Dear Lord Best,

Lords Select Committee on Communications: Social Media and Criminal Offences

I was grateful for the opportunity to give evidence before the Committee in July in support of its inquiry into the legal and regulatory framework around social media and communications offences.

This is a complex and dynamic area and I welcome the Committee’s report, in particular the Committee’s conclusion that the CPS guidelines on prosecuting communications sent via social media appropriately take account of freedom of expression.

I note that the Committee requested clarification of the circumstances in which cases involving ‘revenge pornography’ may be prosecuted under the Malicious Communications Act 1988 and the Communications Act 2003, noting that the social media guidelines did not specifically refer to ‘revenge pornography’ and that the relevance of the CPS guidance on obscene publications in relation to ‘revenge pornography’ was not clear.

The issue in ‘revenge pornography’ cases will be whether the message or communication is grossly offensive, indecent, obscene or false, not whether the image itself is indecent or obscene. An image that falls short of being obscene for the purposes of the Obscene Publications Act, or which would not merit prosecution under that Act, may nonetheless be part of an indecent, obscene or grossly offensive message when considered in the context of the message as a whole, the circumstances in which it was sent and those to whose attention it was brought. It is in these circumstances that a prosecution under the Malicious Communications Act 1988 or the Communications Act 2003 may be appropriate.

I have amended the CPS guidelines on prosecuting communications sent via social media to clarify their application to cases involving ‘revenge pornography’ and set out these principles. I have also amended the CPS guidance on obscene publications to clarify that cases of revenge pornography should be considered under the social media
guidelines. I enclose a copy of both sets of updated guidelines. I hope that this provides the clarity that the Committee seeks.

Yours sincerely

ALISON SAUNDERS
DIRECTOR OF PUBLIC PROSECUTIONS
Guidelines on prosecuting cases involving communications sent via social media

Introduction

1. These guidelines set out the approach that prosecutors should take when making decisions in relation to cases where it is alleged that criminal offences have been committed by the sending of a communication via social media. The guidelines are designed to give clear advice to prosecutors who have been asked either for a charging decision or for early advice to the police, as well as in reviewing those cases which have been charged by the police. Adherence to these guidelines will ensure that there is a consistency of approach across the CPS.

2. The guidelines cover the offences that are likely to be most commonly committed by the sending of communications via social media. These guidelines equally apply to the resending (or retweeting) of communications and whenever they refer to the sending of a communication, the guidelines should also be read as applying to the resending of a communication. However, for the reasons set out below, the context in which any communication is sent will be highly material.

3. These guidelines are primarily concerned with offences that may be committed by reason of the nature or content of a communication sent via social media. Where social media is simply used to facilitate some other substantive offence, prosecutors should proceed under the substantive offence in question.

4. These guidelines replace the interim guidelines issued on 19 December 2012 and they have immediate effect.

General Principles

5. Prosecutors may only start a prosecution if a case satisfies the test set out in the Code for Crown Prosecutors. This test has two stages: the first is the requirement of evidential sufficiency and the second involves consideration of the public interest.

6. As far as the evidential stage is concerned, a prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. This means that an objective, impartial and reasonable jury (or bench of magistrates or judge sitting alone), properly directed and acting in accordance with the law, is more likely than not to convict. It is an objective test based upon the prosecutor's assessment of the evidence (including any information that he or she has about the defence).

7. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

8. It has never been the rule that a prosecution will automatically take place once the evidential stage is satisfied. In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.

9. Every case must be considered on its own individual facts and merits. No prospective immunity from criminal prosecution can ever be given and nothing in these guidelines should be read as suggesting otherwise.

10. In the majority of cases, prosecutors should only decide whether to prosecute after the investigation has been completed. However, there will be cases occasionally where it
is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these cases, prosecutors may decide that the case should not proceed further.

11. Cases involving the sending of communications via social media are likely to benefit from early consultation between police and prosecutors, and the police are encouraged to contact the CPS at an early stage of the investigation.

Initial assessment

12. Communications sent via social media are capable of amounting to criminal offences and prosecutors should make an initial assessment of the content of the communication and the conduct in question so as to distinguish between:

1. Communications which may constitute credible threats of violence to the person or damage to property.
2. Communications which specifically target an individual or individuals and which may constitute harassment or stalking within the meaning of the Protection from Harassment Act 1997.
3. Communications which may amount to a breach of a court order. This can include offences under the Contempt of Court Act 1981, section 5 of the Sexual Offences (Amendment) Act 1992, breaches of a restraining order or breaches of bail. Cases where there has been an offence alleged to have been committed under the Contempt of Court Act 1981 or section 5 of the Sexual Offences (Amendment) Act 1992 should be referred to the Attorney General and via the Principal Legal Advisor's team where necessary.
4. Communications which do not fall into any of the categories above and fall to be considered separately (see below): i.e. those which may be considered grossly offensive, indecent, obscene or false.

