CPS

Guidelines on prosecuting cases involving communications sent via social media

March 2016

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Introduction

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.

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 re-sending (or re-tweeting) 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.

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.

These revised interim guidelines replace the previous guidelines and they have immediate effect.

General Principles

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.

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).

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

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.

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.

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.

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

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 conduct in question so as to distinguish between:

Category 1

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

Category 2

Communications which **specifically target an individual or individuals** and which may constitute harassment or stalking, controlling or coercive behaviour, revenge pornography, an offence under the Sexual Offences Act 2003, blackmail or another offence.

Category 3

Communications which may amount to a **breach of a court order or a statutory prohibition**. This can include:

- Offences under the Juries Act 1974;
- Offences under the Contempt of Court Act 1981;
- An offence under section 5 of the Sexual Offences (Amendment) Act 1992;
- Breaches of a restraining order; or
- Breaches of bail.

Cases where there has been an offence alleged to have been committed under the Juries Act 1974 require AG consent and any charging decision must be referred to the Director's Legal Advisor (DLA). Offences under the Contempt of Court Act 1981 or section 5 of the Sexual Offences (Amendment) Act 1992 should be referred to the Attorney General and via the DLA and the Private Office Legal Team where necessary.

Category 4

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

As a general approach, cases falling within Categories 1, 2 or 3 should be prosecuted robustly where they satisfy the test set out in the Code for Crown Prosecutors. On the other hand, cases which fall within Category 4 will be subject to a high threshold and in many cases a prosecution is unlikely to be in the public interest.

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

Category 1: Credible threats

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.

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.

Credible threats of violence to the person or damage to property may also fall to be considered under section 1 of the Malicious Communications Act 1988, which prohibits the sending of an electronic communication which conveys a threat, or 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 such a prosecution, 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 (see Category 2 below).

Where there is evidence of hostility based on race, religion, disability, sexual orientation or transgender identity, prosecutors should refer to the section on “Hate crime” below.

Any terrorist related threat or other communication should be referred to the Special Crime and Counter Terrorism Division at ctd@cps.gsi.gov.uk.

Category 2: Communications targeting specific individuals

If communication(s) sent via social media target a specific individual or individuals they will fall to be considered under this category if the communication(s) sent fall within the scope of:

- Sections 2, 2A, 4 or 4A of the Protection from Harassment Act 1997 and constitute an offence of harassment or stalking; or
- Section 76 of the Serious Crime Act 2015 and constitute an offence of controlling or coercive behaviour; or
- Section 33 of the Criminal Justice and Courts Act 2015 and amount to an offence of “revenge pornography”; or
- Other offences involving communications targeting specific individuals, such as offences under the Sexual Offences Act 2003 or Blackmail.

In such cases there may be a potential overlap of offences. For instance, where there is more than one incident, or the incident forms part of a course of conduct directed towards an individual, a charge of harassment and / or a charge of controlling or coercive behaviour may be appropriate. Prosecutors will therefore need to assess the facts of the case carefully to determine the most appropriate charge(s) and reference should be made to the relevant legal guidance.

Harassment or stalking

Harassment can include repeated attempts to impose unwanted communications or contact upon an individual in a manner that could be expected to cause distress or fear in any reasonable person. It can include harassment by two or more defendants against an individual or harassment against more than one individual.

Stalking is not defined in statute but a list of behaviours which might amount to stalking are contained in section 2A (3) of the Protection from Harassment Act 1997. This list includes contacting, or attempting to contact, a person by any means.

When considering an offence under the Protection from Harassment Act 1997, the prosecution will need to prove that the defendant pursued a course of conduct which amounted to harassment or stalking. The Act states that a "course of conduct" must involve conduct on at least two occasions.

The conduct in question must form a sequence of events and must not be two distant incidents (*Lau v DPP (2000), R v Hills (2000)*). Each individual act forming part of a course of conduct need not be of sufficient gravity to be a crime in itself; however, the fewer the incidents, the more serious each is likely to have to be for the course of conduct to amount to harassment: *Jones v DPP* [2011] 1 W.L.R. 833.

