

Guidance on cases involving Communications sent via Social Media

Introduction

COPFS recognises that there is ever increasing usage of technology and social media as a method of communication. This raises particular considerations and challenges for prosecutors given the speed with which communications can be sent with ease of access to an individual and the widespread audience they can reach. This guidance will ensure that there is a consistency of approach across Scotland by prosecutors in relation to such communication and alert the public and in particular users of electronic and social media of where the boundaries lie between criminal and non criminal communications

This guidance covers offences that are most likely to be committed by the sending of communications via social media **by reason of the nature of the content of the communication**. Where social media is simply used as the vehicle to facilitate some other substantive offence prosecutors should refer to guidance for the substantive offence in question. For instance, a number of sexual offences, particularly some which involve children such as grooming, can be facilitated and perpetrated via use of social media. Social media can also be used as a vehicle to share or distribute indecent images of children. Whilst some of these offences are listed in the guidance as being relevant separate and distinct legal guidance is available to Prosecutors for such offences and reference should be made to that guidance.

“Social media” is an umbrella term that incorporates the use of or interaction with various devices, websites, applications and on-line tools by the user in order to generate and share content either in words or pictures with others.

This policy extends to the resending or for example ‘liking’ or ‘retweeting’, of communications originally posted by others. “Communications” include comments, pictures or photographs, videos and soundfiles.

General Principles

A robust approach is and will continue to be taken in Scotland to communications posted via social media if they are criminal in content in the same way as such communications uttered or published in the non-virtual world would be handled. As with any other offence, prosecutors may only instigate criminal proceedings where there is sufficient credible and reliable

evidence and it is in the public interest to do so. Details of the public interest considerations that the prosecutor must take into account in reaching that decision can be found in the Prosecution code. These considerations apply equally to communications made via social media.

However, COPFS recognises that there are also some particular considerations that apply in relation to communications sent by social media.

Relevant Particular considerations

Prosecutors should be aware that many of the internet service providers, including Facebook and Twitter, have servers abroad. If it is considered necessary to evidence the source of any social media post, a request for mutual legal assistance can be sent to the host country, via the International Cooperation Unit. For guidance on when such a request will be required and when consideration can be given to obtaining evidence less formally, prosecutors are directed to Serious and Complex Case Guidance, Chapters 4 (forms part of HC21 guidance) and 5.

In assessing whether there is a sufficiency of evidence prosecutors will need firstly to be satisfied that the identity of the person responsible for sending or posting the communication has been established which will require some care given the nature of on-line dialogue and the potential that exists for individuals to take on different personas.

Where there is sufficient evidence to identify the accused prosecutors will then have to consider the nature of the communication and assess whether it is criminal in content.

It is recognised both nationally and internationally that freedom of speech and freedom of expression applies to any medium of communication including the internet and social media. The European Convention on Human Rights and the Charter of Fundamental Rights of the European Union state that all people are guaranteed the right to freedom of expression. These freedoms include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority.

Article 10 of the European Convention on Human Rights provides:

(1) 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions

or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The right to Freedom of expression can therefore be restricted where it is shown to be necessary and proportionate. This can include reasons of national security, the prevention of disorder or crime and the protection of the reputation or rights of others.

Accordingly, the context in which any communication is sent will be a highly material and relevant consideration for prosecutors in assessing, in any given case, whether the conduct complained of is criminal and whether it is in the public interest to prosecute.

Prosecutors should bear in mind that there may be occasions where the communication in question will be in a language other than English which when translated may not on the face of it seem particularly offensive or criminal but in the context of the original language or culture may in fact be grossly offensive. In such cases Prosecutors may have to request additional information from investigators to ensure they have a full understanding of the circumstances in order to assess whether the conduct complained of is criminal.

Generally a high threshold is set before communications will fall foul of the criminal law and general satirical comments, offensive humour or provocative statements which might be distasteful or painful to some will not reach that high threshold.

However, the ubiquitous nature of on-line speech and the perception by some that it can provide a cloak of anonymity can allow such communications to quickly cross the boundary into the inappropriate, indecent and criminal. Individuals cannot be allowed to believe it is acceptable to peddle hatred or make anonymous threats of violence and harm from their computers. Such on-line dialogue crosses the limits of conventional discourse and may amount to a criminal offence.

Approach to be taken by Prosecutors

Prosecutors should first make an initial assessment of the content of the communication and the conduct in question so as to distinguish between:

1. Communications which **specifically target an individual or group of individuals** in particular communications which are considered to be **hate crime, domestic abuse, or stalking**.

