

STATES OF JERSEY



DRAFT TELECOMMUNICATIONS (AMENDMENT No. 3) AND CRIME (MISCELLANEOUS PROVISIONS) (JERSEY) LAW 201-

**Lodged au Greffe on 1st March 2016
by the Chief Minister**

STATES GREFFE



Jersey

DRAFT TELECOMMUNICATIONS (AMENDMENT No. 3) AND CRIME (MISCELLANEOUS PROVISIONS) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Assistant Chief Minister has made the following statement –

In the view of the Assistant Chief Minister, the provisions of the Draft Telecommunications (Amendment No. 3) and Crime (Miscellaneous Provisions) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator P.F.C. Ozouf**

Assistant Chief Minister

Dated: 17th December 2015

REPORT

Background

The digital world moves extremely rapidly and any legislation in this area runs the risk of quickly becoming outdated. New devices are emerging at an unprecedented rate, and consumer behaviour is changing in often unpredictable ways.

It is important that the relevant authorities in Jersey have the ability, in appropriate cases, to prosecute people for sending communications that are grossly offensive or of an indecent, obscene or menacing character, including via social media. As part of this, the law should enable the appropriate authorities to tackle behaviour that constitutes cyberbullying.

On 15th October 2015, the Assistant Minister for Economic Development made a Ministerial Decision approving instructions to the Law Draftsman to prepare amendments to the legislation applying to harmful electronic communications (*see* [MD-E-2015-0088](#)). The purpose of these amendments is to ensure that the legislation in Jersey continues to effectively deter the sending of harmful online communications and provides appropriate and lasting protection for the Public, whilst also ensuring that it does not have a chilling effect on free speech. In short, it should allow for people in Jersey to take full advantage of the opportunities offered by new technology, safe in the knowledge that they will be appropriately protected by the law in so doing.

On 30th November 2015, the Minister for Home Affairs made a Ministerial Decision approving instructions to the Law Draftsman to prepare amendments to the legislation applying to restraining orders (*see* [MD-HA-2015-0078](#)). The purpose of these amendments is to ensure that legislation in Jersey continues to deter the commission of disorderly conduct and harassment and provides appropriate and lasting protection for the public.

Research and consultation

To inform the policy on harmful electronic communications, the Economic Development Department commissioned independent quantitative research to better understand the behaviour and attitudes of online users, as well as their experience of – and existing level of concern around – harmful electronic communications (e.g. cyberbullying). The policy team also examined a range of international case studies. These are described in detail within the consultation document attached to this report as **Part 1 of Appendix 2**; but in summary, they support the view that there is no ‘gold standard’ or single approach internationally, and that the behaviour that this paper considers is often covered by existing legislation that is not primarily aimed at addressing electronic communication (e.g. harassment laws). A summary of the responses submitted to the consultation is also attached to this report, as **Part 2 of Appendix 2**.

The case studies do demonstrate that some jurisdictions have enacted specific legislation however, or tailored guidelines to address cyberbullying. In the UK in recent years there have been a number of controversial cases in this area that led to concerns about ensuring a consistent and fair approach to prosecution. This led, in 2013, to the Director of Public Prosecutions developing guidelines on the prosecution of cases involving communications sent via social media (the “DPP Guidelines”).

In particular, the DPP Guidelines recommend that prosecutors should take into account the intent and context of online communications when considering

prosecuting. The UK guidelines have helped inform the States of Jersey's policy in this respect.

In March 2015, the Council of Ministers (the Council) issued the aforementioned public consultation, based on the findings of the above research, and on the analysis conducted by officers. The consultation sought views on whether it would be appropriate to make changes to the legislation in Jersey applying to harmful electronic communications. Specifically, it sought views on whether the existing legislation should be amended to remove doubt about its application, and to ensure that it is 'future proof'. It also considered whether a new offence is required to tackle the publication of revenge pornography.

The responses to the consultation mainly offered personal opinion and highlighted individual experiences. As such, they provided limited new quantitative evidence; however, they did support the original quantitative research that was commissioned as part of the development of the consultation, as well as other analysis and evidence gathered throughout the process (e.g. international case studies) (*see Appendix 2*).

What are the changes to the Telecommunications (Jersey) Law 2002 intended to achieve?

Having undertaken the research mentioned above, it became apparent that the existing legislation in Jersey is, in fact, largely fit for purpose and does provide protection from cyberbullying and other types of behaviour on social media that would be considered criminal if conducted via traditional means of communication. However, the legislation in question was enacted before social media became pervasive, and thus was not designed for the 'digital era', nor was it explicitly intended to deal with behaviour conducted via social media. The policy view is that some minor amendments are required therefore, in order to –

- ensure that existing legislation applies to harmful electronic communications sent without use of a public network;
- 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
- 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 amendments were drafted with a view to offering an approach that is light-touch and proportionate, whilst delivering value for money. The aim is not to create new legislation where it is unnecessary, but to ensure that there is the ability to prosecute in all appropriate cases.

In respect of all of the above, it must be remembered that the digital world moves extremely quickly and, therefore, any legislation runs the risk of soon becoming outdated. So far as it is possible to do so, these amendments are designed to ensure the law is future-proof, by which we mean it should remain applicable even as technologies and trends in behaviour change and develop.

This requires the legislation to be 'platform neutral', which is to say that it must cover all types of electronic communication, irrespective of the device used or the technology that facilitates it. It also accounts for technological development, as well as

for changes in the use of existing technologies, including in ways that may not be foreseeable or commonly practiced today.

The intention is that these amendments to the legislation should not result in a disproportionate increase in the number of prosecutions being brought about. It should be remembered that the existing legislation is largely fit for purpose, and that these amendments are designed to bring clarity to the law and resilience to change. As such, this legislation should not be used to stifle free speech, for example criminalising legitimate political debate and discussion, humour and satire, and restricting people's right to be offensive, etc.

It should be noted that these examples are not exhaustive, and are given for the benefit of States Members, as a means of contextualising the amendments.

How are we going to achieve this?

It is apparent that prosecutions for harmful electronic communications can already be made under the Article 51 of the Telecommunications (Jersey) Law 2002 (the "TJL") or the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 (the "CDCJL"). However, there is no room for complacency. Both technology and peoples' behaviour online are changing all the time.

Whilst the consultation process did not highlight any particular difficulties, it would be beneficial to make certain small amendments to the TJL to ensure that single acts of harmful electronic communication, which do not form part of a course of conduct, can be suitably and proportionately punished.

In particular the amendments made to the TJL will –

- Ensure the legislation in this area remains future-proof and 'platform neutral', the proposed amendment to *Article 51* would prohibit improper use of any telecommunications system, not just a 'public' telecommunications system (such as the telephone network) as it is currently defined. This will ensure that a prosecution can take place where a message of the requisite character is sent over either a private network, or from one device directly to another, for example. It is not to say that this behaviour would not be covered by the current legislation, but that it will ensure there is no uncertainty in the future.
- Ensure the legislation does not have a chilling effect on free speech by making provision so that an offence of sending a message or other matter that is (or conveys anything that is) grossly offensive or of an indecent, obscene or menacing character would be committed **only** if the sender knew or intended the message to be of such a character or was aware of the risk that the message would be viewed as such by a reasonable member of the Public. The introduction of this *mens rea* (guilty mind) element of the offence will reflect current practice in the criminal courts, which have drawn on English case law in respect of the equivalent offence in the Communication Act 2003 as persuasive when interpreting the existing Article 51 TJL offence. This element of the new offence has been formulated to clarify the application of Article 51, but allow the courts to continue to draw on English case law where appropriate.
- Ensure fair and proportionate penalties, the proposed amendment to Article 51 would increase the penalty for this offence to a maximum of 2 years' imprisonment and an unlimited fine (either or both of which may be imposed by the court, under Article 13(3) of the Interpretation (Jersey) Law 1954).

It is worth highlighting one further point with regard to acts of 'revenge pornography' (i.e. the non-consensual disclosure of private sexual images). The consultation that

was undertaken earlier this year sought input on whether the Council of Ministers should consider a new offence to deter and prosecute acts of revenge pornography.

Such an offence was recently introduced in the UK in the Criminal Justice and Courts Act 2015, and it carries a maximum penalty of 2 years' imprisonment and an unlimited fine. However, further analysis indicates that this is not necessary in Jersey, and would not be proportionate at this time. It has been demonstrated since publishing the consultation that prosecutions can and have been made under existing legislation for distributing revenge pornography.

