

Crown Prosecution Service—written evidence (FEO0106)

House of Lords Communications and Digital Committee inquiry into Freedom of Expression Online

The Crown Prosecution Service (CPS) welcomes the opportunity to contribute to this important inquiry on Freedom of Expression Online. While this response does not address the specific questions posed as part of this inquiry, we hope that the following information provides useful background context.

Introduction

The CPS prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales. The CPS is independent, and we make our decisions independently of the police and government. Our duty is to make sure that the right person is prosecuted for the right offence, and to bring offenders to justice wherever possible. The CPS:

- decides which cases should be prosecuted;
- determines the appropriate charges in more serious or complex cases, and advises the police during the early stages of investigations;
- prepares cases and presents them at court; and
- provides information, assistance and support to victims and prosecution witnesses.

Prosecutors must be independent, fair and objective. When deciding whether to prosecute a criminal case, our lawyers must follow the Code for Crown Prosecutors. This means that to charge someone with a criminal offence, prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction, and that prosecuting is in the public interest. The CPS works closely with the police, courts, the Judiciary and other partners to deliver justice.

Within the CPS, the Special Crime and Counter Terrorism Division (SCCTD) advises on and, where appropriate, prosecutes some of the most sensitive, complex and demanding cases across England and Wales. This includes cases where there is a need to strike a balance between the right to free speech and protecting victims and the public.

How the CPS balances freedom of expression and protecting the public online

1. CPS guidance recognises the potential impact of prosecutions on the Right to Freedom of Expression under Article 10 of the European Convention on Human Rights (ECHR). Our legal guidance makes it clear that it is not only speech which is well-received and popular that is protected, but also speech which is potentially offensive, shocking or disturbing. The guidance seeks to balance the rights of an individual to freedom of speech and expression against the duty of the state to act proportionately in the interests of public

safety, to prevent disorder and crime, and to protect the rights of other individuals and communities.

2. Online communications may involve the commission of a range of existing offences against the person, public justice, sexual or public order offences. Where an online communication is not being used to commit another substantive offence, the communications offences or stirring up hatred offences may be considered.
3. Within the CPS, offences of 'stirring-up' racial and other types of hatred under Part III of the Public Order Act 1986 are prosecuted by specialist prosecutors within SCCTD. SCCTD's role ensures consistency in decision making in these serious and sensitive cases. Prosecutions for these offences also require the consent of the Attorney General, which provides an additional safeguard against bringing inappropriate prosecutions which may be in breach of Article 10.
4. The posting of hateful material online may also involve the commission of communication offences, including 'grossly offensive' communications. Given the complexities in interpreting and applying the law in this area, CPS Areas must refer online 'grossly offensive' communication decisions to Special Crime Division for consideration to ensure consistency in decision making.
5. This response sets out the principles contained in our published legal guidance on freedom of expression in relation to:
 - 'grossly offensive communications' under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 as outlined in our Social Media Communications Guidance;¹ and
 - Stirring up hatred offences under Part III of the Public Order Act 1986 as outlined in our Racist and Religious Hate Crime Guidance² and Homophobic, Biphobic or Transphobic Hate Crime.³

Grossly offensive communications

6. The law on grossly offensive communications is not always easy to interpret or apply. The term 'gross offensiveness' does not have a simple definition because it relies on a number of principles developed in case law, and it is important to consider all relevant factors and the background and context in which the communication took place. Given the complexities in interpreting and applying the law in this area and to ensure consistency in decision making in these cases, the following proposed decisions must be referred to SCCTD for consideration:

¹ <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media>

² <https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance>

³ <https://www.cps.gov.uk/legal-guidance/homophobic-biphobic-and-transphobic-hate-crime-prosecution-guidance>

- a. Any proposal to charge a communications offence where the allegation is one of gross offence, obscenity or indecency:
 - o Section 1(1)(a)(i) and 1(1)(b) of the Malicious Communications Act 1988;
 - o Section 127(1) of the Communications Act 2003 save for the reference to "menacing".
 - b. Any proposal to charge or take no further action for any communications offence (section 1 or 127) where directed towards a person of public prominence.
7. Every day on social media there are millions of communications that people may find offensive. It is therefore in the public interest that the threshold for these offences is high to protect the freedom of expression principles contained in Article 10 of the ECHR, even if that expression may be unwelcome.
 8. Our Social Media Communications⁴ legal guidance makes it clear that cases are assessed with reference to "contemporary standards ... the standards of an open and just multi-racial society", assessing whether the particular message in its particular context is "beyond the pale of what is tolerable in our society", adopting the observations in *DPP v Collins* [2006] UKHL 40.
 9. Article 10 protections, however, will not apply to the expression of any ideology which goes against the very principles of the ECHR, namely justice and peace. Article 17 makes it clear that freedom of expression aimed at destroying or limiting, for instance, a person's right to a private and family life, or their peaceful enjoyment of property, or their enjoyment of rights in a way discriminatory of them compared to others, will not engage Article 10.

Stirring up hatred offences

10. Part III of the Public Order Act 1986 contains a series of offences relating to activity which stirs up hatred on grounds of race, religion or sexual orientation. Racial hatred is defined in section 17 of the Act. Sections 18 to 22 prohibit various forms of communicating threatening, abusive or insulting language and the prosecution must prove that hatred was intended to be stirred up or that it was likely to be stirred up.
11. Sections 29B to 29G create similar offences in relation to language which stirs up hatred on the grounds of religion and sexual orientation with two important distinctions. These offences only prohibit threatening language and it must be proved that the offender intended to stir up hatred. The narrower language within these provisions reflects concerns that persons expressing religious views would be caught within the ambit of the provision. This concern was further reflected in S29J and S29JA which

⁴ <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media>

provided specific additional protections for freedom of expression in relation to religious views and views regarding sexual orientation. For example, section 29J provides that:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

12. Article 10 of the ECHR allows freedom of expression save in certain limited circumstances. These circumstances include the offences contained within Part III of the Public Order Act 1986, however, the freedom of expression defence contained in Section 29J confirms that nothing in the Act "... prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult, or abuse of particular religions, or the beliefs or practices of its adherents." There is considerable European jurisprudence in relation to Article 10 that must be considered in these cases. In particular, the European Court of Human Rights has held that freedom of expression on matters of politics or public interest should be given special protection.
13. Conduct or material which only stirs up ridicule or dislike, or which simply causes offence, would not meet the requisite threshold required by the Act. In relation to sexual orientation, the Public Order Act 1986 sets out a freedom of expression defence in section 29JA, which confirms that "for the avoidance of doubt, the discussion or criticism of sexual conduct or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening".
14. Our legal guidance outlines that in deciding upon the public interest in charging these offences it is essential that prosecutors keep in mind that in a free, democratic and tolerant society people are able to robustly exchange views, even when these may cause offence. However, as noted above, the rights of the individual to freedom of expression must be balanced against the duty of the state to act proportionately in the interests of public safety, to prevent disorder and crime, and to protect the rights of others.
15. Stirring up hatred offences are highly sensitive. For that reason, and to ensure a consistent approach, any allegation under this legislation must be referred by the relevant CPS Area to the SCCTD. If it is decided that the case should be prosecuted as a stirring up hatred offence, specialist prosecutors in SCCTD will take over the conduct of the case from the Area. As noted above, any offence under this section can only be commenced with the consent of the Attorney General.

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