13. As a general approach, cases falling within paragraphs 12 (1), (2) or (3) should be prosecuted robustly where they satisfy the test set out in the Code for Crown Prosecutors. On the other hand, cases which fall within paragraph 12(4) will be subject to a high threshold and in many cases a prosecution is unlikely to be in the public interest.

14. Having identified which of the categories set out in paragraph 12 the communication and the conduct in question falls into, prosecutors should follow the approach set out under the relevant heading below.

(1) Credible threats

15. Communications which may constitute credible threats of violence to the person may fall to be considered under section 16 of the Offences Against the Person Act 1861 if the threat is a threat to kill within the meaning of that provision.

16. Other credible threats of violence to the person may fall to be considered under section 4 of the Protection from Harassment Act 1997 if they amount to a course of conduct within the meaning of that provision and there is sufficient evidence to establish the necessary state of knowledge.

17. Credible threats of violence to the person or damage to property may also fall to be considered under section 1 of the Malicious Communications Act 1988, which prohibits the sending of an electronic communication which conveys a threat, or section 127 of the Communications Act 2003 which prohibits the sending of messages
of a "menacing character" by means of a public telecommunications network. However, before proceeding with such a prosecution, prosecutors should heed the words of the Lord Chief Justice in *Chambers v DPP* [2012] EWHC 2157 (Admin) where he said:

"... a message which does not create fear or apprehension in those to whom it is communicated, or may reasonably be expected to see it, falls outside [section 127(i)(a)], for the simple reason that the message lacks menace." (Paragraph 30)

As a general rule, threats which are not credible should not be prosecuted, unless they form part of a campaign of harassment specifically targeting an individual within the meaning of the Protection from Harassment Act 1997 (see category (2) below).

18. Where there is evidence of hostility or prejudice, prosecutors should pay particular regard to sections 28-32 of the Crime and Disorder Act 1998 and section 145 of the Criminal Justice Act 2003 (increase in sentences for racial and religious aggravation) and section 146 of the Criminal Justice Act 2003 (increase in sentences for aggravation related to disability, sexual orientation or transgender identity).

(2) Communications targeting specific individuals

19. If communication(s) sent via social media target a specific individual or individuals they will fall to be considered under this category if the communication(s) sent fall within the scope of the Protection from Harassment Act 1997 and constitute harassment or stalking.

20. Harassment can include repeated attempts to impose unwanted communications or contact upon an individual in a manner that could be expected to cause distress or fear in any reasonable person. It can include harassment by two or more defendants against an individual or harassment against more than one individual.

21. Stalking is not defined in statute but a list of behaviours which might amount to stalking are contained in section 2A (3) of the Protection from Harassment Act 1997. This list includes contacting, or attempting to contact, a person by any means.

22. When considering an offence under the Protection from Harassment Act 1997, the prosecution will need to prove that the defendant pursued a course of conduct which amounted to harassment or stalking. The Act states that a "course of conduct" must involve conduct on at least two occasions. Where it forms part of a course of conduct, "revenge pornography" - where sexually explicit media is publically shared online without the consent of the pictured individual, usually following the breakdown of an intimate relationship - may fall to be considered under this category of cases: see paragraph 42.

23. The conduct in question must form a sequence of events and must not be two distant incidents (*Lau v DPP* (2000), *R v Hills* (2000)). Prosecutors should consider that a course of conduct may often include a range of unwanted behaviour towards an individual and a communication sent via social media may be just one manifestation of this. Where an individual receives unwanted communications from another person via social media in addition to other unwanted behaviour, all the behaviour should be considered together in the round by the prosecutor when determining whether or not a course of conduct is made out.
24. If there is evidence that an offence of stalking or harassment has been committed and the communication targets an individual or individuals on the "basis" of their race or religion, prosecutors should consider whether the offence is a racially or religiously aggravated offence. In order to do so, there must first be sufficient evidence that the basic offence has been committed (as set out in sections 29-32 of the Crime and Disorder Act 1998), followed by the aggravating element defined in section 28 of the Crime and Disorder Act 1998. Where there is aggravation related to disability, sexual orientation or transgender identity, prosecutors should have regard to the increase in sentence provisions under section 146 of the Criminal Justice Act 2003.

