Journal of Media Law

ISSN: 1757-7632 (Print) 1757-7640 (Online) Journal homepage: www.tandfonline.com/journals/rjml20

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Jacob Rowbottom

To cite this article: Jacob Rowbottom (2024) Private conversations and standards of propriety: *DPP v Cobban*, Journal of Media Law, 16:2, 190-201, DOI: 10.1080/17577632.2024.2437583

To link to this article: https://doi.org/10.1080/17577632.2024.2437583

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Published online: 10 Jan 2025.

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JOURNAL OF MEDIA LAW
2024, VOL. 16, NO. 2, 190–201
https://doi.org/10.1080/17577632.2024.2437583

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Private conversations and standards of propriety: *DPP v Cobban*

Jacob Rowbottom

Faculty of Law, University of Oxford, Oxford, UK

ABSTRACT
This comment considers the decision of the Divisional Court in *DPP v Cobban*, looking at the application of s 127 of the Communications Act 2003 and the compatibility with Articles 8 and 10 of the ECHR. The comment argues that the decision is significant in imposing a criminal restriction to uphold standards of propriety in relation to a closed conversation between consenting adults. The comment also questions whether the reach of the decision can be limited to a context that involves police officers. The decision points to the limited protection of expression rights and highlights the ongoing problems of s 127 in applying a standard of gross offence in a speech crime.

ARTICLE HISTORY Received 13 November 2024; Accepted 26 November 2024

KEYWORDS Freedom of expression; gross offence; private messages; expectation of privacy; Article 10

Introduction

In *Cobban v DPP*, two police officers were convicted in the magistrates' court under s 127 of the Communications Act 2003 for sending messages found to be grossly offensive via WhatsApp.[1] The convictions are notable because the messages were circulated privately among a group of consenting adults, none of whom were offended by the content. The magistrate's decision was appealed by way of case stated to the Divisional Court. Rejecting the appeal in July 2024, the Divisional Court found that the convictions were compatible with Articles 8 and 10 of the ECHR.[2] While the facts of the case (and the circumstances in which the messages were discovered) provoke little sympathy, the case illustrates the far reach of a criminal law

CONTACT Jacob Rowbottom jacob.rowbottom@univ.ox.ac.uk

[1] 21 September 2022, before District Judge Turnock sitting at the Westminster Magistrates' Court and then at the City of London Magistrates' Court.
[2] *Cobban v DPP* [2024] EWHC 1908 (Admin), '*Cobban*'.

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that imposes broad standards of propriety in relation to electronic communications. The case is also notable as the court gave relatively little weight to the free speech interests that may be at stake in such a context. Recognising these issues, the Divisional Court sought to confine the decision to its facts, placing particular emphasis on the status of the speakers as police officers. This comment argues that the implications of the decision for free speech are troubling and that it underscores the longstanding problems posed by s 127.

The facts

The facts of *Cobban* arose from the investigation of police officer Wayne Couzens following the murder of Sarah Everard. During the investigations, it emerged that Couzens had been part of a WhatsApp group called 'Bottle and Stoppers' with six other police officers that exchanged messages described by the Divisional Court as 'racist, misogynistic, sexist, homophobic, and disablist'.[3]

The members of the WhatsApp group were subject to police disciplinary proceedings in relation to the messages.[4] In December 2022, the disciplinary panel found that the six officers had 'breached police standards of professional behaviour for discreditable conduct'.[5] By the time of the panel's conclusion, four of the officers were no longer serving, and the two remaining officers were dismissed without notice. Five of the officers were barred from future employment with the police.[6]

Three of the officers in the group, Cobban, Borders and Neville, were also prosecuted in criminal proceedings under s 127(1) of the Communications Act 2003 in relation to a smaller number of messages. Section 127(1) provides:

> A person is guilty of an offence if he (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be so sent.

In the magistrates' court, Neville was acquitted of the charges, but Cobban and Borders were convicted of the offence under the 'grossly offensive' part of the provision in relation to six exchanges sent in 2019.[7] Both of the convicted defendants were sentenced to concurrent terms of 12 weeks in custody for each offence.

