



## **“Electronic communications media: how to regulate the hate!”**

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### **Abstract**

Information technology presents the law with ongoing challenges because of its ability to capture, debate and discuss the most intimate aspects of peoples' lives. In particular, the use of social media to send messages of hate, harassment or offense continues to conflict with its role as a place for uncensored public debate. The remit surrounding this avenue of communication is, therefore, open to interpretation and this article will consider whether, given the ease and lack of thought processes behind many online communications, the current statutory regulations in the UK are fit for purpose.

In particular, the article will evaluate the consequences of adapting current domestic legislation to cover electronic communications – a medium that the legislation was never intended to cover. It will evaluate whether the legislation in its current guise is fit for a mass communications arena. As a consequence of recent amendments to the regulatory environment, it will be argued, *inter alia*, that the whole nature of the criminality that the legislation had in mind has changed. The Malicious Communications Act 1988, for example, was originally intended to cover offences, such as sending a malicious letter through the postal system, that require contemplation and a series of actions and steps in order to make them out. As originally enacted, culpability under s.1 of The Malicious Communications Act would lie in the intention of the sender to cause distress or anxiety to the recipient, whether or not distress or anxiety is actually caused. This aspect of calculated and targeted harm is a significant feature of the

offence: for example, letters need to be written, addressed, stamped, and posted. However, given the ease and lack of thought processes behind many online communications, extending s.1 to capture these communications represents a stark transformation of the criminal sanction that the legislation originally intended and has led to confusion at law. Furthermore, extending the Communications Act 2003 has not been the panacea many expected, and this will be evaluated in tandem. Conclusions will be drawn about the aptitude of the legislation for dealing with the complexities of new communications media given that this represents an enduring challenge for the law.

**Key words:** Information technology law, online communications, criminal sanction, legislation

## **Introduction**

Electronic communications media is used as a generic term to embrace all forms of electronic transmissions of information, including information communicated via the internet. Whilst the norms for appropriate use of such media are in a continuous state of development, there is no question that inappropriate or abusive behaviour online is real<sup>1</sup>. The ease with which campaigns of intimidation and messages of an unsavoury, offensive, malicious or broadly anti-social nature may be disseminated online has led to widespread concern that this conduct is adequately tackled by appropriate sanction. One approach, and the focus of this article, has been to adapt criminal law so as to incorporate such behaviour. Whilst it is recognised that this

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<sup>1</sup> NK Baym, *Personal Connections in the Digital Age* (2nd edn Polity Press, 2015), 66, 179.

is a growing problem<sup>2</sup>, commentators including scholars<sup>3</sup> and statutory bodies<sup>4</sup> have questioned whether mere adaptation of the criminal law is the most appropriate way of dealing with the idiosyncrasies of the internet age given the marked differences between on- and offline interactions: for example, that on-line interactions are more publicised and have the potential to reach a wider (non-specific) audience<sup>5</sup>. In contemporary times, social media such as Facebook, Twitter and Instagram provide avenues to reach a global audience in a matter of seconds<sup>6</sup>. Is the adaptation of existing legislation in general and criminal sanction in particular really suitable to this forum? The Malicious Communications Act 1988 is a case in point. The 1988 Act makes provision for the punishment of persons who *send or deliver* letters or other articles for the purpose of causing distress or anxiety. The whole thrust of the Malicious Communications Act concerns somebody doing something *and* taking steps to bring it about – writing a letter; putting it in an envelope, properly stamped, taking it to a post box and sending it to the addressee. It therefore has a physical element, which involves some engineering. This is not the same as rattling off some keys on a computer keyboard and sending off an ill-judged e-mail or two. Accordingly, the whole nature of the criminality that the legislation had in mind has changed with the extension of the Malicious Communications Act to cover electronic communications. Not only are electronic communications extremely easy to send with very little in the way of physical exertion, but they have been recognised as being “often uninhibited, casual and ill thought out”<sup>7</sup>, it being “often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment”<sup>8</sup>.

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<sup>2</sup> K Shields and K Jones, ‘Tackling Online Trolling’, (2016) CL&J 180 JPN 666.

<sup>3</sup> Including, inter alia, N Geach and N Haralambous, ‘Regulating Harassment : Is the Law Fit for the Social Networking Age?’ (2009) 73(3) JCr L 241.

<sup>4</sup> Including, inter alia, Abusive and Offensive Online Communications: A Scoping Report (2018) Law Com No 381; Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248 and Modernising Communications Offences , A Final Report (HC 547, Law Com No 399, 2021)

<sup>5</sup> L McDermott, ‘Legal issues associated with minors and their use of social networking sites’ (2012) 17(1) Comms L 19.

<sup>6</sup> S Neshkovska and Z Trajkova, ‘The Essentials of Hate Speech’ (2017) 7(14) TIJE 77.

<sup>7</sup> *Smith v ADVFN Plc* [2008] EWHC 1797 (QB) 14.

<sup>8</sup> *ibid* 17.

Accordingly, the revised approach to the Malicious Communications Act warrants exploration and, to this end, it is useful to consider the genealogy of the legislation. The article, therefore, navigates the origins of the Malicious Communications Act and the types of conduct envisaged under the Act, as well as the revision to Section 1 to include electronic communications. It then proceeds to evaluate whether certain of the distinct characteristics of electronic communications abrogate the suitability of the Act to this form of media, exploring two distinct strands of analysis, before moving on to consider whether the Communications Act 2003 adequately addresses the shortcomings. Finally, other methods of tackling anti-social behaviour that is committed online are presented as are various musings by The Law Commission.

### **The origins of The Malicious Communications Act 1988**

The origins of The Malicious Communications Act 1988 lay in the publication of work by the Law Commission on the reform of criminal libel. In the course of its analysis of the existing law, it recommended<sup>9</sup> abolition of the common law offence of criminal libel, which was eventually achieved many years later by s.73 Coroners and Justice Act 2009. In its Working Paper on Criminal Libel<sup>10</sup>, the Law Commission identified poison pen letters as a particular problem which, although they exposed victims to great personal distress and anxiety, were often not caught by the existing law. The Law Commission defined a poison-pen letter as:

“a communication, written or otherwise, which is grossly offensive, or of an indecent, shocking or menacing character, [and which was sent] for the purpose of causing needless anxiety or

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<sup>9</sup> Law Commission, ‘Second Programme of Law Reform’ (1968) (No. 14), item XVIII, para. 2. [c17.pdf \(bailii.org\)](#)

<sup>10</sup> Law Commission, ‘Criminal Libel’ (Law Com Working Paper No 84, 1982). [c84.pdf \(bailii.org\)](#)

distress [to the recipient] or any other person.”<sup>11</sup> Whilst they tended to be abusive or frightening, poison pen letters did not amount to either civil or criminal libel as they were often not defamatory. Further, even if they were defamatory, they were often not published, as they were specifically targeted solely at the recipient. Moreover, they were not within the Public Order Act 1936.<sup>12</sup> as it then stood and, unless obscene, they were also outside the ambit of the Post Office Act 1953.<sup>13</sup>, which was principally intended for the protection of post office officials.<sup>14</sup> In its subsequent Report on Poison-Pen Letters.<sup>15</sup>, the Law Commission reiterated that there was no criminal offence which specifically penalised those persons who sent poison pen letters.<sup>16</sup> It evaluated a range of criminal offences that might come into play in certain circumstances, including s16 of the Offences Against the Person Act 1861, s2 Criminal Damage Act 1971 and s 21 Theft Act 1968.<sup>17</sup> before determining that such sanction (which ranged between a maximum penalty of 10 to 14 years’ imprisonment) would be inappropriate for many cases of poison pen letters and should be reserved for only very serious offences<sup>18</sup>.

