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The Crown Prosecution Guidelines and Grossly Offensive Comments: An Analysis

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The Crown Prosecution Guidelines and Grossly Offensive Comments: An Analysis

This article will critically evaluate the Crown Prosecution Service guidelines concerning grossly offensive comments made *via* social media. Abusive comments conducted online have recently dominated newspaper headlines. The Crown Prosecution Service has attempted to give clear advice to prosecutors as to when a comment made online will go from being one that is simply offensive, to one that is so grossly offensive it warrants criminal prosecution. The guidelines were first created in 2013 and updated in 2016. This article will critically examine the guidelines and grossly offensive comments made online and consider whether a coherent and accessible document has been created.

Key Words: Social Media; Grossly Offensive Comments; CPS Guidelines; Malicious Communications Act 1988; Communications Act 2003

Introduction

Each day millions of comments are made online *via* social media platforms. For example, on average around 500 million “tweets” are sent every day.¹ Social media is considered electronic communication *via* the use of the internet to connect with other individuals, build profiles and publicly share information.² Social media networks include the likes of Facebook, Twitter, Instagram and Snapchat. Recent figures indicate the reach of social

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¹ Internet Live Stats, ‘Twitter Usage Statistics’ (*Internet Live Stats*, 2016) <<http://www.internetlivestats.com/twitter-statistics/>> accessed 8 November 2016

² For a range of definitions which can be associated with social media see Christian Fuchs, *Social Media a critical introduction* (Sage Publications 2014) 35-37

media, with 73% of individuals having access to one or more social media sites.³ With such easy access to the online world, the law has sometimes struggled to keep pace with changing technology.

This is particularly the case with regard to abusive comments made online.⁴ Such comments can have a significant effect on those to whom they are directed. For instance, Gina Miller (the claimant who argued that the Government needed Parliamentary approval before it could trigger the Article 50 process to begin exiting the European Union⁵), felt the need to employ 24 hour private security protection after receiving death threats online and threats of sexual violence.⁶ Following the stream of online abuse aimed at Miller, Rhodri Phillips received a 12 week custodial sentence for two counts of sending menacing messages contrary to section 127 of the Communications Act 2000.⁷ He posted on his Facebook page, “£5,000 for the first person to ‘accidentally’ run over this [Gina Millar] bloody troublesome first generation immigrant.”

The issues associated with prosecuting abusive comments made online have been well documented in recent years. The lack of consistency when it came to prosecuting online behaviour resulted in the Crown Prosecution Service (CPS) introducing guidelines (the

³ Office for National Statistics, ‘Internet Access – Households and Individuals 2016 – ONS’ (*Office for National Statistics*, 2016)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2016>> accessed 04 October 2016

⁴ The ever-growing issue of online abuse, particularly aimed at individuals in the public domain, has been raised as an issue before Ministers following the 2017 general election. HC Deb 12 July 2017, Vol 267, cols 152-169

⁵ *R (Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768

⁶ Lisa O’Carroll ‘Gina Miller: “I’ve been told that as a colored woman, I’m not even human”’ *The Guardian* (London, 25 January 2017) <<https://www.theguardian.com/politics/2017/jan/25/parliament-alone-is-sovereign-gina-miller-speaks-out-after-article-50-victory>> accessed 6 June 2017

⁷ *R v Rhodri Phillips* Westminster Magistrates’ Court 13 July 2017 (unreported). His second count for sending menacing messages was in relation comments he made about Arthur Sube. See, Julia Gregory, ‘Aristocrat faces jail after being menacing and racist about Gina Miller’ *The Guardian* (London, 11 July 2017) <<https://www.theguardian.com/uk-news/2017/jul/11/man-jail-offering-money-run-over-gina-miller-rhodri-philipps-viscount-brexit>> accessed 20 July 2017

guidelines) on social media prosecutions in 2013.⁸ These guidelines were not without fault and, consequently, the CPS produced a revised version in October 2016.⁹

This article critically examines the social media guidelines and their application to grossly offensive comments made online. First, the law which criminalises grossly offensive comments will be identified. Then, three cases will be considered to illustrate why the guidelines were thought necessary. Moving on from this, the basic two stage approach introduced by the guidelines will be explored, before focusing on the concept of grossly offensive comments. This will take the format of outlining the approach to grossly offensive comments given in the guidelines, examining the significant weight accorded to freedom of expression and evaluating the defences identified by the CPS. Recommendations will then be put forward as to how the guidelines can be improved for future use.

The Law

The sending of grossly offensive messages is controlled under two statutes in the United Kingdom: the Malicious Communications Act 1988 (MCA) and the Communications Act 2003 (CA). The MCA was originally enacted to govern malicious communications sent by post. The CA was enacted to control the provision of broadcast services by organisations. Both have been adapted¹⁰ to cover conduct carried out *via* social media platforms.