2. Communications which may constitute **threats** of violence to the person, incite public disorder or constitute threats to damage property.
3. Communications which may amount to a **breach of a court order or contravene legislation making it a criminal offence to release or publish information relating to proceedings**.
4. Communications which do not fall into categories 1,2 or 3 above but are nonetheless considered to be **grossly offensive, indecent or obscene or involve the communication of false information about an individual or group of individuals which results in adverse consequences for that individual or group of individuals**.

Categories (1), (2) and (3)

There is a strong presumption in favour of prosecution action in court where a sufficiency of evidence exists because of the public safety considerations involved.

Category (4)

Cases which fall within category (4) above fall to be considered separately however and a number of factors will have to be considered by prosecutors in reaching a decision as to whether the conduct is criminal in nature, and whether it is in the public interest to take action and the level of action which is required to meet the public interest.

Having identified which of the categories the communication(s) falls into, prosecutors should follow the approach set out under the relevant headings below

Category 1 and 2 offences

The **main** offences relevant for category 1 offences are:

- (i) common law crime of uttering threats
- (ii) Breach of the Peace
- (iii) Attempt to Pervert the Course of Justice
- (iv) Conspiracy
- (v) Incitement in the commission of a criminal offence
- (vi) Contravention of section 38 of the Criminal Justice & Licensing (Scotland) Act 2010

(vii) Contravention of section 127 of the Communications Act 2003

(viii) Contravention of section 39, Criminal Justice & Licensing (Scotland) Act 2010 – Prosecutors should also consider whether there is any breach of interdict or non harassment order relevant to such cases and the relevant legislative provisions and guidance in relation to this.

(ix) Contravention of section 50A Criminal Law Consolidation (Scotland) Act 1995

(x) Offences aggravated by Prejudice under the Offences (Aggravation by Prejudice) (Scotland) Act 2009

(xi) Contravention of sections 6, 7, 23, 24, 33 and 34 of the Sexual Offences (Scotland) Act 2009

In addition to these offences there are a number of offences relevant for category 2, namely:

(i) Contravention of sections 1 and/or 6 of Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012

(ii) Contravention of sections 18 and 19 of the Public Order Act 1986

The above is not an exhaustive list and prosecutors should consider the guidance available for each of these and any other relevant offences in establishing whether the conduct complained of amounts to criminal conduct and which is the most relevant offence in the particular circumstances.

There is a **strong presumption** that it is in the public interest to instigate court proceedings where there is a sufficiency of evidence to do so, particularly in relation to all cases

- motivated by prejudice or hate,
- where there has been a course of conduct which amounts to stalking or harassment,
- where the conduct is indicative of domestic abuse, or
- where public order offences arise

and all such cases should be **prosecuted robustly**

Particular Categories of Crime which fall within Categories 1 and 2

Hate Crime

Hate crimes are all crimes where there is evidence the accused has evinced malice or ill will based on the victim's actual or perceived race, religion, sexual orientation, transgender identity or disability or where the crime is so motivated. This also applies where the motivation behind a communication sent by social media is prejudice or hate and **prosecutors must therefore consider in such prosecutions whether the relevant aggravation should be added to the substantive charge.**

Stalking

The definition of "conduct" amounting to stalking provided for in section 39 of the Criminal Justice & Licensing (Scotland) Act 2010 includes contacting, or attempting to contact, a person by any means and therefore includes communications by social media. Although there must be conduct on at least 2 occasions for stalking to be established the conduct may include a range of unwanted behaviour towards an individual and prosecutors should be aware therefore that a communication sent via social media may be just one manifestation of this conduct.

Domestic Abuse

Communications sent via social media may be a feature of domestic abuse. Where the conduct does form part of domestic abuse prosecutors should refer to the domestic abuse guidance in addition to this guidance.

Prosecutors should also be aware that there is an increasing potential for the internet and social media to be used to post so called "revenge porn". This generally involves the distribution of intimate photographs, images, manipulated and/or altered images and/or videos of an individual on the internet or via social media without their permission. It could also include written text or sound files of an intimate nature. Although the images/material may have initially been taken with the consent of the individual, the sharing of these images/material is done without their consent and is generally done with deliberate and malicious intent to degrade and abuse.