25. Further information about the offences of harassment or stalking can be found within the CPS Legal Guidance on Stalking and Harassment.

(3) Breach of court orders

26. Court orders can apply to those communicating via social media in the same way as they apply to others. Accordingly, any communication via social media that may breach a court order falls to be considered under the relevant legislation, including the Contempt of Court Act 1981 and section 5 of the Sexual Offences (Amendment) Act 1992, which makes it an offence to publish material which may lead to the identification of a victim of a sexual offence.

27. In such cases, prosecutors should follow the CPS Legal Guidance on Contempt of Court and Reporting Restrictions and observe the requirement for contempt cases to be referred to the Attorney General and via the Principal Legal Advisor's team where necessary.

28. Prosecutors should also consider whether the communication in question has breached the requirements of another order, such as a Restraining Order, or if it would constitute a breach of bail.

(4) Communications which are grossly offensive, indecent, obscene or false

29. Communications which do not fit into any of the categories outlined above fall to be considered either under section 1 of the Malicious Communications Act 1988 or under section 127 of the Communications Act 2003. These provisions refer to communications which are grossly offensive, indecent, obscene, menacing or false (but as a general rule, menacing communications should be dealt with under category 1 above on credible threats).

30. Section 1 of the Malicious Communications Act 1988 deals with the sending to another of an electronic communication which is indecent or grossly offensive, or which conveys a threat, or which is false, provided there is an intention to cause distress or anxiety to the recipient. The offence is one of sending, delivering or transmitting, so there is no legal requirement for the communication to reach the intended recipient. The terms of section 1 were considered in Connolly v DPP [2007] 1 ALL ER 1012 and "indecent or grossly offensive" were said to be ordinary English words. A person guilty of an offence under section 1 of the Malicious Communications Act 1988 is liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine or both.

31. Section 127 of the Communications Act 2003 makes it an offence to send or cause to be sent through a "public electronic communications network" a message or other matter that is "grossly offensive" or of an "indecent, obscene or menacing character". The same section also provides that it is an offence to send or cause to be sent a false
message "for the purpose of causing annoyance, inconvenience or needless anxiety to another". The defendant must be shown to have intended or be aware that the message was grossly offensive, indecent or menacing, which can be inferred from the terms of the message or from the defendant's knowledge of the likely recipient. The offence is committed by sending the message. There is no requirement that any person sees the message or be offended by it.

32. In *Chambers v DPP* [2012] EWHC 2157 (Admin), the Divisional Court held that because a message sent by Twitter is accessible to all who have access to the internet, it is a message sent via a "public electronic communications network". Since many communications sent via social media are similarly accessible to all those who have access to the internet, the same applies to any such communications. However, section 127 of the Communications Act 2003 does not apply to anything done in the course of providing a programme service within the meaning of the Broadcasting Act 1990.

The High Threshold at the Evidential Stage

33. Every day many millions of communications are sent via social media and the application of section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 to such comments creates the potential that a very large number of cases could be prosecuted before the courts. Taking together, for example, Facebook, Twitter, LinkedIn and YouTube, there are likely to be hundreds of millions of communications every month.

34. In these circumstances there is the potential for a chilling effect on free speech and prosecutors should exercise considerable caution before bringing charges under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. There is a high threshold that must be met before the evidential stage in the Code for Crown Prosecutors will be met. Furthermore, even if the high evidential threshold is met, in many cases a prosecution is unlikely to be required in the public interest (see paragraphs 46 onwards).

35. Since both section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 will often engage Article 10 of the European Convention on Human Rights, prosecutors are reminded 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 ..."

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

"Freedom of expression constitutes one of the essential foundations of a democratic society ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ..."
37. 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:
   o Necessary; and
   o Proportionate.

These exceptions, however, must be narrowly interpreted and the necessity for any restrictions convincingly established.

38. The common law takes a similar approach. In *Chambers v DPP* [2012] EWHC 2157 (Admin), the Lord Chief Justice made it clear that:

"Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by [section 127 of the Communications Act 2003]."

39. Prosecutors are reminded that what is prohibited under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 is the sending of a communication that is grossly offensive. A communication sent has to be more than simply offensive to be contrary to the criminal law. Just because the content expressed in the communication is in bad taste, controversial or unpopular, and may cause offence to individuals or a specific community, this is not in itself sufficient reason to engage the criminal law. As Lord Bingham made clear in *DPP v Collins* [2006] UKHL 40:

"There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates."

**Context and approach**

40. Context is important and prosecutors should have regard to the fact that 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 reach millions. As Eady J stated in the civil case of *Smith v ADVFN* [2008] 1797 (QB) in relation to comments on an internet bulletin board:

"... [they are] like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take'."