Under section 1 of the MCA it is a criminal offence to convey, *via* the use of a communications network (e.g. the internet): “(i) a message which is indecent or grossly

⁸ Crown Prosecution Service, ‘Guidelines On Prosecuting Cases Involving Communications Sent Via Social Media’ (*CPS.gov.uk*, 2013) <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html> accessed 27 February 2016.

⁹ Crown Prosecution Service, ‘Guidelines On Prosecuting Cases Involving Communications Sent Via Social Media’ (*CPS.gov.uk*, 2016) <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/> accessed 10 October 2016

¹⁰ The MCA has been amended to cover electronic communications by s.43(1)a of the Criminal Justice and Police Act 2001.

offensive; (ii) a threat; or (iii) information which is false and known or believed to be false by the sender”. It is also an offence to send “any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature”. The *actus reus* of the offence is in the sending of the message, there is no need for the message to be received. However, the purpose of the sender must be to “cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated”.

The CA generally deals with comments which are in the public domain, for instance a message posted on a Facebook page. Under section 127 of the Act, a message sent, *via* a communications device, which is “grossly offensive” or of an “indecent, obscene or menacing character” is an offence. Like the MCA, the offence is in the sending of the message; there is no need for the intended victim to receive the communication, although there has to be an intention or awareness present that the conduct was grossly offensive.¹¹

Both the MCA and CA are similar; indeed, Scaife suggests that the Acts are interchangeable.¹² However, the courts and the CPS have distinguished the key differences between the two Acts: the CA covers only communications which makes use of technology, whereas the MCA governs all communications including the postal system:

A letter dropped through the letterbox may be grossly offensive, obscene, indecent or menacing, and may well be covered by section 1 of the 1988 Act [MCA], but it does not fall within the legislation now under consideration [CA].¹³

However, their use in an online context has created some difficulties, especially with regard to the term grossly offensive. Neither Act gives a clear indication as to what is meant by this phrase. As a result, this has created problems in cases concerning the prosecution of actions which utilise social media.

¹¹ *DPP v Collins* [2006] UKHL 40 per Lord Bingham at paras 8 & 10

¹² Laura Scaife, *Handbook of Social Media and the Law* (Routledge 2015) 166

¹³ *DPP v Collins*, n.11 para 7

Pre Guidelines

Cases considered by the courts before the 2013 guidelines, after recommendations for prosecution by the CPS, left the position unclear as to when conduct undertaken online would be seen as a breach of the criminal law. This is clear from *Chambers v DPP*.¹⁴ Here, the defendant found himself before the courts, after being prosecuted for breaching section 127 of the CA for sending a message of a menacing nature. Chambers, in January 2010, following the closure of an airport due to bad weather, posted the following comment on his twitter page: “Crap! Robin Hood Airport is closed. You’ve got week [sic] and a bit to get your shit together otherwise I’m blowing the airport sky high.” This comment later came to the attention of airport officials. As a result, Chambers was arrested and convicted under section 127 of the CA, despite the airport deeming the threat non-credible.¹⁵ He subsequently appealed his conviction and, on appeal, the Crown Court determined that the tweet was “menacing in its content and obviously so. It could not be more clear. Any ordinary person reading this would see it in that way and be alarmed.”¹⁶

Chambers and his legal team appealed the decision in the High Court. The judges during the original High Court appeal were unable to reach an agreement and consequently the matter was subjected to a second appeal in the same court. In July 2012, the High Court quashed Chambers’ conviction, coming to the conclusion that his comments, although ill thought out, were intended as a joke. Lord Judge stated:

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 this legislation.¹⁷

¹⁴ *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 WLR 1833

¹⁵ *R v Chambers* Doncaster Magistrates’ Court 10 May 2010 (unreported)

¹⁶ Per Judge Jacqueline Davis found in Laura Scaife, *Handbook of Social Media and the Law* (Routledge 2015) 135

¹⁷ *Chambers*, n.14 per Lord Judge at para 28

Although this case concerned a communication of a menacing nature, rather than a grossly offensive comment, it illustrates the difficulties of prosecuting a comment made on social media. This statement made by Lord Judge can apply to grossly offensive comments, exposing a lack of clarity when it comes to determining at what point a comment goes further than being one which is merely offensive (and so lawful), to one that is so grossly offensive it should be criminalised.

In *R v Woods*,¹⁸ grossly offensive comments made by the defendant resulted in prosecution and conviction. Following media coverage of a young child, April Jones, going missing in Wales, Woods, under the influence of alcohol, made a number of Facebook comments in relation to April. These included: “Who in their right mind would abduct a ginger kid?” and “I woke up this morning in the back of a transit van with two beautiful little girls, I found April in a hopeless place.” These comments later took a more sinister turn when he made sexually explicit statements regarding April. His comments quickly caught other Facebook users’ attention. His remarks were actively shared across the Facebook community, where one member publicly published Woods’ home address. Consequently, around fifty people descended upon the property where Woods lived, resulting in the police having to arrest him for his own safety. He was later rearrested and charged under the CA for sending grossly offensive comments. He received a custodial sentence of twelve weeks for his actions.