Further, it is felt that a new offence tailored to address a specific form of online behaviour would contravene the 'future-proof' approach proposed by the consultation, in that it would risk becoming quickly outdated, given the pace at which online trends develop.

What are the amendments to the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 (the "CDCJL") intended to achieve

Whilst preparing instructions to amend Article 51 of the TJJ, it was recognised by the Home Affairs Department that there would also be advantages to amending the CDCJL at the same time, offering additional protection to victims of harmful electronic communications.

To provide some context to this, Article 5 of the CDCJL currently enables prosecutors to apply to the Court for a restraining order where a person has been convicted of harassment. Restraining orders may be drafted to meet the particular risks presented in the case. For example, in cases involving cyber-bullying, the restrictions may prohibit the offender having contact with the victim (by any means online or offline), and prohibit the publication or sharing of any material relating to the victim. The restraining order may be made for a specified or indeterminate period of time. Breach of a restraining order is itself a criminal offence, and carries a maximum sentence of 12 months' imprisonment and a fine.

Restraining orders will be imposed where the Court considers the restrictions necessary (and proportionate) to protect the victim and/or prevent further offences. They play a significant part in managing the risks to the victim and preventing further harassment. However, restraining orders are not available where the offender is convicted of the Article 51 TJJ offence, or indeed any other offence. This can leave the police and prosecutors with difficult decisions to make as to how to best protect victims of cyberbullying.

Where a course of conduct can be established, prosecutors will often proceed under the harassment legislation rather than prosecute multiple charges of TJJ offences so that a restraining order can be obtained following conviction.

Where a course of conduct cannot be established, but a prosecution could be brought under the TJJ, the limits on the availability of restraining orders mean that it may be appropriate to wait and see whether further harassment of the victim takes place that would establish a course of conduct. A prosecution could then be brought under the CDCJL, and a restraining order could be obtained following conviction to safeguard the victim from further harassment. However, given the potential seriousness of even one harmful electronic communication, it was felt that amendments to the CDCJL would be appropriate, proportionate and would avoid the necessity to adopt a wait and see approach in such cases.

Therefore –

- To provide additional protection to victims of harmful electronic behaviour, the amendments made by *Article 2* would have the effect of permitting the court to make or impose a restraining order on conviction for any offence (not only an offence of harassment), if the court is satisfied that it is necessary to do so to protect the victim or any person named in the order from further conduct which would amount to harassment, or from a perceived threat of violence.
- It should be noted that restraining orders are available to prosecutors dealing with revenge pornography cases in the UK (whether the prosecution is brought under the Communications Act or harassment legislation).
- To ensure parity with the new penalties under the TJJ offence, the penalties for an offence of harassment, and for breach of a restraining order, would be increased correspondingly to a maximum of 2 years' imprisonment and an unlimited fine.

Conclusion

By enacting the amendments described above therefore, the States of Jersey will ensure that people in Jersey are appropriately protected from all forms of harmful electronic communication, now and in the future.

Specifically, the amendments will do this by ensuring that the wording of the legislation in Jersey is future-proof, so that people are protected even as technologies and behaviour change. Further, the amendments will ensure that the specific context of online communication is taken into account, and that an offence would only be committed if the sender knew or intended the message to be of a grossly offensive, indecent, obscene or menacing character. The penalties in this area have also been updated to ensure that they are appropriate and proportionate.

Lastly, the consultation document attached as **Appendix 2** to this report provides a detailed background to the policy development in this area (though it should be noted that the final policy position was adopted on the basis of a range of evidence, including the consultation, after it was issued), and human rights notes prepared by the Law Officers' Department are attached as **Appendix 1**.

Financial and manpower implications

There are no financial or resource implications for the States arising from the adoption of this draft Law.

Human Rights

The notes on the human rights aspects of the draft Law in **Appendix 1** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX 1 TO REPORT

Human Rights Notes on the Draft Telecommunications (Amendment No. 3) and Crime (Miscellaneous Provisions) (Jersey) Law 201-

These notes have been prepared in respect of the Draft Telecommunications (Amendment No. 3) and Crime (Miscellaneous Provisions) (Jersey) Law 201- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“**ECHR**”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The purpose of these amendments is to ensure that the criminal law in Jersey continues to effectively deter the sending of harmful online communications, and provides appropriate and lasting protection for the public, whilst also ensuring that it does not have a chilling effect on free speech.

The draft Law makes amendments to the Telecommunications (Jersey) Law 2002 (“the **2002 Law**”) (see *Article 1* of the draft Law) and also to the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 (“the **2008 Law**”) (see *Article 2* of the draft Law). As the amendments to each of those Laws raise different issues with respect to ECHR compliance, they are analysed separately below.

Amendments to the 2002 Law

Article 1 would amend the 2002 Law to expand the scope of the offence currently found in Article 51 of that Law. The substituted Article 51 would prohibit improper use of any telecommunications system, not just a public telecommunications system such as the telephone network. The purpose of this change is to ensure that the offence applies to communications over private networks, or sent directly from one device to another without the use of a public network (e.g. via Bluetooth).

The amendments made by *Article 1* would also increase the maximum custodial penalty for an offence under the substituted Article 51 from a maximum of 6 months’ imprisonment to a maximum of 2 years’ imprisonment.

Article 1 also introduces an express ‘*mens rea*’ (guilty mind) element into the substituted Article 51 offence of sending a message or other matter that is grossly offensive or of an indecent, obscene or menacing character. Under new Article 51(2) and (3), the offence in Article 51(1) would only be committed if the sender knew or intended the message to be of such a character or was aware of the risk that the message would be viewed as such by a reasonable member of the public.

The principal ECHR right that may be engaged by the amendments made to the 2002 Law is the right to freedom of expression under Article 10, which states, as relevant:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. 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 national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The amendments to the 2002 Law made by *Article 1* capture additional means of communication and substantially increase the penalty for misuse of a telecommunications system. Therefore the amendments may amount to an interference with the right in Article 10(1) of the ECHR.

The right to free expression is fundamental to the maintenance of a free and democratic society. However, despite the high importance attached to this right, it is possible for restrictions on the right to be justified under Article 10(2) of the ECHR. Any such interference must pursue a legitimate aim set out in Article 10(2), must be prescribed by law and be “necessary” in a democratic society (i.e. proportionate to the aim pursued).

Tackling the misuse of telecommunications systems to send grossly offensive, indecent, obscene or menacing messages clearly falls within the scope of the legitimate aims set out in Article 10(2) ECHR.

The offence in Article 51 of the 2002 Law (now and as substituted), can be applied by the courts in a way that, in the circumstances of a particular case, protects the public while allowing free speech, including rude or distasteful comment or banter, to continue.

The extension of the application of the Article 51 offence to communications sent without use of a public telecommunications system is important to ensure the offence can be applied to new technology and does not change the type of offending behaviour captured. The increase in the maximum custodial penalty for commission of the substituted Article 51 offence reflects that conduct amounting to cyberbullying may have a very significant effect on the victim, particularly in a small community. The increased penalty will give the prosecution and the criminal courts greater latitude to reflect this in sentencing in serious cases.

The new *mens rea* element of the substituted Article 51 offence has been formulated to reflect the decisions of the courts in England and Wales relating to the application of the equivalent offence in section 127 of the Communications Act 2003 (in particular the decisions in *Chambers v DPP* [2012] EWHC 2157(Admin) and *DPP v Collins* [2006] UKHL 40). That case law would be persuasive here in any event, so this addition might not substantially alter the nature of the Article 51 offence. However, it does provide additional certainty and clarity as to the circumstances in which an individual will be liable to prosecution and will help to ensure that Article 51 is applied in a manner that is proportionate in practice.

Taking into account the points above, the amendments made by *Article 1* are proportionate to the pursuit of a legitimate aim.

Amendments to the 2008 Law

Article 2 would amend the 2008 Law so as to permit the court to make or impose a restraining order following conviction for any offence (not only an offence of harassment), if the court is satisfied that it is necessary to do so to protect the victim or any person named in the order from further conduct which would amount to harassment, or from a perceived threat of violence. The new Law would also increase the maximum penalty for breach of a restraining order to 2 years' imprisonment and an unlimited fine.