This type of offending behaviour is usually perpetrated by an ex-partner, the motivation being to humiliate the individual and continue the abuse and control of the individual through publication of these images/material and/or the threat to release further images to family, friends, employers and social media sites generally. However this can also arise from one-off sexual encounters and from on-line relationships where there has never been a physical relationship, for example "sexting"

These images can quickly become shared with a wide audience via social media pages and can cause distress and humiliation to victims. COPFS recognises the devastating impact this might have on victims, the reputational damage this might cause and that this type of offending

behaviour may form part of a wider picture of domestic abuse and/or harassment and therefore there is a strong presumption that it will be in the public interest to instigate court proceedings where a sufficiency of evidence exists.

Public Order Offences

As was seen in the 2012 riots in England there is the capacity for social media to be used to facilitate various public order offences.

Public order offences are defined to include offences from which it can be inferred from the circumstances that they are related to rioting, looting and any other form of public disorder. This includes the organising of any such disorder by any means, including by social media and other electronic or mobile communication devices. Many of these offences will relate to communications sent aimed at organising meetings to engage in disorder. It should be apparent or be inferred from the circumstances that any invitation to meet is for the purposes of a criminal act in order for there to be a sufficiency of evidence. Where a sufficiency of evidence exists there is a strong presumption it will be in the public interest to instigate court proceedings.

Category 3 Offences

Court orders may at times place certain restrictions on individuals which can affect communications via social media. For example where bail conditions are imposed on an accused not to approach or communicate with a named individual in any way or where the court withholds names or other details from the public and prohibits the publication of these details. There are also legislative provisions which restrict the publication of certain information, for instance information that may lead to the identification of a person under the age of 16 years (section 47 of the Criminal Procedure (Scotland) Act 1995; section 182 of the Children's hearing (Scotland) Act 2011). These are just some examples and this is not intended to be an exhaustive list. Prosecutors will consider these offences having regard to the relevant legislation which may include the Contempt of Court Act 1981.

Prosecutors should also consider whether the communication constitutes a breach of any bail conditions which would necessitate an application for review of bail conditions or for revocation of bail.

Communications that do not fall to be considered under categories 1-3 above will fall to be considered under category 4

Category 4 Offences

The **main** offences relevant are:

(i) Breach of the peace

(ii) Contravention of section 38 of the Criminal Justice & Licensing (Scotland) Act 2010

(iii) Contravention of section 127 of the Communications Act 2003

The substantive difference between category 1 and 2 and category 4 communications are that in category 4 the communication does not constitute a credible threat of violence or of damage to property or intention to incite public disorder or form part of a course of conduct targeted against a particular individual or group of individuals but nonetheless is considered to be threatening in some way or to be grossly offensive, indecent or obscene or **involve the communication of false information about an individual or group of individuals which results in adverse consequences for that individual or group of individuals** . The context of the communication is also likely to be different from the other categories where private messaging may be more prevalent, particularly where a specific individual or group of individuals is being targeted. The re-sending or re-tweeting of comments made by others **may** fall to be considered in category 4 rather than category 1 and 2 where no specific individual or group of individuals is targeted.

Evidential test

Again prosecutors should consider the guidance available for each of the offences listed in order to establish whether the conduct complained of amounts to a crime and which is the most relevant offence.

There is a high threshold test at this stage. There are particular factors prosecutors must consider in deciding whether the behaviour amounts to a criminal act.

It is not the role of prosecutors to restrict freedom of expression and as a public authority COPFS cannot breach convention rights.

COPFS recognises the importance of the right of freedom of expression and that the European Court of Human Rights has made clear in *Sunday Times v UK (NO 2) [1992] 14 EHRR 229* that:

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 to those that offend, shock or disturb

Accordingly, there is a high threshold test to be met before such communications will amount to criminal conduct.

In deciding whether such a communication is lawful the context will be important.

In the case of *Chambers v DPP [2012] EWHC 2157 (Admin), 2012 1 WLR 1833* the Lord Chief Justice made it clear that:

Satirical, 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]

It is not sufficient for a communication to be simply offensive to constitute a criminal offence, section 127 requires that the communication be “**grossly** offensive”.

Factors to be taken into account in meeting the evidential test

Context of the Communication

Prosecutors should have regard to the fact that the context in which interactive social media dialogue takes place is quite different from other communications. Access is ubiquitous and instantaneous.

Banter, jokes and offensive comments are commonplace and often spontaneous. Communications intended for a few may in fact be accessed by millions and such exposure increases the likelihood for someone being offended. As such it is relevant for prosecutors to consider the way in which the communication was made, the intended audience and the application or use of any privacy settings.

Whilst some individuals may maintain they have a reasonable expectation of privacy on social networking sites, without the application of privacy settings, those who post comments/pictures/videos cannot claim to have a reasonable expectation of privacy over the contents of their posts and many privacy settings do not in fact curtail the reach of the communications made.