A different outcome occurred in the matter of Thomas.¹⁹ Thomas, a Port Talbot footballer, made a homophobic comment about the divers Tom Daley and Peter Waterfield,

¹⁸ *R v Woods* Chorley Magistrates Court 8 October 2012 (unreported). See also, The Telegraph, ‘April Jones: Facebook troll jailed for “despicable” comments’ *The Telegraph* (London, 8 October 2012) <<http://www.telegraph.co.uk/technology/facebook/9594228/April-Jones-Facebook-troll-jailed-for-despicable-comments.html>> accessed 25 October 2016

¹⁹ Crown Prosecution News Brief, ‘DPP Statement On Tom Daley Case And Social Media Prosecutions’ (*CPS.gov.uk*, 2012) <<http://blog.cps.gov.uk/2012/09/dpp-statement-on-tom-daley-case-and-social-media-prosecutions.html>> accessed 27 February 2016

following them coming fourth during the 2012 Olympics: “if there is any consolation for finishing fourth atleast [sic] daley and waterfield [sic] can go bum each other #teamHIV.”

Despite the nature of this message being offensive, it was deemed that this message was not so grossly offensive it warranted prosecution. Subsequently, no criminal action was brought against Thomas.²⁰

It is perhaps easy to see why the comments made by Woods were grossly offensive and so worthy of prosecution. It is less obvious why those made by Thomas were not. Or, to put the matter more pertinently, if the two cases of *Woods* and Thomas are on either side of a line between comments which are merely offensive and those which are grossly so, the question arises as to where that line lies. This was an element reflected in the DPP’s statement concerning Thomas:

... the CPS has the task of balancing the fundamental right of free speech and the need to prosecute serious wrongdoing on a case by case basis. That often involves very difficult judgment calls and, in the largely uncharted territory of social media, the CPS is proceeding on a case by case basis. In some cases it is clear that a criminal prosecution is the appropriate response to conduct which is complained about ... But in many other cases a criminal prosecution will not be the appropriate response.²¹

That had followed concerns raised over the “disproportionate application of the criminal law”²² with regards to social media prosecutions. Indeed, the national lead on digital crime, Chief Constable of Essex Constabulary, Stephen Kavanagh, suggested that there was a lack of consistency in prosecuting online abuse.²³

²⁰ Thomas was, though, fined by his football club, Port Talbot, for his actions.

²¹ Crown Prosecution News Brief, n.19

²² Jacob Rowbottom, ‘Crime and communication: do legal controls leave enough space for freedom of expression?’ in David Mangan & Lorna E. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar Publishing 2017) 53

²³ Matthew Weaver, ‘Police are inconsistent in tackling online abuse, admits chief constable’ *The Guardian* (London, 14 April 2016) <<https://www.theguardian.com/uk-news/2016/apr/14/online-abuse-police-inconsistent-digital-crime-stephen-kavanagh>> accessed 1 March 2017. See, also Alex Bailin QC & Edward Craven, ‘Prosecuting social media: the DPP’s interim guidelines’ (*The International Forum for Responsible Media Blog*, 23 December 2012) <<https://inform.wordpress.com/2012/12/23/prosecuting-social-media-the-dpps-interim-guidelines-alex-bailin-qc-and-edward-craven/>> accessed 20 July 2017

The lack of clarity as to what amounts to a grossly offensive comment, as well as a desire to create some form of consistency across police forces,²⁴ led the CPS to issue interim guidelines in 2013: *Guidelines on Prosecuting Cases Involving Communications Sent via Social Media*. The DPP, Keir Starmer QC stated at the time of publication:

The guidelines will help prosecutors to make fair and consistent decisions to prosecute in those cases that clearly require robust prosecution in accordance with the Code for Crown Prosecutors, and to uphold the right to freedom of speech in those cases where a communication might be considered grossly offensive, but the high threshold for prosecution is not met.²⁵

Following the initial interim guidelines being published, the first House of Lords Select Committee meeting took place examining how the current criminal law framework applied to social media in the United Kingdom. Here, it was put forward that the law was adequate in governing social media and the CPS guidance was “clear and accessible.”²⁶ Despite this, the guidelines were later updated in 2016.

The following section will examine the two stage test introduced by the 2013 guidelines in order to establish whether they bring sufficient clarity to the question of when a comment is so offensive as to be a crime.