The ECHR right most likely to be engaged by this amendment is Article 8 ECHR, which provides:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

The imposition of a restraining order may infringe the right to private life under Article 8(1) ECHR of the person on whom it is imposed. However, the imposition of such an order also serves to protect the Article 8(1) ECHR rights of any potential victim of harassment or threatening conduct. Interference with Article 8(1) ECHR rights can be justified where the interference is in accordance with the law and proportionate to a legitimate aim identified in Article 8(2) ECHR.

The imposition of a restraining order following conviction for an offence may pursue a legitimate aim falling within the scope of Article 8(2). Further, where it is proposed that a restraining order should be made, the court will be required to balance competing Article 8(1) ECHR rights to ensure that the extent of any restriction imposed by a restraining order is proportionate. This requirement is reflected in Article 5(4)(b) of the 2008 Law as amended by Article 2(4), which makes it clear that the court can only make a restraining order where it is satisfied, on the balance of probabilities, that it is appropriate to make the order to protect a person from conduct that would amount to harassment or would be likely to cause the person to be in fear of violence.

The requirement for the court to balance competing Article 8 ECHR rights when exercising its powers to make, vary or discharge a restraining order also arises from Article 6(1) of the Human Rights (Jersey) Law 2000. That Article requires the court to act in a manner compatible with Convention rights, including Article 8 ECHR.

Taking into account the points above, *Article 2* is also compatible with the ECHR, as any interference with Article 8(1) ECHR rights arising from it will be in accordance with the Law and should only be such as is necessary in a democratic society for the protection of the rights of others.

In view of the above, the draft Law is compatible with the ECHR, as any infringement of the rights in Articles 8(1) and 10(1) is capable of being justified under Articles 8(2) and 10(2).

APPENDIX 2 (PART 1) TO REPORT

Consultation
Council of Ministers

States
of Jersey

Title of consultation:

Review of legislation on harmful electronic communications

Summary:

The purpose of this consultation is to invite comments on the legislation applying to harmful electronic communications. It seeks views on whether the existing legislation is appropriate, or whether it requires amending, to remove any doubt about its application and to ensure that it is 'future proof'. It also considers whether a new offence is required to tackle the publication of revenge pornography.

Date published:

31 March 2015

Closing date:

19 June 2015

Supporting documents attached:

Annex 1: Electronic Communications - Usage & Behaviour Survey November 2013

We aim for a full and open consultation process and aim to publish consultation submissions online. If you do not want your response, including your name and contact details, to be published, please state this clearly in writing when you submit your response together with a brief explanation. We will respect your wish for confidentiality as far as possible, subject to the Freedom of Information law.

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Introduction

The Council of Ministers is consulting on whether it is appropriate to make changes to the legislation applying to harmful electronic communications.

The Council recognises that it is important that the relevant authorities in Jersey have the ability, in appropriate cases, to prosecute people for sending grossly offensive, threatening, false or malicious electronic communications, including via social media. As part of this, the law should enable the appropriate authorities to tackle behaviour that constitutes cyberbullying; however, the law should not provide that electronic communications are subject to a more stringent level of legislation than other means of communication.

The Council is confident that the existing legislation is largely fit for purpose. However, changes to legislation may be required to remove any doubt about the application of existing legislation to activities conducted electronically, via means such as social media; to make certain that the legislation is future proof; and to ensure that existing offences do not have a chilling effect on free speech.

For the purposes of this consultation, the term social media has been broadly defined as meaning 'the online social networks, technology and methods through which people share content, opinions, information and ideas – whether this is in the form of text, images, audio or video' though it is worth noting that this definition should not be taken as exhaustive.¹

Cyberbullying may include a range of online conduct and has been defined as 'the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group that is intended to harm others.'² So it may include sending abusive or threatening messages, but may also take place by other methods, such as impersonating a person online or posting revenge pornography.

The digital world moves extremely quickly and any legislation in this area runs the risk of quickly becoming outdated. From Snapchat to 'real-time web', new platforms and trends are emerging at an unprecedented rate, in an often unpredictable way and on a grand scale. Taking Facebook as an example, it was founded in 2004

¹ Results from the 2013 BDO Local Government Social Media Survey

http://www.bdo.co.uk/data/assets/pdf_file/0009/186525/following_the_trends_2013.pdf

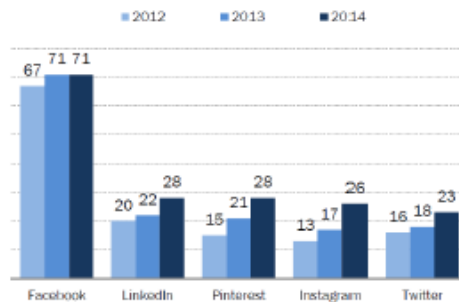
² www.cyberbullying.org

and now boasts more than 1.3 billion active users.³ Other platforms, claiming fewer users are growing at a faster rate, as indicated in **Figure 1: Social media sites, 2012-2014**.⁴ Therefore, it is proposed that any amendments to the law and any new offences should be drafted in such a manner that makes them resilient to technological development, or 'future proof', as far as it is practical to do so.

Figure 1: Social media sites, 2012-2014

Social media sites, 2012-2014

% of online adults who use the following social media websites, by year



Pew Research Center's Internet Project Surveys, 2012-2014. 2014 data collected September 11-14 & September 18-21, 2014. N=1,597 internet users ages 18+.

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It is also vital that any amendments to the law should be made in such a way that strikes a balance between ensuring criminal law can be implemented effectively and protecting freedom of expression. As definitions of 'grossly offensive' or 'threatening' communications can be subjective, consideration must be given to how legislation can be framed so as to avoid unnecessarily infringing the right to freedom of expression, as provided by Article 10 of the European Convention of Human Rights, while also ensuring that there is greater certainty in the application of the relevant provisions than has been the case in other jurisdictions, in particular England and Wales.

³ <http://newsroom.fb.com/company-info/> Facebook. February 6, 2015.

⁴ http://www.pewinternet.org/files/2015/01/PI_SocialMediaUpdate20144.pdf

This consultation is not about the detail of potential amendments to the law but about the proposed approach and the high-level principles that will guide any legislative response.

Contents

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2. Current legislative position
3. International examples
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5. Proposal
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Who should respond?

It is important that any changes to legislation take into account a wide range of views and experiences. Therefore we would like to hear from:

- members of the public;
- telecoms providers;
- ISPs;
- social media providers;
- digital businesses;
- internet safety professionals;
- consumer organisations; and
- schools and other education providers.

Section 1: Background

The internet has become integral to everyday life in Jersey. By 2014, nine out of ten adults (91%) had access to the internet; 89% of adults could access it at home and 86% of workers could access the internet at work.⁵

Although the most popular device for accessing the internet in Jersey remains the home computer, it is followed closely by the smart phone. The use of tablets is also increasing in popularity. In 2013 more than half (59%) of those in Jersey who accessed the internet used a smart phone, while more than two-fifths (42%) used a tablet.⁶ In the UK there has also been a rise in the number of internet-enabled devices such as televisions and games consoles, which one would expect to see mirrored in Jersey.⁷

Internationally, there has been a rapid rise in the use of social networks. In the UK almost half of adults (47%) claim to use a social network, and usage is even higher in Jersey.⁸ In 2014, 65% of adults said they used a social networking site. The use of social networks is particularly prevalent among young people; nine out of ten adults aged 16-34 years (92%) reported using social media such as Twitter and Facebook, compared to two out of ten (19%) of those aged 65 years or over.⁹

In conjunction with increased access to the internet and the rapid growth in the use of social media, there have been growing concerns, both internationally and in Jersey, about the potential for harm caused by new types of activity associated with their use.

UK case studies

Internationally, there have been numerous high profile cases involving cyberbullying and other abusive and threatening behaviour conducted over social media. These have involved a variety of social networking sites including Twitter,

⁵ Jersey Annual Social Survey 2014,
<http://www.gov.je/Government/JerseyWorld/StatisticsUnit/PeopleCommunities/Pages/SocialStatistic.aspx#anchor-1>

⁶ Jersey Annual Social Survey 2013,
<http://www.gov.je/Government/JerseyWorld/StatisticsUnit/PeopleCommunities/Pages/SocialStatistic.aspx>

⁷ Ofcom Communications Market Report 2014,
http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/2014_UK_CMR.pdf

⁸ OCMR 2014,

⁹ JASS 2014

Facebook and Ask.Fm. In some instances criminal charges have been brought against alleged offenders.