Prosecutors should consider that a course of conduct may often include a range of unwanted behaviour towards an individual and a communication sent via social media may be just one manifestation of this. Where an individual receives unwanted communications from another person via social media in addition to other unwanted behaviour, all the behaviour should be considered together in the round by the prosecutor when determining whether or not a course of conduct is made out.

If there is evidence that an offence of stalking or harassment has been committed and the communication targets an individual or individuals on the basis of their race or religion, disability, sexual orientation or transgender identity prosecutors should refer to the section on “Hate crime” below.

Further information about the offences of harassment or stalking can be found within the CPS Legal Guidance on Stalking and Harassment.

Controlling or coercive behaviour

Communications sent via social media may alone, or together with other behaviour, amount to an offence of Controlling or coercive behaviour in an intimate or family relationship under Section 76 of the Serious Crime Act 2015. The offence came into force on 29 December 2015 and does not have retrospective effect.

The offence only applies to offenders and victims who are personally connected: in an intimate personal relationship; or they live together and they have previously been in an intimate personal relationship; or they live together and are family members.

The controlling or coercive behaviour in question must be repeated or continuous, it must have a serious effect on the victim, and the offender must know or ought to know that the behaviour will have such an effect. A "serious effect" is one that either causes the victim to fear, on at least two occasions, that violence will be used against them, or it causes the victim serious alarm or distress that has a substantial adverse effect on their usual day-to-day activities.

The patterns of behaviour associated with coercive or controlling behaviour might include: isolating a person from their friends and family; depriving them of their basic needs; monitoring their time; taking control over where they can go, who they can see, what to wear and when they can sleep. It could also include control of finances, such as only allowing a person a punitive allowance, or preventing them from having access to transport or from working.

Controlling or coercive behaviour does not only occur in the home. For instance, the offender may track and monitor the whereabouts of the victim by communications with the victim, via email, texts or social media, and / or by the use of spyware and software.

Note that where this offence does not apply, the offences of harassment or stalking may apply. For instance:

- The offender and victim are no longer in a relationship and no longer live together. However, the offender is continuing to exert controlling or coercive behaviour beyond the marriage, relationship or period of co-habitation.
- The offender and the victim are not in an on-going relationship and are not family members, as defined by the Act.

In such circumstances, prosecutors should consider the facts of the case carefully, to determine whether the evidence establishes the offences of harassment or stalking.

For further information prosecutors should refer to the legal guidance on Controlling and coercive behaviour and the legal guidance on Domestic abuse.

Revenge pornography

Revenge pornography is a broad term, which usually refers to the actions of an ex-partner, who uploads onto the internet, or posts on a social networking site, or shares by text or email, intimate sexual images of the victim, to cause the victim humiliation or embarrassment.

Specifically, section 33 of the Criminal Justice and Courts Act 2015 creates an offence of disclosing private sexual photographs or films without the consent of an individual who appears in them and with intent to cause that individual distress.

The offence will cover anyone who re-tweets or forwards without consent, a private sexual photograph or film, if the purpose, or one of the purposes, was to cause distress to the individual depicted in the photograph or film, who had not consented to the disclosure. However, anyone who sends the message only because he or she thought it was funny would not be committing the offence.

Sections 34 and 35 of the Act define “disclose”, “photograph or film”, “private” and “sexual”.

The statutory offence came into force on 13 April 2015 and does not have retrospective effect.

Further guidance is provided in the Guidelines on prosecuting the offence of disclosing private sexual photographs and films.

When assessing whether a prosecution is required in the public interest, prosecutors must follow the approach set out in the guidelines referred to above as well as the wider principles set out in the Code for Crown Prosecutors. One factor that may warrant particular consideration is the involvement of younger or immature perpetrators. Children may not appreciate the potential harm and seriousness of their communications and as such the age and maturity of suspects should be given significant weight, particularly if they are under the age of 18.

Where an act of revenge pornography is carried out prior to 13 April 2015, consideration should be given to whether the communication in question is grossly offensive, indecent, obscene or false, and may therefore be prosecuted under one of the Communications Acts offences: see Category 4 below.

