

# STATES OF JERSEY



## **DRAFT TELECOMMUNICATIONS (AMENDMENT No. 3) AND CRIME (MISCELLANEOUS PROVISIONS) (JERSEY) LAW 201- (P.19/2016): COMMENTS**

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**Presented to the States on 10th June 2016  
by the Economic Affairs Scrutiny Panel**

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**STATES GREFFE**

## COMMENTS

### **Background**

Members will be aware that the Economic Affairs Scrutiny Panel called in this proposition for scrutiny on 12th April 2016 following a debate on the principles, which were approved by the States. The Panel felt obliged to take this course as, while it had been informed of the public consultation carried out on harmful electronic communications in 2015, it was not aware that the proposition was due to be lodged at the beginning of March 2016. Knowing of some public and political interest in the matter, and as the department was reluctant to delay the debate, it was decided to call in [P.19/2016](#) to give members time to scrutinise its provisions. This resulted in the Panel having a limited period in which to carry out its work, but members are pleased that with co-operation from all concerned they have been able to complete the review.

Ultimately, members consider that they have had adequate opportunity to question departments involved and to examine evidence presented. The Panel therefore feels confident in presenting these comments, although in different circumstances members might have preferred to have time for a more extensive review.

### **Meetings**

The Panel received a briefing on the proposition from departmental officers and the Assistant Chief Minister with responsibility for Digital matters (Senator P.F.C. Ozouf) on 5th April 2016. Members subsequently met with representatives of the States of Jersey Police Force on 17th May, and officers from the Chief Minister's Department, Community and Constitutional Affairs and the Law Officers' Department on 18th May to discuss the issues in detail. A public hearing with the Chief Minister and the Minister for Home Affairs followed on 26th May 2016. The hearing transcript is available on the Scrutiny website at [www.scrutiny.gov.je](http://www.scrutiny.gov.je).

### **Purpose of the review**

The Panel's review considered the reasons for the proposed legislative changes, their fitness for purpose and likely outcomes. It did not focus in any detail on the specific nature of the crimes they are designed to address, or the incidence of such crimes in Jersey, as both of these areas had previously been investigated by the department, through an extensive survey commissioned in 2013<sup>1</sup>, and the Council of Ministers' public consultation: 'Review of legislation on harmful electronic communications' which ran from 31st March to 19th June 2015.

### **Rationale**

Members were aware of concerns about the increasing incidence of online crimes elsewhere, some of which have been addressed in other jurisdictions by the introduction of targeted legislation; for example, provisions introduced specifically in the Criminal Justice and Courts Act 2015 in respect of revenge pornography in the UK. This particular course has not been followed locally. The Panel was informed that in many cases, existing legislation allows for the prosecution of crimes committed online. There have been successful prosecutions both in the UK (under their Communications Act

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<sup>1</sup> Island Analysis: Electronic Communications – Usage and Behaviour Survey, November 2013

2003) and in Jersey based on similar Laws already in place to deal with offences related to telecommunications systems.

However, Jersey's previous Attorney General expressed concern some time ago that there might be a gap in legislation in the Island. The types of offences being committed online were evolving, and means of communication were also changing with the uptake of new technology and ever-increasing use of social media. There was some doubt as to whether existing legislation would continue to be fit for purpose in the changing circumstances. A specific concern centred on the ability of the existing legislation to cover cases where communications were sent using social media (e.g. Facebook). Concerns have also been raised about the ability to deal with electronic communications sent other than through a public telecommunications system (e.g. communications sent via Bluetooth or over local networks in offices).

This led to consideration of how legislation could be 'future-proofed' against technological and behavioural changes. Experience had proved that prosecutions could be successful in respect of communications sent over social media under existing legislation, but it was felt that the opportunity to improve provisions so that they would not be overtaken by future developments should be taken. Subsequently, there has also been representation from States Members who attended a recent Commonwealth Parliamentary Association Conference, expressing concerns over whether Jersey would be able to meet the terms of the Istanbul Convention (a Council of Europe Convention on preventing and combating violence against women and domestic violence, including provisions about revenge pornography) which has so far been signed by some 40 countries.