While, for obvious reasons, the Law Commission was unable to quantify the scale of poison pen letters.<sup>19</sup>, it concluded that the harm caused by them was such that legislation criminalising such conduct should be considered. Accordingly, the Law Commission recommended the creation of a criminal offence, of limited scope, to deal with this particular harm<sup>20</sup>. It

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<sup>11</sup> Law Commission, ‘Criminal Libel’ (Law Com Working Paper No 84, 1982) [9.14]. See also Law Commission, ‘Poison-Pen Letters’ (Law Com No 147, 1985) [4.25].

<sup>12</sup> Specifically section 5, which referred to the use of threatening, abusive or insulting words or behaviour, or the distribution or display of any writing, sign, or visible representation which was threatening, abusive or insulting.

<sup>13</sup> It is an offence under section 11 of the Post Office Act 1953 for any person to send indecent or obscene material through the post. However, the original prohibition on sending indecent or obscene material through the post came in the form of S4 Post Office (Protection) Act 1884. Under the 1953 Act, there was no possibility of a custodial sentence (*Poison-Pen Letters* (No. 147) (1985), para 2.7).

<sup>14</sup> Law Commission, ‘Poison-Pen Letters’ (Law Com No 147, 1985) [2.9].

<sup>15</sup> Law Commission, ‘Poison-Pen Letters’ (Law Com No 147, 1985).

<sup>16</sup> Law Commission, ‘Poison-Pen Letters’ (Law Com No 147, 1985) [2.3].

<sup>17</sup> Law Commission, ‘Poison-Pen Letters’ (Law Com No 147, 1985) [2.10].

<sup>18</sup> Law Commission, ‘Poison-Pen Letters’ (Law Com No 147, 1985) [2.11].

<sup>19</sup> Law Commission, ‘Poison-Pen Letters’ (Law Com No 147, 1985) [2.17].

<sup>20</sup> Law Commission, ‘Poison-Pen Letters’ (Law Com No 147, 1985) [2.15], [3.8-3.9].

determined that the subsequent offence would be limited to letters or articles having specified characteristics (such as being indecent or grossly offensive)<sup>21</sup> – forms of communication such as oral, radio, telephone or other forms of electronic communication would be excluded<sup>22</sup>. The Law Commission further considered that it was essential to distinguish poison pen letters from other types of communication on the basis that they were sent for the purpose, and with the intention, of causing anxiety or distress, which, it determined, needed to be incorporated into the offence<sup>23</sup>. Specifically, it recommended that the nature of the thing sent (denoted by the descriptive terms) and the purpose (the causing of anxiety or distress) must be linked for imposition of criminal sanction<sup>24</sup> and that the maximum penalty for the new offence should be six months' imprisonment or a fine of £2,000 (level 5), or both<sup>25</sup>.

Accordingly, the draft malicious communications bill appended to the Report made provision for the punishment of a person who, without reasonable excuse, sends to another any article which

- (a) is, in whole or part, of an indecent or grossly offensive nature; or
  
- (b) conveys-
  - (i) a message which is of such a nature;
  - (ii) a threat which is not warranted; or
  - (iii) information which is false and known or believed to be false by the sender

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<sup>21</sup> Law Commission, 'Poison-Pen Letters' (Law Com No 147, 1985) [4.8-4.9].

<sup>22</sup> Law Commission, 'Poison-Pen Letters' (Law Com No 147, 1985) [4.7].

<sup>23</sup> Law Commission, 'Poison-Pen Letters' (Law Com No 147, 1985) [4.25 and 4.31].

<sup>24</sup> Law Commission, 'Poison-Pen Letters' (Law Com No 147, 1985) [4.33].

<sup>25</sup> Law Commission, 'Poison-Pen Letters' (Law Com No 147, 1985) [4.50].

Such a person would be guilty of an offence if it is his purpose (or among his purposes) that the article concerned, so far as falling within paragraph (a) or (b) above, should cause the person to whom he sends it distress or anxiety.

The draft bill was taken up, with some amendments (see below), as a private member's bill by Andrew Stewart<sup>26</sup>. It received all party support in Parliament and was generally well received. For example, it was documented that "It is drawn in wise language. It is firm, but it is nevertheless well drafted"<sup>27</sup> and "This is exactly the type of Bill that should be introduced by a private Member. It fills a gap in legislation. It is basically non-controversial, and it does not try to do a job that should be done by the Government"<sup>28</sup>. It therefore received a swift passage through Parliament and was enacted as the Malicious Communications Act in 1988.

S 1 of the Act covers the offence of sending letters etc. with intent to cause distress or anxiety. As originally enacted, s.1 provided:

1. (1) Any person who sends to another person-

(a) a letter or other article which conveys -

(i) a message which is indecent or grossly offensive;

(ii) a threat; or

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<sup>26</sup> Supported by Mr David Hams, Mr Michael Lord, Mrs Gillian Shephard, Mr Greg Knight, Ms Clare Short and Mr Tim Boswell.

<sup>27</sup> Hansard HC vol 127 col 613 (12 February 1988).

<sup>28</sup> Hansard HC vol 127 col 642 (12 February 1988).



(iii) information which is false and known or believed to be false by the sender; or

(b) any other article which is, in whole or part, of an indecent or grossly offensive nature,

is guilty of an offence if his purpose or one of his purposes in sending it is that it should, so far as falling within paragraph (a) or (b) above cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated

A person is not guilty of an offence under subsection (1)(a)(ii) above if he shows -

(a) that the threat was used to reinforce a demand which he believed he had reasonable grounds for making; and

(b) that he believed that the use of the threat was a proper means of reinforcing the demand.

As drafted, culpability would lie in the intention of the sender to cause distress or anxiety to the recipient, whether or not distress or anxiety is actually caused. This aspect of calculated and targeted harm is a significant feature of the offence: for example, letters need to be written, addressed, stamped and posted. The Act deals with communications aimed at particular individuals and not matter that is more widely disseminated. The original form of s.1(1) was confined to letters or other articles, such as tapes, videos or films – in other words, tangible things/property. There were already offences to deal with communications sent via the post or made by telephone, so the legislation was focussed on what were perceived to be the types of conduct that should be criminalised, including not only poison pen letters, but also other items sent with a view to causing distress or anxiety.