[3]ibid [1].

[4]For the background, see Independent Office for Police Conduct, *Conduct matter Operation Argens* (6 March 2023).

[5]Independent Office for Police Conduct, 'Dismissal rulings for six over inappropriate WhatsApp messages sent by police officers' (9 December 2022) https://www.policeconduct.gov.uk/news/dismissal-rulings-six-over-inappropriate-whatsapp-messages-sent-police-officers. The 7th member of the group, Wayne Couzens, was subject to separate criminal proceedings.

[6]The remaining officer was subject to different regulations, see Independent Office for Police Conduct, ibid.

[7]Cobban was acquitted of two counts in relation to messages on which he was jointly charged with Neville, *Cobban* (n 2) [6].

The messages will not be detailed here, but two examples illustrate the nature of the content. The first example relates to an exchange on 5 April 2019, in which Borders wrote that he 'can't wait to get on guns so I can shoot some cunt in the face!' Cobban replied with a reference to tasering cats, dogs and children. Borders then replied 'and a couple of downys?', a term which he used to refer to people with Down's Syndrome. The trial judge found the messages to be grossly offensive because a police officer was joking about using firearms and tasers on children and people with Down's Syndrome.[8] The trial judge noted that Borders accepted the comments were 'wrong to say' and that a person would 'probably' be grossly offended by the idea of a police officer making such jokes.[9]

The second example took place on 7th August 2019, after one officer on the WhatsApp group referred to three domestic violence incidents that day. Borders replied to that message stating 'I bet they all had one thing in common … Women that don't listen'. The judge found that it 'would be deeply distressing to the victim of any domestic assault' to learn that a police officer, who was employed to protect people from such harm, was trivialising the trauma of such crimes and engaged in a form of 'victim blaming'.[10] Both of these examples show that the finding of gross offence was based not just on the content of the messages, but the fact they were sent by police officers.

The appeal

In the Divisional Court, the appellants argued that the offence should not apply to communications shared only between consenting adults that were not offended by the content. The appellants argued that such consensual communications are not 'improper' and that the word 'message' in s 127 refers to the *addressee* of the message as well as its *content*.[11] The argument ran that the grossly offensive quality of a message should be assessed taking its recipient into account. Lady Carr and Saini J rejected this argument, relying on Lord Bingham's ruling in *Collins*, in which he explained that s 127 'is not concerned with protecting people from receipt of unsolicited messages of the proscribed character but is rather aimed at ensuring propriety in communications over electronic public communications networks'.[12] According to this reasoning, if the provision is about maintaining standards on such a communications network, then it does not matter whether the message actually caused offence to the recipient or not. The misuse of the

[8]See the summary of the trial judge's findings, ibid [17].
[9]ibid.
[10]ibid.
[11]ibid [47].
[12]ibid [50]. Paraphrasing Lord Bingham in *DPP v Collins* [2006] UKHL 40.

communications network occurs even where the recipient consents to receiving such content and approves of it.[13] Moreover, the reasoning explains why it is not even necessary for the message to be received or seen by anyone.[14] The sending of the grossly offensive message alone constitutes the conduct targeted by s 127.

The appellants also argued that the mens rea should be read to require that the defendants intend or be reckless as 'to whether the message was grossly offensive to those who might reasonably be expected to read it'.[15] The Divisional Court again followed *Collins* and relied on the purpose of the offence to reject this argument. As s 127 is not intended to protect a recipient from offence, then there is no need for the defendant to intend the message to be grossly offensive to a likely reader or be reckless to such an effect.[16] The court reasoned that while such intent might be relevant when deciding whether to prosecute, it is not an ingredient of the offence.[17] To commit the offence, the court stated that 'the defendant must have intended his message to be grossly offensive to those to whom it related, or be aware that it may be taken to be so'.[18]