### **Consultation**

The Council of Ministers' consultation did not receive many responses (a total of 12, one from the Consumer Council and the remainder from individuals). The reason for such a low level of responses was not clear, although it was pointed out that there was rather more debate about the matter both in the media and amongst States Members at the time than might be indicated by this number.

In contrast, the previous survey in 2013 asked 755 people about their online activity, and particularly any experience or concerns about malicious, grossly offensive or threatening communications, including cyber-bullying. Responses indicated that 2–3% of users had experienced some form of online bullying. As a percentage this seems like a small figure, but if the result is considered representative of the wider population, it becomes a much more significant number (potentially 2,000 – 3,000 people out of 100,000).

Members are aware that the impact of this form of behaviour on individuals can be profound. Anecdotally, it seems likely that an increase in the use of smartphones and tablets to access the Internet since 2013 may also have resulted in an increased incidence of online bullying. Evidence of a greater number of complaints and incidents investigated by the States of Jersey Police in 2015 over 2014 (offences involving online harassment increased by some 50%) strongly suggests that may be the case, although it is too soon to identify a trend. Increased awareness of such behaviours may also be playing a part.

## **Legislation**

The proposition involves amendments to 2 separate pieces of legislation; the Telecommunications (Jersey) Law 2002 and the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008. This distinction may not be immediately apparent; both the debate on the principles and media attention to date seem to have focused largely on changes to the Telecommunications Law.

### **Telecommunications (Jersey) Law 2002**

Three aims of the changes to the Telecommunications Law are identified in the proposition –

1. *Ensure that existing legislation applies to harmful electronic communications sent without use of a public network*
2. *Increase the maximum penalties for existing offences which may be applied to electronic communications, to reflect the seriousness of the potential harm to victims of such conduct; and*
3. *Ensure that existing offences do not have a chilling effect on free speech, in particular by removing ambiguity about the circumstances in which a prosecution may take place, especially where the sender might not have intended the communication to be grossly offensive or of an indecent, obscene or menacing character.*

The first part is intended to ‘future-proof’ the legislation and ensure that it remains ‘platform neutral’. While most offences may have been capable of being dealt with under existing legislation, this is designed to remove uncertainty about the ability to tackle offending behaviour conducted using forms of telecommunication that do not make use of a public telecommunications system (e.g. Bluetooth).

Under the second part, the proposed amendment to Article 51 increases the penalty for offences to a maximum of 2 years’ imprisonment and an unlimited fine (either or both of which may be imposed by the court). This is intended to allow for fair and proportionate penalties. The 2 year maximum term of imprisonment reflects changes in UK legislation dealing with revenge pornography. The Panel questioned the necessity of an unlimited fine, but was told that this was in keeping with the approach to setting criminal penalties for offences in Jersey. The Attorney General reviews the level of penalty proposed for any new or revised criminal offence to ensure that, so far as is appropriate in policy terms, the available penalties for similar offences are set at a consistent level. The Law Officers are content with the penalties proposed here. The Panel was also told that sentencing practice in Jersey is different to that in the UK, as the prosecutors make recommendations to the court on the appropriate level of sentence for particular offences. While the recommendations made in any particular cases will depend on all the relevant circumstances, prosecutors aim to achieve consistency in their recommendations depending on the nature of the offence committed.

### ***Mens rea***

The third part introduces an important *mens rea* (‘guilty mind’) element in respect of the offence in Article 51(1) of the Telecommunications Law. Essentially, this means that an offence is only committed where there is knowledge and intent on the part of the offender. They would either have to know that a message or other matter they were

sending was grossly offensive, or of an indecent, obscene or menacing character; or be aware of the risk that it could be viewed as such by any reasonable member of the Public. Also covered are circumstances in which for the purpose of causing annoyance, inconvenience or needless anxiety to another, a person sends a message that they know to be false, or persistently makes use of a telecommunication system for this purpose.

The explicit introduction of the *mens rea* and 'reasonableness' test into the legislation is designed partly to protect rights to free speech, and partly to prevent the prosecution of people who might unwittingly send material that others find grossly offensive, without realising this.