Examples of the types of conduct envisaged by the Law Commission and Parliament that the Act would cover, and examples from cases decided under the Act would include: excrement

posted through a letterbox (Law Commission Report No.147, para.4.10), delivering a coffin to a front door (HC Deb vol 127 col 620 12/2/88), sending a false death notice (HC Deb vol 127 col 608 (12/2/88), sending a live tarantula to a former employer (*The Times* 6/7/2006), sending photographs of aborted foetuses to a pharmacy (*Connolly v DPP* [2008] 1 WLR 276), sending a piece of wood infected with dry rot put through a letterbox (HC Deb vol 127 col 641 12/2/88), sending a poster of a newscaster with her eyes gouged out (HC Deb vol 127 col 615 (12/2/88), anonymous letters sent to widows following the Penlee lifeboat disaster in 1982 suggesting that they might be happy that their husbands had died because of the money they had received (HC Deb vol 127 col 615 (12/2/88), sending poison-pen letters suggesting that a man had been responsible for the death of his mother (HC Deb vol 127 col 615 (12/2/88), sending a package containing thirty pieces of silver (HC Deb vol 127 col 617 12/2/88), throwing a fire bomb at the front door of the leader of a local council (HC Deb vol 127 col 620 12/2/88), a letter sent to woman telling her falsely that her husband who is on a business trip abroad and out of contact, has been killed (HC Deb vol 127 col 624 12/2/88), letters containing racist threats (HC Deb vol 127 col 624 12/2/88) and other offences concerned with the sending of letters, as interpreted in the case of *Penketh* 1982 146 JP 56.<sup>29</sup>

To take account of developments in technology, s.1(1) was amended<sup>30</sup> to include electronic communications and provides:

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<sup>29</sup> See <https://hansard.parliament.uk/commons/1988-04-22/debates/8dc98fa0-e23a-4961-896a-7a13c15b073c/OffenceOfSendingLettersEtcWithIntentToCauseDistressOrAnxiety#1155>, last accessed 5 August 2021. 'In *Regina v. Penketh*, (...) a woman had appealed for a penfriend and had written to a person who turned out to be Penketh. He began to bombard her with letters and it reached the stage when she did not want to hear from him further. Penketh wrote to the woman's son's headmaster and, among other things, stated that he was the father of her child. He ultimately pleaded guilty to criminal libel and was placed on probation for three years, with a condition that he make no attempt to contact the woman again. However, he repeatedly breached that probation order and was ultimately sentenced to imprisonment which, on appeal, was determined to be nine months.'

<sup>30</sup> By s 43 Police and Criminal Justice Act 2001.

Any person who sends to another person—

(a) a letter, electronic communication or article of any description which conveys—

(i) a message which is indecent or grossly offensive;

(ii) a threat; or

(iii) information which is false and known or believed to be false by the sender; or

(b) *any article or electronic communication*<sup>31</sup> which is, in whole or part, of an indecent or grossly offensive nature, is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.

The premise behind the extension of the Malicious Communications Act to include electronic communication was essentially that, since e-mails can be malicious, they should be subject to appropriate legislation. However, this amendment increased significantly the scope of the legislation to cover mass communications that are capable of reaching a very large audience. It is notable that the number of prosecutions under this Act was minimal until it was extended to cover these types of exchanges. As detailed below in relation to the evaluation of the types of users captured under Section 1, there have recently been an array of prosecutions concerning a seemingly disparate range of behaviours and this increased scope of the Act inevitably raises questions in regards to restrictions on freedom of expression and, in turn, to Article 10 of the European Convention on Human Rights.<sup>32</sup> This is especially so when those restrictions involve

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<sup>31</sup> Emphasis added.

<sup>32</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10 [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf), last accessed 5 August 2021.

criminalising such conduct.<sup>33</sup> It has been accepted that, in principle, criminalising forms of expression is capable of being appropriate, as long as the limitations are prescribed by law, are recognised under Article 10(2) and are necessary in a democratic society.<sup>34</sup> Freedom of Expression is, of course, integral in democratic society and constitutes one of the essential foundations of a democratic society, representing one of the basic conditions for its progress and for the development of every man<sup>35</sup>. Accordingly, the Director of Public Prosecutions (DPP) has reminded prosecutors to exercise their discretion in ensuring that the cases that are prosecuted under the Act are ones deserving to go before the courts.<sup>36</sup> With this in mind, it is important to consider two key questions in respect of the criminal sanction of online communications under the legislation – firstly, whether the Malicious Communications Act is indeed fit for a mass communications arena and secondly, are the users of electronic communications similar to those originally envisaged under the Act?

### **Is the Malicious Communications Act fit for a mass communications arena?**

According to a 2015 report from the House of Lords Select Committee on Communications, 1.2 billion people regularly use Facebook, 34 million of them in the UK; 255 million regularly use Twitter, 15 million of them in the UK<sup>37</sup>. In 2017, 90% of households in Great Britain had

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<sup>33</sup> G Broadbent, 'Malicious Communications Act 1988: Human Rights' (2007) 71(4) JCL 288, 290.

<sup>34</sup> The carefully structured judgment of Dyson LJ, with which Stanley Burnton J agreed in *Connolly v DPP* [2007] EWHC 237 (Admin) do you need to pinpoint here?

<sup>35</sup> *Handyside v UK* (App no 5493/72) (1976)1 EHRR 737

<sup>36</sup> \_\_ 'The Code for Crown Prosecutors' (2018)

[http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/), last accessed 5 August 2021.

<sup>37</sup> Select Committee on Communications, 'Social media and criminal offences' HL (2014-15) 37 [7]

internet access.<sup>38</sup> and 99% of 12 to 15 year olds are online.<sup>39</sup> Recent statistics suggest that the number of regular Facebook users has now reportedly risen to 2.85 billion monthly active users as of the first quarter of 2021, with 54.8 million of those users being in the United Kingdom. This was almost 9.6 million more than the number of Facebook users a year prior, in April 2020.<sup>40</sup> There are also 192 million daily active users on Twitter.<sup>41</sup>, with 16.45 million of those users in the UK as of January 2021.<sup>42</sup>.

One of the unfortunate consequences of technological enhancement has been the rise in the number of crimes committed using this media. For example, hate crime offences recorded by police forces in England and Wales hit a high in 2020, with 103,379 in 2018-19 – up 10 per cent from the previous year and more than double the 2012-13 figure of 42,255. However, the Home Office statistics do not distinguish between crimes committed online and offline. The Crown Prosecution Service does not hold data which identifies the number of hate crime prosecutions where offending occurred online.<sup>43</sup> Vaughan has however commented that, whilst some 1,851 online hate crime cases were logged up to August 2019, fewer than 1% of those reported resulted in charges.<sup>44</sup>.

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<sup>38</sup> For more information see Office for National Statistics, Internet access – households and individuals, Great Britain: 2017 (3 August 2017), available at

<https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2017>

<sup>39</sup> Department for Digital, Culture, Media & Sport, *Online Harms White Paper* (December 2020)

<https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper#contents>, last accessed 5 August 2021

<sup>40</sup> \_\_\_, 'Number of monthly active Facebook users worldwide as of 1st quarter 2021' (2021)

<http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>, last accessed 5 August 2021.

<sup>41</sup> Y Lin, '10 Twitter statistics every marketer should know in 2021 (infographic)' (2021) [10 Twitter Statistics Every Marketer Should Know in 2021 \[Infographic\] \(oberlo.co.uk\)](#) last accessed 5 August 2021.

<sup>42</sup> \_\_\_, 'Leading countries based on number of Twitter users as of April 2021' (2021)

<https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-selected-countries/> last accessed 5 August 2021

<sup>43</sup> H Vaughan, 'Less than 1% of cases reported to online hate crime unit resulted in charges' *The Independent* (London 30 Dec 2019) <https://www.independent.co.uk/news/uk/home-news/online-hate-crime-report-charge-sadiq-khan-a9263316.html>, last accessed 5 August 2021.