The box below shows some examples of recent UK cases. These illustrate the range of activity that is being considered in this consultation.

Figure 2: UK Case Studies

Abusive and menacing tweets

In January 2014 Isabella Sorley and John Nimmo were sentenced to twelve weeks and eight weeks respectively for sending abusive tweets to the feminist campaigner Caroline Criado-Perez. They pled guilty to separate offences of improper use of a public electronic communications network, contrary to section 127 of the Communications Act 2003.

Offensive Facebook posts

In 2012 Matthew Woods, who had made several offensive postings about the missing five-year-old girl April Jones, was jailed for twelve weeks. He had been found guilty of sending by means of a public electronic communications network a message or other matter that is grossly offensive, contrary to the Communications Act 2003.

In 2012 Liam Stacey posted offensive comments about the footballer Fabrice Muamba. He pleaded guilty to a racially aggravated offence under Section 4A of the Public Order Act 1986 and he was sentenced to 56 days in prison.

Cyberbullying

The suicide of teenager Hannah Smith is believed to have occurred after she was subjected to bullying on the social networking site Ask.Fm. Following this the site made changes to its reporting policies.

Revenge pornography

In 2014 Luke King was given a 12-week sentence after pleading guilty to harassment without violence. He had published intimate images of a woman on the WhatsApp messaging service, after making a series of threats to her. This is believed to be the first instance in the UK of someone being jailed for posting revenge pornography online, following the issuance in October 2014 of guidance that clarifies how prosecutors can use existing legislation to prosecute perpetrators of these offences. King was prosecuted under the Protection from Harassment Act 1997, but people who distribute revenge pornography images and videos could now face two years in jail under a new UK law dealing specifically with the practice. The Criminal Justice and Courts Act covers material shared via the internet, text messages and physical distribution.

Policies of social networks

All of the major social networking sites have policies that are designed to help safeguard users. Details of these policies can be found on the social networks' websites.¹⁰

In most instances the policies prohibit abusive behaviour including: threats to others, bullying and harassment, and hate speech. The policies also outline the steps users should take if they encounter this type of behaviour. A recent report on social media and criminal offences by the House of Lords Select Committee on Communications noted:

Facebook has a real name culture, a set of community standards (e.g. regarding nudity), enables people to control their own privacy, and enables the reporting of abuse; Twitter have rules against threats of violence, targeted harassment and similar issues. Other operators are less responsible.¹¹

However, in some instances, social media policies have been seen to be ineffective or the social networks themselves have not been seen to enforce these policies adequately. Internationally, concerns have been expressed that these policies alone are not sufficient to protect people from harmful behaviour that would be illegal if conducted offline. The Select Committee report goes on:

The number of staff employed to consider reports of content or conduct is inevitably inadequate to the scale of use of the website. Globally, Facebook employ "hundreds" of people in this area; Twitter "in excess of 100"... We encourage website operators further to develop their ability to monitor the use made of their services. In particular, it would be desirable for website operators to explore developing systems capable of preventing harassment, for example by the more effective real-time monitoring of traffic.¹²

This sentiment was echoed in comments from Twitter CEO Dick Costolo in a recent interview:

¹⁰ For example: <https://www.facebook.com/communitystandards>;
<https://support.twitter.com/articles/18311-the-twitter-rules#>; <https://www.snapchat.com/safety>;
<https://www.blogger.com/content.g?hl=en>

¹¹ <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3701.htm>

¹² Ibid.

We're going to get a lot more aggressive about [abuse on the platform] and it's going to start right now...we've always taken it seriously. We've drawn a line on what constitutes harassment and abuse. I believe that we haven't yet drawn that line to put the cost of dealing with harassment on those doing the harassing. It shouldn't be the person who's being harassed who has to do a lot of work...you set policies and then you try to stick to those policies.¹³

It is of particular importance to the Government of Jersey that vulnerable users (including children) are protected against harmful behaviour when using social networking sites.

¹³ http://www.nytimes.com/2015/03/01/magazine/dick-costolo-thinks-its-ok-to-never-tweet.html?_r=0

Section 2: Current legislative position

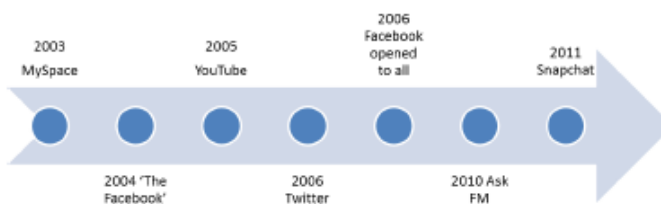
Existing legislation

There are four key pieces of legislation that are relevant to this area in Jersey. These are:

- Electronic Communications (Jersey) Law 2000¹⁴
- Article 51 of the Telecommunications (Jersey) Law 2002¹⁵
- Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008¹⁶
- Data Protection (Jersey) Law 2005¹⁷

This legislation was enacted before social media became pervasive, and thus was not designed for the 'digital era', or was not explicitly intended to deal with behaviour conducted via social media.

Figure 3: Launch dates of major social networks and video sharing sites



¹⁴

http://www.jerseylaw.je/law/display.aspx?url=lawsinforce%2Fconsolidated%2F04%2F04.280_ElectronicCommunicationsLaw2000_RevisedEdition_1January2008.htm

¹⁵

http://www.jerseylaw.je/law/display.aspx?url=lawsinforce/consolidated/06/06.288_TelecommunicationsLaw2002_RevisedEdition_1January2013.htm

¹⁶

<http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5Chtm%5CLawFiles%5C2008%2FL-41-2008.htm>

¹⁷

http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%2fconsolidated%2f15%2f15.240_DataProtectionLaw2005_RevisedEdition_1January2012.htm

It is important therefore, that this consultation establishes whether it is necessary to make changes to existing legislation, to ensure that the relevant authorities can adequately respond to criminal behaviour – such as sending grossly offensive, threatening, false or malicious communications via social media – while also ensuring that the offences do not have a chilling effect on free speech.

The relevant Jersey legislation is summarised below.

Electronic Communications (Jersey) Law 2000 [ECJL]

The ECJL provides for the facilitation of electronic business and the use of electronic communications and electronic storage. Under the ECJL, provision is made for the obligations of service providers and for the protection of service providers from criminal and civil liability, in certain circumstances, for messages posted on their systems. The term 'electronic communication' is defined in section 2 of the ECJL as follows:

'electronic communication' means a communication of information transmitted –

- a. by means of guided or unguided electromagnetic energy or of both; or
- b. by other means but while in electronic form;

However, no provision is made in the ECJL for the prohibition of grossly offensive, threatening or malicious communications.

Article 51 of the Telecommunications (Jersey) Law [TJL]

Under Article 51, any person who –

- a. sends, by means of a public telecommunication system, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- b. for the purpose of causing annoyance, inconvenience or needless anxiety to another, sends by those means a message that the person knows to be false or persistently makes use for that purpose of a public telecommunication system,

shall be guilty of an offence and liable to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 4 (currently £5,000) on the standard scale, or both.

The TJL defines 'telecommunication system' as 'a system for the conveyance of messages through the agency of energy'.¹⁸ It is clear that abusive phone calls can be prosecuted under Article 51 of the TJL. It also appears that emails and postings on video sharing sites such as YouTube, or social media sites such as Facebook and Twitter, can be prosecuted under Article 51, because internet access is provided via a public telecommunications system.

Decisions of the Courts in England and Wales have made it clear that messages sent via social media were communications through such a service.¹⁹ The definition of 'telecommunications system' in the TJL is different to that used in similar legislation in England and Wales however, which refers to an 'electronic communications service'.²⁰ Though it is perhaps not beyond doubt, it is likely that the TJL would be interpreted in a similar way with regard to the applicability of Article 51 to electronic communications and communications via social media.

Crime (Disorderly Conduct and Harassment) (Jersey) Law, 2008 [CDCJL]

Under Article 2 of the CDCJL a person commits an offence if he or she:

- a. uses words that are threatening or abusive;
- b. behaves in a threatening or abusive way; or
- c. engages in disorderly behaviour,

within the hearing or sight of another person likely to be caused alarm or distress by the words or behaviour. As a consequence this offence does not apply in the context of electronic communications.