41. Against that background, prosecutors should only proceed with cases under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications
Act 2003 where they are satisfied there is sufficient evidence that the communication in question is more than:

- 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 to those subjected to it.

If so satisfied, prosecutors should go on to consider whether a prosecution is required in the public interest.

**The malicious use of intimate photographs (sometimes referred to as 'revenge pornography')**

42. Cases involving 'revenge pornography' - where sexually explicit media is publically shared online without the consent of the pictured individual, usually following the breakdown of an intimate relationship - may fall to be considered under the social media guidelines. The impact of such offences on victims can be significant. Such cases are an example of the importance of context. The issue in social media cases will be whether the message or communication is grossly offensive, indecent, obscene or false, not whether the image itself is indecent or obscene. An image that falls short of being obscene for the purposes of the Obscene Publications Act, or which would not merit prosecution under that Act, may nonetheless be part of an indecent, obscene, or grossly offensive message when considered in the context of the message as a whole, the circumstances in which it was sent and those to whose attention it was brought.

43. 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 category (2) above) should be considered.

44. Where the images may have been taken when the victim was under 18, prosecutors should consider whether any offences under the Protection of Children Act 1978 have been committed.

45. In the most serious cases, where intimate images are used to coerce victims into further sexual activity, or in an effort to do so, other offences should be considered. If coercion of an adult has resulted in sexual activity section 4 of the Sexual Offences Act 2003 should be considered. If no activity has taken place but there is clear evidence that an offence was intended to lead to a further sexual offence section 62 of the same Act should be considered. If the victim was a child sections 8 and 10 of the Act should be considered, under the limb of 'causing' activity if coercion has resulted in sexual activity and 'inciting' such activity if it has not.

**The public interest**

46. When assessing whether a prosecution is required in the public interest for cases that fall within this category (that is category 12(4) above), prosecutors must follow the approach set out in these guidelines as well as the wider principles set out in the Code for Crown Prosecutors. In particular when prosecutors are considering the public interest questions set out in paragraph 4.12 of the Code for Crown Prosecutors, they should have particular regard to paragraph 4.12(c) and the question asked about the
circumstances of and harm caused to the victim where the communication is targeted at a particular person.

47. Since section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003 will often engage Article 10 of the European Convention on Human Rights, no prosecution should be brought unless it can be shown on its own facts and merits to be both necessary and proportionate.

48. A prosecution is unlikely to be both necessary and proportionate where:

49. The suspect has expressed genuine remorse;

50. Swift and effective action has been taken by the suspect and/or others for example, service providers, to remove the communication in question or otherwise block access to it;

51. 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; or

52. The content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.

This is not an exhaustive list, however, and each case must be considered on its own facts and its own individual merits.

- In particular, 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 there is a hate crime element to the communication(s). A prosecution for an offence under section 1 of the Malicious Communications Act 1988 may be in the public interest in such circumstances, particularly if the offence is repeated; alternatively, a prosecution may be merited for an offence under section 127 (2) of the Communications Act 2003 in respect of the persistent use of a public electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety to another, assuming the high threshold for prosecution has been passed.

**Children and Young People**

50. The age and maturity of suspects should be given significant weight, particularly if they are under the age of 18. Children may not appreciate the potential harm and seriousness of their communications and a prosecution is rarely likely to be in the public interest.

**Public Order Legislation**

51. Although some cases falling within paragraphs 12 (1) - (4) may fall to be considered under public order legislation, such as Part 1 of the Public Order Act 1986, particular care should be taken in dealing with social media cases in this way because public order legislation is primarily concerned with words spoken or actions carried out in the presence or hearing of the person being targeted (i.e. where there is physical proximity between the speaker and the listener) and there are restrictions on prosecuting words or conduct by a person in a dwelling.

52. Prosecutors are reminded that in *Redmond-Bate v DPP* (Divisional Court, 23 July 1999), Sedley LJ emphasised that under the Public Order Act 1986 the mere fact that words were irritating, contentious, unwelcome and provocative was not enough to
justify the invocation of the criminal law unless they tended to provoke violence. In a similar vein, in *Dehal v CPS* [2005] EWHC 2154 (Admin), Moses J, referring to section 4A of the Public Order Act 1986, held that:

"... *the criminal law should not be invoked unless and until it is established that the conduct which is the subject of the charge amounts to such a threat to public order as to require the invocation of the criminal as opposed to the civil law.*" (paragraph 5).

