission also highlighted the fact that

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the large number of overlapping offences, especially in the area of threatening and menacing communications, can become a source of confusion.

The report also underlines the ambiguity of the elements of some offences in respect of how they apply to online communications. It is unclear, for example, whether cyberspace could be considered as a “public place” for the purposes of the common-law offence of “outraging public decency.” The use of vague terms in describing offences - such as “grossly offensive,” “obscene” or “indecent” communications - arguably means that the definition of certain criminal offences may be perceived as being flexible enough to encompass a wide range of online harmful activity and capable of adaptation to cover future developments. However, offences couched in imprecise terms pose issues of indeterminacy and legal interpretation, which can in turn prove “problematic for respect of rule of law values and principles such as predictability, consistency, equality, certainty and non-retroactivity.”

Lastly, the Commission observed that “the criminal law is having little effect in punishing and deterring certain forms of group abuse” and drew attention to the phenomenon of “pile on” harassment, whereby online harassment is coordinated against an individual by multiple people. It also raised concerns about the responses of criminal law to online abuses of privacy such as “outing” or “doxing” and questioned whether the current law provides adequate remedies for the most serious breaches of privacy. The Department for Digital, Culture, Media and Sport will now analyse the report and decide on the next steps to be taken regarding tackling online abuse.

Law Commission, Abusive and Offensive Online Communications: A Scoping Report (Law Com No 381)

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