The Guidelines: A two stage test

The guidelines indicate that a two stage approach should be undertaken when it comes to deciding if certain conduct online should result in prosecution. The CPS will look at the facts before them and establish that two elements are present in order for a recommendation of

²⁴ BBC News, ‘Lindsay Hoyle MP says Lancashire Police “inconsistent” over social media’ *The BBC* (London, 18 October 2012) <<http://www.bbc.co.uk/news/uk-england-lancashire-19992795>> accessed 1 March 2017.

²⁵ Crown Prosecution Service, ‘DPP publishes final guidelines for prosecutions involving social media communications’ (*CPS.gov.uk*, 2013) <http://www.cps.gov.uk/news/latest_news/dpp_publishes_final_guidelines_for_prosecutions_involving_social_media_communications/> accessed 20 July 2017

²⁶ Select Committee on Communications, *Social media and criminal offences* (HL 2014-15, 37) para 14

prosecution to occur. First, the comment or conduct in question must fall within one of four categories:

- There is a credible threat of violence, either to the person or someone's property;
- The actions can be seen to amount to "harassment, stalking, controlling or coercive behaviour, revenge pornography, an offence under the Sexual Offences Act 2003, blackmail or another offence";²⁷
- There is a breach of a court order;
- The statement in question can be considered grossly offensive, indecent, obscene or false.

If it can be found that the behaviour in question falls within one of these four categories, the second part of the test will be applied: the public interest test. Essentially, public interest falls on a number of considerations:²⁸

- The seriousness of the offence – the more serious the more the likelihood of prosecution;
- The culpability of the defendant – here, among other things, the criminal history of the person committing the acts will be taken into account;
- The circumstances and any harm caused to the victim – the more vulnerable the victim and the greater the harm, the more likely a recommendation for prosecution will occur;

²⁷ CPS Guidelines, n.9 found under *Category 2: Communications Targeting Specific Individuals*

²⁸ Crown Prosecution Service, 'Code for Crown Prosecutors' (CPS.gov.uk, 2016)

<https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html> accessed 10 October 2016

- The age of the defendant – the social media guidelines suggest that it will not normally be in the public interest to prosecute those under 18 years old;
- Community impact – the greater the impact upon the overall community affected by the message, the more likely it is that prosecution will be recommended;
- Proportionality – with reference to the evidence available, is prosecution the appropriate response. Here, consideration must be made to the cost of bringing the action before the court;
- The protection of sensitive information – would it do more harm than good to release information contained in the case into the public domain.

Subsequently, with regard to online comments, if prosecution is considered to be within the public interest, when the above considerations are taken into account, and the comments fit within one of the categories established in the first part of the test, then it is more likely that the CPS will recommend prosecution.

The remainder of the article will primarily consider the fourth classification in the first test of the guidelines; specifically, whether there is sufficient clarity about what amounts to a grossly offensive comment.

Grossly offensive comments and the guidelines

As demonstrated above, a number of issues arose when it came to prosecuting actions which might amount to being of a grossly offensive nature. As a result, the CPS attempted in both the original version of the guidelines and its newest form to combat this problem.

In this section, three main elements will be explored:

- The question of what may be deemed a grossly offensive comment;
- Freedom of expression and its implications with regard to grossly offensive comments; and
- The factors specified in the guidelines that may indicate that a prosecution would be inappropriate.

What is a grossly offensive comment?

In the original guidelines, the section governing grossly offensive comments starts by simply stating how the MCA and CA can be applied in relation to such comments. The guidelines briefly outline the main elements of these statutes. However, there is no new information contained in this section to which the CPS or even the police did not already have access. For instance, little clarification is contained in relation to what constitutes a grossly offensive comment. Instead the CPS relies on the judgment of Lord Justice Dyson in *Connolly v DPP*: “The words ‘grossly offensive’ and ‘indecent’ are ordinary English words.”²⁹ So what then comprises a grossly offensive or indecent comment?

For the CPS, context is everything. Within the guidelines, the suggestion is that conduct online differs from many other forms of communication and is similar in nature to ephemeral conversations one may encounter in a relaxed, informal social setting. This is reflected further in the House of Lords Select Committee on Communications social media report, who argue that this form of communication is casual and therefore, a higher legal threshold should be applied.³⁰

The guidelines make use of Eady J’s judgment in *Smith v ADVFN* to illustrate the point:

... [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

²⁹ *Connolly v DPP* [2007] EWHC 237 (Admin), [2008] 1 W.L.R. 276 per Lord Justice Dyson at para 10

³⁰ Select Committee on Communications, n.26

amount of repartee or ‘give and take’.³¹

The analogy that comments made online can be compared to a social situation taking place in a bar is, I suggest, flawed.³² Many abusive comments made online would not be spoken in a public setting. Indeed, online abuse may seem more sinister and therefore the likelihood that a person would say such comments, without the physical presence of a screen between them and the wider public, is slim: “activities have not only replicated those in the virtual world but also have taken on their own character fuelled by an environment where anonymity is the norm”.³³

For instance, in a recent interview with the BBC, two female online gamers have spoken out about the abuse they have suffered online. In the article, they speak of being harassed online, where they have received threats of rape: “the way I get harassed is about what they would do to my body, about why I don't deserve to be there because I use my sexuality - it's all extremely graphic”.³⁴ Comments made online are often more explicit than statements made in the “real world”.