53. However, in some cases, prosecutors may be satisfied that the incitement provisions in Part III of the Public Order Act 1986 are relevant and should be used. Such cases must be referred to the Special Crime and Counter Terrorism Division and require the consent of the Attorney General to proceed.

**Handling arrangements**

54. These guidelines come into effect on 20 June 2013. Any cases that fall to be considered under these guidelines will be dealt with by the relevant CPS Area or CPS Direct. Cases which fall to be considered under these guidelines should be handled by a prosecutor with the appropriate level of skill and experience. Special arrangements apply to cases which fall within category (4), as identified in paragraph 12(4) and paragraphs 29 - 45 above.

55. Revised handling arrangements for category (4) cases apply from the 3rd March 2014.
   - CPSD cases: To ensure that cases which call for an immediate response can be dealt with while suspects are still in police custody CPS Direct lawyers may charge cases involving communications sent via social media which fall into category (4) with the prior authority of the CPSD CCP or DCCP.
   - Cases not charged by CPSD: Other cases referred to CPS Areas pre-charge, or charged by the police, require authorisation from the Private Office Legal Team. Authority is required before any final decision is made to charge or where the Area intends to proceed with a police charge. Referral should be made in accordance with the "Protocol on referral of cases under the guidelines on prosecuting cases involving communications sent via social media." Referral should be made at the earliest possible stage.
Obscene Publications

Code for Crown Prosecutors - considerations

The Code does not contain anything specifically on Obscene Publications.

The Attorney General, in a Parliamentary Written Answer on 16 June 1997, said that "in determining whether a prosecution would be in the public interest, the principal factors include:

- the degree and type of obscenity together with the form in which it is presented;
- the type and scale of any commercial venture;
- whether publication was made to a child or the possibility that such publication would be likely to take place."

The Law

The Obscene Publications Acts (OPA) 1959 [Archbold: 31-63] and 1964 [Archbold: 31-76] provide for:

- Prosecution (under section 2 of the 1959 Act as expanded by section 1 of the 1964 Act); and
- Forfeiture (under section 3 of the 1959 Act).

Definition of "obscene" see Archbold: 31-63

Definition of "publishes" see Archbold: 31-72

The Acts are designed:

- To penalise purveyors of obscene material by making it an offence under section 2 either to publish an obscene article or to have an obscene article for publication for gain; and
- To prevent such articles from reaching the market by way of seizure and forfeiture proceedings under section 3.

For either proceedings, the test of whether an article is obscene is the same and set out at section 1 of the OPA 1959.

A prosecution cannot be commenced more than 2 years after the commission of the offence.

In general, the issue "obscene or not" must be tried by the jury without the assistance of expert evidence: Archbold: 31-68.

Jurisdiction

The general rule used to be that English and Welsh courts did not accept jurisdiction over offences committed outside England and Wales. That general rule is now subject to a number
of statutory exceptions, as the UK has extended its jurisdiction to become extra-territorial for specified offences, and has made special provision for the determination of where the *actus reus* of the offence took place. The common law also provides for an extension of jurisdiction in certain circumstances.


There are very difficult jurisdicational issues about whether material hosted overseas is within reach of the English criminal law. It will depend on a range of factors including who posted the material on the site, where it is hosted and what the person intends the material to do. If a web site is hosted abroad and is downloaded in the UK, the case of *R v Perrin* [2002] 4 Archbold News 2 will apply.

*R v Perrin* is specifically concerned with 'publishing' electronic data under the Obscene Publications Act 1959 and states that the mere transmission of data constitutes publication. It is clear from the decision in *R v Perrin* and in the earlier case of *R v Waddon* (6 April 2000 unreported), that there is publication both when images are uploaded and when they are downloaded. In the case of *R v Waddon* the Court of Appeal held that the content of American websites could come under British jurisdiction when downloaded in the United Kingdom.

*The Obscene Publication Act 1959* has been amended to deal with electronically stored data or the transmission of such data (see section 1(3)).

**European Court of Human Rights**

Legislation in England and Wales prohibits obscene publications, performances, and photographs. The Convention rights to freedom of expression set out in Article 10 may be used to claim that the particular legislation is incompatible with the Convention. Article 10 states that the right of freedom of expression shall include:

"*freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*" Article 10(2) goes on to say that, "*the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of ... public safety, for the prevention of disorder or crime, for the protection of health or morals, protection of the reputation or rights of other ..."