Where the images may have been taken when the victim was under 18, prosecutors should consider whether any offences under section 1 of the Protection of Children Act 1978 (taking, distributing, possessing or publishing indecent photographs of a child) or under section 160 of the Criminal Justice Act 1988 (possession of an indecent photograph of a child) have been committed. Further information is available in the legal guidance on indecent photographs of children.

Other offences involving communications targeting specific individuals

Communications may target a specific individual and involve offences other than those set out above. In such circumstances, prosecutors should seek to prosecute the substantive offence, where there is sufficient evidence to do so.

Where intimate images are used to coerce victims into further sexual activity, or in an effort to do so, other offences under the Sexual Offences Act 2003 should be considered, such as:

- Section 4, Causing sexual activity without consent, if coercion of an adult has resulted in sexual activity.
- Sections 8 (child under 13) and 10 (child), Causing or inciting a child to engage in sexual activity: 'causing' activity if coercion has resulted in sexual activity; and 'inciting' such activity if it has not.
- Section 15, Meeting a child following sexual grooming.
- Section 62, Committing an offence with intent to commit a sexual offence, if no activity has taken place but there is clear evidence that an offence was intended to lead to a further sexual offence.

Further information on these offences is contained in the legal guidance on Rape and sexual offences.

Where intimate images are used to threaten and make demands from a person, prosecutors should consider whether the offence of blackmail applies. For example, so called "webcam blackmail", where victims are lured into taking off their clothes in front of their webcam, and sometimes performing sexual acts, on social networking or online dating sites, allowing the offender to record a video. A threat is subsequently made to publish the video, perhaps with false allegations of paedophilia, unless money is paid. In such circumstances, it may be appropriate to charge blackmail or attempted blackmail.

Question 1
Does the expanded section on Category 2 offences - *Communications targeting specific individuals* - cover all the main offences of this type? If not, what other offences might be covered?

Category 3: Breach of court orders and statutory prohibitions

Court orders and statutory prohibitions 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 or a statutory prohibition falls to be considered under the relevant legislation, including:

- Offences under sections 20A-G of the Juries Act 1974, such as disclosing information obtained by research to another jury member and disclosing information relating to jury deliberations (where a jury was sworn on or after 13 April 2015);
- The Contempt of Court Act 1981 (this will include juror misconduct not covered by the statutory offences, and for disclosure of jury deliberations where a jury is sworn before 13 April 2015);
- 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; and
- Automatic and discretionary reporting restrictions relating to persons under 18 years of age in s49 of the Children and Young Persons Act 1933 and s45 of the Youth Justice and Criminal Evidence Act 1999.

In such cases, prosecutors should follow the CPS Legal Guidance on Juror Misconduct Offences and CPS Legal Guidance on Contempt of Court and Reporting Restrictions. Note the requirement for Juries Act offences to be referred to the Director's Legal Advisor (DLA) and the Private Office Legal Team prior to seeking AG's consent; and for contempt cases to be referred to the Attorney General and via the Director's Legal Advisor and the Private Office Legal Team, where necessary.

Prosecutors should also consider whether the communication in question has breached the requirements of another order, such as a Restraining Order, or if it would constitute a breach of bail.

Category 4: Communications which are grossly offensive, indecent, obscene or false

Communications which do not fit into any of the categories outlined above will usually 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 category 1 above on credible threats).

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. Section 32 of the Criminal Justice and Courts Act 2015 amended section 1 making the offence an either-way offence and increased the maximum penalty to 2 years' imprisonment for offences committed on or after 13 April 2015. This amendment allowed more time for investigation, and a more serious penalty available in appropriate cases.

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. The s127 offence is summary-only, with a maximum penalty of 6 months' imprisonment.

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.

The High Threshold at the Evidential Stage

There is a high threshold that must be met before the evidential stage in the Code for Crown Prosecutors (the Code) will be met. Furthermore, even if the high evidential threshold is met, in many cases a prosecution is unlikely to be required in the public interest. See further the sections below on The Public Interest and Article 10 ECHR.

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]."

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. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates."
- “The Justices must apply the standards of an open and just multi-racial society”.
- “The question is whether … [the defendant] used language which is beyond the pale of what is tolerable in our society”.
- “[Is there anything] in the content or tenor of [the] messages to soften or mitigate the effect of [the] language in any way”?

