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Transcript

Social Media, Free Speech and the Law

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Elizabeth Wilmshurst:

Keir Starmer was a barrister at Doughty Street Chambers, specializing in human rights, a bit of international law and criminal law, and has been director of public prosecutions (DPP) and head of the Crown Prosecution Service since 2008. So we're delighted to have you here. You're on a sort of tour introducing your interim guidelines on social media, free speech and the law – so over to you.

Keir Starmer:

Thank you very much and good afternoon, sorry to keep you waiting – that was entirely my fault, I had to give evidence to the House of Lords Select Committee on EU opt-out measures. So if I drift off into EU law you'll know why.

I wanted just to spend a little time talking to you about the guidelines that we've drafted on prosecuting cases involving communications sent via social media. I thought I'd begin by just giving you some background and context. As a general proposition, there has always been a healthy tension between free speech and the reach of the criminal law. That's not new just because we've got social media; we've had that for a very long time. In this country, traditionally the balance between free speech and the reach of the criminal law has been held by notions such as place and reaction. So if you look at the public order acts from 1936 onwards, you'll see that the balance is struck by saying you can say certain things in private, but you can't necessarily say them in public. You can say certain things as long as they don't provoke a violent reaction, and you can't say other things if they do, such as the incitement provision. So they've been the traditional benchmarks for this balancing exercise. More recently, the whole notion of hate crime has added to the mix. But within all that for decades, there's always been a protected area, somewhere where you can pretty much can say and think what you like – often in your own home.

The rapid growth in social media, particularly in the last 10 years, to my mind poses a challenge to that balance for a number of reasons. The first is the sheer scale of use, and some of you may be familiar with some of these figures already. It is now estimated that there are one billion active Facebook users worldwide, of which 33 million are in the UK. As for Twitter, it's estimated there are over 380 million Twitter users worldwide, of which 12 million are in the UK. The average number of tweets a day is thought to be 340 million. I should add that LinkedIn has an estimated four million users in

the UK, and there are over 800 million visits to YouTube every month; 72 hours of video are uploaded to YouTube every minute.

So the scale is quite extraordinary, and the extent of the reach is equally extraordinary. Access is ubiquitous and instantaneous. Banter, jokes and offensive comments are commonplace, and communications intended for a few have the potential to reach millions.

The other reason why social media has posed a challenge to the traditional balance between free speech and criminal law is the governing legislation. For this, we just have to take a little step back in history. Back in the early 1930s, telephones were being developed. They'd been tried out in the late 1800s and various international calls had been made. But by the 1930s, telephones were becoming a little more common – more and more people were beginning to use them. But back then, you could only make a long-distance call if you went through an exchange: they hadn't cracked direct dialling. So you'd have to phone the exchange, the exchange would then make the connection with the number that you wanted to connect to, and that way the call could be put together. In the 1930s the exchanges were largely staffed by women, and there were about 200 exchanges. Parliament got very concerned about the prospect that as more people were going to use telephones, these women might be exposed to language that they ought to be protected from. Therefore, in 1935, parliament passed the Post Office (Amendment) Act, making it an offence to communicate any message by phone which was ‘grossly offensive or of an indecent, obscene or menacing character’.

Now in the first draft of the bill that became that act, the only protected category was the staff in the telephone exchange. But that got changed to the public in general. So onto the statute books in 1935 came a provision to protect largely staff in exchanges from ‘grossly offensive messages or messages of an indecent, obscene or menacing character’. The act also prohibited communicating any message which was false for the purpose of causing annoyance, needless inconvenience or needless anxiety. I've tried to track down where that came from – that was apparently because before telephones were much-used, telegrams were the only way of getting a message swiftly to somebody, or reasonably swiftly. And there was a habit apparently, in the late 1800s, of mischievous people sending telegrams to people with a false message such as 'your relative is dead' – seriously! And the family would then have real distress before they could find out for sure what the true situation was.

So covering off both those issues in 1935, parliament said if it was grossly offensive or if it's false and you're intending to annoy someone, that's an offence. That act has been re-enacted over a number of years. It's expanded in two ways. Firstly, what is prohibited is not just messages, but 'messages or other matter'; and secondly a message by telephone became a message by 'public telecommunications systems' in 1969, when the telephone systems went onto a different public framework, and in 2003 that became a 'public electronic communications service'.

So by the time we get to 2003, we have a Communications Act which keeps the original 1935 wording prohibiting grossly offensive or indecent, obscene or menacing messages, if they are sent by public electronic communications system – section 127 of the Communications Act. Let me add two dates – keep 2003 in your mind. In 2004, Facebook is established as a private company in the United States. In 2006, Twitter is established, again, as a private company in the United States. Now you'd have to be a member of parliament with considerable foresight to have had that in mind when re-enacting in 2003 the old 1935 provision relating to messages.

