

The Committee is chaired by Dr. T.K. Visanathan, former Union Law Secretary and Secretary General, Lok Sabha and comprised inter alia of the following Dr. Gulshan Rai, National Cyber Security Coordinator, Prof (Dr) Sivakumar Member Law Commission of India Shri Navjeet Wasan IPS (retd) former DG, BPR&D, Shri. P.K. Dubey, Legal expert. Mr. Saji Kumar, Joint Secretary Ministry of Law and Justice; Dr, Ritika Verma DFSS, Ministry of Home Affairs; Shri Prasad Addl Secy, Ministry of Home Affairs and Sh. Vyom Shah Advocate.

The Committee has accordingly proposed substantive alterations in the IPC and procedural safeguards in the Information Technology Act.¹ The same have been discussed in the following paragraphs.

- a) **Amendments to the Indian Penal Code** - Taking cue from the proposition of the Law Commission of India 267th Report on Hate Speech,² the Expert Committee has in its draft formulation adopted the Commission's proposal subject to certain modifications to suit the aspect of content regulation on social media or other internet platforms used for articulating and advocating harmful opinions.

The primary step taken by the Committee is thus, bringing forth the additions of Sections 153 C and 505 A in the Indian Penal Code imbibing the following alterations therein namely, "intention" has been explicitly affixed in the both the suggested provisions that is, the need for intent during both stages of the offence viz., (i) during communicating information on the basis of specified grounds and, (ii) to cause fear or incitement, has been established.

¹ It is imperative to mention herein that during the vibrant deliberation on combating this issue, the representatives from the Ministry of Women and Child Development stressed upon re-introducing a renovated section 66 A within the Information Technology Act, incorporating suitable change therein however, it was mooted by the other members, propagating the view of the Chair in this regards, advocating the need to grasp the fact that the IT Act is essentially commercial in nature and therefore, for any act invoking punishment, a specific provision must be inserted in the Indian Penal Code which is more competent to tackle criminal affairs. Accordingly, the suggested amendments were initiated and finalized.

² supra note 27; 267th Law Commission Report on Hate Speech.

Additionally, the word “fear” used simpliciter by the Law Commission in the draft provisions submitted by it, has been specified by suffixing it with “fear of injury”. Another pertinent refinement moved relates to incorporation of the phrase “any means of communication” implying hereby that an act, as asserted by the afore sections, to incite hatred or cause fear, alarm or provocation of violence, regardless of the communication mode that has been deployed, including the internet, to convey the expression, shall be punishable if the offence under the prescribed sections is otherwise made out.

Further, the draft formulations also take into account the constitutional infirmities that the Supreme Court found in relation to Section 66A of the Information Technology Act, 2000. In *Shreya Singhal*, the Court found that not defining terms such as “grossly offensive” or “menacing” fell foul of Article 19(1)(a), due to the wide scope for discretion it allowed and the consequential chilling effect on freedom of speech. Accordingly, in the draft formulations of Sections 153C and 505A, only online speech that relates to religion, race, caste, community, sex, gender, place of birth, residence and language falls within the purview of the proposed section.

In relation to Section 153C(a) it is critical to note that the formulation proposes to regulate threatening words on any of the grounds mentioned above only if the person used them with the intent to cause fear of injury or alarm. In addition, a high bar has been created to ensure that speech that is not “gravely threatening” is not treated as an offence under this provision. Similarly, the proposed Section 153C(b) can be distinguished from the erstwhile Section 66A which was struck down for being vague as it criminalised offensive and annoying speech. The proposed formulation, on the other hand, clearly defines the kind of speech that would constitute an offence. Accordingly, the proposed Section 153C (b) criminalises online speech only when it both advocates hatred and causes the incitement of an offence.

The last category of online speech that is proposed to be categorized as an offence is speech that is “highly disparaging, abusive or inflammatory against any person or group of persons”, and is uttered *with the intention to cause “fear of injury or alarm”* (Section 505 A (a)) and speech that

is “*gravely threatening or derogatory information*” and uttered with “*intent to provoke the use of unlawful violence*” (Section 505A(b)). This formulation requires that the speech be highly disparaging, abusive or inflammatory, *and* is made with the intention to cause fear of injury or alarm or that the speech be gravely threatening or derogatory and made with the intention to provoke violence. The proposed formulations therefore penalise online speech to the extent that it is linked to grounds that have the potential to affect social stability or disturbs public order. In addition, the speech itself must be gravely threatening, advocating hatred or abusive and inflammatory. In our opinion, this should ensure that there is no chilling effect on online speech.