However, Article 3 of the CDCJL provides that a person commits an offence if he or she pursues a course of conduct:

- a. that amounts to harassment of another person; and
- b. that he or she knows, or ought to know, amounts to harassment of another person.

Under some circumstances the CDCJL would be the appropriate legislation for dealing with the conduct being considered in this consultation. However, this would

¹⁸ Article 1(1) of the TJL defines the term 'energy' to mean 'electric, magnetic, electro-mechanical, electro-chemical or electro-magnetic energy'

¹⁹ In particular *DPP v Chambers* [2012] EWHC 2157 (Admin) at para.23, but also subsequent decisions concerning the applicability of existing offences to messages sent by social media.

²⁰ Electronic Communications Act 2003
<http://www.legislation.gov.uk/ukpga/2003/21/part/2/chapter/1>

only be the case when there have been two or more separate incidents such that a 'course of conduct' can be established.²¹

The application of the Article 3 offence in the context of communications via social media was considered by the Royal Court in the case of *Chapman v Attorney General*, which concerned an appeal against conviction and sentence from the Magistrate's court.²² In that case the course of conduct alleged to amount to harassment arose from three incidents, two of which were communications on Facebook. Although in that case the Royal Court did not find the messages sufficiently serious to justify criminal culpability for the course of conduct as whole, it is clear that the offence can be used in relation to communications via social media.

The Data Protection (Jersey) Law 2005 [DPL]

The DPL requires 'data controllers' to process personal data (i.e. data relating to particular identifiable persons) in accordance with eight data protection principles as well as the other provisions of the DPL.²³

In many cases the processing of personal data by private individuals for domestic purposes using social media will fall within an exemption from the requirements of the DPL. As a result, the DPL does not provide a complete answer to the concerns addressed in this consultation.²⁴ However, in the UK, equivalent provisions of the Data Protection Act 1998 have been used occasionally to address the unwanted publication of some personal data on social media by campaign groups.²⁵

²¹ See Article 3(5) of the CDCJL

²² [2013] JRC257

²³ i.e. persons having control over the processing of personal data

²⁴ Article 36 of the DPL provides that personal data processed by an individual only for the purposes of that individual's personal, family or household affairs (including recreational purposes) are exempt from the data protection principles and Parts 2 and 3 of the DPL.

²⁵ See for example *Law Society v Kordowski* [2011] EWHC 3185(QB), which was concerned with the "Solicitors from Hell" website.

Summary

In summary, analysis of the existing legislation indicates the following:

1. No explicit provision is made in the ECJL for the prohibition of offensive, threatening or malicious communications.
2. It appears that the definition of 'telecommunications systems' in the TJL could be interpreted as including electronic communications such as email and social media, so that the offences in Article 51 of that law could be applied to harmful online communication such as cyberbullying.
3. Prosecution under the CDCJL is appropriate in some cases when there have been sufficient incidents to qualify as a 'course of conduct'. However, 'one-off' incidents would not qualify as harassment.
4. The DPL places some relevant restrictions on the use of personal data, but it is limited in its application to the processing of personal data by private individuals, so it isn't a substitute for appropriately tailored offences.
5. The existing law does provide protection from cyberbullying and other types of behaviour on social media that would be considered criminal if conducted via traditional means of communication.
6. Nonetheless, consideration should be given as to whether the TJL or other legal provisions should be amended or additional offences introduced to remove any ambiguity about the circumstances in which a prosecution may take place and the particular types of malicious, grossly offensive and threatening communications that are covered.

Section 3: International examples

Internationally, the type of behaviour considered in this consultation is rarely a specific criminal offence. Instead, it often falls under other legislation such as stalking and harassment laws.

Some jurisdictions have taken steps to explicitly tackle behaviour such as cyberbullying through legislation.

Canada

For example, in 2013 Nova Scotia introduced a new law (the Cyber Safety Act) which gives victims the ability to sue cyberbullies or (in the case of minors) their parents. The legislation allows victims to apply for protection orders to place restrictions on, or to identify, the cyberbully. A new unit, Cyber Scan, oversees this law.²⁶ The court has powers to cut off the suspected bully's internet or seize their equipment for up to one year. This legislation has been criticised as it is perceived that those deemed to be 'cyberbullies' are not offered the opportunity of a defence and that parents and school administrators can be liable, to various degrees, for what minors do online.

USA

In the USA the primary federal law regarding internet safety is the Children's Internet Protection Act of 2000 [CIPA]. Schools and libraries subject to the CIPA must have an internet safety policy for their computers that filters and blocks obscene content in order to receive discounts for internet through their E-rate programme. They must also have a policy that addresses minors' access to harmful material on the internet.

Individual US states have also passed some relevant legislation. For example, in 2010 Arkansas passed a new criminal offence of cyberbullying that criminalises the transmission, sending or posting of a communication by electronic means of frightening, coercing, intimidating, threatening, abusing, harassing or alarming another person if this action was in furtherance of severe, repeated or hostile behaviour towards the other person. This offence is punishable by up to 90 days imprisonment.

²⁶ <http://www.cyberscan.novascotia.ca/>

Singapore

In November 2014 Singapore introduced a wide-ranging law that targets harassment.²⁷ The law makes it clear that the courts may prosecute acts of harassment committed online. The courts will also be able to impose fines of up to \$5000, longer imprisonment sentences (up to 12 months), community orders and increased penalties for repeat offenders.

England and Wales

In England and Wales the behaviour being considered in this consultation falls foul of offences under a number of different pieces of legislation. The two most relevant are: the Malicious Communications Act 1998 and the Communications Act 2003.

Section 1 of the Malicious Communications Act 1998

The Malicious Communications Act encompasses the sending of letters, electronic communications and other articles to another person. It covers messages that are indecent, grossly offensive, constitute a threat and that contain false information. To commit the offence the person sending the communication must intend to cause distress or anxiety to the recipient or to other people whom the sender intends the message to be communicated. By virtue of section 1(2A) of the Act, the offence has been specifically extended to cover any communication in electronic form.

Section 127 of the Communications Act 2003

By virtue of Section 127(1) of the Communications Act 2003, it is an offence for a person 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'. Section 127(2) goes on to provide 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'. These offences are similar to those in the TJL.

As noted earlier in this paper, there is a distinction between the Communications Act 2003 and the TJL in the terminology used to describe a system through which messages are sent. However, it is likely that, as with the English legislation, the TJL can capture all forms of electronic communication, including those sent via social media.

²⁷ The Protection from Harassment Act 2014

However, the practical application of the Communications Act 2003, which like the TJA was enacted before the mass adoption of social media, also reveals some difficulties with the application of the section 127 offences to behaviour on social media and offers some important lessons. Indeed, it is only recently that its application to social media has been clarified by judgments of the courts and by the introduction in 2013 of new Guidelines for prosecutions involving social media by the then Director of Public Prosecutions.²⁸

One particular problem that was noted with section 127(1) of the Communications Act 2003 is that it does not make it clear what the intent of the sender should be in order to commit the offence and this has only been clarified by the Divisional Court in England in the case of *Chambers v DPP*.²⁹ Essentially the sender must have intended that the message should be of an offensive or menacing character or alternatively, have recognised the risk that it may create fear or apprehension in any reasonable member of the public who reads or sees it.³⁰

As the then Director of Public Prosecutions, Keir Starmer QC explained, in England it was necessary to put in place prosecutorial guidelines, which were designed, in view of difficulties in applying the legislation to social media, to help ensure a consistent approach to enforcement and balance the fundamental right of free speech with the need to prosecute serious wrongdoing:

The guidelines will help prosecutors to make fair and consistent decisions to prosecute in those cases that clearly require robust prosecution in accordance with the Code for Crown Prosecutors, and to uphold the right to freedom of speech in those cases where a communication might be considered grossly offensive, but the high threshold for prosecution is not met.³¹

It is warranted to suggest that prior to the introduction of these guidelines, the English legislation in this area was so broadly drafted as to lead to its use in too

²⁸ http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/

²⁹ [2013] 1 All ER 149 at 160

³⁰ See paragraph 36 of the decision. The Divisional court said in particular that if the message were intended as a joke, even if a poor joke in bad taste, it is unlikely that the offence would be committed.

³¹

http://www.cps.gov.uk/news/articles/dpp_discusses_prosecutions_involving_social_media/index.html

many cases (including the now infamous *Chambers v DPP* case, better known as the 'Twitter Joke Trial' mentioned above).

