CPS

Interim guidelines on prosecuting cases involving communications sent via social media

Issued by the Director of Public Prosecutions

19 December 2012

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Introduction

1. These guidelines 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. The guidelines 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.

2. The guidelines cover the offences that are likely to be most commonly committed by the sending of communications via social media. These guidelines equally apply to the resending (or retweeting) of communications and whenever they refer to the sending of a communication, the guidelines should also be read as applying to the resending of a communication. However, for the reasons set out below, the context in which any communication is sent will be highly material.

3. 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.

4. These guidelines are interim guidelines and they have immediate effect. At the end of the public consultation period, they will be reviewed in light of the responses received. Thereafter final guidelines will be published.

General Principles

5. Prosecutors may only start a prosecution if a case satisfies the test set out in the Code for Crown Prosecutors. This test has two stages: the first is the requirement of evidential sufficiency and the second involves consideration of the public interest.

6. As far as the evidential stage is concerned, a prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. This means that an objective, impartial and reasonable jury (or bench of magistrates or judge sitting alone), properly directed and acting in accordance with the law, is more likely than not to convict. It is an objective test based upon the prosecutor's assessment of the evidence (including any information that he or she has about the defence).

7. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

8. It has never been the rule that a prosecution will automatically take place once the evidential stage is satisfied. In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.

9. Every case must be considered on its own individual facts and merits. No prospective immunity from criminal prosecution can ever be given and nothing in these guidelines should be read as suggesting otherwise.

10. In the majority of cases, prosecutors should only decide whether to prosecute after the investigation has been completed. However, there will be cases occasionally where it is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these cases, prosecutors may decide that the case should not proceed further.

11. Cases involving the sending of communications via social media are likely to benefit from early consultation between police and prosecutors, and the police are encouraged to contact the CPS at an early stage of the investigation.

Initial assessment

12. Communications sent via social media are capable of amounting to criminal offences and prosecutors should make an initial assessment of the content of the communication and the course of conduct in question so as to distinguish between:

    (1) Communications which may constitute ***credible threats*** of violence to the person or damage to property.

    (2) Communications which ***specifically target an individual or individuals*** and which may constitute harassment or stalking within the meaning of the Protection from Harassment Act 1997 or which may constitute other offences, such as blackmail.

    (3) Communications which may amount to a ***breach of a court order***. This can include offences under the Contempt of Court Act 1981 or section 5 of the Sexual Offences (Amendment) Act 1992. All such cases should be referred to the Attorney General, and via the Principal Legal Advisor's team where necessary.

(4) Communications which do not fall into any of the categories above and fall to be considered separately (see below): i.e. those which may be considered ***grossly offensive, indecent, obscene or false***.

13. As a general approach, cases falling within paragraphs 12 (1), (2) or (3) should be prosecuted robustly where they satisfy the test set out in the Code for Crown Prosecutors. Whereas cases which fall within paragraph 12(4) will be subject to a ***high threshold*** and in many cases a prosecution is ***unlikely*** to be in the public interest.

14. Having identified which of the categories set out in paragraph 12 the communication and the course of conduct in question falls into, prosecutors should follow the approach set out under the relevant heading below.

(1) Credible threats

15. Communications which may constitute credible threats of violence to the person may fall to be considered under section 16 of the Offences Against the Person Act 1861 if the threat is a threat to kill within the meaning of that provision.

16. Other credible threats of violence to the person may fall to be considered under section 4 of the Protection from Harassment Act 1997 if they amount to a course of conduct within the meaning of that provision and there is sufficient evidence to establish the necessary state of knowledge.

17. Credible threats of violence to the person or damage to property may also fall to be considered under section 127 of the Communications Act 2003 which prohibits the sending of messages of a "menacing character" by means of a public telecommunications network. However, before proceeding with a prosecution under section 127, prosecutors should heed

the words of the Lord Chief Justice in *Chambers v DPP* [2012] EWH2 2157 (Admin) where he said:

> "… *a message which does not create fear or apprehension in those to whom it is communicated, or may reasonably be expected to see it, falls outside [section 127(i)(a)], for the simple reason that the message lacks menace*." (Paragraph 30)

As a general rule, threats which are not credible should not be prosecuted, unless they form part of a campaign of harassment specifically targeting an individual within the meaning of the Protection from Harassment Act 1997.

18. Where there is evidence of discrimination, prosecutors should pay particular regard to the provisions of section 28-32 of the Crime and Disorder Act 1998 and section 145 of the Criminal Justice Act 2003 (increase in sentences for racial and religious aggravation) and section 146 of the Criminal Justice Act 2003 (increase in sentences for aggravation related to disability, sexual orientation or transgender identity).