The CPS use the judgment of Lord Judge in *Chambers* – that satirical, rude, potentially offensive comments or unpopular opinions should be permitted – to illustrate that the comments in question need to go beyond what is considered tolerable within society.³⁵ This is a very subjective approach; what one person might find “more than offensive,” another might not. This, therefore, adds little to our understanding of what constitutes a

³¹ *Nigel Peter William Smith v ADVFN Plc* [2008] EWHC 1797 per Justice Eady at para 14

³² Further arguments have been put forward that although online communications are like everyday speech, these digital conversations remain “stored and searchable”. See, Jacob Rowbottom, ‘Casual comments and legal controls: watch what you say online’ (*The International Forum for Responsible Media Blog*, 13 April 2012) <<https://inform.wordpress.com/2012/04/13/casual-comments-and-legal-controls-watch-what-you-say-online-jacob-rowbottom/>> accessed 20 July 2017. See also, Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (5th edn, Routledge 2017) 306

³³ Subhajit Basu & Richard Jones, ‘Regulating Cyberstalking’ (2007) 2 *Journal of Information, Law and Technology* 1, 4

³⁴ BBC News ‘100 Women 2016: The women challenging sexism in e-sports’ *The BBC* (London, 21 November 2016) <<http://www.bbc.co.uk/news/technology-37992322>> accessed 22 November 2016

³⁵ *Chambers*, n.14

grossly offensive comment. Simply put, the CPS has created a document of case law comments, which does very little to clearly establish the point at which the law can intervene on a matter.

For better clarification, the guidelines could have contained explicit examples, in their relevant context, of comments which would be considered grossly offensive and those which would not. For example, clarifying why a Facebook comment stating that “all soldiers should die and go to hell”³⁶ was offensive and therefore warranted prosecution but threats of physical violence *via* social media was not a breach of the law.³⁷ Furthermore, the case of *Woods*, as mentioned previously, could have been used to illustrate how the CPS concluded that his actions warranted prosecution. Instead, the CPS has made brief references to judicial commentary, without supplying specific examples of when a comment will be deemed to be one so grossly offensive it warrants prosecution. Subsequently, the ambiguity of what would amount to a grossly offensive comment remained despite the publication of the 2013 guidelines.

This is a factor which is not overcome in the 2016 updated version of the guidelines. Here, the issue of grossly offensive comments takes a similar format, though a non-exhaustive list of judicial *dicta* is now given. Despite the inclusion of these comments, like that of the previous guidelines, there are no explicit examples of when a statement will be regarded as one that is grossly offensive. All the judgments referred to in this section predate the guidelines themselves; essentially, the CPS has made no reference to cases which have gone before the courts between 2013 and 2016. This is a failure on behalf of the CPS. The

³⁶ *R v Azhar Ahmed* Huddersfield Magistrates’ Court 9 October 2012. See also, Helen Carter, ‘Man gets community sentence for Facebook post about dead soldiers’ *The Guardian* (London, 9 October 2012) <<https://www.theguardian.com/uk/2012/oct/09/community-sentence-facebook-dead-soldiers>> accessed 22 July 2017

³⁷ Sky News, ‘McCann Trolls: Police Won’t Take Action’ *Sky News* (London, 1 May 2015) <<http://news.sky.com/story/mccann-trolls-police-wont-take-action-10361261>> accessed 24 July 2017

CPS could have taken the opportunity in the updated version of the guidelines to demonstrate how they are applied in a working context.

For instance, one case that came before the courts after the publication of the 2013 guidelines concerned abusive messages aimed at the feminist campaigner Caroline Criado-Perez. In January 2014, two individuals were prosecuted under section 127 of the CA following their sending of grossly offensive tweets to Criado-Perez. This followed her well-documented campaign to get the author Jane Austin printed on bank notes in the United Kingdom.³⁸ Messages ranged from derogatory comments about Criado-Perez to threats of rape. The CPS could have taken this opportunity to give a detailed statement as to why these two individuals were prosecuted and others were not. For instance, it could have drawn on aggravated factors such as the anonymity of the messages, the continued abuse aimed at Criado-Perez by the defendants and the comments spanning over more than one social media site.³⁹ In addition, despite the successful prosecution of these two individuals, others who had also been abusive towards the writer were not brought before the courts.⁴⁰ Little clarification has been given by the CPS as to why this was the case.