<sup>44</sup> H Vaughan 'Less than 1% of cases reported to online hate crime unit resulted in charges' *The Independent* (London 30 Dec 2019) <https://www.independent.co.uk/news/uk/home-news/online-hate-crime-report-charge-sadiq-khan-a9263316.html>, last accessed 5 August 2021.

Of course, not all incidents reported to police are crimes, and some complainants do not want to see charges brought. However, it has been observed that users of social media are increasingly being prosecuted under malicious communications or other types of abuse legislation<sup>45</sup>. Between 1st November 2010-1st November 2013, there was an increase of 217% in the number of criminal cases heard under Section 1 of the Malicious Communications Act 1988 and Section 127 of the Communications Act 2003 involving social media users. Of the two, the Malicious Communications Act is used less often (see below) and it remains that there is only a limited amount of case law available in relation to it<sup>46</sup>.

As Section 1 of the Malicious Communications Act 1988 was never intended to apply to mass communications, prosecuting social media users under it is a controversial step. The nature of the electronic communications community means that there are differences between online and offline malicious communications and the Malicious Communications Act 1988 fails to take account of these. As Wood and Smith note, “Communicating in computer-mediated contexts is somehow different than any other form of communication”<sup>47</sup>. Others posit that “There is no existing parallel social construct, and in many ways, the Internet creates wholly new social constructs”<sup>48</sup> and that “The potential integration of text, images and sounds in the same system, interacting from multiple points, in chosen time (real or delayed) along a global network, in conditions of open and affordable access, does potentially change the character of communication”<sup>49</sup>. It is clear therefore that online communications have signalled altogether

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<sup>45</sup> Big Brother Watch, ‘Careless Whispers: How speech is policed by outdated communications legislation’ (Report) (February 2015) 10 <http://www.bigbrotherwatch.org.uk/wp-content/uploads/2015/02/Careless-Whisper.pdf>, last accessed 5 August 2021.

<sup>46</sup> L Scaife, *Handbook of Social Media and the Law* (Routledge 2015) 165.

<sup>47</sup> AF Wood and MJ Smith, *Online Communication* (2<sup>nd</sup> edn LEA, 2005) 3.

<sup>48</sup> JT Costigan, ‘Introduction: Forests, trees and Internet research’ in S Jones (ed), *Doing Internet research : Critical issues and methods for examining the net* (Sage, 1999) 6.

<sup>49</sup> M Castells, M, *The Rise of the Network Society: Economy, Society and Culture* (2<sup>nd</sup> edn Blackwell Publishing, 2000) 356.

new behaviours and communicative norms across formerly discrete channels.<sup>50</sup> because, with the advent of electronic communications and social media, in particular, “everyone has an opinion about everyone else, and they want everyone to hear it”<sup>51</sup>. This is particularly the remit of social networking sites, emails, mailing lists, discussion groups, and websites, all of which can have extraordinary reach.<sup>52</sup>

This point is reinforced by Strater and Lipford, who identify that the structure of electronic communications is such that there is no need for the natural contingency between content and audience because users rarely adjust the audience settings each time they post information.<sup>53</sup> The lack of face to face interaction possible online means that electronic communications are de-coupled from the tangible requirement to specify targeted recipients. Therefore, online communicators do not necessarily select what content is accessible to which audience and this shows a marked difference with poison pen letters. This aspect of online communications is well observed by Castells, who has noted that “The development of electronic communication ... allows for an increasing disassociation between spatial proximity and the performance of everyday life’s functions”<sup>54</sup> – including the mailing of a letter through a postbox because, often, these types of communications are made by “one too many” as opposed to private or direct messaging. This means that the physical requirement to write, seal, stamp, and, crucially, to post at a postbox does not exist in this form of media. Therefore, the dynamic interactions between individuals in this forum create a system with emergent properties.<sup>55</sup> and historically

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<sup>50</sup> F Yakob, ‘Digital currents and invisible futures’ in S Pont, *Digital State: How the Internet is Changing Everything* (Kogan Page, 2013) 15.

<sup>51</sup> T Quinn, ‘I’ve been expecting you. Law for a digital state’, in S Pont, *Digital State: How the Internet is Changing Everything* (Kogan Page, 2013) 127.

<sup>52</sup> NK Baym, *Personal Connections in the Digital Age* (2<sup>nd</sup> edn Polity Press, 2015) 13.

<sup>53</sup> K Strater and HR Lipford, ‘Strategies and Struggles with Privacy in an Online Social Networking Community’ (2008) (2008) British Computer Society 114.

<sup>54</sup> M Castells, *The Rise of the Network Society: Economy, Society and Culture* (2<sup>n</sup> edn Blackwell Publishing, 2000) 424.

<sup>55</sup> F Yakob, ‘Digital currents and invisible futures’ in S Pont, *Digital State: How the Internet is Changing Everything* (Kogan Page, 2013) 17.

new forms of social interaction - properties and forms that were never envisaged under the original drafting of the Malicious Communications Act – and this is exacerbated by the numbers of anonymous online publishers, which the Act is ill-equipped to address.

In short, electronic communications are a very different animal from the physical, tangible and directed communications that the Act was originally intended to cover. This is because the emergence of Internet-based social media has made it possible for one person to communicate with hundreds or even thousands of other people. In short, it does not require the same degree of tangible, directed communication that other forms of media require.

### **Are the users of electronic communications similar to those originally envisaged under the Act?**

In addition to the nature of communication in this forum and its lack of tangible direction, the type of *user* differs to that envisaged at the time the Malicious Communications Act was being discussed. During this time, the usual writers of poison pen messages were identified as being “invariably women—often ... some poor woman going through the menopause in a village somewhere”.<sup>56</sup> Recent studies appear to refute this trend in relation to online communicators. For example, Dutton et al consider that gender in general seems to be largely irrelevant to Internet usage<sup>57</sup>, a stance supported by Moll et al who determine that this method of communicating has become an integral cultural practice and feature amongst adolescents and young adults during the last decade especially, regardless of gender.<sup>58</sup> Other commentators

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<sup>56</sup> Hansard HC vol 136 col 1325 (8 July 1988)

<sup>57</sup> WH Dutton, G Blank and D Groselj, ‘Cultures of the Internet: The Internet in Britain’ (Report) (2013) 22 <http://oxis.oii.ox.ac.uk/wp-content/uploads/sites/43/2014/11/OxIS-2013.pdf>, last accessed 5 August 2021.

<sup>58</sup> R Moll, S Pieschl and R Bromme, ‘Competent or clueless? Users’ knowledge and misconceptions about their online privacy management’ (2014) 41 *Computers in Human Behavior* 212, 212 <http://www.sciencedirect.com/science/article/pii/S0747563214004853>, last accessed 5 August 2021.



have identified a link between online messaging and masculinity or the “chest thumping display of online egos”<sup>59</sup>. This all suggests that the authors of online media and poison pen are not necessarily directly comparable and should not necessarily be caught by the same legislation.