Context and approach

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'."*

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 there is sufficient evidence 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.

The Public Interest

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 such comments creates the potential that a very large number of cases could be prosecuted before the courts. Taking together, for example, the following social media platforms are likely to contain hundreds of millions of communications every month: Facebook; Twitter; LinkedIn; YouTube; WhatsApp; Snapchat; Instagram and Pinterest.

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. See further the section below on Article 10 ECHR.

When assessing whether a prosecution is required in the public interest for cases that fall within Category 4, prosecutors must follow the approach set out in these guidelines as well as the wider principles set out in the Code for Crown Prosecutors (the Code). In considering the public interest questions set out in paragraph 4.12 of the Code, prosecutors should have particular regard to paragraph 4.12(c) and the question asked about the circumstances of and harm caused to the victim where the communication is targeted at a particular person.

If a specific 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, particularly where there is a hate crime element to the communication(s): see the section on Hate crime below. 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; alternatively, a prosecution may be merited for an offence under section 127 (2) of the Communications Act 2003 in respect of the persistent use of a public electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety to another, assuming the high threshold for prosecution has been passed.

The age and maturity of suspects should be given significant weight, particularly if they are under the age of 18: see paragraph 4.12(d) of the Code. Children may not appreciate the potential harm and seriousness of their communications and a prosecution is rarely likely to be in the public interest.

Article 10 ECHR

Since both section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 will often 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 ..."

As the European Court of Human Rights (ECtHR) 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 229):

> "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 ..."

The ECtHR has also determined that there is only limited scope for prosecution in relation to political speech or debate on questions of public interest: *Sener v Turkey* [2003] 37 EHRR 34.

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:

a) Necessary; and
b) Proportionate.

These exceptions, however, must be narrowly interpreted and the necessity for any restrictions convincingly established: *Sunday Times v UK (No 2); Goodwin v UK* [1996] 22 EHRR 123. See the section below on "Hate crime" for some examples of exceptions.

Accordingly, no prosecution should be brought under section 1 of the Malicious Communications Act 1988 or section 127 of the Communications Act 2003 unless it can be shown on its own facts and merits to be both necessary and proportionate.

A prosecution is unlikely to be both necessary and proportionate where:
a) The suspect has expressed genuine remorse;
b) Swift and effective action has been taken by the suspect and/or 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.

This is not an exhaustive list, however, and each case must be considered on its own facts and its own individual merits.

Category 4 offences handling arrangements

All Category 4 offences require charging authorisation from the Private Office Legal Team or the CPSD CCP or DCCP: see the section below on handling arrangements.

Violence against women and girls (VAWG)

The Violence against Women and Girls (VAWG) Strategy provides an overarching framework to address crimes that have been identified as being committed primarily, but not exclusively, by men against women. The approach recognises VAWG as a fundamental issue of human rights, drawing on the United Nations conventions that the UK has signed and ratified. VAWG is recognised worldwide, and by the UK Government, as a form of offending where gender plays a part. However, the CPS recognises those victims who are not necessarily caught by the "VAWG" umbrella - that is, men and boys - who can also be victims of VAWG crimes. To that end, the CPS is inclusive in our approach. All our VAWG policies are applied fairly and equitably to all perpetrators and victims of crime, irrespective of their gender.

Prosecutors should be familiar with the LG on Violence against Women and Girls and apply the principles set out in the guidance in appropriate cases. For practical assistance in dealing with casework preparation and case presentation, reference should be made to the VAWG section of the Casework Hub.

Improving the safety, support and satisfaction of victims and witnesses is a key objective of the VAWG Strategy. In progressing cases, prosecutors should be aware of the particular difficulties faced by VAWG victims and the sensitivities involved in supporting them.

Key characteristics of VAWG victims that may impact on case handling include:

- The perpetrator and victim are often known to one another and often there is a controlling relationship.
- Levels of violence often escalate e.g. from harassment to murder.
- The victim may have additional issues to consider before even reporting an offence to the police e.g. financial dependency; joint children.
- Offences may range from abuse by a single perpetrator to being part of international organised crime.
- There may be delays in reporting due to fear, intimidation and trauma.
- There may be an increased likelihood of repeat victimisation and victim intimidation.
- There is potential for retractions and non-attendance at court.

