



**Public
Prosecution
Service**

Public Prosecution Service for Northern Ireland

Guidelines for Prosecuting Cases involving Electronic Communications

Draft for Consultation (November 2021)

Independent, Fair and Effective



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Guidelines for Prosecuting Cases involving Electronic Communications

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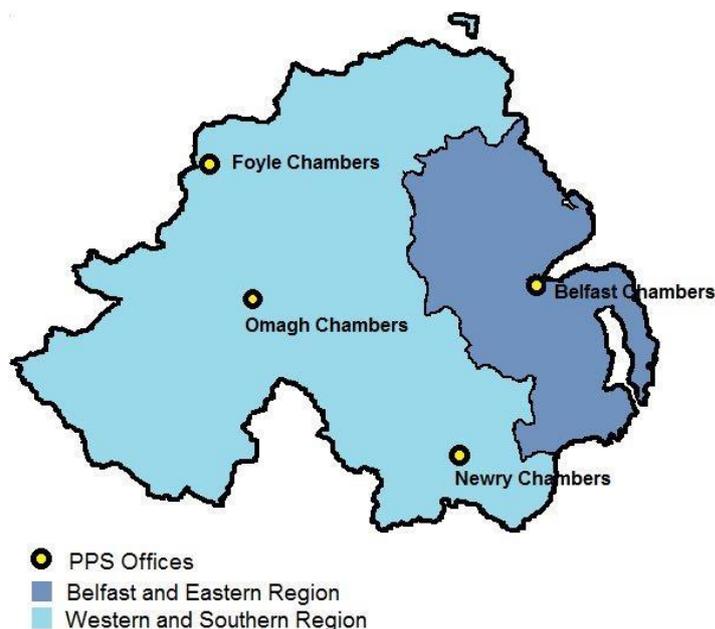
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About the Public Prosecution Service

The PPS, which is headed by the Director of Public Prosecutions, is the principal prosecuting authority in Northern Ireland. In addition to taking decisions as to prosecution in cases investigated by the police, it also considers cases investigated by other statutory authorities, such as HM Revenue and Customs.

While the PPS works closely with the police and other agencies, it is wholly independent; its decisions are impartial, based on an independent and professional assessment of the available evidence and the public interest. The PPS vision is to be recognised as providing a first class prosecution service for the people of Northern Ireland.



The PPS is a regionally based organisation (see map above). There are two regions, both headed by an Assistant Director. The Assistant Director has overall responsibility for decisions as to prosecution and for the conduct of all prosecutions in that region, with the exception of those cases which are considered by prosecutors at Headquarters in Belfast.

There are also a number of other sections within the Service, each headed by an Assistant Director, which deal with specialised areas of work. These include High Court and International, Fraud and Departmental, Central Casework and the Serious Crime Unit.

Contact details for the PPS regional offices, as well as a number of other stakeholders, are provided at **Annex A**.

1. Introduction

1.1 Purpose of this guidance

- 1.1.1 These guidelines are aimed at explaining the approach of the PPS when considering cases where it is alleged that criminal offences have been committed by the sending of an electronic communication, including communications sent via social media.
- 1.1.2 Electronic communications include calls and text messages sent by means of the telephone network, posts on internet discussion forums, streaming of video using the internet and YouTube and other messages sent by or on social media platforms. Social media in this document refers to social networks accessible on the internet which can be used for social interaction between users and the instant sending of messages either to chosen recipients or worldwide, depending on the selection of privacy settings by the sender. Current examples of social network applications include Facebook/Facebook Messenger, Twitter, Instagram, WhatsApp and Google+. There are many others and the list is changing rapidly as new applications are being created and others lose their appeal.
- 1.1.3 These guidelines cover the offences that are likely to be most commonly committed by the sending of electronic communications and in particular those sent by text or by using social media. The offences may apply in respect of an original communication and also any resending of communications, for example 're-tweeting'. However, for reasons set out below, the context in which any communication is sent will be highly important.
- 1.1.4 The main offences in place to address the misuse of a public electronic communications network are contained within section 127 of the Communications Act 2003. These offences are covered in detail at Chapter 2. Other relevant provisions, including the Protection from Harassment (Northern Ireland) Order 1997, the Malicious Communications (Northern Ireland) Order 1988 and the Public Order (Northern Ireland) Order 1987, are dealt with at Chapter 4.
- 1.1.5 It should be noted that these guidelines are primarily concerned with offences that may be committed by reason of the nature or content of a communication. Where the electronic communications network is simply used to facilitate some other substantive offence, prosecutors should normally proceed under the substantive offence in question. For example, if a threat to kill is made by telephone, by text or through social media, the case should be prosecuted under section 16 of the Offences against the Person Act 1861, rather than under the Communications Act 2003.

1.1.6 General advice on reporting and preventing abuse on social media platforms is set out at **Annex B**.

1.2 PPS Code for Prosecutors

1.2.1 This guidance should be read in conjunction with the PPS Code for Prosecutors. The Code sets out the general principles to be applied in decision-making and outlines in detail the Test for Prosecution, as well as guidelines for the conduct of criminal prosecutions and other information about what we do and how we work.

1.2.2 Prosecutions are initiated or continued by the PPS only where it is satisfied that the Test for Prosecution is met. This is a two stage test as follows:

(1) the Evidential Test – the evidence which can be presented in court is sufficient to provide a reasonable prospect of conviction; and

(2) the Public Interest Test – prosecution is required in the public interest.

1.2.3 The Public Prosecutor must analyse and evaluate all the material submitted in a thorough and critical manner. The Evidential Test must be passed before the Public Interest Test is considered. Each of these stages must be considered separately and passed before a decision to prosecute can be taken.

1.2.4 The Code for Prosecutors, along with other PPS publications, is available on the PPS website at www.ppsni.gov.uk, or a hard copy can be obtained by contacting PPS directly.

