



Rt Hon Harriet Harman QC MP
Chair, Joint Committee on Human Rights
Houses of Parliament
London
SW1A 0AA

By email to: jchr@parliament.uk

15 March 2019

Dear Harriet,

DEMOCRACY, FREE SPEECH AND FREEDOM OF ASSOCIATION

I am writing ahead of my appearance before your Committee's important inquiry into democracy, free speech and freedom of association. As you know, that appearance has been delayed until after Easter, at the Committee's request. I wanted to take this early opportunity to provide reassurance about the role of the Crown Prosecution Service (the CPS) in bringing offenders to justice.

Your Inquiry takes place in a context in which Members of Parliament (MPs) have been the targeted victims of criminal conduct. I take that very seriously indeed. Criminal offences committed against MPs imperil both the democratic process and public service.

In my view, our democracy is strengthened, not threatened, by free speech and freedom of association. The vigour and dynamism of our democracy depends upon free speech and freedom of association, and that means the lively, robust, and challenging expression of those freedoms. True free speech means speech that may be rude and shocking. True freedom of association may be boisterous and loud.

However, there are unquestionably persons who purport to exercise these freedoms but who are, in fact, committing criminal offences. As a matter of law, a person cannot rely on freedoms when they seek to destroy or reduce the freedoms of others. I am in no doubt that a claim to these freedoms cannot act as a shield to the investigation and prosecution of crime.



The CPS takes seriously its responsibility to work with our partners to protect the public and create a safe society. Our work is demand led – we do not investigate crime, or choose which cases to consider. CPS prosecutors must review every case referred to us by the police. Investigation is a matter for the police, and MPs who consider that a crime may have been committed must report it to the police so that an investigation can take place.

When the police have conducted an investigation and refer a case to the CPS, the charging decision is based on the two-stage test in the Code for Crown Prosecutors:

- First, whether the evidence provides a realistic prospect of conviction. We do not treat cases involving MPs any differently to any other case when considering whether, having heard the evidence, a court is more likely than not to find the defendant guilty; and
- Second, whether it is in the public interest to prosecute. At this stage, we do take into account the role of MPs in “serving the public;” and the impact on the community of MPs being successfully intimidated. Both of these factors would make it more likely that we would charge a case.

Whether or not the line between rude and offensive has been crossed into grossly offensive and menacing, or the line between boisterous and loud has been crossed into threatening and abusive, may sometimes involve a difficult judgement call. Where it does, that decision is made by an independent prosecutor based on an objective assessment of the evidence alone, without fear or favour.

I cannot expect everyone to agree with the decisions taken by CPS prosecutors in every case. Crucially, however, the CPS explains its decisions, pursuant to the Victim’s Code and we ensure that appropriate avenues of challenge are open. If a victim is dissatisfied with a CPS decision then that decision may be challenged under the Victim’s Right to Review. Any person may hold the CPS to account under our Feedback and Complaints Procedure. The police may also seek a review of a CPS decision under the Director’s Guidance on Charging.

Equality before the law lies at the heart of an effective public prosecution service; and independent and fair prosecution is essential to the maintenance of law and order. I am, nevertheless, aware of the impact of the recent targeting of MPs and the CPS has taken a number of steps to contribute to the Government and wider Criminal Justice System response:

- The CPS has a track record of charging and convicting those who commit criminal offences against MPs. I am attaching, by way of further reassurance, the evidence of that track record.
- The CPS has provided a range of guidance to our prosecutors to assist them when considering such allegations, which the Committee on Standards in Public Life (CSPL) considered to be “reasonable and proportionate.” I attach the most recent example of

this guidance from January 2019.

- The CPS has recently put in place a system to maintain central oversight of cases involving MPs in order to build a clearer picture of the current climate. CPS Areas will record all cases in which the complainant is either a parliamentarian or member of their staff, where the offence is connected to their public role. CPS Areas will provide monthly notification to the Directors of Legal Services to facilitate effective monitoring.
- The CPS is currently working with partners to implement the relevant recommendations of the December 2017 report of the CSPL, including developing new guidance for Candidates.
- The CPS has also developed a new information pack that will support MPs in responding effectively to conduct that may potentially be a criminal offence.