(2) Communications targeting specific individuals

19. If communications sent via social media target a specific individual or individuals, they will fall to be considered under the Protection from Harassment Act 1997 where they amount to a course of conduct within the meaning of section 7 of that Act. In such cases, prosecutors should follow the CPS Legal Guidance on Stalking and Harassment.

20. Where communications target a specific individual and the offence of blackmail is made out, prosecutors should seek to prosecute the substantive offence.

21. Again, where there is evidence of discrimination, prosecutors should pay particular regard to the provisions of section 28-32 of the Crime and

Disorder Act 1998 and section 145 of the Criminal Justice Act 2003 (increase in sentences for racial and religious aggravation) and section 146 of the Criminal Justice Act 2003 (increase in sentences for aggravation related to disability, sexual orientation or transgender identity).

(3) Breach of court orders

22. Court orders can apply to those communicating via social media in the same way as they apply to others. Accordingly, any communication via social media that may breach a court order falls to be considered under the relevant legislation, including the Contempt of Court Act 1981 and section 5 of the Sexual Offences (Amendment) Act 1992, which makes it an offence to publish material which may lead to the identification of a victim of a sexual offence.

23. In such cases, prosecutors should follow the CPS Legal Guidance on Contempt of Court and Reporting Restrictions and observe the requirement for contempt cases to be referred to the Attorney General, and via the Principal Legal Advisor's team where necessary.

(4) Communications which are grossly offensive, indecent, obscene or false.

24. Communications which do not fit into any of the categories outlined above fall to be considered either under section 1 of the Malicious Communications Act 1988 or under section 127 of the Communications Act 2003. These provisions refer to communications which are grossly offensive, indecent, obscene, menacing or false (but as a general rule, menacing communications should be dealt with under the section above on credible threats).

25. Section 1 of the Malicious Communications Act 1988 deals with the sending to another of an electronic communication which is indecent or grossly offensive, or which conveys a threat, or which is false, provided

there is an intention to cause distress or anxiety to the recipient. The offence is one of sending, delivering or transmitting, so there is no legal requirement for the communication to reach the intended recipient. The terms of section 1 were considered in *Connolly v DPP* [2007] 1 ALL ER 1012 and "indecent or grossly offensive" were said to be ordinary English words. A person guilty of an offence under section 1 of the Malicious Communications Act 1998 is liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine or both.

26. Section 127 of the Communications Act 2003 makes it an offence to send or cause to be sent through a "public electronic communications network" a message or other matter that is "grossly offensive" or of an "indecent, obscene or menacing character". The same section also provides that it is an offence to send or cause to be sent a false message "for the purpose of causing annoyance, inconvenience or needless anxiety to another." The defendant must be shown to have intended or be aware that the message was grossly offensive, indecent or menacing, which can be inferred from the terms of the message or from the defendant's knowledge of the likely recipient. The offence is committed by sending the message. There is no requirement that any person sees the message or be offended by it.

27. In *Chambers v DPP* [2012] EWHC 2157 (Admin), the Divisional Court held that because a message sent by Twitter is accessible to all who have access to the internet, it is a message sent via a "public electronic communications network". Since many communications sent via social media are similarly accessible to all those who have access to the internet, the same applies to any such communications. However, section 127 of the Communications Act 2003 does not apply to anything done in the course of providing a programme service within the meaning of the Broadcasting Act 1990.

Context and approach

28. Every day many millions of communications are sent via social media and the application of section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 to any that are grossly offensive, indecent, obscene or menacing or that are false if there is an intention to cause annoyance, inconvenience or needless anxiety to another, creates the potential that a very large number of cases could be prosecuted before the courts. Taking together, for example, Facebook, Twitter, LinkedIn and YouTube, there are likely to be hundreds of millions of communications every month.

29. In these circumstances there is the potential for a chilling effect on free speech and prosecutors should exercise considerable caution before bringing charges under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. There is a ***high threshold*** that must be met before criminal proceedings are brought and in many cases a prosecution is ***unlikely*** to be required in the public interest.

1. Do you agree with the approach set out in paragraph 12 above to initially assessing offences which may have been committed using social media?

The High Threshold

30. Since both section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 engage Article 10 of the European Convention on Human Rights, prosecutors are reminded that these provisions must be interpreted consistently with the free speech principles in Article 10, which provide that: *"Everyone has the right to freedom of expression. This right shall include the freedom to hold*

opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …"

31. As the European Court of Human Rights has made clear, Article 10 protects not only speech which is well-received and popular, but also speech which is offensive, shocking or disturbing (*Sunday Times v UK* (No 2) [1992] 14 EHRR 123):

"Freedom of expression constitutes one of the essential foundations of a democratic society…it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also as to those that offend, shock or disturb …"

32. Freedom of expression and the right to receive and impart information are not absolute rights. They may be restricted but only where a restriction can be shown to be both:

- Necessary and
- Proportionate.