In addition, the case of *R v Newsome*⁴¹ could be used as a further example. In 2014, following the murder of a teacher, Ann Maguire, by a student, Newsome posted the following comment on his Facebook page: “Personally im [sic] glad that teacher got stabbed up [sic], feel sorry for the kid... he shoulda [sic] pissed on her too.” He was later convicted and sentenced to 6 weeks under section 127 of the CA. Again, this case could have been used to demonstrate the application of the guidelines. Reference could have been made to factors

³⁸ *R v John Raymond Nimmo and Isabella Kate Sorley* Westminster’s Magistrates’ Court 24 January 2014. See also, Alexandra Topping, ‘Jane Austen Twitter row: two plead guilty to abusive tweets’ *The Guardian* (London, 7 January 2014) <<https://www.theguardian.com/society/2014/jan/07/jane-austen-banknote-abusive-tweets-criado-perez>> accessed 10 October 2016

³⁹ These factors, and more, were taken into account by the court.

⁴⁰ Crown Prosecution Service News Brief, ‘CPS authorises charges in Twitter-related cases’ (*CPS.gov.uk*, 2013) <http://www.cps.gov.uk/news/latest_news/stella_creasy_mp_caroline_criado-perez/> accessed 26 October 2016

⁴¹ *R v Jake Newsome* Leeds Magistrates’ Court 4 June 2014 (unreported)

which led to the conclusion that prosecution was appropriate as well as to any aggravating and mitigating considerations which may have been taken into account.

The guidelines, therefore, provide little clarity as to when a comment goes further than being one deemed as offensive, to a comment considered so grossly offensive it warrants prosecution.

Grossly Offensive Comments v Freedom of Expression

When it comes to prosecuting online commentary, freedom of expression must be taken into account. Under the European Convention of Human Rights, citizens have the qualified right of freedom of expression.⁴² The guidelines give significant weight to free speech, with a high threshold test being applied to all statements in order to establish whether they warrant criminal intervention. In essence, the CPS argue that a higher threshold will be applied to potentially grossly offensive comments, owing to human rights considerations. The guidelines recognise the importance of the right of freedom of expression and state that

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.⁴³

This reflects the courts' approach to this convention right, as suggested by Akhtar, who states that Lord Judge's judgment in *Chambers* "tilts" in the direction of freedom of expression in social media law cases.⁴⁴

However, other rights may be under threat when it comes to abusive comments made online, as supported by the Secretary General for the United Nations:

⁴² European Convention of Human Rights Article 10.

⁴³ CPS Guidelines, n.9 found under *The High Threshold Test*

⁴⁴ Zia Akhtar, 'Malicious communications, media platforms and legal sanctions' (2014) 20 (6) *Computer and Telecommunications Law Review* 179, 181

The technical difficulty of regulating the content of messages broadcast through the Internet makes it a particularly effective means of misusing the freedom of expression and inciting discrimination and other abuses of human rights.⁴⁵

The guidelines indicate the importance of protecting freedom of expression. This is consistent with the jurisprudence of the European Court of Human Rights, which gives clear primacy to this right.⁴⁶ However, the guidelines fail to make direct reference to other rights which may be breached when it comes to abuse online, such as the right to respect for one's private life.⁴⁷ The balancing of convention rights against each other is nothing new for the justice system, yet the lack of direct reference to rights and considerations – other than freedom of expression – that may be in play when considering the legality of online comments, is an error.⁴⁸

Concerns have been raised that the guidelines give clear weight to freedom of speech and consequently, allow “cyber-bullying to go unchallenged.”⁴⁹ Following implementation of the guidelines, prosecutions for sending threatening abuse online dropped by a third⁵⁰ despite an increase in police reports concerning social media.⁵¹ Indeed, Agate and Ledward suggest that if the case of *Woods* (the individual who made grossly offensive comments regarding the

⁴⁵ The Secretary-General, Preliminary Rep. of the Secretary-General on Globalization and Its Impact on the Full Enjoyment of All Human Rights, 11 26-28, U.N.Doc. A/55/342 (Aug. 31, 2000) 6

⁴⁶ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49. Such significant weight is given to the freedom of expression, as it is considered a fundamental right of a democratic society; therefore, the freedom of expression is highly protected by the European Court of Human Rights, which is reflected in the guidelines. See, European Court of Human Rights, ‘Internet: case-law of the European Court of Human Rights’ (*ECHR*, June 2015) <http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf> accessed 3 March 2017

⁴⁷ European Convention of Human Rights Article 8.