1.3 Legal advice and representation

1.3.1 Offenders are entitled to independent legal advice and representation. The PPS recognises the merits of offenders obtaining the services of a solicitor on coming into contact with the criminal justice system to ensure their legal rights are protected.¹

1.3.2 A solicitor can communicate directly with the PPS and make representations throughout the process on the offender's behalf. Representations can be made to the PPS at any stage of the process and even before a decision has been taken.

¹ For assistance in getting in touch with a solicitor, please contact the Law Society of Northern Ireland at <https://www.lawsoc-ni.org>.

1.4 Commitment to victims and witnesses

- 1.4.1 The PPS recognises that the provision of services and support for victims and witnesses, and ensuring their needs are met, is essential to the overall effectiveness of the criminal justice system. Being the subject of, or witnessing a crime, is often a traumatic experience. It is vital, therefore, that victims and witnesses are given the support, information and services they need to minimise the disruption and upset caused to them, while enabling them to give the best possible evidence.
- 1.4.2 The PPS Victim and Witness Policy explains in full the range and standards of service that victims and witnesses will receive from the prosecution service (see also Chapter 7, 'Victim and Witness Care').

1.5 Choice of charge

- 1.5.1 Prosecutors should always have in mind the following general principles when selecting the appropriate charge(s):
- (1) the offence(s) to be prosecuted should accurately reflect the seriousness of the criminal conduct for which there is evidence and should provide the court with an appropriate basis for sentence;
 - (2) the prosecutor will consider selecting offences to be prosecuted which will enable the case to be presented in a clear and simple way; and
 - (3) the prosecutor should not proceed with more offences to be prosecuted than are necessary in order to encourage a defendant to plead guilty to a few. In the same way, the prosecutor should not proceed with a more serious offence, which is not supported by the evidence, so as to influence a defendant to plead guilty to a lesser offence.

1.6 Mode of trial

- 1.6.1 In general terms, summary offences relate to less serious criminal behaviour and are tried in the Magistrates' Court before a District Judge. Indictable offences relate to more serious criminal behaviour and are tried in the Crown Court before a judge and jury or by a judge alone.
- 1.6.2 There are also a number of hybrid offences that may be prosecuted at either the Magistrates' Court or the Crown Court. For these hybrid offences, having taken a decision to prosecute, the prosecutor must take various factors into account and decide in which court the prosecution should proceed.

1.7 Young persons

- 1.7.1 A 'young person' or 'child' is defined as someone that is under 18 years of age at commencement of criminal proceedings. A young person who offends may also be referred to as a 'young offender'.
- 1.7.2 The PPS is committed to ensuring that the Best Interests of the Child Principle, as set out in Article 3(1) of the United Nations Convention on the Rights of the Child, is adhered to, and that the special considerations which apply to cases involving a young person are enshrined in its working practices.

1.8 Handling arrangements

- 1.8.1 Any cases considered under these guidelines will generally be dealt with by the relevant PPS Region. However where the case is likely to be particularly sensitive, for example due to the identity of the victim or the defendant, or where it gives rise to some other particular complexity, it will be referred to the PPS's Central Casework Section.

1.9 Future legislative reform

- 1.9.1 Judge Desmond Marrinan has carried out a review of the hate crime legislation in Northern Ireland. His review resulted in a number of recommendations for reform, which are currently under consideration by the Department of Justice. A similar review is being carried out by the Law Commission of England and Wales.
- 1.9.2 Whilst it is anticipated that there will be future reform of the Communications Act offences and the Hate Crime provisions in Northern Ireland, in the interim prosecutors will continue to adhere to the guidance.

2. The Communications Act 2003

2.1 Introduction and context

- 2.1.1 The main offences enacted to address the misuse of a public electronic communications network are contained within section 127 of the Communications Act 2003.
- 2.1.2 Section 151(1) of the Communications Act 2003 ('the 2003 Act') defines a 'public electronic communications network' as "an electronic communications network provided wholly or mainly for the purpose of making electronic communications services available to members of the public." A service is made available to members of the public if members of the public are customers, in respect of that service, of the provider of that service.²
- 2.1.3 Section 127 creates two separate and distinct offences. The first, provided for by section 127(1), is directed towards messages that are *grossly offensive, indecent, obscene or menacing*. The second, provided for by section 127(2), is directed towards false messages, or the persistent use of a public electronic communications network that is intended to cause *annoyance, inconvenience or needless anxiety*.
- 2.1.4 Each case must be decided on its own facts and merits, and when considering offences under section 127, and in particular 127(1) of the 2003 Act, prosecutors should have regard to the context in which messages are sent. Context includes: who is the intended recipient? Does the message refer to their characteristics? Can the nature of the message be understood with reference to a news or historical event? Are terms which require interpretation, or explanation by the recipient used? Was there other concurrent messaging in similar terms so that the suspect knowingly contributed to a barrage of such messages?
- 2.1.5 The context in which interactive social media dialogue takes place is quite different to the context in which other communications take place. Access is ubiquitous and instantaneous. Banter, jokes and offensive comments are commonplace and often spontaneous. Communications intended for a few may ultimately reach millions. Such interactions have been likened to "...contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving

² See section 151(9).

on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take'.³

2.1.6 Prosecutors should only proceed with a prosecution if they are satisfied there is sufficient evidence that the communication in question is more than (i.e. crosses the high threshold necessary to protect freedom of expression, even unwelcome freedom of expression):

- Offensive, shocking or disturbing; or
- Satirical, iconoclastic or rude comment; or
- The expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful for those subjected to it; or
- An uninhibited and ill thought out contribution to a casual conversation where participants expect a certain amount of repartee or 'give and take'.