Cyber-enabled VAWG offences

The landscape in which VAWG Crimes are perpetrated is changing. The use of the internet, social media platforms, emails, text messages, smartphone apps (for example, WhatsApp; Snapchat), spyware and GPS (Global Positioning System) tracking software to commit VAWG offences is rising. Online activity is used to humiliate, control and threaten victims, as well as to plan and orchestrate acts of violence.

Some of this activity is known as “cyberstalking”. There is no legal definition of cyberstalking, nor is there any specific legislation to address the behaviour. Generally, cyberstalking is described as a threatening behaviour or unwanted advances directed at another, using forms of online communications. Cyberstalking and online harassment are often combined with other forms of ‘traditional’ stalking or harassment, such as being followed or receiving unsolicited phone calls or letters. Examples of cyberstalking may include:

- Threatening or obscene emails or text messages.
- Spamming (where the offender sends the victim multiple junk emails).
- Live chat harassment or ‘flaming’ (a form of online verbal abuse).
- Leaving improper messages on online forums or message boards.
- Sending electronic viruses.
- Sending unsolicited email.
- Cyber identity theft.

For further information Prosecutors should refer to the section on “The impact and dynamics of domestic abuse ” in the Domestic Abuse Guidelines for prosecutors.

Whether any of these cyber activities amount to an offence will depend on the context and particular circumstances of the action in question. Prosecutors should consider the various social media offences under Categories 1-4, as well as other potential offences.

Category 4 social media VAWG offences

Although many VAWG social media offences may be sufficiently serious to be prosecuted under a Category 1 or Category 2 type offence, there may be some instances when a prosecution may be brought under Category 4, if the high threshold is met ie communications that are grossly offensive, indecent, obscene or false.

For instance, communications that contain images or videos of women with very serious injuries, or of women being raped, or of women being subjected to sadistic acts of violence, accompanied by text that suggests that such assaults / rape / acts are acceptable or desirable may, depending on the context and circumstances, be considered grossly offensive.

Non-social media VAWG offences

Domestic abuse is likely to become increasingly frequent and more serious the longer it continues. Therefore cases may involve evidence of both social media offending, such as harassment or controlling or coercive behaviour through texts and emails, followed by an escalation to more serious non-social media offending, such as physical assaults. Prosecutors will need to assess whether it is appropriate to charge both types of offending, or whether the overall criminality is sufficiently addressed by charges reflecting only the more serious offending. Where only the more serious offending is charged, it may be possible to adduce in evidence the social media activity, such as controlling behaviour, as background context.

Flagging

All domestic abuse cases should be identified on the CMS and all cases should be flagged as "vulnerable / intimidated victim".

Question 2
Does the new section on *VAWG* cover the key issues in social media VAWG offences? If not, what other issues might be included?

Hate crime

The CPS views all hate crime seriously, as it can have a profound and lasting impact on individual victims, undermining their sense of safety and security in the community. By dealing robustly with hate crime, we aim to improve confidence in the criminal justice system and to increase reporting of hate crime.

Hate crime covers offences that are aggravated by reason of the victim's race, religion, disability, sexual orientation or transgender identity.

Category 4 social media hate crime offences

The high threshold at the evidential stage and the public interest and ECHR considerations set out above apply to social media Category 4 hate crime cases, as they do to other cases. However, as stated above in the section on "The Public Interest", prosecutors should also consider in particular paragraph 4.12(c) of the Code for Crown Prosecutors, which states that:

> *"Prosecutors must also have regard to whether the offence was motivated by any form of discrimination against the victim's ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics. The presence of any such motivation or hostility will mean that it is more likely that prosecution is required."*

When assessing communications that appear to be motivated by such discrimination or demonstrate such hostility, prosecutors should be alert to any additional reference or context to the communication in question. Such references or context may sometimes elevate a communication that would otherwise not meet the high threshold to one that, in all the circumstances, can be considered grossly offensive. For instance, a reference within the communication to a recent tragic event, involving many deaths of persons who share any of the protected characteristics.

