CPS Consultation on Interim Guidelines on prosecuting cases involving communications sent via social media: JUSTICE Response

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Introduction

1. Founded in 1957, JUSTICE is a UK-based all-party human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. JUSTICE has worked for many years on the protection of individual rights in the context of progressions in technology (e.g. *Privacy and the Law* (1970)). We continue to work to ensure that criminal prosecutions of speech and expression are narrowly confined and limited to circumstances where criminal sanction is necessary in order to protect the rights of others and proportionate in all the circumstances of the offence. For example, we have worked for many years to highlight the inconsistency of the prosecution of the use of "insulting" words or behaviour pursuant to sections 4 and 5 of the Public Order Act 1980 with the right to free expression guaranteed by Article 10 ECHR, currently under consideration in the Crime and Courts Bill.

2. On the 19 December 2012 the Director of the Public Prosecutions issued interim guidelines for prosecutors on cases involving social media communications ("the Interim Guidelines"). The Interim Guidelines are already in force, but subject to public consultation until March 2013. We welcome this opportunity to contribute to the consultation on the approach to prosecution of these cases.

Background

3. The Interim Guidelines have been prompted by a series of recent controversial prosecutions of persons in connection with commentary published online, largely to closed communities of friends and followers through Twitter and Facebook. A number of these cases are identified in the guidance, but no indication is given as to whether prosecution would have proceeded under the Interim Guidelines. The most famous of these prosecutions is referenced at paragraph 27: the commonly known "*Twitter-Joke Trial*". In this case, Mr Chambers joked online about bombing Robin Hood Airport in response to disruption at the Airport. He was convicted of sending a malicious communication. In 2012, High Court quashed that conviction, stating that Mr Chambers did not intend for the message to be menacing in character and that the intention to make a joke, albeit a bad joke, did not satisfy the necessary intention

for the offence.[1] The *Chambers* case was not alone as Twitter comments became a cause for a number of subsequent cases in 2012, including a case involving racist comments about footballer Fabrice Muamba. The defendant in this case was sentenced to 56 days custody.[2] Facebook comments have also given rise to prosecutions, notably at the height of the 2011 riots in England. One defendant was sentenced to four years after admitting to incitement to violent disorder. The judge in that case reportedly stated, "The message must be clear - if anybody is tempted to use modern media to incite violence on our streets - they will be detected and will face stern punishment".[3] Most recently, in October 2012, a defendant was fined and given a community order after a comment involving the death of six soldiers in Afghanistan was found to be "grossly offensive" and in violation of Section 127 Communications Act 2003.[4]

4. Freedom of expression is arguably 'the primary right in a democracy', without which 'an effective rule of law is not possible'.[5] In England and Wales its importance has been long recognised by the common law:[6] In particular, it is a fundamental aspect of the right of freedom of expression that it includes not merely the expression of ideas or sentiments that we agree with or approve of. If the right to freedom of expression is to mean anything, it must also extend to forms of expression that others find offensive or insulting, including ideas that 'offend, shock or disturb'.[7]

   The growth of prosecution for offences connected with the expression of unpopular ideas or the promulgation of commentary considered in bad taste or conveying insulting or offensive messages has heightened concern about the chilling effect of criminal sanction on freedom of expression through social media. The expansion of the use of social media both at home and abroad as a vital social tool for the expression of ideas and building of interpersonal relationships has been rapid and revolutionary. However, there remains a clear public function in the role of the police and the CPS in ensuring that social media is not used to mask otherwise criminal

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[1] [2012] EWHC 2157

[2] http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/appeal-judgment-r-v-stacey.pdf

[3] http://www.walesonline.co.uk/news/wales-news/2011/11/16/facebook-riot-inciter-jailed-91466-29787421/

[4] http://www.bbc.co.uk/news/uk-england-leeds-19883828

[5] Lord Steyn in *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 at p297.

[6] *Bonnard v Perryman* [1891] 2 Ch 269 at p284.