Any restriction of freedom of expression that is imposed by national law must be capable of objective justification as being necessary in a democratic society for one of the purposes set out.
The so called "margin of appreciation" enables states to have a degree of latitude to decide law and social policy in the light of their own cultures and values. For example, (*Handyside v United Kingdom* (1976) 1 EHRR 737):

"Sharing the view of the Government and the unanimous opinion of the Commission, the court finds that the Obscenity Acts 1959 and 1964 have an aim that is legitimate under Article 10(2), namely, the protection of morals in a democratic society." (paragraph 46)

The majority of the Commission agreed that the European Court had only to ensure that the United Kingdom courts acted reasonably, in good faith and within the limits of the margin of appreciation left to Contracting States by Article 10(2):

"there was no uniform conception of morals. State authorities were better placed than the international judge to assess the necessity for a restriction designed to protect morals." (paragraph 2)

In the expression "necessary in a democratic society" (Article 10(2)), the word "necessary" was not synonymous with "indispensable", but implied the existence of a pressing social need (paragraph 2).

**Possible Defences**

The defence of "Public good" is created by section 4 of the Obscene Publications Act 1959. The defence have to prove that publication of the article in question is justified as being for the public good on the ground that it is for example in the interests of science, literature, art or learning, or of other objects of general concern; Archbold: 31-88.

Section 2(5) of the Act creates a defence for a person who proves that he or she has not examined the article and had no reasonable cause to suspect that it was obscene: Archbold: 31-74.

For provisions as to search, seizure and forfeiture, see Archbold: 31-84.

ECHR Article 10. The Obscene Publications Acts have an aim that is legitimate under Article 10(2), namely, the protection of morals in a democratic society (*Handyside v United Kingdom* (1976) 1EHRR 737).

**Charging Practice**

The particulars of the charge should clearly identify the obscene article e.g. "an Internet website entitled "Welcome" (exhibit reference KDW/6)."

It is impossible to define all types of activity which may be suitable for prosecution. The following is not an exhaustive list but indicates the categories of material most commonly prosecuted:

- sexual act with an animal
- realistic portrayals of rape
- sadomasochistic material which goes beyond trifling and transient infliction of injury
- torture with instruments
- bondage (especially where gags are used with no apparent means of withdrawing consent)
- dismemberment or graphic mutilation
- activities involving perversion or degradation (such as drinking urine, urination or vomiting on to the body, or excretion or use of excreta)
- fisting

Unless any of the factors listed above are present within the given case, the Crown Prosecution Service will not normally advise proceedings in respect of material portraying the following:

- actual consensual sexual intercourse (vaginal or anal)
- oral sex
- masturbation
- mild bondage
- simulated intercourse or buggery
- fetishes which do not encourage physical abuse.

Previously buggery involving humans (whether consensual or not) was regarded as suitable for prosecution under section 2 of the Obscene Publications Act 1959. Now, buggery per se between consenting adults is not regarded as suitable for prosecution under section 2. This includes consensual anal penetration in a situation involving simultaneous double penetration (anal and vaginal) between two men and a woman. However, a depiction of buggery would be regarded as obscene for the purposes of section 2 where one or more of the aggravating features set out above are present. Therefore, depictions of non-consensual buggery will still be regarded as section 2 material.

The principal factors influencing whether a prosecution under section 2 is required are:

- the degree and type of obscenity together with the form in which it is presented: for example the impact of the printed word will be less than the same activity shown in film or photograph;
- the type and scale of any commercial venture should be taken into account;
- whether publication was made to a child or vulnerable adult, or the possibility that such would be likely to take place;
- where children are likely to access material of a degree of sexual explicitness equivalent to what is available to those aged 18 and above in a licensed sex shop, that material may be considered to be obscene and subject to prosecution. This applies to material which is not behind a suitable payment barrier or other accepted means of age verification, for example, material on the front page of pornography websites and non-commercial, user-generated material which is likely to be accessed by children and meets the threshold. see R v Perrin, [2002] EWCA Crim 747;
- where publication took place, especially if material can be readily seen by the general public, for example in a newsagents or market, or websites easily accessible to children;
- the defendant's antecedents, especially where there has been a previous conviction, or caution, for a similar matter;
• the degree of participation of the proposed defendant(s). This becomes relevant where the defendant can employ the statutory defence that he had no knowledge of the contents of the material under section 2(5) of the 1959 Act.

Where proceedings under section 2 are instituted, the number of articles to be placed before the Court should be manageable. The use of too many articles, or charges, could be counterproductive and have a negative effect upon the jury.

The Crown Prosecution Service normally advises on no more than six articles and a consolidation charge that reflects the amount of articles received as being sufficient to highlight the different types of activities portrayed or described, unless there are particular factors in a case, such as multiple defendants, seizure of material from more than one location etc.