Both domestic and European case law have addressed the issue of Article 10 and racist / religious hate crime speech:

DPP v Collins confirmed that it is consistent with Article 10 to prosecute a person for using the telecommunications system to leave racist messages. Effect must be given to Article 17 of the convention, which prohibits the abuse of any Convention rights, as held in *Norwood v the UK* (2004) 40 EHRR SE 111.

The European Commission has held that extreme racist speech is outside the protection of Article 10 because of its potential to undermine public order and the rights of the targeted minority: *Kuhnen v Germany* 56 RR 205.

In *Lehideux and Isorni v France* [2000] 30 EHRR 665, the ECtHR confirmed that Holocaust denial or revision is removed from the protection of Article 10 by Article 17.

Specific hate crime offences

Aggravated or hate crime offences include offences that may be committed via social media, such as harassment, stalking or the distribution of written material or visual images. When reviewing a case that may involve a hate crime offence prosecutors should refer to the relevant hate crime Legal Guidance and the Hate Crime section on the Casework Hub.

See the LG on Prosecuting cases of Racist and religious crime for:

- Racially or religiously aggravated offences, under ss28-32 of the Crime and Disorder Act 1998 (CDA), such as aggravated public order offences and Harassment and Stalking. To prove that the offence is racially or religiously aggravated the prosecution will need to prove the "basic" offence followed by racial or religious aggravation, as defined in s28 CDA.
- Stirring up racial or religious hatred under Part III of the Public Order Act 1986, in particular the offences of: publishing / distributing written material, ss19 and 29C; and distributing / showing / playing a recording of visual images or sounds, ss21 and 29E. Note that these cases must be referred to the Special Crime and Counter Terrorism Division (SCCTD) and proceedings require the consent of the Attorney General.

See the LG on Stirring up hatred on the grounds of sexual orientation for the offence of Stirring up hatred on the grounds of sexual orientation under Part III of the Public Order Act 1986. These offences must also be referred to the Special Crime and Counter Terrorism Division (SCCTD) and require the consent of the Attorney General.

See also the section below on “Public order legislation”.

Sentencing uplift

Sections 145 and 146 of the Criminal Justice Act 2003 provide for an increased sentence for aggravation related to race, religion, disability, sexual orientation or transgender identity. The provisions apply to all offences, apart from racial and religious crime under ss29-32 of the Crime and Disorder Act 1998 (aggravated assaults, criminal damage, public order offences, harassment etc), as these offences carry higher maximum penalties than the basic equivalents.

To prove that the offence is aggravated and obtain a sentence uplift it is necessary to show that either the offender demonstrated hostility to the victim based on the victim’s protected characteristic (race, religion, disability, sexual orientation or transgender identity), or that the offence is motivated by hostility towards persons who have the protected characteristic. Prosecutors should determine the appropriate limb to proceed under, obtain evidence relevant to that limb and provide clear instructions to advocates.

For detailed guidance on the elements of these provisions and how to prove them see the LG on Prosecuting cases of disability hate crime.

Flagging

Hate crime cases should be identified at an early stage and flagged on the CMS. See the relevant hate crime legal guidance for the CPS definition of particular hate crimes, which are dependent on the perception or belief of the victim or another person. Where the definition is satisfied, offences should be flagged as hate crimes, regardless whether they are charged as such.

Question 3
Does the new section on *Hate Crime* cover the key issues in social media Hate Crime offences? If not, what other issues might be included?

False or offensive social media profiles

The act of setting up a false social networking account or website, or the creation of a false or offensive profile or alias could amount to a criminal offence, depending on the circumstances.

For example, the former estranged partner of a victim creates a profile of the victim on a Facebook page, to attack the character of the victim, and the profile includes material that is grossly offensive, false, menacing or obscene.

Depending on the circumstances, an offence may be committed under Categories 1, 2 or 4. Note that a Category 4 offence may be committed by way of a communication or message which is “false”.

Alternatively, a false or offensive profile may amount to an offence under the Public Order Act 1986. See, for example, the case of *S v CPS* [2008] EWHC 438 (Admin), in which the defendant was convicted of Causing a person harassment, alarm or distress under s4A of the Act, for loading onto a

website an image of the victim, together with text, that alleged by implication a number of false assertions, including that the victim had been convicted of violence in the past.