It has been argued that hate speech is an anathema to the civilised world. It is a menace that erodes the values of equality, respect and solidarity<sup>60</sup>. Others determine that any abuse capable of causing emotional distress on the victim should be considered as hate speech and that the law should define insults capable of causing emotional injury as hate and for the application of stricter measures in dealing with derogatory remarks on social media<sup>61</sup>. As the internet continues to grow and transform our lives, often for the better, we should not ignore the very real harms which people face online every day. Whilst there can be no doubt that the harm caused by online abuse must be addressed, it must be addressed appropriately and utilising criminal law to address undesired expression is always going to be a contentious issue<sup>62</sup>.

Further, the authors of online media are increasingly being brought to task under communications legislation that was never intended to cover the type of communications currently being made. The ease with which campaigns of intimidation and messages of an unsavoury, malicious or broadly anti-social nature may be broadcast online has led to widespread concern that this conduct is adequately tackled by appropriate sanction and it is most certainly the case that crimes can now be committed in ways previously unavailable

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<sup>59</sup> D Myers, ‘A new environment for communication play : only play’ in GA Fine (ed) *Meaningful Play, Playful Meaning* (Human Kantics, 1987) 241.

<sup>60</sup> N Alkiviadou, ‘Regulating Hatred: Of Devils and Demons?’ (2018) 18(4) *IJDL*, 218.

<sup>61</sup> AE Arimoro and AA Elgujja, ‘When Dissent by Football Fans on Social Media Turns to Hate: Call for Stricter Measures’ (2019) 6(1) *University of Maidguri JPL* ISSN: 15960617, Available at SSRN: <https://ssrn.com/abstract=3644645>, last accessed 5 August 2021.

<sup>62</sup> See The Criminal Bar Association, *CBA Response to the Law Commission’s consultation paper entitled “Harmful Online Communications: The Criminal Offences”* (January 2021), para 24. Available at <https://www.criminalbar.com/wp-content/uploads/2021/01/CBA-Response-to-the-Law-Commission%E2%80%99s-consultation-paper-entitled-%E2%80%9CHarmful-Online-Communications-The-Criminal-Offences%E2%80%9D.pdf>, last accessed 5 August 2021.

before technological advancement. Technology has, for example, made theft capable of being committed in several ways – for example, instead of stealing cash, online resources have made it possible to, inter alia, divert money away from a persons’ bank account – the offence remains the same (that of theft). But, is it right that users of social media could potentially be brought within the remit of criminal sanction based on their electronic communications given that these offences are very different from the tangible offences originally envisaged under Section 1? Given that electronic communications feature heavily amongst young people<sup>63</sup>, this risks those users being sanctioned by and brought into the criminal justice system at an early stage which can have an impact on their future career chances.

Legal sanctions are tailored to reflect the severity of a situation. However, what users of social media are being punished for under the revised Section 1 is arguably manifestly different from the intentions as originally drafted and this brings into question whether the adaption of this legislation produces questionable outcomes and, further, whether the maximum sentence that applies should be applicable to the social media offences at all.

To convict and sentence a person, a court must be satisfied that the offence is made out and part of this evaluation, in the context of malicious communications legislation, revolves around contested meanings as to what is “malicious”. Recent cases under Section 1 of the Malicious Communications Act 1988 seemingly illustrate a diverse range of behaviours may be caught by the interpretation of this under the legislation. By way of example, in 2017, a defendant was sentenced to 20 months imprisonment and received a 5-year restraining order preventing him from erasing internet history for racially aggravated malicious communications against

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<sup>63</sup> R Moll, S Pieschl and R Bromme, ‘Competent or clueless? Users’ knowledge and misconceptions about their online privacy management’ (2014) 41Computers in Human Behavior 212, 212  
<http://www.sciencedirect.com/science/article/pii/S0747563214004853>, last accessed 5 August 2021.

Muslims and Pakistani communities. The defendant had posted abusive and threatening videos which “spread the word of hatred, dissent and caused significant fear amid the community at large”<sup>64</sup>. Later, in 2020, a defendant was sentenced for sending six abusive e-mail messages to the Mayor of Bristol<sup>65</sup>. The defendant admitted that he had sent the emails and that he felt embarrassed about them but considered that they were not offensive. In other words, the severity of the e-mails was perhaps questionable. The defendant received a non-custodial sentence in this instance. However, in June 2021, an individual was sentenced under Section 1 for sending menacing and threatening messages to politicians - including death threats. The defendant admitted 28 counts of sending an electronic communication with intent to cause distress or anxiety, contrary to Section 1(1)(a) of the Malicious Communications Act 1988 and was sentenced to 12 months in prison<sup>66</sup>. The CPS said at the time that “The barrage of messages ... sent ... was disturbing and caused alarm and distress among his targets and their staff. They contained vile and nasty personal comments as well as threats to cause extreme violence including, on one occasion, death by decapitation”<sup>67</sup>. Arguably, all these cases involve harmful content, but their severity is variable and yet they are all caught by the same legislation. The point here is that criminal law is a strong approach for something done in the moment, which is often uninhibited, casual and ill thought out”<sup>68</sup>, as compared with writing a letter which conceivably takes more deliberation (particularly given the physical steps required to actually send a letter once written).

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<sup>64</sup> Judge Elizabeth Nicholls. See <https://www.thelawpages.com/court-cases/PH-21313-1.law>, last accessed 5 August 2021.

<sup>65</sup> \_\_\_ ‘Man sentenced for sending malicious email after Bristol statue toppled’ (2021) <https://www.cps.gov.uk/cps/news/man-sentenced-sending-malicious-email-after-bristol-stature-toppled>, last accessed 5 August 2021. See further, <https://www.thelawpages.com/court-cases/MR-31132-1.law>, last accessed 5 August 2021.

<sup>66</sup> Crown Prosecution Service, \_\_\_ ‘Man sentenced for sending menacing and threatening messages to politicians’ (2021) <https://www.cps.gov.uk/london-south/news/man-sentenced-sending-menacing-and-threatening-messages-politicians>, last accessed 5 August 2021.

<sup>67</sup> Crown Prosecution Service, \_\_\_ ‘Man sentenced for sending menacing and threatening messages to politicians’ (2021) <https://www.cps.gov.uk/london-south/news/man-sentenced-sending-menacing-and-threatening-messages-politicians>, last accessed 5 August 2021.

<sup>68</sup> *Smith v ADVFN Plc* [2008] EWHC 1797 (QB) 14.

Whilst the recent cases detailed above do serve as a timely reminder that individuals should not feel that they can write what they want to others and that there should be laws to protect all members of the public from malicious and offensive communications, they also highlight a broad-brush approach to the reach of the legislation. This has been engendered by the fact that the extension of the Malicious Communications Act 1988 to incorporate new forms of interaction has involved a conceptual shift from the types of physical communication envisaged in the original version: those that required a series of actions, steps, and contemplation to be carried out. Electronic communications are of a wholly different nature: they may easily, speedily and with very little deliberation be composed and disseminated to a mass audience and lack the physicality inherent in the original legislation. Therefore, the nature of the criminality itself is changed under the new legislation because online communications are of a different order to physical or tangible communications. Not only that, but, under s.1 of the Malicious Communications Act 1988, an item is required to be *grossly* offensive, not simply offensive, and given that the remarks posted in electronic communications media “are often not intended, or to be taken, as serious”<sup>69</sup>, it is difficult to reconcile this requirement with the realities of communicating online. Therefore, because of its legal requirements, the Act struggles in its appropriateness. Accordingly, the extension to the Act is, therefore, arguably misplaced and represents an unfortunate knee jerk reaction to keep pace with technological advancement.