The conclusions on the actus reus and mens rea show that the grossly offensive quality of a message (and the related intent) are not assessed from the perspective of the recipient. Instead, an objective approach is taken applying the standards of 'an open, just, multiracial and multifaith society'.[19] In *Collins* and later cases, the courts have stated that the standard should be applied with reference to those to whom the message relates.[20] That formulation does not require the message to be grossly offensive to the average person, and reflects a degree of pluralism in which certain statements may be offensive to certain communities but not others.[21] That formulation can broaden the scope of s 127's 'grossly offensive' standard, as a message may be more likely to offend those classes of people to whom it relates. However, in other cases the court has found that this standard is not *necessary* for the s 127 offence. In *Raynouard*, the High Court of the Justiciary stated that for the purposes of s 127 in the context of Holocaust denial,

[13] *Cobban* (n 2) [53], discussing the example in *Collins* of private messages between two racists. See *Collins* (n 12) [26].
[14] *Cobban,* ibid [52].
[15] ibid [65].
[16] ibid [69]-[72].
[17] ibid [72]
[18] ibid [111]. Similarly, in its report on offensive communications, the Law Commission stated that the mens rea requires only the intention to send the message 'of the proscribed character', Law Commission, *Modernising Communications Offences: A final report* (HC 547 2021) [2.8].
[19] *Cobban* (n 2) [111].
[20] *Collins* (n 12) [9].
[21] The reaction of a notional average or reasonable person could be taken to reflect matters widely considered to be offensive, but neglect offence likely to be caused to minority groups. However, in practice the reference to 'an open, just, multiracial and multifaith society' means that the notional reasonable person will be taken to be offended by statements relating to a wide range of groups.

it 'is not necessary to be a member of the relevant communities to be grossly offended by such statements; any reasonable person would be'.[22] Similarly, the court in *Cobban* stated that the messages are to be assessed 'in the eyes of a reasonable member of the public, judged by the standards of today's society'.[23] Accordingly, a message can cause gross offence to a person, even though it does not relate to them. For example, a joke about a very young disabled child (who is too young to comprehend or be offended by the message) may not be offensive to the specific person to whom it relates, but may be so to a reasonable person. The offence can thereby be committed if the message is grossly offensive to those to whom it relates or to a reasonable member of the general public.[24]

The status of the speakers in *Cobban* was relevant to the application of s 127 to the facts. The magistrates' court found the gross offence standard of s 127 to be met through a combination of the content of the message and the fact that such statements were being made by police officers. The implication of the reasoning is that a similar message is less offensive when sent by a person that does not hold an official position. However, the reasoning opens up the possibility that similar principles could apply to other classes of speaker holding a position of responsibility. The approach of the court suggests that a message can be regarded as more offensive because it was sent by a doctor, teacher, judge or councillor, for example. Along these lines, the provision could criminalise a group of teachers criticising a school's pronouns policy on a private messaging service in terms that are grossly offensive to the relevant community (for example, if deemed to be transphobic).

If it is thought that the speech of certain public officials should be subject to additional criminal restrictions, then that is arguably better pursued through specific offences. For example, the offence of misconduct in public office is specific to those holding an official position, and provides a way to express societal disapproval of an official's conduct.[25] That offence is more serious than s 127 and has been applied in cases where police officers have shared sensitive information acquired through their work.[26] Misconduct in public office also has its own well-known problems, and relying on such an offence in the context of a conversation would raise issues relating to freedom of expression.[27] However, the ingredients of that offence at least require an assessment of the seriousness of the misconduct,

[22] *Raynouard v HM Advocate* [2024] HCJAC 2 [29].
[23] *Cobban* (n 2) [59]. Similarly, in *R v Casserly* [2024] EWCA Crim 25 [48], looking at gross offence under the Malicious Communications Act 1988, Lady Carr stated at [48] the 'question is whether the message goes beyond the limits of what is tolerable in our society'.
[24] See also *DPP v Kingsley Smith* [2017] EWHC 359 (Admin) [28] and [33].
[25] *Attorney General's Reference No 3 of 2003* [2004] EWCA Crim 868.
[26] For example, see *R v Collins, Lewis and Jaffer* [2022] EWCA Crim 742.
[27] See Law Commission, *Misconduct in Public Office* (HC 1027 2020).