The court will determine as a question of fact whether a message is grossly offensive, and in making this determination they must apply the standards of "an open and just multi-racial society". The context in which the messages were sent will undoubtedly be a relevant factor, and whilst an individual is entitled to make his views known and express them strongly, the question for the court is, in doing so, whether the defendant used language which is beyond the pale of what is tolerable in our society.⁴

2.1.7 Every day many millions of communications are sent via public electronic communication networks and the application of section 127 to such comments, especially those on social media which can be accessed by many different people, creates the potential that a very large number of cases could be prosecuted before the courts.

2.1.8 In these circumstances there is the potential for limitations on free speech and prosecutors will exercise caution before bringing charges under section 127. The Evidential Test in the Code for Prosecutors must first be met. However, even if the Evidential Test is met, in many cases prosecution may not be required in the public interest or the public interest may be met by a diversionary disposal. The application of the Public Interest Test in such cases is considered below at Chapter 3.

³ *Smith v ADVFN [2008] 1797 QB.*

⁴ *DPP v Collins [2006] UKHL 40.*

2.2 Section 127 of the Communications Act and Article 10 of the European Convention on Human Rights

2.2.1 Section 127 of the 2003 Act will often engage Article 10 of the European Convention on Human Rights, and prosecutors should be mindful that these provisions must be interpreted consistently with the free speech principles in Article 10, which provide that:

“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...”

2.2.2 As the European Court of Human Rights has made clear, Article 10 protects not only speech which is well-received and popular, but also speech which is offensive, shocking or disturbing:

*“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 as to those that offend, shock or disturb ...”*⁵

2.2.3 Freedom of expression and the right to receive and impart information are not absolute rights. They may be restricted but only where a restriction can be shown to be both necessary and proportionate. These exceptions, however, must be narrowly interpreted and the necessity for any restrictions convincingly established.⁶

2.2.4 Prosecutors should also take cognisance of the Humans Rights Guidance for the PPS issued by the former Attorney General of Northern Ireland, John Larkin QC, which came into force on 9 June 2014. At paragraph 30 of that guidance the Attorney General states:

“The PPS should give special attention to cases involving hate speech. In dealing with such cases the PPS should give careful consideration to the suspect’s right to freedom of expression; however where the speech in question is aimed at the destruction of the rights and freedoms of other people, such speech will not be protected under freedom of expression provisions such as those in the ECHR.”

⁵ *Sunday Times v UK (No 2)* [1992] 14 EHRR 123.

⁶ See the judgment of the European Court in the *Sunday Times* case at paragraph 50.

2.3 Section 127(1) - Communications which are grossly offensive, indecent, obscene or menacing

- 2.3.1 Section 127(1) of the Communications Act 2003 criminalises the sending of a message, or other matter, by means of a public electronic communications network, that is grossly offensive, or of an indecent, obscene or menacing character. It is also an offence to cause any such message or matter to be sent. What is grossly offensive, indecent or menacing is considered below.
- 2.3.2 The offence is a summary offence and a defendant is, upon conviction, liable to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

Grossly Offensive

- 2.3.3 The leading authority on what constitutes a grossly offensive message in the context of section 127(1) of the 2003 Act is *DPP v Collins*.⁷ In that case 'D' telephoned his MP's constituency office over a 2 year period and either spoke to members of staff or left recorded messages which were subsequently listened to by the MP or his staff. During the calls D ranted and shouted about immigration and asylum policy and used a number of derogatory racial terms. Some of those who heard the messages or who received the calls described themselves as shocked, alarmed or depressed by the language while others were not upset. None were members of an ethnic minority group. D pleaded not guilty. The Justices in the case dismissed the charge and found that while the messages were offensive they were not grossly offensive and that a reasonable person would not find the terms used to be grossly offensive. The Divisional Court concluded that the Justices were entitled to find as they had.
- 2.3.4 The prosecution subsequently appealed the matter to the House of Lords which found as follows:
- (a) The purpose of section 127 was to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravened the basic standards of our society.
 - (b) The 'actus reus' of the offence is the sending of a message of the proscribed character by the defined means. The offence is complete when such a message is sent. It can make no difference that the message is never received nor can the criminality of D's conduct depend on whether a message is received by X who is deeply offended by it, or by Y who is

⁷ *DPP v Collins* [2006] UKHL 40.

not.⁸

(c) Section 127(1)(a) provides no explicit guidance on the state of mind which must be proved against D to establish an offence, other than an intention to send the message in question and therefore it is a crime of basic intent. The Court observed the principles in *Sweet v Parsley*⁹ requiring appropriate words to be read into the statute to require mens rea and accepted the Crown's submission that *D must intend his words to be grossly offensive to those to whom they relate, or be aware that they may be taken to be so.*

(d) Whether a message is grossly offensive is a question of fact to be determined against the standards of an open and just multi-racial society and the words must be judged taking account of their context and all relevant circumstances. In this context Lord Bingham observed:

“Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative way...or may be adopted as a badge of honour. There can be no yardstick of gross offensiveness otherwise than by the application of reasonably, but not perfectionist, contemporary standards to the particular message sent in its particular context.”

(e) The test is whether the message is couched in terms liable to cause gross offence to those to whom it relates (in this case ethnic minority groups). While acknowledging that the context in which the messages were sent was undoubtedly a relevant factor and an individual was entitled to make his views known and express them strongly the question is, in doing so, whether he used language which is beyond the pale of what is tolerable in our society. He concluded that because some of the language used was language which could only have been chosen because of its highly abusive, insulting, pejorative, offensive character that the messages were grossly offensive and would be found by a reasonable person to be so.

2.3.5 The Court considered that if a member of a relevant ethnic minority who heard the messages would have found them grossly offensive, then one could not easily escape the conclusion that the messages would be regarded as grossly

⁸ A fundamental principle of criminal law is that a crime consists of both a mental (*mens rea*) and a physical element (*actus reus*). *Mens Rea* can be translated as 'guilty mind'. The prosecution must prove that the accused had the necessary mental state or degree of fault at the relevant time, (see *Blackstone's Criminal Practice*). The precise mental element varies from crime to crime and is typically defined in statute. A typical statute, for example, may require that a person acts knowingly, purposely or recklessly.