These exceptions, however, must be narrowly interpreted and the necessity for any restrictions convincingly established (see the judgment of the European Court in the *Sunday Times* case at paragraph 50)

33. The common law takes a similar approach. In *Chambers v DPP* [2012] EWHC 2157 (Admin), the Lord Chief Justice made it clear that:

"*Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by [section 127 of the Communications Act 2003]."*

34. Prosecutors are reminded that what is prohibited under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 is the sending of a communication that is ***grossly*** offensive. A communication sent has to be more than simply offensive to be contrary to the criminal law. Just because the content expressed in the communication is in bad taste, controversial or unpopular, and may cause offence to individuals or a specific community, this is not in itself sufficient reason to engage the criminal law. As Lord Bingham made clear in *DPP v Collins* [2006] UKHL 40:

> "*There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context*".

35. Context is important and prosecutors should have regard to the fact that the context in which interactive social media dialogue takes place is quite different to the context in which other communications take place. Access is ubiquitous and instantaneous. Banter, jokes and offensive comments are commonplace and often spontaneous. Communications intended for a few may reach millions. As Eady J stated in the civil case of *Smith v ADVFN* [2008] 1797 (QB) in relation to comments on an internet bulletin board :

> *".. [they are] like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take'."*

36. Against that background, prosecutors should only proceed with cases under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 where they are satisfied that the communication in question is more than:

- Offensive, shocking or disturbing; or
- Satirical, iconoclastic or rude comment; or
- The expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it.

If so satisfied, prosecutors should go on to consider whether a prosecution is required in the public interest.

2. Do you agree with the threshold as explained above, in bringing a prosecution under section 127 of the Communications Act 2003 or section 1 of the Malicious Communications Act 1988?

The public interest

37. When assessing whether a prosecution is required in the public interest, prosecutors must follow the approach set out in the Code for Crown Prosecutors and the approach set out in these guidelines.

38. Since section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 engage Article 10 of the European Convention on Human Rights, no prosecution should be brought unless it can be shown on its own facts and merits to be both necessary and proportionate.

39. Each case must be considered on its own facts and its own merits. However, a prosecution is unlikely to be both necessary and proportionate where:

a. The suspect has swiftly taken action to remove the communication or expressed genuine remorse;

b. Swift and effective action has been taken by others for example, service providers, to remove the communication in question or otherwise block access to it;

c. The communication was not intended for a wide audience, nor was that the obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question; or

d. The content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.

3. Do you agree with the public interest factors set out in paragraph 39 above?

4. Are there any other public interest factors that you think should also be included?

40. However, where a particular victim is targeted and there is clear evidence of an intention to cause distress or anxiety, prosecutors should carefully weigh the effect on the victim. A prosecution for an offence under section 1 of the Malicious Communications Act 1988 may be in the public interest in such circumstances, particularly if the offence is repeated.

Children and young people

41. The age and maturity of suspects should be given significant weight, particularly if they are under the age of 18. Children may not appreciate

the potential harm and seriousness of their communications and a prosecution is rarely likely to be in the public interest.

Public order legislation

42. Although some cases falling within paragraphs 12 (1) – (4) may fall to be considered under public order legislation, such as Part 1 of the Public Order Act 1986, particular care should be taken in dealing with social media cases in this way because public order legislation is primarily concerned with words spoken or actions carried out in the presence or hearing of the person being targeted (i.e. where there is physical proximity between the speaker and the listener) and there are restrictions on prosecuting words or conduct by a person in a dwelling.

43. Prosecutors are reminded that in *Redmond-Bate v DPP* (Divisional Court, 23 July 1999), Sedley LJ emphasised that under the Public Order Act 1986 the mere fact that words were irritating, contentious, unwelcome and provocative was not enough to justify the invocation of the criminal law unless they tended to provoke violence. In a similar vein in *Dehal v CPS* [2005] EWHC 2154 (Admin), Moses J, referring to section 4A of the Public Order Act 1986, held that:

> "*the criminal law should not be invoked unless and until it is established that the conduct which is the subject of the charge amounts to such a threat to public order as to require the invocation of the criminal as opposed to the civil law*" (paragraph 5).

44. However, in some cases, prosecutors may be satisfied that the incitement provisions in Part III of the Public Order Act 1986 are relevant and should be used. Such cases must be referred to the Special Crime and Counter Terrorism Division (SCCTD) and require the consent of the Attorney General to proceed.