the connection with official duties, and the impact on public trust. To determine liability, the court would have to consider whether the defendants were acting as police officers when sending the messages on work-related matters to colleagues, and whether the views expressed were incompatible with the discharge of their functions.[28] The point is not to argue that the misconduct offence should have been relied on in *Cobban*, as the offence has a high threshold and carries heavier sentences. Instead, the example shows how the ingredients of the offence accommodate the standards expected of a public official and asks the relevant threshold questions. By contrast, the decision in *Cobban* relied on an expansive application of a general criminal provision to express disapproval of the conduct of people within a specific class.

The Divisional Court's reasoning on the actus reus and mens rea underscores the broad scope of the s 127 offence. The offence imposes a criminal restriction based on standards of propriety rather than harm, which has long been a source of controversy. Those standards are open-ended and evolve, so the law does little to guide behaviour. In practice, a magistrate will normally decide whether a message crosses the line of contemporary standards.[29] The provision therefore offers a catch-all offence that can be used to prosecute expression that falls far short of the thresholds required for more specific speech crimes, such as inciting racial hatred. However, in practice only a very small percentage of speech that technically violates s 127 will ever come to the attention of the authorities.[30] The prospect of prosecution rests on the messages being discovered or noticed, and also on prosecutorial discretion.

In light of these well-known criticisms of s 127, a 2021 Law Commission report recommended the repeal of the provision and its replacement with a new harm-based offence. The proposed offence would have criminalised the sending of a communication likely and intended to cause harm to a likely audience.[31] Under that proposed provision, messages similar to those in *Cobban* would not meet the threshold, as none of the recipients would be

[28]For a more restrictive application, see *R (on the application of Johnson) v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin). However, the Court of Appeal later stated that the *Johnson* case was not intended 'to circumscribe the ambit of the offence more generally', *R v Ali (Mohammed Adnan)* [2023] EWCA Crim 1464 at [24]. In *Ali*, the court also noted that 'the offence is not limited to conduct by an office holder that specifically discharges their duties' [23]. Instead, the court will look for a 'nexus' between the office and the conduct.

[29]Along these lines, the District Judge in *Cobban* described the messages as 'sickening' and 'disgusting', see 'Wayne Couzens' Met Police colleagues found guilty over "grossly offensive" WhatsApp *messages' The Independent* (21 September 2022).

[30]The Law Commission noted the problems with a criminal measure resting on a standard of offensiveness and concluded that the current law manages to both over- and under-criminalise speech. Law Commission (n 18).

[31]ibid [2.39], and the proposed offence would have included a provision protecting communications where the defendant had reasonable excuse.

harmed and no such harm would be intended.[32] While the proposed replacement of the s 127 offence was included in an early version of the Online Safety Bill, it was removed following concerns from some MPs that it would restrict free speech.[33] The concern to stop the enactment of a new provision restricting expression meant that the more restrictive existing provision was left in place.

ECHR rights

The impact of the convictions on the officers' rights to privacy and freedom of expression was a central issue in the appeal in *Cobban*.[34] To assess these issues, the court first had to decide whether the relevant ECHR rights were engaged. The court found that the messages did not fall under Article 17 of the ECHR, which precludes the protection of activities 'aimed at the destruction' of the Convention rights of others. When Article 17 applies, the speech is not protected and there is no need for a court to consider the proportionality of a restriction.[35] Given such consequences, Article 17 is to be applied cautiously and reserved for the most extreme forms of speech, such as certain forms of hate speech. While the speech may have been grossly offensive, it did not meet the 'destruction of rights' threshold and did not fall outside of the ECHR's protection.[36]