However, the intention of those who post communications will be a relevant consideration. Some individuals may genuinely not have intended that the communication reach a wide audience and may for instance have just sent it to a close group of friends and, either through inadvertence, or because the original post has been re-sent/re-tweeted it has in fact reached a wider audience and caused great upset or offence.

All facts and circumstances will require to be weighed by prosecutors in deciding whether the conduct amounts to a criminal offence and who may be responsible in any particular case. Investigators should ensure that they include all relevant information in any report submitted regarding the extent

of the audience reached by the communication, the nature and accessibility of the social media site used and the application of any privacy settings as these will always be relevant considerations in assessing whether a crime has been committed and what offence would apply in the circumstances. If this information is not provided prosecutors should request additional information before reaching any prosecutorial decision.

Prosecutors should only consider action in this category of cases where they are satisfied there is sufficient evidence that the communication goes beyond being:

- Offensive, shocking or disturbing; or
- Satirical, iconoclastic or rude; or
- The expression of unpopular or unfashionable opinion even if distasteful to some or painful to those subjected to it; or
- An exchange of communication that forms part of a democratic debate

In some instances the context in which the comments are made will weigh in favour of prosecutors being so satisfied, for instance where comments are made following a particular incident, national tragedy or catastrophic event. Such instances will most likely be readily apparent to prosecutors however it may be that particular instructions are issued to prosecutors in response to such incidents where the situation demands it.

Where prosecutors are satisfied that the evidential test has been met they should then go on to consider whether action is required in the public interest.

Prosecutorial considerations

In assessing whether a prosecution is in the public interest a prosecutor must consider the principles set out in the prosecution code which will include careful consideration of the effect of the communication on any victim.

Prosecutors must consider each case on its own facts and circumstances however some particular factors which **may** weigh against prosecutorial action being both necessary and proportionate are:

- The suspect has expressed **genuine** remorse and particularly where this has been done spontaneously and expeditiously
- Swift and effective action has been taken by the suspect to remove the communication in question, to have it removed by others or otherwise to block access to it.

This is not an exhaustive list and it may be that both of these factors would be required along with others before the scales would be tipped against prosecutorial action.

Where there is clear evidence of an intention to cause distress or anxiety, prosecutors should carefully weigh the effect on any victim identified. Where there has been repetition in the offending behaviour then this will be a factor to be weighed by prosecutors in favour of some form of prosecutorial action.

The full range of prosecutorial disposals is available and the prosecutor must take an outcome focussed approach in determining the appropriate level of action in line with Case Marking Guidelines.

Considerations in relation to children and young people.

In addition to Article 10 rights to freedom of expression the United Nations Convention on the rights of the child, particularly Articles 15,16 and 17 are relevant considerations

As with adults, there are a number of sexual offences that can be perpetrated by children via use of social media, separate guidance is available to prosecutors for such offences and reference should be made to that guidance.

Particular regard must be had by prosecutors where the accused is a child or young person. Given their extensive use of the internet and social media networks, children and young people are likely to be significantly affected by the laws which target behaviour on-line.

The age and maturity of accused persons should be given significant weight, particularly if they are under the age of 18. Children and young people may not appreciate the potential harm that can be caused by their online communications. They are unlikely to have a full understanding of the contractual terms that exist with the various social media websites they interact with or how to apply the most appropriate privacy settings in order to control the intended audience they are communicating with. Accordingly they may not appreciate the seriousness of their communications and a prosecution is unlikely to be in the public interest other than in the most exceptional circumstances, particularly so where the communication is one re-sent or re-tweeted.

Prosecutors should be aware that communications via social media may form only part of a wider picture of offending behaviour offline, for instance where there is a course of conduct such as a bullying campaign targeting an

individual or group of individuals. In such cases all facts and circumstances would require to be taken into account.

The Lord Advocate's guidelines in relation to the reporting of offences alleged to have been committed by children and the Joint Agreement in relation to cases jointly reported to the Procurator Fiscal and children's reporter continue to apply

In line with the Lord Advocate's guidelines it will only be in exceptionally serious cases that prosecution will be appropriate for those under the age of 16 such as where (i) there has been sustained conduct involving the issuing of serious threats of violence towards a particular individual or group of individuals (ii) online abusive/intimidating or threatening behaviour has escalated to serious physical violence against a particular individual or group of individuals or (iii) the conduct could give rise to serious public disorder- as such the conduct would likely fall into Category 1 or 2.