The draft formulation of sections 153C and 505A finalized by the Expert Committee is as follows:

Prohibiting Incitement to Hatred

"153 C. Whoever on grounds of religion, race, caste or community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe, uses any means of communication to -

- (a) gravely threaten any person or group of persons with the intention to cause fear of injury or alarm; or*
- (b) advocate hatred towards any person or group of persons that causes, or is likely to cause, incitement to commit an offence*

shall be punishable with imprisonment of either description for a term which may extend to two years or a fine up to Rs 5000, or with both.

Explanation: In this section,

- (a) "means of communication" shall include any words either spoken or written, signs, visible representations, information, audio, video or combination of both*

transmitted, retransmitted or sent through any telecommunication service, communication device or computer resource;

- (b) "telecommunication service" shall have the meaning assigned to it in clause (k) of subsection (1) of section 2 of the Telecom Regulatory Authority of India Act, 1997;
- (c) "communication device" shall have the meaning assigned to it in clause (k) of subsection (1) of section 2 of the Information Technology Act 2000;
- (d) "computer resource" shall have the meaning assigned to in clause (ha) of subsection (1) of section 2 of the Information Technology Act, 2000.

Causing Fear, Alarm or Provocation of Violence in Certain Cases.

"505 A. (1). Whoever, intentionally, on grounds of religion, race, caste or community, sex, gender, sexual orientation, place of birth, residence, language, disability or tribe, uses any means of communication to communicate-

(a) highly disparaging, indecent, abusive, inflammatory, false' or grossly offensive information with the intention to cause fear of injury or alarm; or

(b) gravely threatening or derogatory information with the intent to provoke the use of unlawful violence,

against any person or group of persons, shall be punished with imprisonment for a term which may extend to one year and with fine up to Rs 5000, or both.

Explanation: In this section,

- (a) "means of communication" shall include any words either spoken or written, signs, visible representations, information, audio, video or combination of both transmitted, retransmitted or sent through any telecommunication service, communication device or computer resource;

- (b) *"telecommunication service" shall have the meaning assigned to it in clause (k) of subsection (1) of section 2 of the Telecom Regulatory Authority of India Act, 1997;*
- (c) *"communication device" shall have the meaning assigned to it in clause (k) of subsection (1) of section 2 of the Information Technology Act 2000;*
- (d) *"computer resource" shall have the meaning assigned to in clause (ha) of subsection (1) of section 2 of the Information Technology Act, 2000."*

Besides the Indian Penal Code, the Expert Committee has also suggested amendments to certain provisions of the Code of Criminal Procedure 1973 and the Information Technology Act 2000 as follows, namely:-

Amendments to the Code of Criminal Procedure 1973

It has been noted that law enforcement agencies face several challenges during investigation and prosecution of harmful online conduct due to the dearth of technically trained police personnel, lack of access to expert advice, procedural hurdles in conducting cross jurisdictional investigations, absence of comprehensive data on the crimes reported and the lack of a quick and streamlined procedure for takedown of malicious online content.

In an attempt to address some of these issues, the Committee proposes the insertion of two new provisions namely, sections 25B and 25C in the Code of Criminal Procedure 1973 thereby creating the post of a State Cyber Crime Coordinator and establishing a District Cyber Crime Cell, respectively. The details pertaining to the State Cyber Crime Coordinator vis-à-vis his qualifications, appointment and functions along with the role, composition and conditions of service of the members of the District Cyber Crime Cell respectively, have been mentioned in these sections. The goal of these provisions is to create a cadre of trained cyber experts, both from within the police force and experts in the fields of information technology, digital

forensics, cyber law, etc. to ensure the effective investigation and management of cyber offences.

State Cyber Crime Coordinators

"25B (1) The State Government shall appoint an officer not below, or equivalent to, the rank of an Inspector General of Police, who shall be the Cyber Crime Coordinator of the State.

(2) The functions of the State Cyber Crime Coordinator shall be to:

- (a) oversee the functioning of the District Cyber Crime Cells in the State;
- (b) recommend to the State Government the procedures and best practices to be adopted by the police officers under Section 78 of the *Information Technology Act, 2000* and the District Cyber Crime Cells while investigating any offence under *the Information Technology Act 2000 or involving computer and electronic media under the Indian Penal Code, 1860 or any other law*;
- (c) oversee the training of police officers and experts in the District Cyber Crime Cells in the State;
- (d) coordinate with the State Cyber Crime Coordinators of other States in case of offences under this Act that fall under the jurisdiction of two or more States; *and*
- (e) *carry out such other functions as may be specified by the State Government."*