This is of necessity a brief summary of points that the Panel discussed at length with various witnesses; however, members were satisfied with the explanations received. In particular, the Panel queried whether a potential offender might find it too easy to defend their actions by claiming that they did not intend or understand that their actions could cause offence.

It was noted that if this was in fact a genuine position, then no offence would have been committed; whereas it should be possible for a police investigation to reveal whether a person knew that their actions were grossly offensive, perhaps by virtue of a prior warning, or evidence that they were aware of the risk that a message of the particular nature might be grossly offensive to a reasonable person. If the police are satisfied that an offence has been committed and the person is subsequently charged, prosecutors would apply both an evidentiary test and a public interest test to determine whether a prosecution should proceed. Application of the public interest test requires the prosecution to determine whether it would be in the public interest to prosecute a particular individual given all the circumstances of the case.

In evidence presented, it was maintained that the constituent elements of the revised Article 51 offence generally set a very high bar to be passed before an offence would be committed by sending a message, though it might be easier to prove the elements of the offence for some specific types of offending behaviour (such as distributing revenge pornography, for example). The need to apply a public interest test before proceeding with a prosecution was also presented as an important safeguard, ensuring that prosecutions did not unnecessarily impinge on free speech. Although Jersey is not bound by UK rules, this is reflected in the approach taken in guidance prepared by the UK Criminal Prosecution Service (CPS).<sup>2</sup> The high bar for potential prosecutions is set purposely to ensure that there are strict tests to be passed before criminal prosecution can take place. The Panel was told that other legal remedies may be available in some cases, but these tend to involve expensive civil actions (such as suing for defamation) which may make them unattractive or unavailable to the majority.

Members were told by department officers that considerable thought had been given in developing the legislation to strike the right balance between the need for robust protection for victims where offences had been committed, and the rights of individuals to freedom of speech. Panel members agreed that this was the right way forward, although it was noted that in consequence, it was possible that some people who believed that the amended legislation would offer a significantly higher level of protection against harmful online communications might be disappointed in some circumstances.

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<sup>2</sup> Guidelines on prosecuting cases involving communications sent via social media, March 2016

It was noted for example that under the draft Law, sending repeated messages, or messages known to be false, for the purpose of causing annoyance, inconvenience or needless anxiety would constitute an offence; however, if the sender did not send repeated messages for the purpose of causing annoyance, inconvenience or anxiety or sent a message that he or she genuinely believed to be true, then no offence would have been committed. Making such distinctions would rely on the skill of investigating officers to draw out the circumstances of a possible offence.

The Panel was advised that the focus should be on whether a crime had been committed, rather than the medium of transmission. In everyday life, people are entitled to be rude to others, even if this may not be recommended; the law should not make a distinction between behaviour online and elsewhere. Members were also reminded that in some instances, offenders might be young, innocent or naïve, potentially raising questions about whether it would be in the public interest to prosecute them. It was felt that education for young people in the appropriate use of social media was very important. The Panel was told that an E-Safety Committee has been set up which includes representation from the Education Department, and programmes such as ‘Prison? Me? No Way’ now include material on online safety and behaviour.

### **What is ‘grossly offensive’?**

One point of interest to the Panel was the lack of any effective definition of what constitutes grossly offensive or indecent communications, how such decisions would be taken by the States of Jersey Police, and what guidance was available. Members were told that judgements in such matters would have to be made in the context of ‘generally accepted’ basic standards of society, which are constantly changing. There is no specific guidance in place locally at the moment, but all crimes are processed through the Criminal Justice Unit, and dedicated Law Officer support is also available, so advice is ready to hand. It was suggested that new guidance might be looked at if the legislation is approved, to reflect the high evidence bar required for successful prosecution. Police representatives felt that resources were not currently an issue, on the basis that all officers should receive training to deal with this type of offence. However, every offence is different, so the force would need to draw on experience as this builds up.