⁹ *Sweet v Parsley* [1970] AC 132.

offensive by reasonable persons in general judged by the standards of an open and just multi-racial society. The appeal was allowed.

- 2.3.6 The decision in any individual case as to whether a comment is grossly offensive will clearly depend upon all of the facts and circumstances of the case in relation to context should be considered carefully before concluding whether or not the Evidential Test for prosecution is met.

Obscene and Indecent

- 2.3.7 While DPP v Collins focussed on the ‘grossly offensive’ nature of a message, the Judge in the Divisional Court gave some consideration to the other categories of proscribed message. He stated:

“The four classes of message which are proscribed are not of the same kind. Obscenity and indecency, too, are generally in the eye of the beholder; but the law has historically treated them as a matter of objective fact to be determined by contemporary standards of decency.”

- 2.3.8 There is no apparent reason why the principles set out in Collins, in relation to the proper approach to determining the question of fact regarding the message’s character, would be applied any differently whether the message is potentially indecent, obscene, or grossly offensive. The test to be applied in considering whether a message is indecent or obscene is therefore also an objective one. One must determine those questions by applying reasonably contemporary standards to the particular message in its particular context.
- 2.3.9 Some further guidance may be derived from the case law relating to obscene and indecent articles. In the case of Anderson¹⁰ which related to an offence under the Post Office Act 1953, the Court of Appeal held that ‘obscene’, where it appears within that Act, should take its ordinary dictionary definition.
- 2.3.10 Similarly in Kirk¹¹ the Court of Appeal confirmed that the words indecent and obscene in the Postal Services Act 2000 are ordinary words bearing their ordinary meaning. They are readily understood by members of the jury and it is unnecessary and might be misleading for the jury to be given any of the words which might narrow or enlarge their meaning. The trial judge’s direction followed the leading case under the previous legislation (Post Office Act 1953) where it was held in Stanley¹² that:

¹⁰ Anderson [1972] 1 QB 304.

¹¹ Kirk [2006] EWCA Crim 725.

¹² Stanley [1965] 2 QB 327.

“The words ‘indecent’ and ‘obscene’ convey one idea, namely offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale...an indecent article is not necessarily obscene, whereas an obscene article almost certainly must be indecent.”

Menacing

2.3.11 The issue of what constitutes a ‘menacing’ message within the meaning of section 127(1)(a) of the 2003 Act was considered by the English Court of Appeal in the case of *Chambers v DPP*.¹³ This was a case that was widely reported in the media and involved the prosecution of a man who, following the cancellation of his flight, sent a tweet to his girlfriend that was visible to all of his followers. The tweet read:

“Robin Hood Airport is closed. You've got a week and a bit to get your [-] together otherwise I am blowing the airport sky high.”

2.3.12 The Lord Chief Justice of England and Wales carefully considered the circumstances in which the message was sent and concluded that it was not menacing. The key points to be discerned from the *Chambers* case are that:

- (a) A menacing message need not be credible as an immediate threat to the mind of an ordinary person.
- (b) However, a message which does not create fear or apprehension in those to whom it is communicated, or who may reasonably be expected to see it, falls outside this provision, for the very simple reason that the message lacks menace.
- (c) Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent.
- (d) The mental element of the offence is satisfied if the offender is proved to have intended that the message should be of a menacing character (the most serious form of the offence) or alternatively, if he is proved to have been aware of or to have recognised the risk at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who reads or sees it.

¹³ *Chambers v DPP* [2013] 1 Crim. App R.1.

- (e) The mens rea of the offence is directed exclusively to the state of mind of the offender and if he may have intended the message as a joke, even if a poor joke in bad taste, it is unlikely that the mens rea required before conviction for the offence of sending a message of a menacing character will be established.

2.3.13 In this case the court concluded, that having regard to all the relevant facts and circumstances, the message lacked menace, and accordingly the appeal was allowed.

2.4 Section 127(1): Time limits

2.4.1 Article 19 of the Magistrates' Courts (Northern Ireland) Order 1981 provides a general time limit of six months for summary offences in Northern Ireland.

2.4.2 The offence under section 127 of the Communications Act 2003 did not originally contain any time limit and was thus captured by Article 19 of the 1981 Order. This was amended by virtue of section 51 of the Criminal Justice and Courts Act 2015. The time limit now included within section 127¹⁴ of the 2003 Act is three years from the date of the offence. However, within those three years a six month time limit runs from the day on which evidence comes to the knowledge of the prosecutor which the prosecutor considers sufficient to justify proceedings. Evidence sufficient to justify proceedings is evidence which, in the prosecutor's opinion, amounts to a prima facie case **and** merits proceedings in the public interest.¹⁵

Certificate of Knowledge

2.4.3 Section 127(7) of the Communications Act 2003 makes provision for a prosecutor to produce a certificate confirming the date upon which evidence came to their knowledge in accordance with section 127(5)(b); i.e. the date from which the 6 month time limit runs. The legislation does not prescribe any form that the certificate must take and the creation of such a certificate is not mandatory. However, there is clear benefit in creating a certificate as section 127(7) renders such a document "*conclusive evidence*" of the date of knowledge. In the event that a certificate is not created, the prosecution can adduce evidence of fact showing who made the decision that a prosecution

¹⁴ Section 127(5).

¹⁵ *This is the language used by the English Court of Appeal in the case of Woodward [2017] EWHC 1008 (Admin). It is arguable that evidence sufficient to justify proceedings is evidence which meets the test for prosecution, i.e. evidence sufficient to provide a reasonable prospect of conviction and prosecution is required in the public interest.*

was justified and when. In cases where there is an issue around timing, it is for the prosecution to show that there has been compliance with the requisite time limits.