### **The Communications Act 2003**

Other avenues of sanction are available. One such example is the Communications Act 2003. This Act gave effect to the Government’s proposals for the reform of the regulatory framework

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<sup>69</sup> *Smith v ADVFN Plc* [2008] EWHC 1797 (QB) [17].

for the communications sector, as set out in the Communications White Paper, *A New Future for Communication*.<sup>70</sup> The Act was developed in a post-internet phase and, though not without its problems, is possibly more adept at dealing with situations of online abuse than the Malicious Communications Act. Section 127 covers the offence of sending, by means of a public electronic communications network, a message of a menacing, offensive or obscene character. Under Section 127, a person is guilty of an offence if they:

Send by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character<sup>71</sup>; or

Cause any such message or matter to be sent<sup>72</sup>

A person is guilty under this Section if they:

Send by means of a public electronic communications network, a message that he knows to be false<sup>73</sup>;

Cause such a message to be sent<sup>74</sup>; or

Persistently makes use of a public electronic communications network<sup>75</sup>.

If found guilty under this Section, a person may be liable, on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5, or to both.

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<sup>70</sup> Departments for Trade and Industry and Culture, Media and Sport 'A New Future for Communications: White Paper on the Communications Bill (Cm 5010) HC (2000).

<sup>71</sup> S 127 (1) (a)

<sup>72</sup> S 127 (1) (b)

<sup>73</sup> S 127 (2) (a)

<sup>74</sup> S 127 (2) (b)

<sup>75</sup> S 127 (2) (c)

Section 127 therefore covers the offence of sending, by means of a public electronic communications network, a message of a menacing, offensive or obscene character. The offences contained in section 127 can be traced to legislation relating to the misuse of public service facilities, such as the postal service.<sup>76</sup> and was aimed at ensuring propriety in communications over public electronic communications networks.<sup>77</sup>.

Almost all forms of internet-based communications today fall within the scope of the Section 127 offence.<sup>78</sup> Distinguishing between good jokes, bad jokes, and illegal jokes can be an unenviable task for law enforcement, particularly where there is also a lack of clarity on the other elements of the offence, such as the meaning of indecency or gross offensiveness. This in turn can make it difficult to know when a defence submission that the message was sent and intended “just as a joke” will succeed or not.<sup>79</sup> Accordingly, interpretative challenges are arising in the online context<sup>80</sup> and, as with the Malicious Communications Act 1988, the breadth of Section 127 does make it problematic.

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<sup>76</sup> Section 4(1)(c) of the Post Office (Protection) Act 1884 prohibited sending packets that contained any words, marks or designs of an indecent, obscene, or grossly offensive character. See also [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6\\_5039\\_LC\\_Online\\_Comms\\_Report\\_FINAL\\_291018\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf), 76

<sup>77</sup> *DPP v Collins* [2006] UKHL 40; [2006] 1 WLR 2223 at [7].

<sup>78</sup> Law Commission, ‘Abusive and Offensive Online Communications: A Scoping Report’ (Law Com No 381 Cm 1682, 2018) [82] [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6\\_5039\\_LC\\_Online\\_Comms\\_Report\\_FINAL\\_291018\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf) last accessed 5 August 2021

<sup>79</sup> Law Commission, ‘Abusive and Offensive Online Communications: A Scoping Report’ (Law Com No 381 Cm 1682, 2018) [85] [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6\\_5039\\_LC\\_Online\\_Comms\\_Report\\_FINAL\\_291018\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf) last accessed 5 August 2021

<sup>80</sup> Law Commission, ‘Abusive and Offensive Online Communications: A Scoping Report’ (Law Com No 381 Cm 1682, 2018) [94] [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6\\_5039\\_LC\\_Online\\_Comms\\_Report\\_FINAL\\_291018\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf) last accessed 5 August 2021

Section 127 is also a controversial tool for the criminal sanction of online communications. One of the primary criticisms of Section 127 is its outdated nature, due to it preceding the launch of social network sites such as Facebook (2004) and Twitter (2006)<sup>81</sup>. This means that there is a lack of clarity surrounding the elucidation of “public electronic communications network”, the issue being whether social media sites would fall within the definition required by Section 127. Whilst it is not clear on a black letter reading of the law if the Communications Act 2003 is applicable to such sites<sup>82</sup>, both the internet itself and the social media sites that it houses have been acknowledged as public electronic communications networks, hence potentially falling under this legislation<sup>83</sup> and the UK’s Director of Public Prosecutions (DPP) has recently issued Guidelines on Prosecuting Cases Involving Communications Sent via Social Media. According to this guidance, communications sent via social media may, inter alia, involve the commission of communications offences contrary to Section 1 Malicious Communications Act 1988 and / or Section 127 Communications Act 2003<sup>84</sup>.

Scaife argues that Section 127 retains the lack of clarity in the law which is precisely the mischief which needs to be addressed<sup>85</sup>. Certainly, there have been cases in which this law has been engaged without good reason<sup>86</sup>. However, there are others in which the writers of abusive online messages have rightly been brought to task<sup>87</sup> and Section 127 has been considered to be

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<sup>81</sup> Big Brother Watch, ‘Careless Whispers: How speech is policed by outdated communications legislation’ (Report) (February 2015)<sup>10</sup>  
<http://www.bigbrotherwatch.org.uk/wp-content/uploads/2015/02/Careless-Whisper.pdf> last accessed 5 August 2021.

<sup>82</sup> L Scaife, *Handbook of Social Media and the Law* (Routledge, 2015) 131.

<sup>83</sup> *Chambers v DPP* [2012] EWHC 2157 (Admin); [2013] 1 WLR 1833. For comment, see R. Griffiths “Social media and the criminal law” (2013) 24 Ent. L.R. 57.

<sup>84</sup> See \_\_\_, ‘Social Media - Guidelines on prosecuting cases involving communications sent via social media’ (CPS website 2018) <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media>, last accessed 5 August 2021.

<sup>85</sup> L Scaife, *Handbook of Social Media and the Law* (Routledge 2015) 143.

<sup>86</sup> *Chambers v DPP* [2012] EWHC 2157 (Admin); [2013] 1 WLR 1833.

<sup>87</sup> See \_\_\_, ‘Troll Peter Nunn guilty of MP Stella Creasy rape tweets’, *BBC News*, (London 2 September 2014) <http://www.bbc.co.uk/news/uk-england-london-29034943> last accessed 5 August 2021.

the more prominent piece of legislation in terms of social media crime than the Malicious Communications Act<sup>88</sup>.

Statistics appear to confirm this. Prosecution figures under Section 127 indicate that prosecutions rose steadily from 2013 (1315 prosecutions) to 2015 (1715), before consistently falling thereafter and reaching a low of 1096 in 2020.<sup>89</sup> By comparison, prosecution figures under the Malicious Communications Act indicate that, whilst prosecutions totalled 689 in 2013, rising in 2015 to 749, there were just 75 prosecutions in 2016, 12 in 2017, 14 in 2018, 10 in 2019 and 16 in 2020.<sup>90</sup> Overall, prosecutions under both the Malicious Communications Act and Section 127 legislation appear to have dropped steadily in recent years.

