

The consultation process

The purpose of this consultation is to seek a range of views on the Interim Guidelines on prosecuting cases involving communications sent via Social Media.

We welcome your comments by no later than 13 March 2013.

Questions for consultation

We have identified a number of questions which are outlined at the end of the Consultation Paper on which we would particularly invite comment.

If you are replying by email, we should be grateful if you would not attach any other documents to the consultation paper. There are limits on the size of documents that we are able to accept and any completed consultation document which has an attachment runs the risk of not being delivered. If you wish to send an attachment to us, please email us separately at socialmedia.consultation@cps.gsi.gov.uk.

If you use a special software program to read the Consultation Document and you find that you have difficulty in reading it, please get in touch with the Team whose contact details are set out in the How to Respond section.

If you would like to return your replies to the question at the back of the Consultation Document by post, please download the [Interim Guidelines in PDF format](#).

Alternatively, you can read the [draft Interim Guidelines on the CPS website](#).

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
SE1 9HS

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

Welsh language documents

The following consultation documents are available in Welsh language:

- Download the consultation document on interim guidelines on prosecuting cases involving communications sent via social media [consultation document in Welsh](#) (Adobe PDF document - 230kb)
- [Dadlwythwch y ddogfen ymgynghori ynglŷn â cyfarwyddiadau interim Erlyn achosion sydd yn gysylltiedig a chyfryngau cymdeithasu \(Dogfen PDF Adobe 79kb\)](#)
- Download the consultation [response document in Welsh](#) (Microsoft Word file, 34kb).
- [Dadlwythwch y ddogfen ymateb Gymraeg ynglŷn â'r ymgynghoriad \(Dogfen Microsoft Word – 71kb\)](#)

Alternative formats

If you require a copy of this Consultation Paper in any other format, for example, audio or large print, please contact the postal address above.

Next steps

We will consider every individual response received. A summary of the consultation responses will be published on the CPS website in accordance with the Government's guidelines.

Responses: Confidentiality and disclaimer

The information you send us may be passed to colleagues within the CPS, the Government or related agencies. Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information legislation including the Freedom of Information Act 2000 (FOIA).

If you want the information that you provide to be treated as confidential, please be aware that, under FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could briefly explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded as binding on the CPS.

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.

Government Consultation Principles

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before;
- departments will need to give more thought to how they engage with and consult with those who are affected;
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy; and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

The complete Consultation Principles are available from the [Cabinet Office website](#).

Response Pro Forma

When responding it would be helpful if you would complete this pro forma. Please fill out your name and address or that of your organisation if relevant. You may withhold these details if you wish but we will be unable to include you in future consultation exercises.

Response Sheet

Contact details:

Please supply details of who has completed this response.

Response completed by (name):	<input type="text" value="Kirsty Hughes"/>
Position in organisation (if appropriate):	<input type="text" value="Chief Executive"/>
Name of organisation (if appropriate):	<input type="text" value="Index on Censorship"/>
Address:	<input type="text" value="Free Word Centre
60 Farringdon Road
London EC1R 3GA"/>
Contact phone number:	<input type="text" value="020 7324 2522"/>
Contact e-mail address:	<input type="text" value="Kirsty@indexoncensorship.org"/>
Date:	<input type="text" value="01/03/13"/>

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?

Index acknowledges this approach as a step forward in attempting to prevent needless prosecutions that could seriously damage free speech online. But there are still concerns with the definitions of “grossly offensive, indecent, obscene or false” communications in part (4) paragraph 12.

The provision in (1) that a prosecutor should assess whether a communication constitutes a “credible” threat is vital. Direct threats of violence must be treated seriously, but the context in which communications take place must be taken into account and not merely the words themselves.

Online interaction, as with offline conversation, frequently contains hyperbole and exaggeration, and often even ostensibly violent language.

Prosecutors should be clear on this issue. The danger of assessing words alone, ripped out of context, was made clear in the prosecution of Paul Chambers. Neither airport security nor the police believe that Chambers’s joke that he would blow Doncaster Robin Hood Airport “sky high” was a credible threat, and yet he still faced prosecution and conviction before a lengthy appeal procedure saw him vindicated.

Likewise the provisions in (2) and (3). Part (2) speaks of harassment, stalking and blackmail, all of which are offences which could take place via electronic communications technology (but equally could occur through other means and methods), and would possibly fall outside the remit of the Communications Act 2003. Part (3), the breach of an existing court order would be an offence regardless of the medium, thus rendering the Communications Act irrelevant.

But part 4 of paragraph 12, addressing messages that are “grossly offensive, indecent, obscene or false” remains problematic.

These terms are contained in the deeply problematic communications act. But the interim guidelines do not make any attempt to clarify what they may actually mean. Prosecutors are left none the wiser as to how to the definition and application of these broad terms, which could still lead to inappropriate prosecution.

There is no still no way, for example, for a prosecutor to distinguish between mere offence and “grossly offensive” material.

This clause also makes no distinction on whether such communications are specifically targeted at individuals, as in (2). This again raises the issue of the context and intention of a communication.

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?

No. As above, there are real issues with messages described as “grossly offensive or of an indecent, obscene or menacing character”. If a message sent over social media is genuinely, credibly threatening, or a part of a pattern of harassment, then it should be investigated as such. Many messages posted on social media could be deemed grossly offensive or obscene. If the purpose of the consultation and guidelines is to protect free speech and minimise prosecutions, then these guidelines do not go far enough since they say prosecution should not be of messages that are ‘offensive, shocking or disturbing’ – as they should not be – but then allows grossly offensive messages to be prosecuted without further narrowing or clarifying of the term.

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

These are broadly welcome, but part b could have highly damaging consequences.

If internet service providers reactions to contentious and controversial messages be take into account in assessment of a prosecution case, the potential outcome is that ISPs could be held responsible for content. The introduction of “third-party liability”, where the platform provider becomes responsible for content, even on platforms where content is not pre-moderated, has very serious and wide-ranging implications for free expression. Undermining the “mere conduit” principle as established in the European Union e-Commerce Directive, it could force the role of censor onto web hosting companies, thus concentrating power on the web in the hands of private companies who will be understandably cautious of what is posted online. Such a development would run absolutely contrary to how the web works, and have a severe effect on free speech, which, as the interim guidelines rightly state in paragraph 39(d), should be upheld and respected by an open and diverse society. The fact that takedown is voluntary but has a positive impact on likelihood of prosecution does not mean that these damaging effects will not occur – companies will err on the side of caution and officials, legislators in the UK and in other countries may be encouraged to treat ISPs as publishers in imitation of this guidance.

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

There is a real question over whether the Communications Act 2003 is the correct law under which to prosecute social media cases. In instances of threats, harassment or libel, laws already exist to pursue these cases.

The Communications Act was drawn up long before social media became part of everyday life for millions of Britons, and was not designed with the wide communication potential of social media in mind, but rather the use of person-to-person technology, from telephones in the 1930s to email in 2003, in targeted abuse against individuals.

The CPS and police should hesitate and seriously consider other avenues before pursuing cases under section section 127 of the Communications Act.

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

The swift rise in social media has offered huge opportunities for free expression. But the prosecution of offensive speech has given rise to potentially serious chilling effects. Index on Censorship welcomes the aim of the Crown Prosecution Service in issuing these guidelines to rein in the number of such prosecutions and the recognition in them that there is no right not to be offended.

However, while section 127 of the Communications Act remains on the statute books, there are risks of inappropriate prosecutions of free expression. Index believes serious consideration must be given to the question of whether section 127 of the Communications Act 2003 is fit for purpose.