District Cyber Crime Cells

"25C (1) The State Government shall establish a District Cyber Crime Cell in every district to assist in the investigation of offences -

- (a) *under the Information Technology Act, 2000; and*
 - (b) *involving computer and electronic media under the Indian Penal Code, 1860 or any other law.*
- (2) The District Cyber Crime Cell shall consist of
- (a) *an officer not below, or equivalent to, the rank of Deputy Superintendent of Police, who shall be the head of the District Cyber Crime Cell;*

- (b) such number of Sub-Inspectors as the State Government may deem fit; and*
- (c) at least three experts in information technology, mobile telephony, digital forensics, cyber law or such other experts with such qualifications to be appointed by the State Government in accordance with the rules made under subsection (4).*
- (3) The head of the District Cyber Crime Cell shall report to the State Cyber Crime Coordinator of the State through his supervisory officers.*
- (4) The State Government shall prescribe by rules -*
- (i) the manner of appointment and the terms and conditions of service or empanelment of the members of the District Cyber Crime Cells under sub section (2);*
 - (ii) qualifications of experts under clause (c) of sub section (2)."*

Amendments to the Information Technology Act 2000

At present Section 78 of the IT Act 2000 authorises only officer of the rank of Inspector and above to investigate offences under this Act. However, as young police officers, who are directly recruited at the level of Sub-inspectors are better equipped and trained to investigate cyber offences, there has been a demand from the State Police that this provision needs an amendment. Based on requests received from various stakeholders, an amendment to section 78 of ***the Information Technology Act 2000*** has been suggested to authorize a police officer not below the rank of Sub-Inspector, assisted by a District Cyber Crime Cell, to investigate into any offence committed under the Information Technology Act 2000. The revised section reads as follows:

"Section 78 - Power to investigate offences

"78. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a police officer not below the rank of Sub-Inspector, shall investigate any offence under this Act and shall seek assistance in this regard from the District Cyber Crime Cell established under section 25C of the Code of Criminal Procedure 1973."

Before we conclude the Committee feels that to prevent the abuse of powers by the investigation agencies and to safeguard innocent users of social media it will be worth emulating the practice of U.K. Crown Prosecution Service which follow certain Guidelines viz the Code for Crown Prosecutors which is issued by the Director of Public Prosecutions (DPP)³ under section 10 of the Prosecution of Offences Act 1985.

- (a) The Code for Crown Prosecutors gives guidance to prosecutors on the general principles to be applied when making decisions about prosecutions. The Code is issued primarily for prosecutors in the CPS, but other prosecutors follow the Code either through convention or because they are required to do so by law. The decision to prosecute or to recommend an out-of-court disposal is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with utmost care;

- (b) These Guidelines *inter alia* set out the approach that prosecutors should take when making decisions in relation to cases where it is alleged that criminal offences have been committed by the sending of a communication via social media. They are designed to give clear advice to prosecutors who have been asked either for a charging decision or for early advice to the police, as well as in reviewing those cases which have been charged by the police. Adherence to these guidelines will ensure that there is a consistency of approach across the CPS;

- (c) The Guidelines cover the offences that are likely to be most commonly committed by the sending of communications via social media. "Social media" commonly refers to the use of electronic devices to create, share or exchange information, ideas, pictures and videos with others via virtual communities and networks. For the purposes of these guidelines, this includes emails and texts and other forms of electronic communications;

³ The DPP is the head of the Crown Prosecution Service (CPS), which is the principal public prosecution service for England and Wales. The DPP operates independently, under the superintendence of the Attorney General who is accountable to Parliament for the work of the CPS; See *supra* n.43

- (d) These Guidelines equally apply to the re-sending (or re-tweeting / sharing) of communications and whenever they refer to the sending of a communication, the guidelines should also be read as applying to the re-sending of a communication. However, for the reasons set out below, the context in which any communication is sent will be highly material;

- (e) These Guidelines are primarily concerned with offences that may be committed by reason of the nature or content of a communication sent via social media. Where social media is simply used to facilitate some other substantive offence, prosecutors should proceed under the substantive offence in question.

However since under the scheme of our Code of Criminal Procedure 1973 there is no such provision for issue of Guidelines the Expert Committee has not suggested any amendment to provide for any Guidelines. However the Central Government may consult all the State Governments and other stake holders to explore the possibility of amending the Code of Criminal Procedure 1973 to provide for such Guidelines. Incorporation of such Guidelines generally and in particular with reference to offences involving social media platforms will go a long way in preventing the recurrence of instances where innocent persons have been subject to harassment for exercising their rights.