Antoniou<sup>91</sup> has noted that current legislation fails to address the fast-moving online environment and requires the introduction of proportionate and more effective criminal offences. The most prominent problems with current legislation stem from the large number of overlapping offences which can be confusing, over and underinclusive offences – for example, there is currently no general criminal offence for creating and spreading ‘fake news’, however, under public safety and electoral laws false communications are unlawful. Antoniou further notes that there is ambiguity of certain elements applicable to online offences. Ambiguous terms are a particular problem: ‘grossly offensive’, ‘obscene’, ‘indecent’ are all included in the legislation, as detailed above, but how do these transcribe online and are off-line offences

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<sup>88</sup> Big Brother Watch, ‘Careless Whispers: How speech is policed by outdated communications legislation’ (Report) (February 2015) 7 <http://www.bigbrotherwatch.org.uk/wp-content/uploads/2015/02/Careless-Whisper.pdf> last accessed 5 August 2021.

<sup>89</sup> Ministry of Justice, *Criminal justice system statistics quarterly, England and Wales, year ending December 2020 (annual)* (Report) (20 May 2021) <https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly> last accessed 5 August 2021.

<sup>90</sup> Ministry of Justice, *Criminal justice system statistics quarterly, England and Wales, year ending December 2020 (annual)* (Report) (20 May 2021) <https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly> last accessed 5 August 2021.

<sup>91</sup> A Antoniou, ‘GB-United Kingdom: The Law Commission publishes report on abusive and offensive online communications’ IRIS 2019-1/23 [akantoniou-iris-2019.1-23.pdf](http://akantoniou-iris-2019.1-23.pdf) (essex.ac.uk) last accessed 5 August 2021.



sufficiently flexible to incorporate online activity and adapt to any future changes? The problem here stems from interpretation of imprecise terms which affect the rule and predictability of law, equality, consistency and the principle of non-retrospectivity.

However, the low number of charges is thought to be due to the high Crown Prosecution Service (CPS) charging threshold for online hate, and the difficulties investigators face in obtaining information from social media companies, as well as the presence of ambiguous terms such as “gross offensiveness” “obscenity” and “indecenty”, which fail to provide the required clarity for prosecutors.<sup>92</sup>.

Leake has commented that whilst the offences in Section 127(1) and (2) are relatively straightforward, their application to the whole of the public electronic communications network makes them far more intrusive than must have been contemplated when the offences were first enacted in Section 10(2) of the Post Office (Amendment) Act 1935.<sup>93</sup> For example, sending 10 telegrams or making as many telephone calls in a day in 1935 (or as many emails or SMS messages in 2003) might well have been regarded as persistent. But today that might well be considered rather differently given the explosion in the use of electronic messaging and the rapid evolution of new forms of electronic communication.<sup>94</sup>.

By way of illustration, in the December 2020 case of *Scottow v CPS*<sup>95</sup>, ten tweets sent by the appellant in March 2019 could not be regarded as persistent use of the network and hence could

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<sup>92</sup> Law Commission, ‘Abusive and Offensive Online Communications: A Scoping Report’ (Law Com No 381 Cm 1682, 2018) [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6\\_5039\\_LC\\_Online\\_Comms\\_Report\\_FINAL\\_291018\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf) last accessed 5 August 2021

<sup>93</sup> Stephen Leake, ‘New Cases: Substantive Law: Improper Use of Public Electronic Communications Network’ (2021) 8 CLW 4

<sup>94</sup> *Ibid.*

<sup>95</sup> *Scottow v CPS* [2020] EWHC 3421 (Admin)

not be considered a criminally improper use of the network contrary to Section 127(2)(c). The communications must have some connecting theme or other factor if they are to count as persistent, and it cannot be enough that they all refer, or in some way relate, to the same individual. Here, the appellant's tweets were a conversation with the complainant, of a moderately challenging kind, but nothing more and nothing worse. A prosecution and conviction under 127(2)(c) would have represented a grossly disproportionate and entirely unjustified state interference with free speech as the statutory mischief did not extend to *causing offence* online. The case represented the first time that the Divisional Court had considered the meaning of the word "persistently" in Section 127(2) and its predecessors, the purposive mens rea requirement in that offence, and the application of Article 10(2) of the European Convention on Human Rights to it. Leake determines that it was regrettable that the court did not take the opportunity to give separate and detailed consideration to each of these issues and instead dealt with the case using a broad-brush approach. As a result, there remains no clearly discernible ratio arising from the judgment, although it is important to note that the court held<sup>96</sup> that the Section 127(2)(c) offence was not aimed at the communication of information or ideas that *offend* the recipient, or even the communication of messages that have *offence* as a purpose. Its object was to prohibit the abuse of the facilities afforded by a publicly funded network by repeatedly exploiting those facilities to communicate with another for no other purpose than to annoy them, or cause them inconvenience, or needless anxiety." Accordingly, the required threshold for liability under Section 127(2) could not be considered to have been met<sup>97</sup>. The changes in practice in the use of electronic communications, coupled with the linguistic challenges inherent within legislation that was not developed with this in mind, therefore, continue to dominate.

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<sup>96</sup> *Scottow v CPS* [2020] EWHC 3421 (Admin), at para 32, emphasis added

<sup>97</sup> See further N Dobson, 'The dark arts' (2021) 171 NLJ 7919.

## **An Enduring Challenge**

An enduring challenge remains concerning the role of the *criminal* law in combatting harmful online communications and a variety of approaches have been posited. For example, in recent years, commentators have argued that there would be considerable benefit in reviewing whether the offences in Section 127 of the Communications Act 2003 and Section 1 of the Malicious Communications Act 1988 should be amalgamated into one coherent set of offences<sup>98</sup>, thereby making prosecution more straightforward. It is, however, difficult to discern what would be achieved in practice, given that both pieces of legislation have their interpretative challenges in the online arena.

There are other alternative approaches and ways in which the public's genuine frustrations about anti-social behaviour and the perceived failure of the authorities to tackle it have been addressed. For example, the Crime and Disorder Act 1998 created the anti-social behaviour order (ASBO), which empowered a magistrate to impose a range of prohibitions, requested by a police officer or local authority representative, on an individual who had engaged in an undefined range of behaviours which had either caused or had the potential to cause offence. These prohibitions did not address the offending behaviour directly but were designed to prevent the opportunity for offensive behaviour from arising. Any breach of the prohibitions was a criminal offence, potentially attracting a substantial custodial sentence, irrespective of whether the offensive behaviour itself had been repeated<sup>99</sup>. Such orders have been applied to

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<sup>98</sup> Law Commission, 'Abusive and Offensive Online Communications: A Scoping Report' (Law Com No 381 Cm 1682, 2018) [95]  
[https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6\\_5039\\_LC\\_Online\\_Comms\\_Report\\_FINAL\\_291018\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf) last accessed 5 August 2021

<sup>99</sup> P Edwards, 'New ASBOs for old?' (2015) JCL 79(4)257, 257.