Protective Complaints (Form 1)

2.4.4 In cases where the time limit is fixed by Article 19 of the Magistrates' Courts (Northern Ireland) Order 1981, a protective complaint / Form 1 would be required, in lieu of a complaint on a summons or charge sheet, within 6 months of the date of the offence.

2.4.5 In cases where a certificate of knowledge features, the use of a protective complaint may be required when it is approaching:

- (i) 3 years since the date of the offence; or
- (ii) if it is earlier, 6 months since the date the prosecutor reviewed the evidence.

2.5 The Section 127(2) Offence - Sending a false message for the purpose of causing annoyance, inconvenience or anxiety

2.5.1 Section 127(2) of the Communications Act 2003 provides that a person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he -

- (a) sends by means of a public electronic communications network, a message that he knows to be false;
- (b) causes such a message to be sent; or
- (c) persistently makes use of a public electronic communications network.

2.5.2 There are a number of differences to the section 127(1) offence that should be noted. Firstly, the offences contrary to section 127(2)(a) and (b) relate solely to messages only and not messages 'or other matters'. Secondly, section 127(2)(c) captures the persistent use of a public electronic communications network which is not restricted to the sending of messages. Thirdly, the message in cases under section 127(a) and (b) must be false and the defendant must be proven to know that it is false. It may be possible to infer such knowledge from all of the circumstances, including the content of the message itself and the defendant's relationship with or knowledge of the victim. Fourthly, the message must have been sent, or the persistent use of the public electronic communications network made, for a proscribed purpose; i.e. to cause annoyance, inconvenience or needless anxiety to another.

2.5.3 As is the case in respect of section 127(1), the offence is committed once the message is sent (or the persistent use made) and there is no requirement that anyone see it or that anyone is in fact annoyed, inconvenienced or caused needless anxiety.

3. Offences Committed using Electronic Communications and the Public Interest

3.1 PPS approach

3.1.1 When assessing whether a prosecution is required in the public interest, prosecutors must follow the approach set out in the Code for Prosecutors and also have regard to these guidelines.

3.1.2 As noted above, since section 127 of the Communications Act 2003 (and potentially some of the other offences considered below) will often engage Article 10 of the European Convention on Human Rights, the prosecutor needs to consider whether prosecution is both necessary and proportionate.

3.1.3 Each case must be considered on its own particular facts and merits. Circumstances which will militate against prosecution or which point towards the use of a diversionary disposal include where:

- (a) The suspect has swiftly taken action to remove the communication and/or expressed genuine remorse.
- (b) Swift and effective action has been taken by others, for example, service providers, to remove the communication in question or otherwise block access to it, thereby limiting the harm or damage actually caused.
- (c) The communication was not intended for a wide audience, nor was that the obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question.
- (d) The suspect's age or maturity. This may be relevant where a young or immature person has not fully appreciated what they wrote.
- (e) The circumstances of and the harm caused to the victim

3.1.4 However, where a specific victim is targeted and there is clear evidence of an intention to cause distress or anxiety, prosecutors should carefully weigh the effect on the victim, particularly where the communication(s) appears to be motivated by hostility based upon the victim's religion, their disability, sexual orientation or membership of a racial group.

3.1.5 Prosecutors should be mindful of the potential for a diversionary disposal in these cases. Prosecutors should have regard to the PPS Code for

Prosecutors, the PPS Guidelines for Diversion and the guidance in this document when deciding whether an offence is suitable for diversion. The nature of these offences and the circumstances in which they are often committed are such that, in a number of cases, a diversionary disposal may properly meet the public interest.

4. Other Provisions

4.1 Additional offences considered by prosecutors

4.1.1 In modern society the internet and social media features in a wide range of criminal offending. In most cases this fact alone will not impact upon the selection of appropriate charges. However, where the offending is more directly linked to the nature and content of messages sent online, there are a number of offences that, in addition to those under the Communications Act 2003, frequently arise for consideration.

4.1.2 This chapter does not provide detailed guidance on these offences and is intended only to highlight them and briefly set out some of the situations in which they might apply.

4.2 The Protection from Harassment (Northern Ireland) Order 1997

4.2.1 Harassment is an offence under Article 4 (read in conjunction with Article 3) of the Protection from Harassment Order 1997.

4.2.2 The prosecution must prove that the defendant:

- Pursued a course of conduct;
- Which he knew, or ought to have known, amounted to harassment.

4.2.3 Harassment is not defined within the 1997 Order, however Article 2(2) states that harassment includes alarming a person or causing a person distress. Recent case law also provides some guidance on the types of behaviour which may amount to harassment. In *King v Sunday Newspapers Ltd*¹⁶, reference was made to the case of *Dowson and Others v Chief Constable of Northumbria Police*¹⁷ in which the Judge summarised what must be proven in order for a claim of harassment to succeed:

- (i) there must be conduct which occurs on at least two occasions -
- (ii) which is targeted at the claimant;
- (iii) which is calculated in an objective sense to cause alarm or distress; and
- (iv) which is objectively judged to be oppressive and unacceptable.

The Court further observed that what is oppressive and unacceptable may depend on the social or working context in which the conduct occurs; and that

¹⁶ *King v Sunday Newspapers Ltd*, [2011] NICA 8.

¹⁷ *Dowson and Others v Chief Constable of Northumbria Police* [2010] EWHC 2612.

a line is to be drawn between conduct which is unattractive and unreasonable and conduct which would sustain criminal liability.

4.2.4 In the case of *Majrowski v Guys & St Thomas's NHS Trust*¹⁸, Lord Nicholls stated at paragraph 30:

“Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2.”

4.2.5 The offence of harassment is one which can be committed by means of electronic communications. It should be noted, however, that this offence only applies in relation to a course of conduct, that is, conduct on at least two occasions. It is possible that the repeated sending of communications which are not of themselves ‘grossly offensive, indecent or obscene’ could nevertheless be oppressive and unacceptable and constitute an offence of harassment.