The Divisional Court then went on to consider the specific rights that were at stake, and concluded that the convictions did not engage the Article 8 right to privacy. The key question on this issue was whether the police officers had a reasonable expectation of privacy in relation to the specific WhatsApp messages with the grossly offensive content.[37] The Divisional Court found that the expectation was shaped by the professional codes applicable to police officers, including a social media policy.[38] The court concluded that there was no expectation of privacy given their professional obligations and 'the abhorrent nature of the messages (which all related to policing actions and conduct)'.[39] By focusing on the specific offensive messages and the status of the defendants, the court avoided a general ruling on expectations of privacy in the context of closed group

[32]The point is noted in *Cobban* (n 2) [71].
[33]See Paul Scully MP, HC Deb, 5 December 2022, c45. However, as the events in *Cobban* took place in 2019, s 127 would have applied in any event.
[34]Section 127 is not a provision where the balance is struck in the terms of the statute. The court therefore has to consider the proportionality of its application. See *Cobban* (n 2) [74] and *Casserly* (n 23) [44].
[35]*Cobban* (n 2) [83]
[36]ibid [83]. *Perinçek v Switzerland* App no 27510/08 (ECHR, 15 October 2015).
[37]*Cobban* (n 2) [86].
[38]ibid [97].
[39]ibid, [99]. The court cited and largely tracked the reasoning in *C v Chief Constable of Police Scotland* [2020] CSIH 61.

messages.[40] The implication of the court's reasoning is that the right to privacy would be more likely to be engaged where the message is sent by 'ordinary members of the public engaged in consensual private messaging'.[41]

In contrast to the court's conclusion on Article 8, the convictions clearly engaged Article 10 of the ECHR, so the question was whether the restriction met the requirements of Article 10(2). In applying those requirements, the court accepted that the measure pursued a legitimate aim. While this hurdle is normally easily cleared, the point is not so straight forward where a provision targets offensive speech. The Strasbourg Court and domestic courts have stated on numerous occasions that Article 10 covers speech that is offensive and shocking.[42] Simply that speech is offensive does not provide a reason for its restriction.[43] However, the justification for the interference advanced in *Cobban* did not rely on the prevention of offence, and the Division Court accepted the DPP's argument that 'the convictions pursued the legitimate aims of public safety and the prevention of disorder or crime'.[44] In particular, the court found that the convictions served the goal of 'public confidence in policing', as the sending of such messages would reduce the confidence in the police and thereby threaten public safety.[45]

The reliance on this aim raises a number of questions. First, the prospect that a failure to criminalise the speech would result in a threat to public safety is remote and speculative at best. While it is easier to see how the speech has a negative impact on public confidence, such an effect only arises when the messages are publicly known. Normally, there is little foreseeable risk of messages to a small closed group becoming disseminated to the wider public. The messages in *Cobban* became public due to the police's own investigations. In any event, the goal of public confidence was already served by the disciplinary measures taken by the police in relation to the officers.[46]

[40]Nor does the reasoning apply to non-offensive or non-work related messages by police officers.

[41]*Cobban* (n 2) [99]. For discussion of this issue more generally, see N Moreham, 'Unpacking the reasonable expectation of privacy test' (2018) 134 LQR 651, 669 and 673 noting that the use of a private messaging service signals an expectation of privacy.

[42]*Handyside v United Kingdom* (1979–80) 1 EHRR 737 and *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789. The discussion above noted that the purpose of s 127 is to apply standards of propriety rather than avoid offence. That too does not provide a compelling rationale for restricting speech, as such standards lack specificity and allows for current standards to become entrenched.

[43]Though in several cases the courts have relied on gratuitous offence, particularly when considering the impact on religious freedom. See *Otto-Preminger Institut v Austria* (1995) 19 EHRR 34.

[44]*Cobban* (n 2) [103].

[45]ibid [103].