[7] See e.g. the decisions of the European Court of Human Rights in *Lehideux and Isornia v France* (2000) 30 EHRR 665, para 55; *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1.

conduct. The internet is not a lawless space, merely a novel frontier. A failure of the law to reflect the modern reality of online interrelationships would lead not only to a risk of individual rights violations but could undermine public confidence in our criminal justice system. That this guidance seeks to strike a clear balance between the right of individuals to protection from harassment and other forms of substantive harm and the right to freedom of expression is timely, if not overdue.

The Consultation

5. Broadly we welcome the decision of the CPS to issue guidance in this area and the approach of the Interim Guidelines. Specifically, we welcome:
    (1) The recognition of the importance of social media for freedom of expression and the function of Article 10 ECHR in the exercise of prosecutorial discretion (paragraphs 12, 30);
    (2) The emphasis on specific, identifiable and direct harm in the categorisation of offences identified and considered by the guidance for prosecution (paragraph 12);
    (3) The important emphasis placed on "context" and the "course of conduct" associated with expression subject to inquiry (paragraph 12).
    (4) The distinction between publication through social media and informal interaction online and other methods of publication (paragraphs 28 – 29, 35);
    (5) The emphasis placed in the guidance on the ordinary purpose of public order legislation, and its application to "offline" or "on street" activities (paragraphs 42-44);
    (6) That, in cases based solely on "offensiveness", "indecency", "obscenity" or "falsehood", the threshold for any prosecution will be a high one. The starting point must be the significant protection offered by Article 10 ECHR to freedom of expression. We welcome the express direction that in many cases it is unlikely that prosecution for this kind of offence will be in the public interest. This should create a significant degree of caution when prosecutors consider possible criminal sanctions in these cases. The degree of discretion afforded to prosecutors in these circumstances should not be tempered by subjective assessments of offensiveness or bad taste, but informed principally by their obligations under Section 6 HRA 1998.

6. The promulgation of this guidance could bring a degree of legal certainty to the law as it is applied to the use of social media. However, in light of the potential for speech offences to chill the expression of thoughts and ideas even in the absence of prosecution, we hope that steps are taken by the CPS, perhaps working together with service providers, to draw attention to the guidelines. Effort must be taken to reassure the public that prosecution for commentary – even offensive or insulting commentary – will rarely be in the public interest.

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

7. We broadly support the approach taken in paragraph 12 of the guidance. We welcome the distinction between the categories of offence identified at 12(1) – (3) (credible threats; offences such as harassment or blackmail targeting an individual or group of individuals and breach of a court order) and cases where prosecution is sought on the grounds that material is "grossly offensive, indecent, obscene and false". It is important the guidance makes clear that where a communication meets the description of those offences recommended for prosecution (at 12(1)-(3)); prosecutorial discretion remains subject to the ordinary Code for Crown Prosecutors. Individual decisions must meet the ordinary tests for prosecution in every case and in each decision, context will be key.

8. In the elaboration of the guidance on each of these types of communication we welcome the reference to existing guidance in connection with the ordinary prosecution of these offences online. However, we question whether the referral to existing guidance – in connection with a reference to the importance of context and the distinct nature of communication through social media – will be adequate to assist prosecutors to make appropriate decisions in all cases. For example, a close factual analysis of behaviour on Twitter may be required in order to consider whether a course of conduct will support prosecution under the Protection from Harassment Act 1997. While prosecutors may be familiar with this kind of factual assessment, they may be less familiar with Twitter and the language used in this context (see paragraph 35). Clearly CPS guidance cannot be so specific as to fetter the discretion of individual prosecutors (paragraph 9). However, it is possible that prosecutors might benefit from some further support in the application of this guidance, including

by the dissemination of information on the types of language pursued to prosecution in future cases.