In cases where a large amount of material suitable for prosecution under section 2 has been seized, the use of the Criminal Procedure Rules (CPR) should be considered. CPR 2010 Rule 14.2.2 permits multiple examples of offending within one count without duplicity; if the defence is the same, then there is no prejudice to the defendant. This does not mean that you cannot have specimen charges if preferred.

Use of conspiracy charge

Categories of material: Imported pornographic material

Most publishers are outside the jurisdiction and cannot be prosecuted. However where the material falls within that which is usually prosecuted proceedings should be taken against those responsible for its distribution and retailing.

Categories of material: Domestic pornographic material

Where the material has clearly been produced in this country, attempts should be made to prosecute those responsible for its production and distribution before any action is taken against retailers.

Pending the result of those proceedings, it may be more appropriate to proceed by way of forfeiture against the retailers.

Categories of material: Extreme videos that appear realistic

When a video of this type is considered it should be remembered that it is not just what is depicted but how it is treated that is important.

Material depicting the violent mutilation, torture, death and cannibalism of those involved has been found to have a tendency to deprave and corrupt.

Such scenes that are explicit and/or lingering can indicate to the viewer approval or encouragement of the behaviour involved thereby normalising the depraving or corrupting behaviours.
You should examine each violent episode in relation to the work as a whole, and in particular consider the following:

- who is the perpetrator and what is their reaction?
- who is the victim and what is their reaction?
- how is the violence inflicted and in what circumstances?
- how explicit, prolonged and realistic are the scenes?
- is the violence justifiable in the context of the film?

Any doubt about the obscenity of this type of material should only be resolved by way of prosecution, preferably involving the distributors, and not by way of forfeiture.

**Possible alternative offences:**

**Extreme Pornography**

Prosecutors should consider charging suspects with the new offence of possession of extreme pornographic images in cases where the suspect cannot be charged with an offence contrary to the Obscene Publications Acts as he has not published or distributed such images. See [Extreme Pornography](#), elsewhere in the Legal Guidance.

**Indecent photographs of children**

Section 1 of the Protection of Children Act 1978 covers the taking, making, distribution, showing or possession with a view to distributing any indecent image of a child. This offence or an offence contrary to section 160 Criminal Justice Act 1988 should be charged instead of an Obscene Publications offence where the material concerned includes indecent images of children (defined as being persons under the age of 18). See [Indecent Photographs of Children](#), elsewhere in the Legal Guidance.

**Revenge pornography**

Revenge pornography is the public sharing of sexually explicit media without the consent of the pictured individual, usually following the breakdown of an intimate relationship and with the intention of causing the victim distress. In such cases prosecutors should consider charging suspects with offences under section 1 of the Malicious Communications Act; section 127 of the Communications Act; the Protection from Harassment Act or; where the victim was under 18 when the images were taken, the Protection of Children Act 1978. Prosecutors should refer to the [Guidelines on prosecuting cases involving Communications sent via Social Media](#).

**Video Recordings Act 1984 and 2010 (VRA)**

As well as introducing a system for the classification of video recordings and the like, the VRA also creates a number of criminal offences including: supplying video recording of unclassified work; Certain video recordings only to be supplied in licensed sex shops; Supply of video recording not complying with requirements as to labels, etc and supply of video recording containing false indication as to classification. See the Video Recordings Act 1984 and 2010, elsewhere in the Legal Guidance and the Video Recordings Act 1984 and the Video Recordings Act 2010.

**Indecent Displays (Control) Act 1981**

Section 1 of the Indecent Displays (Control) Act states it is an offence to publicly display indecent matter. If material prosecuted under the VRA is on display in shops and the cover can be classified as indecent, consider charging this offence. See Indecent Displays (Control) Act 1981.

**Importation of Indecent and Obscene Material**

The prohibition on the import of indecent and obscene material is contained in section 42 of the Customs Consolidation Act 1876. It prohibits indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or other indecent or obscene articles. It is an offence under section 170(2) CEMA 1979 to be knowingly concerned in attempting to evade the prohibition on indecent and obscene articles imposed by section 42 of the Customs Consolidation Act 1976. Archbold 31-128.

The Customs Consolidation Act 1876 does not define the terms "indecent" or "obscene". It is therefore necessary to rely on the dictionary definitions and the changing standards of society as reflected in contemporary court decisions.

The offence is triable either way. The maximum term of imprisonment on summary conviction is six months. On indictment the maximum is seven years imprisonment.

