

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

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.

Response Sheet

Contact details:

Please supply details of who has completed this response.

Response completed by (name):

Kirsty Brimlow QC, James Vine and
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Position in organisation (if appropriate):

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22.3.13 extension agreed

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?

There is some opinion which deprecates guidelines in the area of social media and considers that a prosecutor should be able to use his/her common sense when applying the two stage test for prosecution. After careful consideration as to evidence of an identifiable need for guidelines, namely high profile cases which drew criticism for their prosecution (and by implication criticism of lack of common sense by the prosecutor), we consider that concerns as to actual guidelines can be addressed by analysis of the guidelines themselves.

· We agree that distinguishing between communications which amount to credible threats of violence and specific targeting of an individual so as to amount to harassment from communications which are ‘grossly offensive, indecent or false’ is an appropriate first step for prosecutors analysing offences committed using social media.

· However, we suggest that more detailed guidance, which include examples, would make this distinction clearer to prosecutors and ensure consistency of approach. In turn, it will assist the users of social media who require such guidance. The following improvements are recommended:

1. Further guidance and clarification should be provided, preferably with examples, of what may and may not amount to a credible threat of violence within the context of social media;

2. The guidelines should include factors which prosecutors must consider in order to determine whether a communication amounts to a credible threat of violence and harassment. Relevant factors should include:

i. The intended recipients of the communication - including age and evidence of vulnerability (regardless of how the communication is further disseminated or shared via social media);

ii. the age and/or maturity of the author of the communication and any specific mental health issues attaching to the author (these factors should be given considerable weight in addressing the subsequent approach);

iii. the context of the communication, including the forum within which it was sent (for example a semi-private group or online discussion forum);

iv. the motivation and intention of the maker of the statement as far as it is apparent from the context, tone and wording of the communication;

v. responses to and reception of the communication; and,

vi. whether or not the perceived threat could realistically be carried out in light of factors such as proximity, context and the nature of the perceived threat;

vii. Prosecutors should also be reminded to exercise caution when assessing whether a threat is credible in the context of social media and should keep in mind that the context in which interactive social media takes place is or can be very different to the context in which other communications take place. When assessing whether a threat is credible prosecutors should heed the comments of Eady J in *Smith v ADFNC* [2008] 1797(QB) which are quoted in paragraph 35 of the guidance.

· Further guidance should also be provided as to what factors prosecutors should consider when assessing who "may reasonably be expected to see" a message within the test of 'menacing character' set out by the Lord Chief Justice in *Chambers v DPP* [2012] EWHC 2157 (Admin) at para 30. The guidelines should emphasize the importance of taking account of the intended recipients of a message and the reasonable expectation of the original author that his or her message should only be read by the audience he or she intended.

• We welcome that the guidelines make it clear that a high threshold must be met before

communications identified as 'grossly offensive, indecent, obscene or false' are prosecuted and that in most cases it will be unlikely that a prosecution will be in the public interest. However, the guidance provided of matters necessary to meet this high threshold is skeletal. The terms 'grossly offensive', 'indecent' and 'obscene' are subjective terms and determining whether a communication is "more than" grossly offensive, obscene etc means is equally subjective and may lead to disparity in approach. Whilst accepting that guidelines are just that and caselaw will develop, we consider that it would be useful for the guidelines to point to how the specific terms should be understood. Also practical examples of types of cases which would fall under the fourth category and meet the high threshold identified in paragraph 12 would be useful to both prosecutors and users of social media.

- The guidance provided within paragraph 17 should be amended to clarify that threats that are not credible should not be prosecuted at all and that any exception to this should be referred to the DPP before proceeding (see page 5 of the guidelines).

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?

We do not consider that Section 1 of the Malicious Communications Act 1988 and 127 of the Communications Act 2003 are appropriate provisions to prosecute purported offences committed via social media. Obviously, it was never drafted with social media offences in mind. The provisions are in such broad terms that it is doubtful whether they fulfil the test of legal certainty. The comments in response to question 1 and further clarification of when the high threshold test is met apply here.

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

In principle yes, however we would suggest that further factors could sensibly be included (see question 4). We suggest that (c) and (d) should contain more detailed guidance; what amounts to 'an obvious consequence of sending a communication' is unclear as is what goes 'obviously beyond what could conceivably be tolerable or acceptable in an open and diverse society'.

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

Further

public interest factors should include:

(i) The age and maturity of the author of the communication (this factor should be given considerable weight by prosecutors);

- (ii) The forum within which the communication was sent (for example whether the communication was sent in a semi-private forum online like a facebook group)
- (iii) whether the communication may have been sent in jest;
- (iv) whether the communication may amount to an ill-thought out and casual response;
- (v) the antecedents of the author of the communication, as a general rule first time offences committed on social media should not be prosecuted. A system of warnings could be considered to assist a prosecutor's approach to repeat potential offending;
- (vi) whether there are concurrent civil proceedings in relation to the communication;
- (vii) proportionality;
- (viii) whether the author of the message and the intended recipients are resident in England and Wales.

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

We encourage the issue of sentencing guidelines for offences committed by social media by the Sentencing Guidelines Council. We consider that they would appropriately compliment these guidelines on prosecution.