And you might be thinking, 'How does a private American company have the 1935 Act intended for public telecommunications applying to it?' The answer is: in a case last year of *Chambers v. DPP*, often known as the Twitter joke case, the divisional court held that any message that's accessible by the internet in this country has passed through a public electronic communications service – and by that, the decision extended the 1935 provision that was intended for exchange staff to the millions and billions of people who send messages by social media.

Hence, we have got the challenge of balancing free speech and the criminal law, in an environment where the scale is enormous, the style and context of communicating is arguably different to other styles and contexts, and where we're dealing with legislation which was not drafted and drawn up with a view to establishing a balance for social media, coming as it did at least a year before social media really began to take off.

And that's led to a number of cases coming up for consideration. And some of these will be familiar to you. Early last year a man called Liam Stacey was prosecuted for messages that he put out on Twitter about Fabrice Muamba, who was the footballer who you may recall suffered a heart attack during a football game on a Sunday afternoon. He was taken to hospital straight from the football ground, and while he was there, about two or three hours later, Liam Stacey started sending a series of extremely offensive messages about

Fabrice Muamba and his family. He was prosecuted and he was sentenced to 56 days in prison.

Matthew Woods was also prosecuted last year for very offensive comments, made on Facebook this time, regarding the missing children April Jones and Madeleine McCann. His messages went up within hours of our charging decision in that case. And the significance of that is: you may recall the alleged perpetrator had been arrested, and April Jones was obviously still missing. And we were acutely conscious of the fact that when we announced a charging decision, we were sending a pretty clear message to her parents that we no longer thought that April Jones was still alive. Up until then they'd been holding up the hope that she was still alive. So it was a very difficult and tense period. Within two or three hours, Matthew Woods was putting up messages that were so grossly offensive that nobody has ever actually repeated them in any public forum as far as I'm aware.

So they're two of the cases. The third case by way of example is the case where the footballer Daniel Thomas was not prosecuted for posting homophobic comments about Olympic divers Tom Daley and Peter Waterfield on Twitter. In that case, the message was not intended to reach either of the victims, it was removed swiftly and Mr Thomas expressed his remorse at causing offence.

But these judgement calls are not easy to make, depending as they do on context, circumstance and in an environment where very strong views are held about whether cases should be prosecuted, what cases should be prosecuted, and what are the tolerable limits. As a result of the increase in number of these cases, and in recognition of the difficulty in making the judgement calls, I decided earlier last year that we should publish guidelines for prosecutors indicating how they should approach the exercise of deciding whether or not to prosecute.

Those guidelines were issued on 19 December last year, and they are in force, but they're out for consultation for three months. And therefore in the third week of March we'll end the consultation period. The first thing I'd like to invite you all to do is to look at them and respond. Because when prosecutors exercise their discretion on whether or not to prosecute, they do that on the basis that a prosecution is not required in the public interest. I think in that context it's extremely important for us to know what the public think of the way in which we've set the balance. That's why in the last two or three years, I've tended to draft guidelines on an interim basis and put them out for consultation for three months while we operate them, before then going back

to them to see what people have made of them and whether we need to make any amendment. We did it with the assisted suicide guidelines some years ago, and we've done it with other guidelines since then. So please if you get the chance make sure you look at them and respond so that we can take into account the comments you may have.

The guidelines which you may or may not have seen take prosecutors through the decision-making process in any case involving a communication sent by social media. The general approach we've taken is this: we've said to prosecutors, the first thing you must do is go through an initial assessment and put the case in its proper category. The categories that we've drawn up are these: one, cases where the communications constitutes a credible threat of violence to persons or property. Category two is communications which specifically target an individual and which may constitute harassment, or a campaign of harassment, under the Protection from Harassment Act 1997. The third is communications which amount to a breach of a court order – and you may have seen that we recently prosecuted a number of individuals for revealing the name of a rape victim in the Ched Evans case. There was a court order saying the victim shouldn't be named, and a number of people named the victim using social media, and we prosecuted those people. The fourth category is communications which don't fall into categories one, two and three, and which may be considered grossly offensive, indecent, obscene or false – the old 1935 offence.

So the first thing to do is work out: is it a credible threat of violence? Is it targeted harassment? Is it breaching a court order? If it's in those categories then a pretty robust view is taken about the need to prosecute. If on the other hand it doesn't fall in to those categories and is what might be considered grossly offensive, etc., then the guidelines indicate there should be a high threshold for prosecution and that in many cases a prosecution is unlikely to be in the public interest. We then go on to spell that out by reference to, among other things, Article 10 of the European Convention on Human Rights, and the case law under Article 10 which includes the passage from the *Sunday Times* case that says 'freedom of expression constitutes one of the essential foundations of a democratic society'. It's 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.