In view of these difficulties in England and Wales, it may be appropriate to make changes to existing legislation in Jersey to remove any uncertainty as to its application. Further, if any new offence is enacted in response to this consultation, it must be prepared with an awareness of these difficulties, so as to avoid similar pitfalls.³²

One of the difficulties in applying the existing offences to social media is that, arguably, it is important that the context in which a communication takes place is taken into account in deciding whether it should be characterised as criminal. The House of Lords Select Committee on Communications cites the following extract from the guidance, emphasising this point:

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.³³

Revenge pornography

Notwithstanding that other offences may apply, the UK has recently amended legislation to make 'revenge pornography' a specific offence. The Criminal Justice and Courts Act 2015, which received Royal Assent on 12 February 2015 states:

It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made —

- a) without the consent of an individual who appears in the photograph or film, and
- b) with the intention of causing that individual distress.³⁴

Speaking on the topic of revenge pornography, Minister for Women and Equalities Nicky Morgan said:

³² <http://www.bailii.org/ew/cases/EWHC/QB/2012/2157.html>

³³ http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/

³⁴ <http://www.legislation.gov.uk/ukpga/2015/2/section/33/enacted>

Circulating intimate photos of an individual without their consent is never acceptable. People are entitled to expect a reasonable level of respect and privacy...it is right that those who do circulate these images are held to account, and that we educate young people to the hurt that can be caused by breaking this trust.³⁵

In Jersey, posting sexually explicit material onto the internet may constitute the sending of a message of a character prohibited by Article 51 of the TJL. In this context the focus will be on whether the sending of the particular message or communication is grossly offensive, indecent or obscene, not whether the image itself is grossly offensive, indecent or obscene. Posting revenge pomography online might also, potentially, form part of a course of conduct amounting to harassment. Further, where the material depicts a person under the age of 16, that may be an offence under Article 2 of the Protection of Children (Jersey) Law 1994.³⁶

Existing legislation might therefore address incidents of revenge pomography. Nonetheless, given the harm that might be caused to a victim by just a single incident of revenge pomography, Jersey may wish to consider enacting a specific offence, perhaps of a similar nature to that enacted in the UK, to tackle this type of conduct and to ensure that the maximum penalty for such an offence is commensurate with the harm caused.

Therefore, whilst taking the opportunity to consult on the subject of inappropriate online behaviour, it was felt that this consultation should also seek input on whether it would be appropriate to consider making revenge pomography a specific new offence, or whether it would be preferable to use existing legislation where possible.

Education and awareness initiatives

Education and awareness-based approaches may also have a chance of effectively reducing harmful behaviour in the longer term. A number of jurisdictions undertake initiatives aimed to inform and educate internet users.

For example, Safer Internet Day is organised by the UK Safer Internet Centre in February of each year to promote the safe and responsible use of online

³⁵ <https://www.gov.uk/government/news/new-law-to-tackle-revenge-pornography>

³⁶ Article 2 concerns indecent photographs or pseudo-photographs of children

technology and mobile phones for children and young people.³⁷ The Anti-Bullying Week which takes place in November each year also tackles cyberbullying and has been taken up by other jurisdictions such as the Isle of Man.

Australia's key anti-bullying event for schools, the National Day of Action Against Bullying, has been running since 2011. It provides resources to schools, children and parents regarding 'real world' bullying and cyberbullying.

In Malta the Be Smart Online project, which is partly funded by the European Union, endeavours to ensure that all stakeholders in the Island focus on the safer use of the internet by children and youths. The initiative is designed to raise awareness of the primary issues, as well as to promote and operate reporting facilities for internet abuse, and to support respective victims.

Summary

By studying international approaches to managing harmful electronic communications, we might better inform Jersey's own approach to grossly offensive, threatening and malicious behaviour online. The key points are as follows:

1. Instantaneous communication that takes place on the internet and via social media has its own particular character, meaning that definitions of offences must be carefully crafted so that the imposition of an offence does not unnecessarily stifle free speech.
2. Where the potential application of offences is unclear or offences are very broadly drafted, then guidelines for prosecutors and police can help to ensure that there is a consistent approach to legislation and help set parameters for where prosecution is appropriate.
3. There are inherent difficulties in enforcing legislation on a medium such as the internet, which has no territorial boundaries.
4. There are concerns regarding the effectiveness of legislation, particularly regarding the ability to police and prosecute in terms of resourcing and evidence.
5. Legislation may be appropriate in some cases but other non-legislative approaches, including improved education and awareness, could also be considered to help address harmful behaviour in a constructive rather than a punitive way.

³⁷ <http://consumers.ofcom.org.uk/2014/02/safer-internet-day-2014/>

Section 4: Islanders' experiences and attitudes

To inform policy development in this area, and to enhance its understanding of online behaviour and attitudes, the Government of Jersey commissioned Island Analysis to conduct quantitative research on usage and behaviour in relation to electronic communication in Jersey. This research had a particular focus on user experience and existing levels of concern around malicious, grossly offensive or threatening communications: including cyber-bullying.³⁸

The research offered further insight regarding:

- online usage trends;
- online malpractice and level of concern;
- the need for additional education and support relating to online usage and security;
- different demands of various sections within the population regarding online usage; and
- the perceived need or otherwise for legislative amendments to enhance consumer protection online.

The full report is attached to this document as Annex 1, and key findings from this research are outlined below. In considering these findings it is important to note that this survey was conducted online and that respondents were therefore likely to be regular internet users.

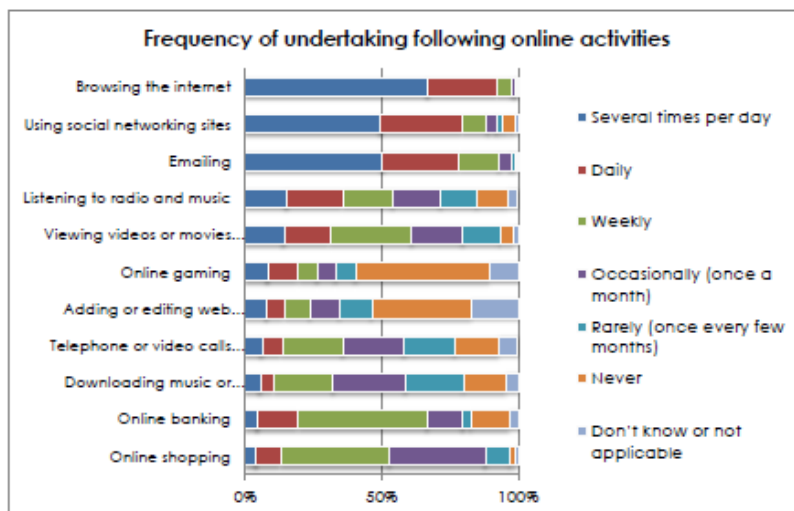
Online usage

The research found that the laptop computer at home and the smart mobile phone were the two most used devices to access the internet. The tablet computer was also becoming more popular.

The most frequent online activities were browsing the internet, using social media sites and email. Half of respondents said they accessed social media sites several times a day and the most used social media sites were Facebook, Google+ and Twitter.

³⁸ The full report can be found in Annex 1

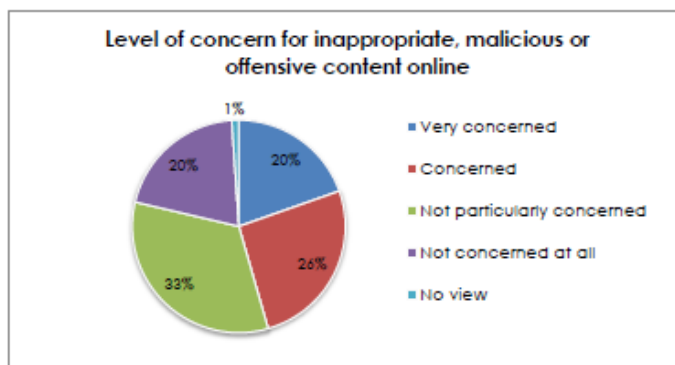
Figure 4: Online activities



Level of concern about content online

Just under half of respondents indicated that they were either 'very concerned' (20%) or 'concerned' (26%) about being exposed to inappropriate, malicious or offensive content online. A further one in three was 'not particularly' concerned, with 20% saying they were 'not concerned at all'.