If there is any financial gain or loss incurred as a consequence of the false account or profile, an offence may also be committed under the Fraud Act 2006: under section 8 possession or making or supplying 'articles' for use in frauds includes any program or data held in electronic form. For further guidance prosecutors should refer to the LG on the Fraud Act 2006, in particular that relating to ss6-8 of the Act.

Note that some social networking sites may disable false accounts when they became aware of them.

Public Order legislation

Although some cases within Categories 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.

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)

However, in some cases prosecutors may be satisfied that the offences in Parts I or III of the Public Order Act 1986 are relevant and should be used: see the sections above on "Hate crime" and "False and offensive social media profiles".

Ancillary Orders

Ancillary orders are a useful tool to address the abuse of social media, whether the abuse amounts to a criminal offence or not, and particularly in circumstances where a person is in fear or requires protection. Prosecutors should consider whether an ancillary order may be appropriate, pre-charge, post-conviction and post-acquittal.

For a detailed account of available ancillary orders prosecutors should refer to the Ancillary orders toolkit and any relevant legal guidance.

The following are examples of orders that may be appropriate in social media cases:

Prevention Orders

If a decision is made to take no further action, but there is a need to stop or prevent an individual engaging in anti-social behaviour, prosecutors may advise that the police consider seeking a Prevention Order (a pre-charge civil injunction) under s1 of the Anti-social Behaviour, Crime and Policing Act 2014 (ASBCPA). However, Article 10 rights will need to be considered before applying for such an order. The CPS cannot apply for this order.

Criminal Behaviour Orders

Criminal Behaviour Orders (CBO) are available under Part 2 ASBCPA. A CBO is available on conviction for any criminal offence, in any court, on the application of the prosecutor.

The order is aimed at tackling the most serious and persistent offenders, so are more likely to be appropriate in Category 1 or 2 social media cases, rather than Categories 3 or 4. They are also primarily intended to protect the wider community, so other orders may be more appropriate where there is a named victim, such as in cases of domestic abuse.

The court must be satisfied that the offender has engaged in behaviour that caused, or was likely to cause, harassment, alarm or distress to any person, and that the court considers making the order will help in preventing the offender from engaging in such behaviour.

In some cases, what may initially appear to be simply anti-social behaviour, there may be a link between the behaviour and hate crime. Where there is evidence of hostility based on the protected hate crime characteristics of ethnicity, religion, gender identity, sexual orientation or disability, prosecutors should be proactive in seeking further evidence from the police. For example:

- Asking the victim, the victim's carer and / or family, neighbours, housing agencies etc if there have been other incidents involving the victim;
- Checking whether the suspect has been involved in any other incidents and, if so, whether the victims on those occasions shared the same protected personal characteristics.

Further details can be found in the Legal Guidance on Criminal Behaviour Orders.

Restraining Orders

A Restraining Order is a civil behaviour order that can be made against a defendant on conviction or acquittal for any criminal offence. The order is intended to protect a named person from harassment, stalking (on conviction or acquittal) or conduct that will put the person in fear of violence (on conviction only).

These orders may be appropriate, for example, in the following types of cases:

- The defendant and witness know each other or previously have been in an intimate relationship.
- The parties have on-going contact.
- The complainant has been targeted by the defendant in some way.

Note that Restraining Orders must only impose prohibitions and not positive requirements.

For further information see the legal guidance on Restraining Orders.

Domestic Violence Protection Notices and Domestic Violence Protection Orders

Domestic Violence Protection Notices and Orders (DVPNs and DVPOs) give the police power to provide immediate protection to alleged victims of domestic abuse in circumstances where the police consider that there are no enforceable restrictions that can be placed on the perpetrator: for example, where the police decide there will be "no further action" on a case, or where a suspect receives a simple caution, or has been bailed without conditions.

The orders can be obtained without the victim's consent.

DVPNs only have effect for 48 hours, after which an application has to be made by the police to a magistrates' court to apply for a DVPO.