malicious communications. For example, in 2008, a 52-year-old man who sent poison pen letters, humiliated his victims on websites and sent hundreds of emails to 17 villagers was given an ASBO which banned him from entering the village or contacting his victims. However, in 2014, in a bid to introduce ‘simpler, more effective powers to tackle anti-social behaviour’<sup>100</sup> the Coalition government replaced the ASBO with two new instruments: a postconviction Criminal Behaviour Order (CBO) and a wholly civil anti-social behaviour injunction (ASBI).<sup>101</sup>

As per Part 2 of the Anti-social Behaviour, Crime and Policing Act 2014, a CBO is an order which, for the purpose of preventing the offender from engaging in such behaviour—

(a) prohibits the offender from doing anything described in the order;

(b) requires the offender to do anything described in the order.<sup>102</sup>

The ASB Injunction came into force in March 2015. It is a purely *civil* order<sup>103</sup>, applied for in a county court, and with breach treated as contempt of court. Contempt proceedings have the symbolic merit of not giving the contemnor a criminal record<sup>104</sup>. Whilst individuals must be cognisant of the fact that harm caused by online abuse must be dealt with, it must be addressed appropriately and extending the reach of criminal sanction may not be the best way of tackling

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<sup>100</sup> See Home Office, 'Anti-social Behaviour, Crime and Policing Act' (Collection of documents relating to the bill, 2013) <https://www.gov.uk/government/collections/anti-social-behaviour-crime-and-police-bill>, last accessed 5 August 2021.

<sup>101</sup> The process of reform began in 2011 with the publication of a Home Office consultation paper entitled *More Effective Responses to Anti-Social Behaviour*, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/118296/asb-consultation-document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118296/asb-consultation-document.pdf), last accessed 5 August 2021. A White Paper, *Putting Victims First: More Effective Responses to Anti-Social Behaviour*, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228863/8367.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228863/8367.pdf), last accessed 5 August 2021, followed in 2012 once the responses to the consultation had been considered.

<sup>102</sup> Anti-social Behaviour, Crime and Policing Act 2014 c. 12, Part 2 Criminal behaviour orders, S 22(5)

<sup>103</sup> Often applied in the context of housing, but can also be applied to non-housing related anti social behaviours.

<sup>104</sup> P Edwards, 'New ASBOs for old?' JCL 2015, 79(4) 257, 264.

this. However, it is also debateable whether having several routes of sanction, each with a different focus designed to tackle a particular problem, has created problems in relation to both charging selection<sup>105</sup> and prosecution<sup>106</sup>, as the statistics presented above appear to confirm.

The limitations of the existing law concerning harmful online communications and how that behaviour is best tackled continue. In recognition of the variety of persisting problems, in February 2018 a review by the UK's Law Commission of the law in relation to abusive and offensive online communications was announced. Law Commission (Phase I) determined that the law governing offensive online behaviour was out of date and recommended reform and consolidation of existing criminal laws dealing with offensive and abusive communications online<sup>107</sup>. At the time, Law Commissioner Professor David Ormerod QC commented: 'There are laws in place to stop abuse but we've moved on from the age of green ink and poison pens...The digital world throws up new questions and we need to make sure that the law is robust and flexible enough to answer them. If we are to be safe, both on and off line, the criminal law must offer appropriate protection in both spaces'<sup>108</sup>.

Phase II of the Law Commission's consultation exercise was launched in September 2020, and the consultation period ran until 18 December 2020. The Government has subsequently accepted the Law Commission's recommendations to reform the communications offences,

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<sup>105</sup> Padfield argues, for example, that judges continue to impose short custodial sentences under existing legislation, which begs the question of whether short sentences do enough to compel an offender to reflect on their behaviour. See N Padfield, 'Offensive and abusive online communications' (2018) 12 CLR 943, 944.

<sup>106</sup> Kat Shields and Katie Jones, 'Tackling Online Trolling', CL&J (2016) 180 JPN 666, 666.

<sup>107</sup> Law Commission, Abusive and Offensive Online Communications: A Scoping Report (2018) Law Com No 381 [95]

[https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6\\_5039\\_LC\\_Online\\_Comms\\_Report\\_FINAL\\_291018\\_WEB.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf) last accessed 5 August 2021.

<sup>108</sup> <https://www.lawcom.gov.uk/government-asks-law-commission-to-look-at-trolling-laws/#:~:text=Law%20Commissioner%20Professor%20David%20Ormerod,flexible%20enough%20to%20answer%20them>

made in the 2021 Modernising Communications Offences report and intends to include the offences in the Online Safety Bill<sup>109</sup>. Whilst it remains to be seen whether, in due course, Parliament will enact new offences, Leake<sup>110</sup> has submitted that, at least in relation to Section 127, there is an urgent need for it to do so given that an offence created in relation to telegrams and telephone calls more than 85 years ago is no longer apt to apply to more modern forms of communication.

## **Conclusion**

Two broad offences are often engaged in relation to online abuse: Section 1 of the Malicious Communications Act 1988 and Section 127 of the Communications Act 2003. This article has focused on the genealogy of the legislation and identified key problems with extending the existing principles underpinning the regulations to cover electronic communication. This mode of communication has made it possible for one person to communicate with hundreds or even thousands of other people at the click of a button. It does not require the same degree of tangible, directed communication that other forms of media do require. Hence, electronic communications are a very different animal from the physical, tangible and directed communications that the Acts examined in this article were originally intended to cover. The extension of The Malicious Communications Act 1988 to include electronic communications has not been satisfactory at meeting its aims because new communications media are of a different rank to physical or tangible communications the Act was intended to capture. Specifically, and as discussed above, the enlargement of the Act fails to fully take in to account

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<sup>109</sup> Law Commission, Modernising Communications Offences, A final Report (HC 547, Law Com No 399, 2021) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2021/07/Modernising-Communications-Offences-2021-Law-Com-No-399.pdf>

<sup>110</sup> Stephen Leake, 'New Cases: Substantive Law: Improper Use of Public Electronic Communications Network' (2021) 8 CLW 4.

the social dynamics of online users or the complexities of mass communications networks. Further uncertainty surrounds the 1988 Act's use of the term "grossly offensive" communication, which may be so broadly defined as to fall foul of the principle of legal certainty.<sup>111</sup> As Baym, articulates, "the new media are not cyberspaces juxtaposed with the offline"<sup>112</sup>, hence legislation drafted to suit offline contexts cannot necessarily simply be enlarged so as to rightly apply to online situations. Similarly, whilst the Communications Act 2003 and, in particular, Section 127 is perhaps more applicable to this forum and type of communicating because it was developed in a post-internet phase, this also, is not without its problems given the linguistic uncertainty prevalent within that legislation. This represents an enduring challenge in order to meet the realities of 21<sup>st</sup> Century communications that will likely see a change in the landscape going forward, but whether this results in an *adaptation* of existing legislation as opposed to the *development* of legislation very much with new communications media in mind remains to be seen. In conclusion, it is inadvisable to merely *adapt* legislation, when instead there is a need to *develop* legislation.

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<sup>111</sup> Kat Shields and Katie Jones, 'Tackling Online Trolling', CL&J (2016) 180 JPN 666, 667.

<sup>112</sup> NK Baym, *Personal Connections in the Digital Age* (2<sup>nd</sup> edn Polity Press, 2015) 177.