

# Full Fact - response to the consultation on communications offences

Full Fact is a charity that exists to inform and improve public debate. We exist in effect to reduce the prevalence of harmful false and misleading information in public debate.

We are leaders in artificial intelligence in our field. Our 2016 paper on automated fact checking was called "seminal" by the Reuters Institute and we were one of 20 winners of the Google AI for Social Good Impact Challenge - out of 2,600 applicants from more than 100 countries.

Online, our fact checking work is used by Facebook, Google, Instagram, WhatsApp, and YouTube.

We are members of the government's Policy Forum on covid misinformation and regularly give evidence to relevant select committees.

We welcome the Law Commission's careful attention to this area and we are grateful for the very high quality consultation paper.

We offer this short submission to signpost our concerns based on our specific operational and technical expertise as well as our principled concerns. If it would be helpful to discuss any of this further or for us to expand on it, we would be glad to.

While we welcome the attempt to bring the law more clearly into line with the requirements of the ECHR and proportionality, we have serious doubts about the proposed offences, particularly in relation to false communication.

Broadly our concerns fall in the following areas -

- (1) They cannot achieve the goals set for them because enforcement at scale works differently than enforcement in the courts, and they will have foreseeable but unintended consequences that are damaging to freedom of expression. ('The internet scale problem')
- (2) They cannot achieve the goals set for them because in practice harmful misinformation works differently than the offence supposes. ('The falsity problem')
- (3) They may over-criminalise.

A critical consequence of all this is that it seems to us that the proposals may well blur the distinction being relied upon in the planned Online Safety legislation between illegal content and legal but harmful content in ways that are detrimental to legal clarity, freedom of expression, and the coherence of the statute book. We would like to understand how the Commission expects this all to work in practice and at the moment we have not understood.

## **THE INTERNET SCALE PROBLEM**

The Commission's paper makes clear that the mischief these new offences seeks to address includes large-scale online activity, "abusive online communications... sent and received on an enormous scale".

Full Fact recognises that online abuse damages public debate, and participation in public debate. The Commission's description of some of the challenges is very helpful and we agree about the scale of harmful misinformation.

We can see two ways a communications offence can seek to have the scale of effect the Commission identifies as needed.

The first is enforcement for deterrence. A small number of particularly egregious offenders are prosecuted in the hope that this acts as a deterrent to other offenders. The clear risk here is of a chilling effect. The broad language of the proposed offence suggests that individuals are unlikely to be able to anticipate accurately what they can do and may.

The second is automated enforcement. In practice, as we know from our own work with the internet companies and in developing these technologies, machine learning is used to identify, flag, and take action on specific items of content and those who share them. Internet companies are rightly under pressure to act on illegal content.

In proposing an offence that creates a broad and hard-to-define category of illegal false content, the Commission risks cutting across the legal-but-harmful vs illegal content distinction relied upon in online enforcement.

The reality, we suggest, might be that the legal safeguards provided by the courts are mostly irrelevant to how this offence will in practice be enforced: by machine learning algorithms developed privately by internet companies under political pressure from governments. Given the reality of how content moderation works at internet scale, we would like to see the Commission consider this interaction in more depth, and whether it makes the case for much more explicit and clearly bounded offences.

## **THE FALSITY PROBLEM**

The proposed offence specifically targets false information.

In practice, the challenge with this is that, in our experience, misinformation is often deliberately designed to be not false but to create a false impression in the minds of the audience. It is often possible, and often simple, to manipulate a false claim into a true claim that is in effect misleading.

The Commission will understand that proving that a sender knows information to be false will often be challenging in a misinformation context but we understand this is an intentional limit.

## **OVER-CRIMINALISATION**

The balance between harm and freedom of expression is something that needs broad debate in parliament and society.

We expect that the Commission will receive many submissions arguing that either the false information offence appears to criminalise normal behaviour that would be widely accepted as normal, or that the reasonable excuse test has to do far more work than lay people can reasonably be expected to understand. We have difficulty believing that this proposed offence creates an appropriate level of legal certainty for people.