[46]I put to one side the question of when workplace sanctions can also violate freedom of expression. The Strasbourg jurisprudence has recognised that Article 10 includes a positive obligation to protect speech from interference from private sources, such as employers. See *Redfearn v United Kingdom* (2013) 57 EHRR 2. For discussion of such issues, see P Wragg, 'Free speech rights at work: resolving the differences between practice and liberal principle' (2015) 44 Industrial Law Journal 1, and P Collins, *Putting Human Rights to Work* (OUP 2022).

Through the disciplinary procedures, resignations and dismissals, the police had already demonstrated that such attitudes are not tolerated within the force.[47] Despite the internal steps taken by the police, the Divisional Court found the interference to be proportionate 'over and above professional misconduct proceedings'.[48] However, the court did not expand on what the criminal sanction added to this goal, other than that it allowed a way 'to express public disapproval' of the officers' conduct.[49] This part of the reasoning of the Divisional Court could be developed to apply to other professions. For example, the private messages of doctors or teachers could also pose a threat to public confidence in those professions and provide a rationale for restricting speech in closed groups outside of work.[50]

Categories of speech

When considering whether the restriction was necessary in a democratic society, the court located the messages in the overall hierarchy of speech categories established in earlier case law. Under this hierarchy, the greatest weight is 'afforded to matters of public concern or political expressions'.[51] In *Cobban*, the court noted that the speech was far removed from that category and performed no 'societal function'.[52] Instead, the messages contained 'racist, misogynistic, homophobic, and disablist content', and therefore 'fell right at the bottom of the hierarchy of speech'.[53] With this starting point, and taking into account the professional duties of the police officers, the court concluded that the convictions were a proportionate interference with the expression right.[54]

The hierarchy of speech categories has its roots in an approach that was developed in relation to publications to the world at large and in the mass media. The reasoning followed an instrumentalist justification for Article 10 rights in which speech is valued because it helps to inform the public and serves their needs as recipients of a message. While that line of argument provides a compelling justification for media freedom, different considerations are at play in relation to private conversations or everyday

[47]Compare *C v Chief Constable of Police Scotland* [2020] CSIH 6, in which the aim of public confidence was discussed in relation to disciplinary measures.
[48]*Cobban* (n 2) [107].
[49]ibid.
[50]For example, a lack of public confidence in doctors could be argued to serve the protection of health under Article 10(2), see *Adil v General Medical Council* [2023] EWCA Civ 1261 [47]. For other professions, arguments could be made relying on the 'rights of others' or protection of morals. See *Khan v Bar Standards Board* [2018] EWHC 2184 (Admin) [63] for an example of the rights of others being relied on to protect the reputation of a profession and the clients' expectation that members of the profession adhere to high ethical standards.
[51]*Cobban* (n 2) [104].
[52]ibid [105].
[53]ibid [106].
[54]ibid [107].

communications. Such speech is not protected primarily for its quality or value to the audience. A person's private conversations do not need to serve the public interest or have a high-minded purpose to warrant strong protection.[55] In a private conversation, the speaker's autonomy to express their thoughts provides the primary justification for the right. By giving the speech limited weight and placing it at the bottom of the hierarchy, the Divisional Court undervalued the autonomy interest and applied a framework better suited to mass communications. However, the court left open whether such speech interests could play a bigger role in a case concerning private conversations that do not involve police officers.[56]

Prosecutorial discretion

The application of s 127 in *Cobban* opens up the potential for closed conversations to be criminalised for violating standards of propriety. The Divisional Court argued that the restriction of everyday speech would be mitigated by prosecutorial discretion.[57] The court referred to the CPS Guidance on Communication Offences, which directs prosecutors to consider whether the message was intended for a wide audience or a specific victim.[58] That criteria suggests there should have been a lower public interest in prosecuting the officers in *Cobban*, as their messages were not published to the world at large and not directed at any victim.[59]

Cobban highlights the limits of prosecutorial discretion as a safeguard. The prosecution of the officers owed much to the circumstances surrounding the discovery of the messages when inspecting Wayne Couzens' mobile phone following his arrest.[60] Had the officers in question not been associated with such a notorious criminal, then the messages would have remained unknown. Once the messages came to light, then the authorities had little choice but to take action. There are longstanding problems about the general culture within the police and the persistence of racism and misogyny in some parts of the force. The conviction of Couzens further raised the

[55]In another s 127 case, the court noted that the protection of free speech is not limited to the confines of 'proper debate', see *Scottow v CPS* [2020] EWHC 3421 (Admin) [44]-[45]. The wider scope of Article 10 was noted in *Casserly* (n 23) [35], but the court applied the hierarchy of speech to the question of weight at [48]. See also J Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 *Cambridge Law Journal* 355.