In *R v Hirst* [2001] 1 Cr App R (S) 44 the Court of Appeal upheld a sentence of 12 months imprisonment on a plea of guilty by a 51 year-old with no convictions to conspiracy to import obscene videos in a sophisticated operation in which the offender had an important role.

**Children and Young Persons (Harmful Publications) Act 1955**

(Stone's Justices' Manual, 8-22445).

This Act applies to any book, magazine or other like work which is of a kind likely to fall into the hands of children or young persons and consists wholly or mainly of stories told in pictures (with or without the addition of written matter), being stories portraying:

- the commission of crimes; or
- acts of violence or cruelty; or
- incidents of a repulsive or horrible nature;

in such a way that the work as a whole would tend to corrupt a child or young person into whose hands it might fall.
A Child for the purposes of this Act means a person under the age of fourteen years: young person means a person who has attained the age of fourteen years and is under the age of eighteen years.

It is also an offence to print; publish; sell; let on hire or import works to which this Act applies. Offences contrary to this Act are summary only and require the consent of the Attorney General.

**Penalties**

Section 71 of the Criminal Justice and Immigration Act 2008 has increased the maximum penalty for conviction on indictment for the publication etc. of obscene articles from three to five years imprisonment. This increase in penalty does not apply to any offence committed before 26 January 2009.

**Forfeiture Proceedings**

Most obscene publications relate to magazines, books, films of less than 16mm and DVDs of no literary or artistic merit and the bulk of these are usually dealt with by way of forfeiture proceedings under section 3 of the 1959 Act. Archbold: 31-84.

It is important to realise that such proceedings can only take place when the material in question has been seized pursuant to the execution of a warrant issued by the magistrates' court under section 3.

The conduct of such proceedings becomes the responsibility of the CPS under section 3(2) (d) Prosecution of Offences Act 1985. Archbold: 1-253.

In some cases involving the seizure of large quantities of material, the Police will seek advice as to which articles should be placed before the Court with a view to obtaining a summons under section 3.

Such advice can properly be given with a view to placing a representative sample of the various activities contained within the material before the Court.

Articles not considered to be obscene can be returned to the person concerned under the proviso to section 3(3) of the 1959 Act. Archbold: 31-84.

Although forfeiture proceedings will normally be handled locally, where such proceedings relate to a film of 16mm or more the information in support of the warrant must have been laid or on behalf of the Director of Public Prosecutions.

Where a summons under section 3 has been issued and it is likely that the person concerned will be prosecuted under section 2, the forfeiture proceedings should be adjourned sine die pending the outcome of the prosecution.

If there has been an acquittal, the magistrates should be informed, especially where the sole defence run was that the article in question was not obscene.
Under Section 143 of the **Powers of Criminal Courts (Sentencing) Act 2000** the magistrates court has power to deprive an offender of property used or intended for use for the purposes of crime.

Section 39 of the **Police and Justice Act 2006** and Schedule 11 to the Act amends the Protection of Children Act 1978 to provide a mechanism to allow police to forfeit indecent photographs of children held by the police following any lawful seizure. The provisions came into effect on 1 April 2008 and provide an administrative regime to forfeit images where a decision not to proceed with a prosecution is made or where a caution is issued (it does this by replacing section 5 of the PCA 1978).

The Law Officers have undertaken that where a publisher intervenes in forfeiture proceedings and indicates an intention to continue publishing, whatever the result of the forfeiture proceedings may be, then in the absence of special circumstances and there being sufficient evidence the Director will usually proceed against the publisher by way of prosecution rather than pursue the forfeiture proceedings. The undertaking does not apply to "pulp" magazines. These are magazines where there cannot be any claim of literary, artistic, scientific or any other merit. These are magazines considered by virtue of their nature and character not worthy of consideration by a judge and jury. Therefore if they are obscene they can be consigned to the incinerator (i.e. "pulped") with a minimum of expense by the Justices.

**Disclosure of Material**

Requests by other agencies, including defence solicitors, to be provided with copies of obscene material should not be acceded to. To do so would be a technical breach of section 2 Obscene Publications Act 1959. The originals should be available to be viewed at a convenient location in the presence of the police and/or CPS.

**Useful references**

*Handyside v United Kingdom* (1976) 1 EHRR 737

Legal Guidance on Prosecuting Child Abuse

Legal Guidance on Extreme Pornography

Legal Guidance on Indecent Photographs of Children

Legal Guidance on Prohibited Images of Children

Legal Guidance on Video Recording Acts 1984 and 2010

Indecent Displays (Control) Act 1981

Video Recordings Act 1984

Video Recordings Act 2010