4.3 Sexual Offences

4.3.1 It is clear that sexual offences may be committed or initiated via social media. For example, perpetrators may utilise social media sites to research and contact a young person to engage in communication with them with a view to meeting the child (‘grooming’) or inciting them to engage in sexual activity, contrary to Article 22 of the Sexual Offences (NI) Order 2008.

4.3.2 Electronic communications may be used to commit a number of offences involving images captured, made or distributed using computers or other electronic devices. The Protection of Children (NI) Order 1978 deals with indecent images of children and the Coroner and Justice Act 2009 contains provisions in respect of prohibited images of children. Section 51 of the Justice Act (Northern Ireland) 2016 creates an offence of disclosing a private sexual photograph or film of an individual who appears in the photograph or film, without their consent, and with the intention of causing that individual distress. These are serious offences that can, in appropriate cases, carry lengthy custodial sentences and, in addition, may require the defendant to be placed upon the sex offenders register.

4.3.3 Therefore, in taking a prosecutorial decision in cases where, for example, a child has sent an indecent image of themselves to another child, a practice

¹⁸ *Majrowski v Guys & St Thomas's NHS Trust* [2006] UKHL 34.

that is increasingly common and sometimes referred to as 'sexting', prosecutors must identify and weigh all relevant public interest considerations. Such considerations may include the age of the children involved, the relationship that exists or existed at the time, the number of images, the nature/category of the image(s), whether the recipient distributed the image(s) and whether this was with or without the consent of the sender.

4.3.4 It should be noted that separate guidance is available which deals with how those who lead on safeguarding in schools and education establishments should respond to incidents involving sexting. This includes guidance produced by the UK Council for Internet Safety, working in collaboration with the Safeguarding Board for Northern Ireland, which sets out the circumstances in which the police may need to become involved. Information is also available on the PSNI website.¹⁹

4.3.5 Cases involving 'revenge pornography' - where sexually explicit media is publicly shared online without the consent of the pictured individual, usually following the breakdown of an intimate relationship - may fall to be considered under these guidelines. The impact of such offences on victims can be significant. Such cases are a further example of the importance of context. Where there is more than one incident, or the incident forms part of a course of conduct directed towards an individual, a charge of harassment (see above) may be considered. As above, where the images shared may have been taken when the victim was under 18, prosecutors should consider whether any offences under the Protection of Children (NI) Order 1978 have been committed.

4.4 The Malicious Communications (Northern Ireland) Order 1988

4.4.1 The Malicious Communications (Northern Ireland) Order 1988 makes it an offence to send to another person a letter or other article which conveys: (i) a message which is indecent or grossly offensive; (ii) a threat; or (iii) information which is false and known or believed to be false by the sender; or (iv) any other article which is, in whole or part, of an indecent or grossly offensive nature, if his purpose, or one of his purposes, in sending it is that it should 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.

4.4.2 There are a number of concepts within the 1988 Order that have parallels within the Communications Act 2003. However, it should be noted that 'letter or other article' is unlikely to include an electronic communication. Whilst the

¹⁹ [*Sexting and the law: A basic guide to help professionals and the public deal with incidents of sexting.*](#)

Malicious Communications Act 1998, which applies in England and Wales, has been amended to explicitly bring within its ambit electronic communications, no similar amendment has been enacted in respect of the 1988 Order. In any case where police charge or recommend this offence in relation to an electronic communication, consideration must therefore be given to whether the communication falls under any of the other legislative provisions discussed in these guidelines.

4.5 Public Order (Northern Ireland) Order 1987

4.5.1 The Public Order (Northern Ireland) Order 1987 creates a number of offences in relation to the stirring up of hatred and arousing of fear.

4.5.2 In the context of the 1987 Order, 'fear' means fear of a group of persons defined by reference to religious belief, colour, race, nationality (including citizenship), ethnic or national origins, sexual orientations or disability. 'Hatred' in this context means hatred against a group of persons so defined.

4.5.3 Offences exist in relation to:

- the use of words or behaviour or the display of written material (Article 9(1));
- the publishing or distribution of written material (Article 10(1));
- the distribution, showing or playing or recordings of visual images or sounds (Article 11(1));
- the broadcasting of programmes (Article 12(1)); and
- the possession of written material or recordings of visual images or sounds. It is possible that electronic communications and social media could feature in the commission of all of these offences.

4.5.4 Offences under the 1987 Order engage Article 10 of the European Convention of Human Rights, which provides individuals with a wide range of freedoms in terms of expression through the spoken and written word. Article 10 allows courts to protect expression which may shock, offend or even disturb other people, subject to the exceptions provided for under Article 10.2. The general parameters of Article 10 also have to be considered in the context of Article 17 of the convention, which prohibits the abuse of any convention rights as held in the case of *Norwood v the UK*.²⁰

4.5.5 The European Commission has held that extreme racist speech is not protected by Article 10, due to the potential to undermine public order and the rights of the targeted community.²¹

²⁰ *Norwood v the UK* (2004) EHRH SE 111.

²¹ *Kuhen v Germany* 56 RR 205.

- 4.5.6 When deciding whether to prosecute an individual for an offence under the 1987 Order where the conduct relates to the sending of an electronic communication (or the causing of such a communication to be sent), prosecutors should consider whether prosecution under the Communications Act 2003 may be more appropriate. The proofs in relation to the offences under the 1987 Order can be onerous, with a requirement on the prosecution to establish that the words or behaviour used, or the written material displayed were threatening / abusive / insulting, and that there was either an intention to stir up hatred or arouse fear, or a likelihood that hatred would be stirred up or fear aroused. Establishing that certain words were grossly offensive or menacing may be more straightforward and, depending on the facts and circumstances of the individual case, including the seriousness of the conduct and the adequacy of the sentencing powers under the 2003 Act, it may be more appropriate to proceed for an offence contrary to section 127(1).
- 4.5.7 It should be noted that prosecution for the offences referred to at paragraph 4.5.3 above requires the consent of the Director of Public Prosecutions.