While the CPS, as the principal prosecuting authority for England and Wales, have a central role to play in delivering justice where criminal offences have been committed against MPs, we agree with the CSPL that a wide range of stakeholders, including social medial companies, broadcast and print media, and MPs and the Government, have a vital role to play in preventing this type of behaviour. The CPS stands ready to support those stakeholders in this important endeavour. We also agree with the Committee that there “is no evidence that the current criminal law is insufficient” but suggest that sentencing guidelines should provide for the seriousness of offences directed at individuals engaged in the democratic process.

I look forward to discussing these important issues with your Committee in more detail on 8 May 2019. In the meantime, the CPS will continue to make the decision to prosecute independently and fearlessly and, where the Code test is met, bring offenders to justice.

I am copying this letter to the Attorney General, Rt Hon Geoffrey Cox QC MP, and the Home Secretary, Rt Hon Sajid Javid MP.

Yours sincerely,



MAX HILL QC

DIRECTOR OF PUBLIC PROSECUTIONS

Recent case examples involving MPs

To note: These cases are representative of the type of cases the CPS receives involving harassment, intimidation or abuse of MPs.

Cases in which the CPS secured convictions

Charge date	Offence	Sentence	CPS Area	Party (at time of offence)
January 2019	Malicious Communications Act 1988 offence	Community Order + Fine	South West	Conservative
November 2018	Criminal Damage (also charged with Harassment but this charge later dropped at the request of the MP)	Community Order for 6 months with rehabilitative activity requirement of 10 days + Restraining Order	CPS Wales	Labour
October 2018	3 charges related to 2 MPs: Harassment without violence; Communications Act 2003 Section 27; The use of threatening and abusive language to cause alarm/ distress	9 weeks suspended custodial sentence + 3 month supervision order + 4 years restraining order	South West	Conservative + Labour
September 2018	Malicious Communications Act 1988 offence	Custodial - 28 days	London North	Conservative
July 2018	Harassment without violence	Custodial - 20 weeks suspended prison sentence	South West	Labour
July 2018	Harassment without violence	Custodial - 20 weeks suspended prison sentence	South West	Labour
May 2018	Malicious Communications Act 1988 offence	Community Order - 12 months	London North	Labour
November 2017	Communications Act 2003 Section 27 (2 counts)	Community Order - 12 months	Thames and Chiltern	Labour

October 2017	Harassment without violence	Custodial - 20 weeks + 4 year Restraining Order	South West	Labour
September 2017	Malicious Communications Act 1988 offence	Community Order - 12 months + 28 day electronically-monitored curfew	London North	Labour
June 2017	Harassment	6 weeks custody suspended for 12 months with 8 week curfew 10pm - 5am + Restraining Order	North West	Labour
June 2017	Harassment without violence	Custodial - 14 weeks	South West	Labour
May 2017	Malicious Communications Act 1988 offence	Custodial - 8 weeks + Restraining Order	London North	Conservative
April 2017	Harassment without violence	Fined £700 + Restraining Order	East of England	Conservative
July 2016	Malicious Communications Act 1988 offence (9 counts)	Custodial - 2 years, 3 months	North East	Labour
June 2016	Racially or religiously aggravated intentional harassment, harassment, alarm or distress or fear or provocation of violence	Custodial - 2 years + Criminal Behaviour Order restricting access to internet and to restrict access to victim	London North	Labour
2014	Communications Act 2003 Section 27 (2 counts)	Custodial - 1 month	Mersey-Cheshire	Labour
2013	Communications Act 2003 Section 27 (2 counts)	Custodial - 8 weeks + Restraining Order	CPS HQ	Labour
2012	Racially or religiously aggravated intentional harassment, harassment, alarm or distress or fear or provocation of violence	Fined £120	Mersey-Cheshire	Labour

Cases in which the CPS advised no further action (NFA)