[56]See *Cobban* (n 2) [110].

[57]ibid [56].

[58]See CPS, *Communications Offences: Legal Guidance* <https://www.cps.gov.uk/legal-guidance/communications-offences> (accessed 13 November 2024). The likely recipient is relevant to the public interest stage of prosecution decisions. Elsewhere the guidance provides for procedures to approve decisions on s 127 offences.

[59]In most of the exchanges, the offensive messages referred to general categories of people. However, one message referred to a colleague called 'Kate', but was not sent to that person. Another message made remarks with reference to unnamed colleague. *Cobban* (n 2) [10] and [17].

[60]See Independent Office for Police Conduct (n 4).

significance of such issues. For the police and prosecutors to have ignored the messages, once discovered, would have been seen to tolerate such a culture. Moreover, the authorities would have faced allegations of protecting their own or conducting a cover up. While independent, prosecutors in such cases will want to avoid any perception of treating police officers favourably, and may prefer to let the matter proceed to a court to determine whether criminal sanction is warranted.

To protect their reputation, the police and prosecutors faced pressure to take strong action against the officers. On this view, a failure to take action may well have undermined public confidence in the police. While that is compelling for the police and prosecutors, the imposition of criminal liability is a matter for the court. A decision of the magistrates' court to acquit or of the Divisional Court to allow the appeal would not have reflected a failure of the police to take action. Instead, the courts are expected to provide a brake to stop an interference with speech where there is a strong (and understandable) pressure on the police or others to restrict it.

Conclusion

The criminalisation of grossly offensive content disseminated via social media is a source of controversy and can potentially restrict a broad range of expression. While some cases applying s 127 have stressed the importance of free speech, the decision in *Cobban* applies the law extensively to regulate conversations that were not available to the public and never intended to be seen by a wider audience. In *Cobban*, the law continued the path taken in *GS*, in which the law of obscenity was applied to messages between consenting adults.[61] This does not mean that comments on WhatsApp or other services should never find their way into court. For example, messages shared on WhatsApp or similar services can be used as evidence for some other legal claim, such as a claim of harassment in employment law. Some messages shared in a closed group can constitute a criminal offence, such as those containing protected state secrets. What is different about s 127 is that the criminalisation is based on standards of propriety and does not require a showing or connection with any further consequences or harm. With such issues in mind, the court sought to limit the reach of the decision to facts of the case, which concerned the conduct of police officers. This note has questioned whether such an emphasis on the status of the speakers was appropriate and whether it can successfully differentiate the facts of *Cobban* from other cases. The facts of *Cobban* generated considerable outrage, and there was a clear demand for something to be done. However, the prosecution

[61] *R v GS* [2012] EWCA Crim 398, discussed by A Gillespie, 'Obscene conversations, the internet and the criminal law' (2014) 5 Crim LR 350.

relied on a broad catch-all offence applying standards of propriety and the decision raised many of the well-known problems with s 127. *Cobban* may provide an unsympathetic set of facts, but it has resulted in a problematic precedent.

Acknowledgements

With thanks to Nicole Moreham and participants at the Future of Hate Speech workshop at the School of Law, Queen Mary University on 25 October 2024 for comments on an earlier version of this paper.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Notes on contributor

Jacob Rowbottom is a Professor of Law at the University of Oxford and Fellow of University College, Oxford. He is the author of Media Law (2nd ed, 2024) and Democracy Distorted (2010). He is a co-editor of the Journal of Media Law.