Figure 5: Level of concern

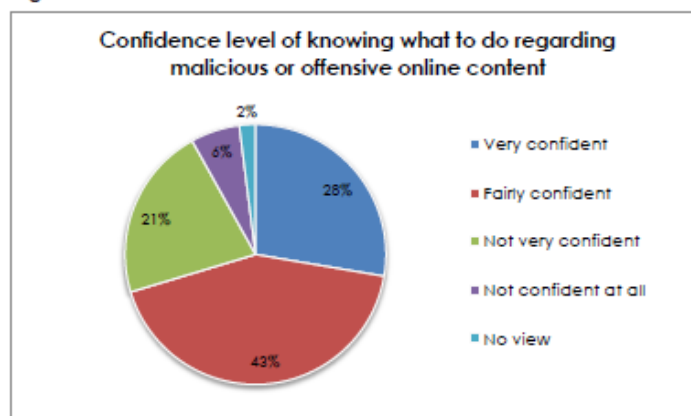


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Confidence and awareness

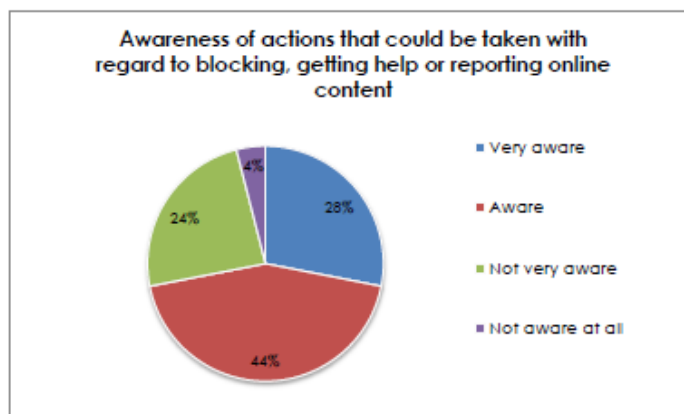
In Jersey, evidence suggests that majority of internet users are aware of how to respond to malicious, indecent or grossly offensive content, and feel confident in doing so.³⁹ The majority of respondents (72%) stated that they were 'very aware' or 'aware' of the actions that they could take with regard to blocking, getting help, or reporting offensive online content. A similar percentage (71%) indicated that they were 'very confident' or 'confident' of knowing what to do if they came across this type of content if they found it online. However, it is important to note that a significant proportion (27%) reported that they were 'not very confident' or 'not confident at all' of knowing what to do if they encountered this type of material and 28% said they were 'not very aware' or 'not aware at all' of actions that they could take.

Figure 6: Confidence



³⁹ Annex 1

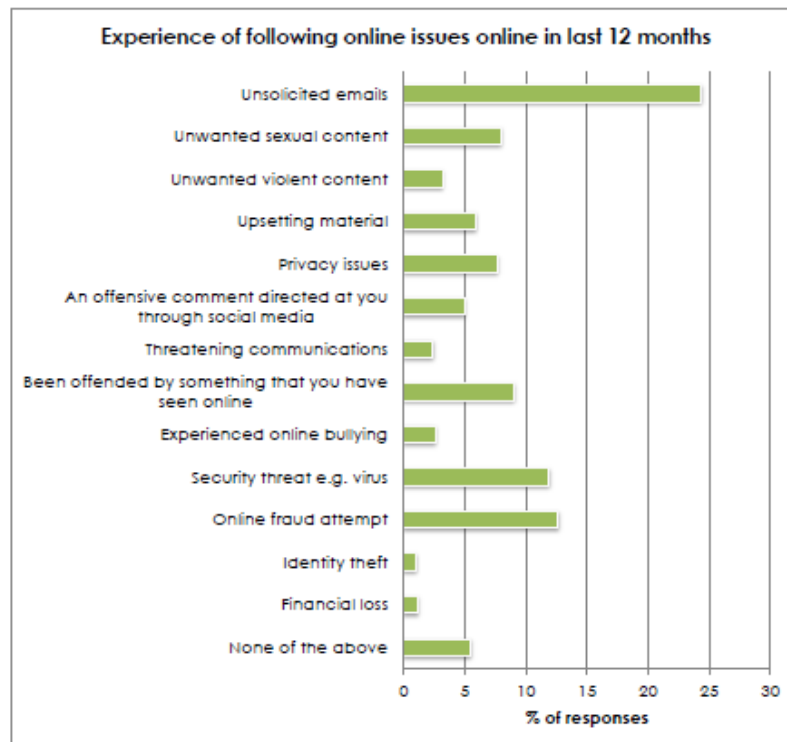
Figure 7: Awareness



Users' experiences

Respondents were asked to detail the issues that they had encountered online during the past 12 months. By far the most commonly reported problem was receiving unsolicited emails, followed by online fraud attempts and virus security threats. A small proportion (3%) of respondents said they had experienced online bullying while 2% said they had received threatening communications. Analysis of responses by age group indicates very little variation between age groups, however the 50 and over group reported a slight preponderance of online fraud attempts and unsolicited emails.

Figure 8: Experience of Online Issues



Only half the respondents indicated that they had taken action against such online activity. Respondents were asked to state what action they had taken and many reported blocking the content or reporting it to the website.

The research indicates that such online experiences do not significantly affect the way that the majority use the internet, with 71% of respondents saying that it had 'no impact at all'. But when respondents were offered the opportunity to state how it had changed their behaviour, if at all, many reported being more cautious about which sites they use and being more vigilant regarding security.

Responsibility for internet safety

Respondents were strongly of the view that, for adults, internet safety was the responsibility of individual users and, to a slightly lesser extent, website owners/creators. Respondents overwhelmingly felt that parents were responsible for the internet safety of children and, to a much lesser extent, the organisation that the minor was accessing the internet through (e.g. a school, workplace or college).

Summary

The findings from this research indicate that, as more people have access to the internet, social media use is becoming almost ubiquitous. A large proportion of internet users in Jersey feel confident going online and using social media, and say they know how to respond if they come across potentially harmful material. However, there is still a significant number of less confident users who might benefit from increased protection and/or improved education and information around internet safety.

It is clear that most of the respondents believe that adults bear the majority of responsibility for their own safety online. The situation is less clear-cut with minors, where the majority of respondents felt that parental responsibility was paramount but some felt that institutions such as schools have an important role to play

Only a small proportion of respondents reported experiencing online bullying or threatening communications. However, international cases demonstrate that, for the minority who do encounter malicious or threatening communications online, or who are victims of cyber bullying, the experience can be deeply troubling and in some cases have severe and potentially tragic consequences.

Section 5: Proposal

It should be clear in Jersey that a person may be guilty of an offence if he or she sends, or causes to be sent electronically, including by social media, a message that is of a grossly offensive, obscene or threatening character or sends a false electronic communication for the purpose of causing annoyance, inconvenience or needless anxiety to another.

While it does not appear that a new offence is needed to achieve this, it is also recognised that there have been difficulties in applying offences to behaviour of this nature in England and Wales. It might therefore be appropriate to take some action to avoid similar difficulties in Jersey by either clarifying the law or creating a new offence.

It is proposed that further consideration be given to whether it might be appropriate to introduce further definition and clarification into the TJL than is currently present in Article 51(a) or whether any further offences are required.

It is also proposed that any changes to legislation should draw on the principles established in the DPP's guidelines for when it would be appropriate to prosecute in respect of communications sent by social media.⁴⁰ Clarification of the law in line with the DPP's guidelines would have three primary objectives:

1. to ensure that all types of threatening and bullying behaviour conducted via social media are potentially captured by the relevant offences;
2. to provide greater certainty as to when offences will apply and to ensure that they only act as a restrictions on freedom of speech where it is necessary and proportionate to do so; and
3. to provide, so far as is appropriate, that the context in which the communication is sent, including the age and maturity of the sender and the circumstances of the potential victim is taken into account in determining whether an offence has been committed.

Any amendments to the legislation in Jersey should be made in light of these objectives. This should help to avoid some of the difficulties faced in England and Wales, mentioned earlier in this paper, and mitigate concerns about threats to free speech.