Date of CPS decision	Incident	Reason	CPS Area	Party (at time of offence)
February 2019	Threats received via social media	Evidential test not met	Yorkshire and Humberside	Labour
February 2019	Foil swastikas left on constituency office doorstep	Evidential test not met	Yorkshire and Humberside	Labour
March 2018	The charge related to an incident of harassment involving 4 MPs. Charges were made in the case of 2 of the 4 MPs.	The threat was assessed to have been directed at the other 2 of the 4 MPs targeted and the defendant was charged as such. He received a 20-week suspended prison sentence. The emails targeted at this MP in particular were not found to have met the evidential threshold.	South West	Labour
March 2018	The charge related to an incident of harassment involving 4 MPs. Charges were made in the case of 2 of the 4 MPs.	The threat was assessed to have been directed at the other 2 of the 4 MPs targeted and the defendant was charged as such. He received a 20-week suspended prison sentence. The emails targeted at this MP in particular were not found to have met the evidential threshold.	South West	Labour
February 2018	Threats received via social media	DISCONTINUED: Further evidence requested from police by CPS was not received.	North East	Labour
February 2018	Chants of 'Nazi' during the MP's speech	Evidential test not met. The decision not to prosecute was subject to a request for VRR by the MP. The decision was upheld by the Chief Crown Prosecutor for Wessex.	East of England	Conservative

2017	Abusive messages received via social media	Not considered to contain evidence of real threat	CPS HQ	Labour
------	--	---	--------	--------

Ongoing cases

Stage	Offence	CPS Area	Party (at time of offence)
Re-trial due in 2019	2 defendants previously convicted for being members of a banned neo-Nazi group. A further defendant convicted for preparing for an act of terror (to kill the MP)	CPS HQ	Labour
Charged. Awaiting trial.	Harassment and Racially aggravated harassment, alarm or distress (2 counts)	London South	Conservative
Pre-charge	Pre-charge. Incidents involve threats via social media	East of England	Labour
Defendant failed to appear - warrant out for arrest	Communications Act 2003 Section 27	London South	Labour
Pre-charge	Allegation of harassment/ malicious communications sent by one individual to a number of MPs	Complex Casework Unit	Various MPs
Pre-charge	Allegation of harassment/ malicious communications sent by one individual to a number of MPs	Thames and Chiltern	Various MPs
CPS has authorised a charge. Awaiting confirmation that the police have acted on this advice.	Harassment	South West	Conservative

OFFENCES DURING PROTEST, DEMONSTRATIONS OR CAMPAIGNS

Contents

Public Protests

Public Order Offences

Harassment and Stalking Offences

Hate Crime

Communication Offences and Social Media

Public Interest

ECHR

Headlines

- The rights of freedom of speech and to protest peacefully are protected by the law. However this right is not absolute, and it is unlikely to provide any defence when aggressive and threatening behaviour prevents people going about their daily lives.
- Prosecutors must apply the principles of the European Convention on Human Rights (the Convention), in accordance with the Human Rights Act 1998, at each stage of a case. It is a defence to prove the conduct was reasonable and in accordance with the freedom of expression and other freedoms. If these freedoms are engaged, a justification for interference with them (by prosecuting) must be established. A prosecution may only proceed if it is necessary and proportionate.
- Criminal law in respect of public order offences is intended to penalise the use of violence and/or intimidation by individuals or groups. In addition, behaviour which is repeated and unwanted by the victim and which causes the victim alarm or distress may constitute harassment. Such behaviour may also be motivated by hostility to race or religion or other protected characteristics.
- A person may not however rely on a Convention right such as freedom of expression where they engage in any activity or perform any act aimed at the destruction or limitation of any of the rights and freedoms of others protected by the Convention. In these cases, the Convention right is not engaged and a suspect may not rely upon it.