### **Free speech**

The Panel has been approached by several individuals (including fellow politicians and local bloggers) voicing concerns about the possible impact of the amendments on free speech. Having considered the evidence presented, including the high bar for prosecution, members believe that the amendments do not constitute any serious risk to such freedom.

The Panel notes that under the European Convention on Human Rights (Article 10, principles of free speech) everyone has the right to freedom of expression, which also protects the right to speech that is offensive, shocking or disturbing. Any restriction to such rights must clearly be shown to be both necessary and proportionate.

As things currently stand, the police already receive some complaints about individual blog sites, and feel that knowledge and test cases will evolve over time. The ‘reasonableness’ test is an accepted concept in other parts of the law, and it is considered that this legislation is more about making a level playing field between online and ‘offline’ behaviour to ensure that they are treated equally.

### **Police procedures**

It does not have to be the victim of an offence who reports it or makes a complaint; third parties can also do this. After an initial view of a potential offence is taken, one consequence might be an interview with the suspected offender. In each case an investigative strategy is determined. A first enquiry would generate a reported crime, which would then go to the Response Investigation Unit (RIU) for further enquiries if there were an identified suspect. All serious crimes would be passed to an appropriate Crime Services department for investigation. All other crimes would remain with officers on shift, who would continue, with specialist support if necessary, to try and identify an offender. All investigating officers could make enquiries of the complainant (to see for example if there was any other background or history to the complaint) and further investigations would then be completed (including interviews where appropriate) in order to determine whether the criminal evidential test was passed. Thereafter, the public interest test would also be applied, and any such cases would then pass through the Criminal Justice System.

Generally, the response to any potential case would be flexible and depend on the individual circumstances. With reference to concerns about freedom of speech, a case was cited in which complaints were made concerning low-level threats contained in a private blog; no action was taken, as it was determined that the interaction was not of a nature that would have constituted an offence if it had happened elsewhere (rather than online).

Police representatives considered that the proposed legislative changes were appropriate. To some extent, their use would depend on the development of case law over time, both locally and in the UK. Given the powers already available under existing legislation, it was not considered that the amendments would make a huge difference, but they would assist with some aspects, and would be a useful additional tool.

### **Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008**

#### **Restraining orders**

This aspect of the changes introduces the ability to apply restraining orders (for the protection of a victim) following a single instance of a crime, rather than needing to wait for a pattern or series of repeated actions to be demonstrated. This is considered to be particularly appropriate in the case of harmful online communications because of the extreme distress that can be caused to victims by even one instance of such an offence, for example, revenge pornography.

The Panel was told that there had been cases where offenders had shown little or no remorse, and even stated openly that they intended to repeat the offence. Previously there would have been little that the Police could do to address this until a pattern of behaviour was established, which offered little protection to the victim. The change to the Disorderly Conduct and Harassment Law would allow restraining orders to be put in place (where appropriate) following conviction for a first offence, which should greatly improve the situation and provide added reassurance to victims. Restraining orders are specifically tailored to the individual offence, although it was noted that in normal circumstances the police do not actively monitor them, but rely on victims to report any subsequent breach of the order.

The Panel would highlight the fact (which may not have been immediately apparent to Members during the debate on the principles) that the increased ability to apply restraining orders is not solely linked to crimes under the Telecommunications Law, but will potentially be available following conviction for any crime; previously they were only available in the case of convictions for the offence of harassment in Article 3 of the Disorderly Conduct and Harassment Law. The need for a wider application had apparently been identified previously, and it was felt that this was a good opportunity to make the changes, rather than waiting for other legislative amendments. Panel members feel that this may represent a more important change to legislation than that in respect of harmful online communications, even though the latter may appear to be the primary focus of this proposition.

### **Conclusions**

From the evidence seen and heard during its review, the Panel believes that the amendments proposed in P.19/2016 are proportionate and fit for purpose. It is considered highly unlikely that they will have any negative impact on freedom of speech, but they should help to clarify when an offence has been committed and provide additional tools for the protection of victims. They will also bring additional flexibility to determine and apply appropriate sanctions to offenders, for a type of crime that can be particularly distressing for victims and which unfortunately appears to be becoming more common. Panel members therefore support the proposed changes.