9. We would regret if the reference to "robust" prosecution in these circumstances were to encourage a "tick-box" or default approach to prosecution in all cases of the types identified in paragraph 12 (1) – (3). We recognise that this language may have been employed to encourage prosecutors not to shy away from the proper prosecution of offences properly constituted simply by virtue of their commission online. Clearly, there are obligations on prosecutors, grounded in human rights law, to protect individuals from harm and threatening behaviour, including where that behaviour happens on the internet. However, in all circumstances, prosecution must be informed by knowledge of the specific kinds of behaviour conducted in the context of social media, the proper application of the ordinary prosecutorial code and the application of Article 10 ECHR. For example, in the case of violation of a court order, "retweeted" thousands of times, there may be different public interest considerations which apply in connection with the original violation of the order and the subsequent republication (for example, consider the involvement of *Twitter* in the violation of "superinjunctions").[8] We would recommend the removal of references to "robust" prosecution from the guidance to avoid confusion.

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?

10. We welcome the apparent approach of the guidance that where doubt exists over the grounds for prosecution, the default in these cases should be a decision that prosecution is not in the public interest. We particularly welcome:

    (1) The specific reference to Article 10 ECHR in paragraphs 30 – 33, which makes clear from the outset that the high threshold from prosecution is grounded in the obligation of prosecutors under Section 6 HRA 1998.

[8] For example, it was estimated that around 75,000 people named Ryan Giggs on Twitter, before his identity was revealed in Parliament. http://www.telegraph.co.uk/technology/twitter/8531175/Ryan-Giggs-named-as-Premier-League-footballer-in-gagging-order-row.html Similarly, in connection with the *Trafigura* injunction, http://www.guardian.co.uk/commentisfree/libertycentral/2009/oct/14/trafigura-fiasco-tears-up-textbook.

(2) The reiteration at this stage that context is crucial to the decision to prosecute (paragraph 35);
(3) The adoption of the guidance of the Court in *Chambers* that the law should be slow to diminish "satirical or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful or painful to those subjected to it" (paragraph 33);
(4) Clear guidance that prosecution must not be based solely on behaviour of that nature without "something more" (paragraph 36).

11. We have significant concerns about the need to interpret the underlying offences – in Section 1 Malicious Communications Act 1988 and Section 127 Communications Act 2003 - narrowly in order to avoid an unduly chilling impact on the right to free expression. The language of "gross offensiveness" is inherently subjective, and as illustrated by the recent string of prosecutions, wont to application to behaviour which it is not necessarily in the public interest to prosecute. As with the inclusion of "insulting" in the language of the Public Order Act 1986, the offence creates a false impression that individuals are granted a right to be free from insult or offence, which is clearly excluded by the application of Article 10 ECHR. It is particularly important that prosecutorial decisions are detached from both populist ideas of offensiveness (for example, outrage expressed by tabloid newspapers over behaviour denigrating the armed forces) and the particular sensitivities of specific groups (for example, religious or other groups who may be particularly offended by depictions of homosexuality).

12. We understand the reluctance of the CPS to provide case-studies – or a clear indication of the kinds of cases which should not be prosecuted – lest these be portrayed as granting blanket immunity from prosecution. However, we note that this part of the Guidelines is expressed almost entirely in the negative. While it is extremely helpful to identify what is disproportionate without "something more", leaving this esoteric description empty could encourage greater subjectivity in the application of prosecutorial discretion. As has been illustrated by the coverage of the *Chambers* case and subsequent high-profile prosecutions, the mere fact of the prosecution may have a detrimental effect on the public's impression of the criminal justice system and on their willingness to express themselves online. The clear impression given by the Guidelines is that the default should be no prosecution. However, individual prosecutors, and the general public, may be assisted by a

clearer indication of what limited factors should be considered when considering what types of communication may yet be considered "grossly offensive". If this is not provided in the Guidelines, prosecutors may be supported by further training to explore case-studies on difficult cases in order to share expertise and disseminate good practice on the application of the Guidelines.

Do you agree with the public interest factors set out in paragraph 39 above? Are there any other public interest factors that you think should also be included?