Public Protests

1. Protests may take many different forms, ranging from action by one person acting alone to a demonstration attended by thousands of people. Freedom of speech and the right to protest peacefully are protected by the law (both the common law and the Human Rights Act 1998). Under the European Convention on Human Rights (ECHR), which is given effect by the Human Rights Act, Articles 10 (Freedom of Expression) and 11 (Freedom of assembly and association) are most relevant. However, freedom of speech and the right to peaceful protest are not absolute and the exercise of those rights can be restricted so long as any restriction is prescribed by law is necessary and proportionate.
2. Examples of case law that considered these issues can be found within the full legal guidance, [here](#). A non-exhaustive list of offences that may be committed arising out of a public protest can be found within the full guidance, at [Annex A](#).
3. The evidential stage should consider factors such as how an offender is identified in potentially large crowds, whether there was an element of planning before the commission of the offence can be proved, and if any electronic evidence to demonstrate an involvement in the commission of an offence is available. Some points to consider at the evidential stage can be found [here](#).
4. At the public interest stage, prosecutors must apply the public interest factors set out in the Code, as well as having regard to some of the factors set out [here](#).
5. For further details see the full guidance on Public Protests [here](#).

Public Order Offences

6. Related public order legislation ensures individuals' rights to freedom of expression and assembly are balanced against the rights of others to go about their daily business unhindered. Relevant offences contrary to the Public Order Act 1986 may include threatening, abusive or insulting words or behaviour, or display of visible representations, which:
 - a. Are likely to cause fear of, or to provoke, immediate violence: [section 4](#)
 - b. Intentionally cause harassment, alarm or distress: [section 4A](#)
 - c. Are likely to cause harassment, alarm or distress (threatening or abusive only words or behaviour only – not insulting): [section 5](#).
7. It is a defence to section 4A and section 5 for the accused to demonstrate that their conduct was reasonable, which must be interpreted in accordance with the

freedom of expression and other freedoms. If these freedoms are engaged, a justification for interference (by prosecution) with them must be convincingly established. A prosecution may only proceed if necessary and proportionate. Reference should be made to the [charging standard purpose](#) and the [charging standard practice](#).

8. The full guidance on Public Order Act offences can be found [here](#).

Harassment and Stalking Offences

9. The [offence of harassment](#) contrary to the Protection from Harassment Act 1997 is committed where a person engages in a course of conduct which amounts to the harassment of another person, and they know it amounts to harassment or they ought to know. "Course of conduct" is a fact-specific assessment. It requires behaviour on more than one occasion but this need not be the same behaviour on each occasion. Behaviour which begins as a legitimate complaint or inquiry may turn into harassment if unreasonably prolonged or persistent. Further information on elements of the offence of harassment can be found [here](#).
10. It is a defence to prove the conduct was reasonable which must also be interpreted in accordance with the freedom of expression and other freedoms. If these freedoms are engaged, a justification for interference with them (by prosecuting) must be convincingly established. A prosecution may only proceed if necessary and proportionate.
11. The [offence of stalking](#) is committed when the harassment amounts to stalking; a non-exhaustive list of examples can be found [here](#).
12. Related [charging guidance](#) helps set out the difference between someone who is stalked and someone who is harassed, and if both could be applied.
13. The full guidance can be found [here](#).

Hate Crime

14. Sections 28 to 32 of the [Crime and Disorder Act 1998](#) provides that, where a series of existing offences – including assault, criminal damage, stalking, harassment and public order offences – are committed, and such an offence (i) was motivated by hostility to race or religion, or (ii) was accompanied by hostility to race or religion proximate to the commission of the offence, that a separate racially or religiously aggravated offence is committed attracting a greater penalty.

15. Any potential offence of incitement to racial or religious hatred or hatred because of sexual orientation should be referred to the Special Crime and Counter Terrorism Division for review.
16. For those offences not covered but where hostility or hostile motivation towards race or religion is [present](#), or hostility or hostile motivation towards disability, sexual orientation or transgender is [present](#), this must be treated as an aggravating factor at sentence and stated as such in open court: sections 145/146 Criminal Justice Act 2003.
17. Prosecutors must adopt a proactive approach to seeking evidence from the police to help them to decide if a case can be prosecuted as a racially or religiously aggravated hate crime and that there is evidence that should be presented to the court at sentence.
18. If the case passes the evidential stage and it is a case of racial or religious hate crime, or it is motivated by discrimination against the victim's ethnic or national origin, or religion or belief, it is more likely that a prosecution is required in the public interest.
19. For further details, see the full guidance [here](#).