5. Offences Aggravated by Hostility

5.1 Criminal Justice (Northern Ireland) (No 2) Order 2004

- 5.1.1 If there is evidence that any of the offences described in this guidance have been committed and the communication targets an individual or individuals on the basis of their race, religion, disability or sexual orientation, prosecutors should consider whether the offence is an offence aggravated by hostility.
- 5.1.2 For an offence to be aggravated by hostility there must first be sufficient evidence that the substantive offence has been committed, followed by the aggravating element as set out in Article 2 of the Criminal Justice (Northern Ireland) (No 2) Order 2004. Article 2 of the 2004 Order also makes provision for an increased sentence to be imposed, where there is a finding by the Court that an offence has been aggravated by hostility. The hostility can be either demonstrated by the defendant before, during or shortly after the commission of the offence, or be the motivation for the offence.
- 5.1.3 The presence of any such motivation or hostility may mean that it is more likely that prosecution is required. The PPS recognise that offences which are aggravated by hostility often have a disproportionate impact on the victim, as they are being specifically targeted due to a personal characteristic. Prosecutors will take in to account any hate crime context as appropriate when assessing whether the high threshold is met, in accordance with the PPS Hate Crime Policy. All evidence required to prove that the offence was aggravated by hostility must be presented to the Court.

6. Other Matters

6.1 Ancillary orders

- 6.1.1 When sentencing a defendant the court may also impose a number of ancillary orders. The purpose of ancillary orders can be in some cases to redress the harm caused by the defendant, or in others to prevent re-offending or repeat victimisation.
- 6.1.2 Prosecutors must consider ancillary orders upon conviction (and in the case of restraining orders, upon acquittal) for substantive offences, in order to prevent re-offending by the most serious and persistent offenders. Prosecutors must also have regard to the victim when considering such applications, particularly around the issue of their future protection.
- 6.1.3 In prosecuting cases involving electronic communications, prosecutors may consider the following ancillary orders:
- Sexual Offences Prevention Orders; and
 - Restraining Orders.

Sexual Offences Prevention Order

- 6.1.4 Under section 104 of the Sexual Offences Act 2003 a court may, in appropriate circumstances, make a Sexual Offences Prevention Order (SOPO). A SOPO operates to prohibit the defendant from doing anything described in the order and will have effect for a fixed period of not less than five years or until further order. The SOPO places restrictions on the behaviour of the defendant that are considered necessary for the purpose of protecting the public, or any particular members of the public, from serious sexual harm from the defendant by reducing the motivation and/or opportunity to reoffend. The SOPO should be tailored to meet the dangers the specific defendant poses and should be proportionate and not oppressive.
- 6.1.5 A SOPO may be issued against a 'qualifying offender'. This is defined as a person who, before or after the commencement of the Sexual Offences Act 2003:
- (i) has been convicted of an offence listed in Schedule 3 or Schedule 5;
 - (ii) has been found not guilty of an offence listed in schedule 3 or schedule 5 by reason of insanity; or
 - (iii) is under a disability and has done the act charged against him in respect of such an offence; or

(iv) has received a caution.

Any breach of a SOPO (or Interim SOPO) without reasonable excuse is an offence under section 113 of the Sexual Offences Act 2003.

Restraining Orders

- 6.1.6 The court has the power to make a restraining order under Article 7 of the Protection from Harassment (NI) Order 1997, either upon conviction for any offence and in addition to any sentence, or upon acquittal for any offence if it is deemed necessary to protect a person from harassment by the defendant (Article 7A).
- 6.1.7 In accordance with Article 7(2), a restraining order made upon conviction may, for the purpose of protecting the victim of the offence, or any other person referred to in the order, from conduct which amounts to harassment or will cause a fear of violence, prohibit the defendant from doing anything described in the order.
- 6.1.8 A restraining order may be made upon acquittal if the court considers it necessary to do so to protect a victim from harassment by the defendant. A restraining order is a civil order and as such, it is possible that although the defendant is acquitted on the criminal standard of proof, the court may still be satisfied on the balance of probabilities that the behaviour which was the subject of the prosecution occurred or that some behaviour which is not the subject of the charge occurred.
- 6.1.9 Under Article 7(3A) both the prosecution and the defence are entitled to lead further evidence in support of, or in opposition to, the making of a restraining order. Such proceedings will be conducted in accordance with Rule 102 of the Magistrates' Court Rules (NI) 1984 as the hearing is civil in nature.

6.2 International jurisdiction

- 6.2.1 Cases in which it is alleged that criminal offences have been committed by the sending of an electronic communication may cause difficulties in relation to the appropriate jurisdiction in which to initiate proceedings. The general rule is that an offence will only be triable in the jurisdiction where the offence takes place, unless there is a specific statutory provision that provides the Court with extra-territorial jurisdiction.
- 6.2.2 In cross-border cases an offence must have a 'substantial connection' with this jurisdiction for courts in Northern Ireland to have jurisdiction. The general

position is that, where a substantial number of the activities constituting a crime take place within Northern Ireland, the courts of Northern Ireland have jurisdiction, unless it can be argued on a reasonable view that, the conduct ought to be dealt with by the courts of another country.

- 6.2.3 In the case of offending under section 127 of the Communications Act 2003, the offence is completed when the message is sent. Therefore, the offence will generally be considered to have taken place in the jurisdiction in which the suspect was located at the time that they sent the message. Where, therefore, a message is sent or posted from within another jurisdiction, the investigation and prosecution of that offence will be a matter for the authorities within that other jurisdiction.