Handling arrangements

45. These guidelines come into effect on 19 December 2012.

46. Any cases that fall to be considered under these interim guidelines will be dealt with by the relevant CPS Area (or CPS Direct). However, for the duration of the interim guidelines, CPS Areas and CPS Direct should notify the Principal Legal Advisor of any cases that they intend to prosecute under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 at the earliest possible stage at Principal.LegalAdvisor@cps.gsi.gov.uk.

5. Do you have any further comments on the interim policy on prosecuting cases involving social media?

ANNEX A

The consultation process

The purpose of this consultation is to seek a range of views on the Interim Guidelines on prosecuting cases in relation to communications sent via Social Media.

We welcome your comments by no later than **13 March 2013**.

Questions for consultation

We have identified a number of questions which are outlined at the end of the Consultation Paper on which we would particularly invite comment.

If you are replying by email, we should be grateful if you would not attach any other documents to the consultation paper. There are limits on the size of documents that we are able to accept and any completed consultation document which has an attachment runs the risk of not being delivered. If you wish to send an attachment to us, please email us separately at socialmedia.consultation@cps.gsi.gov.uk.

If you use a special software program to read the Consultation Document and you find that you have difficulty in reading it, please get in touch with the Team whose contact details are set out in the How to Respond section.

If you would like to return your replies to the question at the back of the Consultation Document by post, please download the Interim Guidelines in PDF format.

Alternatively, you can read the draft Interim Guidelines on the CPS website.

How to respond

Both written and electronic responses to the consultation are acceptable, although we would prefer electronic replies on the completed pro-forma.

Please be aware that if you complete and return this document by email, you will be responding over the open internet. If you would prefer, please complete and return the PDF version to the postal address given below.

Please include your name, organisation (if applicable), postal address and email address.

Closing date for responses: **13 March 2013**

Responses can be sent by post to:

Interim Guidelines on Social Media Consultation Team
Strategy and Policy Directorate
Crown Prosecution Service
9th Floor
Rose Court
Southwark Bridge
SE1 9HS

or by email to: socialmedia.consultation@cps.gsi.gov.uk

Welsh language documents

The following consultation documents are available for download in Welsh:

- Interim guidelines on prosecuting cases in relation to communications sent via social media (Adobe PDF document - 70kb).

  Dadlwythwch y ddogfen ymgynghori ynglŷn â cyfarwyddiadau interim Erlyn achosion sydd yn gysylltiedig a chyfryngau cymdeithasu (Dogfen PDF Adobe 70kb).

- Consultation response document (Microsoft Word file - 34kb).

  Dadlwythwch y ddogfen ymateb Gymraeg ynglŷn â'r ymgynghoriad (Dogfen Microsoft Word – 34kb).

Alternative formats

If you require a copy of this Consultation Paper in any other format, for example, audio or large print, please contact the postal address above.

Next steps

We will consider every individual response received. A summary of the consultation responses will be published on the CPS website in accordance with the Government's guidelines.

Responses: Confidentiality and disclaimer

The information you send us may be passed to colleagues within the CPS, the Government or related agencies. Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information legislation including the Freedom of Information Act 2000 (FOIA).

If you want the information that you provide to be treated as confidential, please be aware that, under FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could briefly explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded as binding on the CPS.

Please ensure your response is marked clearly if you wish your response and name to be kept confidential. Confidential responses will be included in any statistical summary of numbers of comments received and views expressed. The CPS will process your personal data in accordance with the Data Protection Act 1998 - in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Government Consultation Principles

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before;
- departments will need to give more thought to how they engage with and consult with those who are affected;
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy; and;
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

The complete Consultation Principles are available from the Cabinet Office website.

Response Pro Forma

When responding it would helpful if you would complete this pro forma. Please fill out your name and address or that of your organisation if relevant. You may withhold these details if you wish but we will be unable to include you in future consultation exercises.

Response Sheet

Contact details:

Please supply details of who has completed this response.

Response completed by (name):	
Position in organisation (if appropriate):	
Name of organisation (if appropriate):	
Address:	
Contact phone number:	
Contact e-mail address:	
Date:	

Please answer the consultation questions in the boxes below.

1. Do you agree with the approach set out in paragraph 12 to initially assessing offences which may have been committed using social media?

2. Do you agree with the threshold in bringing a prosecution under section 127 of the Communications Act 2003 or section 1 of the Malicious Communications Act 1988?

3. Do you agree with the public interest factors set out in paragraph 39?

4. Are there any other public interest factors that you think should also be included?

5. Do you have any further comments on the interim policy on prosecuting cases involving social media?

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