⁴⁸ For an argument suggesting that Article 8 should take precedence in cases concerning social media, see, Lorna Wood, ‘Social Media: it not just about Article 10’ in David Mangan & Lorna E. Gillies (eds), *The Legal Challenges of Social Media* (Edward Elgar Publishing 2017) 104-124

⁴⁹ Jacob Rowbottom, n.22, 54

⁵⁰ Alice Philipson, ‘Online bullies go unpunished as prosecutions for abusive messages plunge by a third’ *The Telegraph* (London, 30 January 2014) <<http://www.telegraph.co.uk/technology/social-media/10606329/Online-bullies-go-unpunished-as-prosecutions-for-abusive-messages-plunge-by-a-third.html>> accessed 20 July 2017

⁵¹ Martin Evans, ‘Police facing rising tide of social media crimes’ *The Telegraph* (London, 5 June 2015) <<http://www.telegraph.co.uk/news/uknews/crime/11653092/Police-facing-rising-tide-of-social-media-crimes.html>> accessed 20 July 2017. For a critique of these figures, see, Jacob Rowbottom, n.22

missing school girl, April Jones) was presented to the CPS today, the case would never make it before the courts.⁵²

The CPS have attempted to overcome some of these difficulties in the updated version of the guidelines by including specific sections dealing with hate crimes and violence against women and girls in the UK, where the commission of such offences may be aided by social media. Both these sections imply that comments which amount to hate crimes or promote violence against women and girls⁵³ are likely to breach the high threshold test, and therefore warrant prosecution. This is a significant step forward by the CPS, as hate crime has recently been on the increase in the UK,⁵⁴ this is especially true in relation to hate crime conducted online since the referendum in the UK on membership of the European Union.⁵⁵ The CPS have thus attempted to take into account other factors outside freedom of expression in the newest version of the guidelines. This is a significant step forward in the protection of individuals from online abuse, although it is yet to be seen how these changes will be applied in reality.

Proportionality

⁵² Jennifer Agate & Jocelyn Ledward, 'Social media: how the net is closing in on cyber bullies' (2013) 24 *Entertainment Law Review* 263, 264. This is disputed by Dorfman. She is highly critical of the law's interference with conduct carried out *via* the use of social media. She suggests that it is for society to dictate and comment on when an action goes beyond a statement of bad taste. For her, the guidelines are too wide and, therefore, leave open the possibility that freedom of speech will be limited. See, Rosalee Dorfman, 'Can you say "social media prosecutions" with a straight face? The Crown Prosecution Service can' (2013) *The Leeds Journal of Law and Criminology* <<http://criminology.leeds.ac.uk/2013/09/05/social-media-prosecutions/>> accessed 20 October 2016.

⁵³ Sills et al state "the pervasiveness of these platforms [social network sites] – such as Facebook, YouTube, Twitter, and numerous others – has driven many social and cultural activities online" including violence against women". Sophie Sills, Chelsea Pickens, Karishma Beach, Lloyd Jones, Octavia Calder-Dawe, Paulette Benton-Greig, & Nicola Gavey, 'Rape culture and social media: young critics and a feminist counterpublic' (2016) 16 (6) *Feminist Media Studies* 1, 5

⁵⁴ Katie Forster, 'Hate crimes soared by 41% after Brexit vote, official figures reveal' *The Independent* (London, 13 October 2016) <<http://www.independent.co.uk/news/uk/crime/brexit-hate-crimes-racism-eu-referendum-vote-attacks-increase-police-figures-official-a7358866.html>> accessed 14 February 2017. See also, Jon Robins, 'Post Brexit Hate Crimes' (2016) 180 *Criminal Law Justice Weekly* 696

⁵⁵ Cara McGoogan, 'Government funds research into social media hate crime after Brexit vote' *The Telegraph* (London, 9 February 2017) <<http://www.telegraph.co.uk/technology/2017/02/09/government-funds-research-social-media-hate-crime-brexit-vote/>> accessed 14 February 2017

It is clear that not all grossly offensive comments made online will result in prosecution. Rowbottom states that “there are simply not the resources to prosecute all those [grossly offensive comments] that could fall foul to the letter of these laws.”⁵⁶ Similarly, Chief Constable of Essex Constabulary, Stephen Kavanagh, has publicly spoken about the continued pressure on the police when it comes to online abuse: “the levels of abuse that now take place within the internet are on a level we never really expected. If we did try to deal with all of it we would clearly be swamped”.⁵⁷

The guidelines reflect the notion that prosecution should only occur where it is appropriate. Indeed, prosecution is “unlikely to be necessary and proportionate” where one or more of the following elements are present: genuine remorse being expressed by the defendant for their behaviour; comments being swiftly removed from social media platforms; proof that the conduct in question was never intended for a wide audience; or if the comments can be regarded as simply a person expressing their right to freedom of speech. If some, or all, of these elements are present in a matter before the CPS, it is unlikely that a recommendation for prosecution will be put forward.

However, similar to the issue of what is deemed a grossly offensive comment, little clarity is given on these factors within the guidelines. For example, what constitutes swift action in relation to removing a statement online? Could it be said that removing a comment within 24 hours is sufficient? The guidelines do not provide an answer to this question, or any indicative examples; this is a significant flaw on the CPS’s behalf.