7. Victim and Witness Care

7.1 Victim and witness services

- 7.1.1 The Victim and Witness Care Unit (VWCU) is a dedicated Unit made up of specially trained staff from the PPS and PSNI. The purpose of the VWCU is to improve the experience of victims and witnesses and it is central to the provision of services. It allows for a single point of contact (via the VCWU case officer) within the criminal justice system. Its primary role is to keep victims and witnesses fully informed of the progress of their case throughout the criminal justice process. The VCWU can also make referrals to other service providers if additional support is required.
- 7.1.2 If a decision is taken to prosecute a defendant for a crime committed against you, then you can choose to make a Victim Personal Statement. This allows you, to say in your own words, how a crime has affected or continues to affect you. It can only be used when a case goes to court and a person pleads guilty or is found guilty. It will tell a judge what harm the crime has caused you, before a sentence is passed.
- 7.1.3 Prosecutors will, in appropriate cases, apply for special measures for young, intimidated or otherwise vulnerable witnesses allowing them to give their evidence with confidence. Special measures are a range of provisions that can be put in place if the judge is satisfied that a witness is either vulnerable or intimidated and, if so, whether special measures would be likely to improve the quality of their evidence. The aim is to help the witness to maximise the quality of their evidence by putting in place certain facilities that will assist in addressing some of the difficulties they may have with giving evidence in court.
- 7.1.4 The PPS Victim and Witness Policy explains in full the services and standards of services that victims and witnesses will receive from the prosecution service.

7.2 The giving of reasons

- 7.2.1 The policy of the PPS is to give victims reasons in all cases where a decision is made not to prosecute. A two tier approach applies: In a wide range of cases which might be classed as more serious, either due to the nature of the offence or to the vulnerability of the victim, detailed reasons will automatically be given for the decision not to prosecute and a meeting offered. Where detailed reasons are given the PPS will consider what information about the

decision may be provided to the victim, balancing the interests of all parties together with any other considerations which seem material to the particular facts and circumstances of the case.

7.2.2 In other cases reasons are given in general terms. For example, where the available evidence does not allow the Prosecution to establish an essential element of the offence the PPS will indicate that there was insufficient evidence to afford a reasonable prospect of a conviction. Another example would be a case in which the evidence was sufficient but the decision was taken not to prosecute given the age and infirmity of the prospective defendant. Here the reason given would be that it was not in the public interest to prosecute.

7.2.3 All victims are entitled to receive more detailed reasons for the decision taken and will be advised of that entitlement when general reasons are provided. All victims will also be informed of their right to seek a review when notified of the decision not to prosecute, whether they receive detailed or general reasons. It may be that the provision of detailed reasons will assist a victim deciding whether they wish to pursue a review. Where detailed reasons are given the requirement to seek a review within 3 months will only run from the date of receipt of the detailed reasons letter.

Annex A: Contact Details

Public Prosecution Service

Policy and Information Unit

Policy and Information Unit
Public Prosecution Service
Belfast Chambers
93 Chichester Street
Belfast BT1 3JR

Telephone: (028) 9089 7100
Deaf/Hard of hearing (SMS): 07795 675528
Email: info@ppsni.gov.uk (for general enquiries)
complaints@ppsni.gov.uk (for complaints)
reviews@ppsni.gov.uk (for reviews)

Website: www.ppsni.gov.uk

Victim and Witness Care Unit

VWCU - Belfast Office (for Belfast and Eastern Region)
Belfast Chambers
93 Chichester Street
Belfast BT1 3JR

Telephone: (028) 9026 4690
Deaf/Hard of Hearing (SMS): 07825 118389
Email: vwcubelfast@ppsni.gov.uk

VWCU - Foyle Office (for Western and Southern Region)
35 Limavady Road
Londonderry
BT47 6LP

Telephone: (028) 7134 0632
Deaf/Hard of Hearing (SMS): 07825 118416
Email: wcufoyle@ppsni.gov.uk

Belfast and Eastern Region / Headquarters Sections

Belfast Chambers

93 Chichester Street
Belfast BT1 3JR

Telephone: (028) 9054 2444
Deaf/Hard of hearing (SMS): 07795 673927

Western and Southern Region

Foyle Chambers

35 Limavady Road
Londonderry BT47 6LP

Telephone: (028) 7134 0648
Deaf/Hard of Hearing (SMS): 07795 675338

Omagh Chambers

2 Townhall Square
High Street
Omagh BT78 1BL

Telephone: (028) 8224 4319
Deaf/Hard of Hearing (SMS): 07795 831188

Newry Chambers

1 Downshire Close
Newry BT34 1FD

Telephone: (028) 3083 2500
Deaf/Hard of Hearing (SMS): 07795 810114

Victim Support Northern Ireland

3rd Floor
Annsgate House
70-74 Ann Street
Belfast BT1 4EH

Telephone: (028) 9024 3133
Supportline: 0845 3030900
Email: info@victimsupportni.org.uk
Website: www.victimsupportni.co.uk

Annex B: Reporting and Preventing Abuse on Social Media

Persons who are subject to abuse via social media may wish to report the matter to the police and / or to the social media platform.

A number of platforms have developed tools to make reporting easier, to secure potential evidence and to prevent unwanted communications, including those that do not amount to a criminal offence. These include:

- A report link, so that particular or multiple communications can be reported directly to the platform. Social media sites may then decide to remove content and disable or suspend accounts, although it is not technically possible for a platform to guarantee a user will not return once their account is closed. Note that if a matter is reported to the police, the police should make a data retention request to the platform, so that evidence is secured for any investigation.
- Taking screenshots of the offending material, which can be saved on or off the device (for example, on cloud storage or a USB drive).
- Tools to block or mute the person who has uploaded abusive content, so that they can no longer see posts or have a conversation with the victim.
- Tools to unsubscribe or 'un-follow' accounts that produce or share offensive material.
- Login alerts, which prompt the platform provider to send a notification if someone tries to log into an account from a new place.
- Privacy settings, to control who can see posts and information from profiles, such as phone numbers and email address.

Further cyber security advice can be found on the Government supported website [Get Safe Online](#).

If you require any further information about the PPS, or a copy of this document in an alternative format, please contact:

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