DVPOs provide the police and magistrates with the power to:

- Enforce non-molestation of the victim.
- Stop a defendant from contacting the victim.
- Prevent a defendant from evicting/excluding the victim from a premises (their household).
- Remove a defendant from a premises (their household).
- Prevent a defendant from returning to a premises (their household) for a period of up to 28 days.

Further information on these and other Orders relevant to domestic abuse can be found in the Domestic Abuse Guidelines for Prosecutors.

Conditions and prohibitions under Orders

Depending on the nature of the particular order, it may include prohibitions, to prevent or restrict certain behaviours, or positive requirements, to address the underlying causes of the offender's behaviour.

In social media cases, the conditions to be imposed under an order may relate to the perpetrator's use of social media, including a restriction or limit placed on communications. Such orders are likely to engage the right to private life under Article 8 ECHR, as well as Article 10 rights, and any interference with these rights will need to be justified, which will be easier where there is a conviction. There are also practical issues to consider in relation to whether a restriction is workable or capable of being monitored and enforced.

Case law relating to Sexual Harm Prevention Orders provides useful guidance on the key principles to consider when imposing requirements relating to internet use and access. In particular, the case of *R v Smith* [2011] EWCA Crim 1772:

- The order should be tailored to the exact requirements of the case.
- The order should avoid conflict or duplication with the requirements of any other court order, injunction or statutory regime to which the offender may be subject.
- The terms of the order should be clear, necessary and proportionate and should not be oppressive.
- A blanket prohibition on computer use or internet access is disproportionate and impermissible, as it restricts the defendant in the use of what is nowadays an essential part of everyday living and a requirement of much employment.

- An example of an effective term is to prohibit the defendant from:

  i. Using any device capable of accessing the internet unless it has the capacity to retain and display the history of internet use, and the device is made available on request for inspection by a police officer; and
  ii. Deleting such history of internet use.

- In some cases it may be necessary to prohibit altogether the use of social networking sites or other forms of chatline or chatroom.

Question 4
Does the new section on *Ancillary Orders* cover the main principles to consider when imposing conditions and prohibitions relating to internet use and access? If not, what other principles might be covered?

Victim Personal Statements

A Victim Personal Statement (VPS) gives victims an opportunity to describe the wider effects of the crime upon them, express their concerns and indicate whether or not they require any support. In social media cases, prosecutors should request a VPS if one has not already been made.

Provisions relating to the making of a VPS and its use in criminal proceedings are set out in the Code of Practice for Victims of Crime (Victims Code), and prosecutors should also refer to the legal guidance on Victim personal statements.

Making a VPS is optional and most VPSs will be in addition to the usual witness statement. A thorough VPS will assist the sentencing court to assess any harm that the offence has caused, including the effect of the offence on the victim, such as distress and anxiety. A VPS may also be used to support an application for an ancillary order.

For domestic abuse cases, a VPS may include a complainant's concerns about safety, intimidation and the perpetrator's bail status.

A victim can make more than one VPS and it is important that VPSs are updated, as the long-term effects of the offence on the victim will only be apparent after the passage of time.

Victims are entitled to say whether they would like to read their VPS aloud in court or whether they would like it read aloud or played (if recorded) for them.

Handling arrangements

These revised interim guidelines come into effect on 3 March 2016. Any cases that fall to be considered under these guidelines will be dealt with by the relevant CPS Area or CPS Direct. Cases which fall to be considered under these guidelines should be handled by a prosecutor with the appropriate level of skill and experience. Special arrangements apply to cases which fall within Category 4.

Handling arrangements for Category 4 cases:

- CPSD cases: To ensure that cases which call for an immediate response can be dealt with while suspects are still in police custody, CPS Direct lawyers may charge cases involving communications sent via social media which fall into Category 4 with the prior authority of the CPSD CCP or DCCP.
- Cases not charged by CPSD: Other cases referred to CPS Areas pre-charge, or charged by the police, require authorisation from the Private Office Legal Team. Authority is required before any final decision is made to charge or where the Area intends to proceed with a police charge.

Any terrorist related threat or other communication should be referred to the Special Crime and Counter Terrorism Division at ctd@cps.gsi.gov.uk

Question 5
Do you have any further comments on the revised Guidelines on prosecuting cases involving social media?