Conclusion

⁵⁶ Jacob Rowbottom, n.32

⁵⁷ Sandra Laville, ‘Online abuse: “existing laws too fragmented and don’t serve victims”’ *The Guardian* (London, 4 March 2016) <<https://www.theguardian.com/uk-news/2016/mar/04/online-abuse-existing-laws-too-fragmented-and-dont-serve-victims-says-police-chief>> accessed 04 October 2016

The reasoning behind the implementation of the guidelines was to create some form of coherency and consistency when it came to the prosecution of online abuse. Nearly one year on from the updated document, there are still issues when it comes to grossly offensive commentary online.

The CPS could overcome these difficulties by being more transparent in the methods they undertake when it comes to their decision-making processes of prosecuting grossly offensive material posted online. Here, the CPS should publish statements after a case is considered in the judicial system as to how they came to the decision that the matter should be brought before the courts. The recent case of *R v Omega Mwaikambo*⁵⁸ provides an example. Although this case concerned a grossly offensive pictures rather than comments, the defendant was successfully prosecuted under section 127 of the CA. Following a fire in a tower block in Royal Borough of Kensington and Chelsea, London, Mwaikambo published an image on his Facebook page of a body of a man killed in the disaster. The photo, which was taken by Mwaikambo, clearly displayed the deceased's face and other distinguishing factors, after Mwaikambo opened the body bag to take the images.⁵⁹ Despite numerous requests from other Facebook users to remove the photo, he did not do this, claiming that posting the image was a form of protest about how the deceased was being treated by the authorities.⁶⁰ The picture was reported to police, resulting in Mwaikambo receiving a 12-week custodial sentence, despite having no previous convictions.

This case could be used as an example to illustrate how the CPS reached their conclusion that the matter should go before the courts. Emphasis should be placed on how the

⁵⁸ *R v Omega Mwaikambo* Westminster's Magistrates' Court, 17 June 2017 (unreported)

⁵⁹ The deceased had been placed in a body bag which had been left unattended following the aftermath of the fire.

⁶⁰ Telegraph Reporters, 'Man jailed for sharing photo of dead Grenfell Tower fire victim on Facebook') *The Telegraph* (London, 16 June 2017) <<http://www.telegraph.co.uk/news/2017/06/16/man-jailed-sharing-photo-dead-grenfell-tower-fire-victim-facebook/>> accessed 26 July 2017

two-stage test, as set out in the guidelines, was applied taking into account any aggravating factors, such as his refusal to remove the pictures. This would create more clarity as to what constitutes “grossly offensive” in a social media context. Furthermore, the factors considered in cases which do not result in a recommendation of prosecution should be made available to the public, with a clear explanation as to why it was decided not to prosecute.

With online abuse slowly becoming more common within society, more needs to be done to tackle this behaviour. Following the 2017 general election, the abuse and intimidation of MPs, particularly online abuse, resulted in Theresa May calling for a parliamentary inquiry to be held.⁶¹ Labour shadow home secretary Diane Abbott recalled just some of the comments she had received via social media during a parliamentary debate:

In my case, the mindless abuse has been characteristically racist and sexist. I have had death threats, and people tweeting that I should be hanged “if they could find a tree big enough to take the fat bitch’s weight”. There was an English Defence League-affiliated Twitter account—#burnDianeAbbot. I have had rape threats, and been described as a “Pathetic useless fat black piece of shit”, an “ugly, fat black bitch”, and a “nigger”—over and over again.⁶²

Other MPs were subject to similar comments, with social media playing a key part in the targeting of these individuals.

The issues of consistency and how the phrase ‘grossly offensive’ should be understood have not been overcome by the publication of either the 2013 or the 2016 guidelines. Little clarity is given by the CPS as to when a comment would go beyond being simply offensive, to one being so grossly offensive it should result in prosecution. The guidelines still need further modification, to reflect recent judicial decisions and lay a basis for more strongly articulated criteria for prosecution decisions. The new guidelines should include details of the decision making processes adopted, and factors considered, in actual

⁶¹ Andrew Sparrow, ‘May orders inquiry into abuse of parliamentary candidates - Politics live’ *The Guardian* (London, 13 July 2017) <<https://www.theguardian.com/politics/blog/live/2017/jul/12/pmqs-grenfell-tower-damian-green-emily-thornberry-labour-accuse-tory-hq-of-personal-attacks-smears-and-untruths-as-mps-debate-candidate-abuse-politics-live>> accessed 24 July 2017

⁶² HC Deb 12 July 2017, Vol 627, Col 152-170, 159

cases when deciding whether or not to prosecute. The new guidelines should also state that, when deciding on prosecution, account should be given to the significant effect online abuse can have on an individual.