So in the guidelines we've said to get over the high threshold for prosecution for this fourth category, prosecutors have to be satisfied that the communication in question is *more than* offensive, shocking or disturbing, satirical or rude, or the expression of an unpopular or unfashionable opinion

about serious or trivial matters, or banter or humour, even if it is tasteful to some or painful to others. It has to be something more than that to get over the high threshold. Insofar as the public interest is concerned, we've indicated to prosecutors that each case must obviously be decided on its own facts and merits, but a prosecution is unlikely to be necessary where: one, the suspect has swiftly taken action to remove the communication, or expressed genuine remorse. One of the features of the cases we've looked at is that in many cases, the individual realizes they've overstepped the mark and removes the communication pretty swiftly. Or prosecution is unlikely to be in the public interest, where 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.

Before drawing up the guidelines, we had a number of roundtable consultations with those with a real interest in social media and free speech, and we included the policy director of Facebook to discuss with him where they thought the responsibility lay if you were providing the service that was allowing people to use social media, particularly to reach others. Obviously I can't tell Facebook or Twitter or anyone else what they ought to put in their own guidelines, but it was a very positive exchange of views about what ought to be in their guidelines and how they might enforce their guidelines. But if a message is blocked very quickly, its impact is likely to be much less.

The third thing we invited prosecutors to take into account and indicated what will make it less likely that a prosecution is needed in the public interest is that 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. So what was the intended audience, and was it targeting the victim?

When I first mentioned this as relevant to the guidelines, there were various bits of coverage saying that I was really indicating that if you didn't have any followers on Twitter you were probably alright. That wasn't what we were intending to deal with, but we have to deal with the situation that it is probably much more harmful if the message is very widely read and disseminated. And of course you have to remember that although we're specifically addressing social media, the old 1935 offence does apply to any message sent by electronic communication systems. So all of your emails, even if it's just to one other person, are caught by the act. And there is obviously the potential there for people to send something to one person or two people that then gets sent on or included in a trail or such other way of reaching many more people.

We also worked out through the cases we were seeing that it did make a difference whether you actually were trying to reach the subject matter. It's the difference, I suppose, virtually, of going into a cafe or bar and having a good old gossip about someone who isn't there, and saying it their face. We thought that a distinction could be drawn in that respect. It's quite interesting; Daniel Thomas, the footballer who made the remarks about Tom Daley, was genuinely quite shocked that Tom Daley had ever got to know about it, because he thought he was making a – he thought funny, I thought unfunny – remark to his mates and family. When he appreciated that it actually got to the intended victim, that came as a surprise to him.

The fourth matter that makes it less likely that a prosecution will be in the public interest is that 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 freedom of expression. So the structure of the guidelines is: first, put the case in its proper category; once you've done that, it will dictate which route you follow, and if it's not threatening, harassing or breaching court orders, then there's a high threshold – a lot of things which are distasteful and painful need to be endured if we're to protect free speech. And if it's taken down quickly, if action has been taken to block it, if it wasn't intended for a wide audience or is not so obviously beyond what could conceivably be tolerable, then it's unlikely to be in the public interest to prosecute.

We've been applying those guidelines to the cases that have come up since the guidelines have been in force. So far there have been about 40 cases, so there's a steady stream of cases. That's the figure of cases that have come to us. I don't know the figure for the number of cases that have come to the police. At the end of the three-month period we will look at the decisions we've made and all responses to the interim guidelines, and we will issue final guidance with or without amendments depending on the cases and the responses to the consultation.

I hope that reasonably briefly takes you through the history around social media and free speech, why it's more difficult than it might otherwise be, and how as prosecutors we are trying to put a framework around our decisions, and build such consensus as we can about the approach we're taking.

And I'll end just by making the slightly broader point, and that is that you may have noticed that since I've been DPP we've issued many more publicly facing documents in the shape of guidelines about the way we take decisions. The reason for that is this: if a public authority exercises discretion, as we do

– it’s discretion whether or not to prosecute – that's really important for the victim, that's really important for the defendant and for others. If you exercise that sort of power, it seems to me you should set out in advance how you're going to approach a problem, and you should give your reasons afterwards. That way people can know the approach you're taking, and can hold you to account by looking at your reasons and assessing for themselves whether you've approached it in the way you said you would. I'm not sure how I could be properly accountable if I don't operate in that way. I think simply saying we've made the following decision without guidance or reasons doesn't actually allow anybody sufficient insight to hold me or anybody else accountable. Thank you very much.