Communications Offences and Social Media

20. Communications sent via social media may involve the commission of a range of existing offences against the person, public justice, sexual or public order offences. They may also involve the commission of communications offences (“the communications offences”) contrary to section 1 Malicious Communications Act 1988 (“section 1”) and / or section 127 Communications Act 2003 (“section 127”).
21. [Section 1](#) of the Malicious Communications Act 1988 and [section 127](#) of the Communications Act 2003 criminalise the sending of certain communications including those alleged to be indecent, grossly offensive or menacing.
22. “Menacing” means creating a sense of apprehension or fear in the likely recipient. There is a high threshold to meet the objective test of whether or not the communication is “grossly offensive”. A prosecution is only viable where the communication in question crosses the high threshold necessary to protect freedom of expression, even unwelcome freedom of expression, particularly in the course of robust political debate. Communication which is merely any one of the following, is likely to be protected as freedom of expression:

- a. Offensive, shocking or disturbing; or
 - b. Satirical, iconoclastic or rude comment; or
 - c. The expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it; or
 - d. An uninhibited and ill thought-out contribution to a casual conversation where participants expect a certain amount of repartee or “give and take”.
23. A prosecution is only likely to be viable where a communication goes beyond the above. This is with reference to “contemporary standards... the standards of an open and just multi-racial society”, assessing whether the particular message in its particular context is “beyond the pale of what is tolerable in society”.
24. Prosecutors must be satisfied that a prosecution is required in the public interest and, where Article 10 of the ECHR is engaged, this means on the facts and merits of the particular case that it has convincingly been established that a prosecution is necessary and proportionate. Particular care must be taken where a criminal sanction is contemplated for the way in which a person has expressed themselves on social media. The full guidance sets out some relevant public interest [factors](#) to consider.
25. Cases involving communications sent via social media that fall within category (4) of the guidelines except those charged by CPSD out of hours. The case will be reviewed for ‘grossness’ and returned to Area to prosecute and/or communicate the decision.
26. For further details, see the full guidance [here](#).

Public Interest Stage

27. Prosecutors should apply section 4 of the Code for Crown Prosecutors and all factors in favour and against a prosecution should be carefully balanced. Relevant factors to consider in this type of case might include
- A prosecution is (also) more likely if the offence has been committed against a victim who was at the time a person serving the public.
 - It is more likely that prosecution is required if the offence was motivated by any form of prejudice against the victim’s actual or presumed ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or if the suspect targeted or exploited the victim, or

demonstrated hostility towards the victim, based on any of those characteristics.

- Impact of the Community which is not restricted to communities defined by location and may relate to a group of people who share certain characteristics, experiences or backgrounds, including an occupational group.

28. Further factors tending in favour of a prosecution in the public interest include:

- Violent acts were committed that caused injury or it is reasonable to believe they could have caused injury;
- The suspect took a leading role in and/or encouraged others to commit violent acts;
- The suspect was in possession of a weapon at the time of the offence;
- The suspect took steps to conceal their identity;
- Significant disruption was caused to the public and businesses;
- Significant damage was caused to property;
- The suspect has a previous history of causing violence, damage, disruption or making threats at public protests;
- Threats were made against an individual or business that caused or it is reasonable to believe they could have caused alarm, fear or distress.

Further factors tending against a prosecution in the public interest include:

- The public protest was essentially peaceful;
- The suspect had no more than a minor role;
- The suspect has no previous relevant history of offending at public protests or in general;
- The act committed was minor;
- The act committed was instinctive and in the heat of the moment.

ECHR stage

29. The first step is to consider whether the activity involve freedom of expression and/or freedom of assembly and association. If it does, prosecutors should consider whether the activity is aimed at the destruction or limitation of any rights and freedoms in Schedule 1 of the Human Rights Act 1998. If protections of freedoms are engaged, the prosecution must be necessary and proportionate.

Conclusion

30. This guidance cannot cover every eventuality but intends to address in outline some of the possible criminal offences that may be encountered. Although each

case must be considered on its own facts and on its own merits, there are general principles that apply in every case. All decision making must be in line with the Code for Crown Prosecutors, CPS policy and guidance and in particular, where freedoms are protected elsewhere in law, justification for interference with them must be established. A prosecution may only proceed if necessary and proportionate.