13. As explained, above, the Interim Guidelines give no guidance on when prosecution will be in the public interest. Outside the section headed "public interest", the Guidelines points prosecutors to a significant number of factors to be considered which will be highly relevant to the assessment of public interest (e.g. context, whether something more exists beyond satire, jest, or bad taste commentary). The limited guidance on public interest refers specifically to the context of the publication, its dissemination and duration and whether it has been recanted and the individual concerned has expressed remorse. We welcome the criteria set out at paragraph 39 (a), (c) and (d). However, we have a concern about the direction to consider the involvement of third party service providers or others at 39 (b):
    (1) Paragraph 39 (a) allows the prosecution to consider remorse and swift removal in the context of determining the public interest. This is clearly important and a valid consideration when a prosecution would otherwise be well founded. However, no individual should be pressured or influenced to self-censor under threat of prosecution in circumstances where criminal sanction would be neither warranted nor proportionate.
    (2) Paragraph 39(c) allows the prosecution to consider the intent to disseminate and to whom. This is a particularly important consideration when the individual concerned has expressed themselves in the context of a closed or semi-closed community, where he or she considers they are speaking only to a limited group of their friends or followers (as on Twitter, Facebook or any number of other community sites).
    (3) Paragraph 39 (d) appears to reiterate the Article 10 ECHR standard. We would emphasise that, in our view, this should be taken to require a high standard before prosecution of these kinds of speech offences

would be considered in the public interest. In our view, this should be read together with the clear guidance that prosecution in most cases is unlikely to be in the public interest. Repetition or paraphrase at this section of the Interim Guidelines may be helpful.

14. However, we remain concerned that some directions in this section of the Interim Guidelines may have unintended or damaging consequences:

    (1) Paragraph 39 (b) suggests that "swift and effective action" taken by others to remove or delete the offending communication may be taken into account in considering the public interest in prosecution. While this kind of "take-down" may limit the dissemination of a publication, and its impact on individuals who may be affected, it remains controversial. Parliament is currently grappling with the responsibility of third-party hosts in connection with defamation (the Defamation Bill) and similarly the courts have not yet settled case-law on the circumstances when hosts are responsible for publication (see for example *Tamiz v Google*, [2013] EWHC Civ 68*)*. Nothing more in the guidance deals with the criminal liability of internet service providers, which we consider would be limited (it is difficult to envisage circumstances when a service provider could be seen to have sufficient intent in connection with a specific publication to support a criminal conviction). However, this section of the guidance could be seen by some as a hook on which to hang requests to providers to pre-emptively censor service-users content, lest they be seen to be supporting allegedly criminal behaviour.

    (2) The section immediately following the guidance on public interest – at paragraph 40 – refers to a particular intention to cause distress or anxiety and the importance of the impact of a communication on an intended victim. We understand that this section is designed to emphasise that a particular intention to target an individual or a course of behaviour may weigh in favour of prosecution in cases not covered by paragraph 12 (1)-(3). However, in most circumstances we consider this kind of targeted behaviour would be covered by paragraph 12(2) and specific offences such as harassment. We are concerned that singling out this behaviour in specific guidance should not be disconnected from the general guidance at paragraph 12 and paragraphs 30 – 33 that there is no right not to be insulted or

offended. The use of language grounded in "distress or anxiety" should not distort the clear message given elsewhere in the Interim Guidelines that prosecutors should be slow to pursue criminal sanction.

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

15. JUSTICE has outstanding concerns about:

    (1) the compatibility of the underlying primary legislation in Section 1, Malicious Communications Act 1988 and Section 127, Communications Act 2003 with Article 10 ECHR. While this guidance should assist in limiting the breadth of the offences connected to "gross offensiveness", the criminalisation of expression based on such vague and subjective statutory language poses an inherent risk to the right of freedom of expression and should not necessarily be managed solely through prosecutorial discretion. The mere existence of the offence may have a chilling effect and may send mixed messages about whether individuals should be protected from offence or insult at the expense of the free exchange of ideas, satire and opinion.

    (2) A lack of consistency in sentencing for offences prosecuted in connection with expression through social media has been stark. While these offences have been on the rise, they remain relatively few and guidance on sentencing limited. The additional chilling effect of potentially disproportionate sentences could be significant.

16. While relevant, these concerns are outside the scope of this consultation and the reach of the Interim Guidelines.