⁴⁰ http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html

One area where greater clarity may be useful is in relation to the intent that a person sending a communication must have if they are to commit an offence. One approach would be to provide expressly that a person only commits an offence where they intend that the message be threatening or grossly offensive or are reckless as to whether it would have that effect. So, where a message is intended purely as a joke and the person has no reason to think it would be perceived in another way, then they would not commit the offence. A variation on this approach would be for a person to commit an offence only where they intend that the message cause distress or anxiety to the particular recipient of the message.

Another area where greater clarity may be useful is in relation to the key terms used in the offence. For example, drawing on experience in England and Wales and the DPP's guidelines, it is proposed that a high threshold should be set when considering which communications should be considered grossly offensive, obscene or threatening. A merely offensive electronic communication, or one that is in bad taste, should not be contrary to criminal law. As mentioned previously, it is important that electronic communication is not held to a different standard than any other form of communication. Further, the expression of controversial views about serious or trivial matters and banter or humour, even if distasteful to some or painful to those subjected to it, should not be prohibited. It might be useful to consider defining key terms such as 'grossly offensive', to provide greater certainty in respect of such matters.

It is also worth considering whether some of the terms used in the TJL remain appropriate. For example it might be preferable to use the term 'threatening' rather than 'menacing' in setting the scope of the Article 51(a) TJL offence. This is on the basis that the two terms may have the same meaning, but 'threatening' is a more common term today and more readily understood.

General matters in relation to offences

In keeping with the objectives outlined above, there may be other ways in which the application of Article 51 of the TJL or any new offence can be tailored.

For example, it might be appropriate to provide for a defence in respect of these offences where the sender (or resender) of an electronic communication takes swift action to remove the communication or block access to it or to mitigate any harm that it may have caused (e.g. by apologising to the recipient(s)).

It may also be appropriate to provide for defences where the sender did not know and could not be expected to know, that the audience for the communication would include a particular alleged victim or would be as large as is ultimately the case.

The legislative form that any amendments to Article 51 of the T.J.L., or any new offences should take will be the subject of further consideration in light of the outcomes of this consultation. If new offences are enacted then further consideration will also need to be given to amending the offence in Article 51 of the T.J.L. to ensure the two laws work in harmony.

While we do not propose to amend the definition of telecommunications system in the T.J.L. at this time, views are welcome on the application of this definition to electronic communications via social network sites such as Facebook and Twitter.

In order to ensure that the provisions are 'future proof', as far as it is practical to do so, it may also be appropriate to look to take powers for the States Assembly to be able to amend technical definitions such as this by Regulations.

As noted above, in England and Wales the DPP has drawn up guidelines to reduce the scope for inconsistent prosecution decisions to be taken regarding the very broad way in which the offences are framed in that jurisdiction. Whether it would be appropriate for Jersey's Law Officers, who are responsible for prosecutorial decision making, to draw up any similar guidelines in relation to any new offences would be a matter for them to consider in due course. It may be relevant to note in this regard that the application of a public interest test is always part of the process when deciding whether to pursue a prosecution.

Revenge Pornography

The posting of sexually explicit material onto the internet, without the consent of the individual depicted, may have devastating consequences for the victim of such an act. Given the potential harm involved, it is proposed that, notwithstanding the potential application of existing offences to this conduct, further investigation should be conducted into whether specific legislative provision should be made. This provision could be of a similar nature to that enacted in the UK and further views are sought on this proposal.

Section 6: Conclusion and questions for consultation

The Council of Ministers is seeking input on what the appropriate legislative position should be for dealing with grossly offensive, threatening, false or malicious electronic communications in Jersey.

The subject of electronic communications, including social media, is a complex and emotive one. It will be important therefore, that any approach takes into account the need to provide the relevant authorities with accessible, up-to-date legislation, whilst ensuring freedom of expression. It is also important that any changes to legislation are made in such a way that ensures they are 'future proof', as far as it is practical to do so.

This consultation proposes that, so far as it is necessary and appropriate, further clarity and certainty should be brought to the law in this area. The Council of Ministers is seeking input on whether existing legislation is appropriate and sufficient, or whether further offences, such as the specific act of 'revenge pornography', should be introduced.

Questions for consultation (Please give reasons for your response)

1. Do you think that the approach proposed in this consultation document strikes the right balance between ensuring freedom of expression and the need to uphold the criminal law?
2. Do you think that, as a matter of general principle, people should be held accountable for their activities conducted online in the same way that they are for activities conducted offline?
3. Do you think it is appropriate to amend the existing offence in Article 51(a) of the Telecommunications (Jersey) Law 2002 so that it is clearer when the sending of a harmful online communication should be treated as criminal?
4. Do you think that it would be appropriate to create a new offence so that it is clearer when the sending of a harmful online communication should be treated as criminal?
5. Do you think that alternative approaches to tackle this type of behaviour should be considered as well as/or instead of changes to legislation? If so, please give details.

6. Do you believe that a specific offence should be considered relating to 'revenge pornography'?

7. Do you have any comments in relation to the topic that you feel have not been addressed in this consultation? If so, please give details.

Ways to respond

Telephone: +44 (0) 1534 448100

Email: HOCconsultation@gov.je

Write to: Harmful Electronic Communications Consultation
Cyril Le Marquand House
The Parade
St Helier
JE4 8UL

This consultation paper has been sent to the Public Consultation Register.

Consultation Summary of Responses
Council of Ministers



Review of Legislation on Harmful Electronic Communications

31 March - 19 June 2015

Summary of consultation responses:

Introduction

In March 2015, the Council of Ministers issued a public consultation on whether it would be appropriate to make changes to the legislation in Jersey applying to harmful electronic communications (i.e. cyber bullying, harassment, revenge porn). The purpose of this consultation was to seek views on whether the existing legislation is appropriate, or whether it requires amending, to remove any doubt about its application and to ensure that it is 'future proof'. It also considered whether a new offence is required to tackle the publication of revenge pornography.

In issuing this consultation, the Council recognised that it is important that the relevant authorities in Jersey have the ability, in appropriate cases, to prosecute people for sending grossly offensive, threatening, false or malicious electronic communications, including via social media. As part of this, the Council acknowledged that the law should enable the appropriate authorities to tackle behaviour that constitutes cyberbullying; however, they also noted that the law should not provide that electronic communications are subject to a more stringent level of legislation than other means of communication.

The consultation sought views both on the proposed policy approach and on the existing legislation, as well as asking seven particular questions:

1. Do you think that the approach proposed in this consultation document strikes the right balance between ensuring freedom of expression and the need to uphold the criminal law?

2. Do you think that, as a matter of general principle, people should be held accountable for their activities conducted online in the same way that they are for activities conducted offline?
3. Do you think it is appropriate to amend the existing offence in Article 51(a) of the Telecommunications (Jersey) Law 2002 so that it is clearer when the sending of a harmful online communication should be treated as criminal?
4. Do you think that it would be appropriate to create a new offence so that it is clearer when the sending of a harmful online communication should be treated as criminal?
5. Do you think that alternative approaches to tackle this type of behaviour should be considered as well as/or instead of changes to legislation? If so, please give details.
6. Do you believe that a specific offence should be considered relating to 'revenge pornography'?
7. Do you have any comments in relation to the topic that you feel have not been addressed in this consultation? If so, please give details.

The consultation was open for twelve weeks and closed on the 19th June 2015. It received twelve responses, a summary of which is enclosed below.

Summary of Consultation Responses

We received twelve responses to the consultation. Eleven responses were from individuals. One was from the Consumer Council.

Responses from Individuals

Given the sensitive nature of this topic, and in accordance with the States of Jersey's policy on public consultations, the responses from individuals have been anonymised, and their content has been summarised rather than repeated verbatim.

Most responses to the consultation reflected individual views, provided examples of personal experience and gave an insight into the potential for emotional distress that can result from harmful online communications.

The responses cover a range of subjects (from cyberbullying and freedom of expression, to questions of responsibility and the right to be forgotten) and provide a good indication of the complexity and emotional impact of this topic. Blogs are a topic of particular concern to many responders, particularly in terms of what should be considered harmful or unlawful in the context of publishing personal blogs.

Nine responses indicated that it would be advantageous to amend or clarify the existing legislation; seven suggested that it would be appropriate to create new offences for either the posting of harmful online communications or for the specific act of revenge pornography (though it is worth noting that many appeared unaware that this behaviour is likely already covered under existing legislation); nine agreed that the legislative approach should treat behaviour conducted online the same as behaviour conducted offline.

The responses also highlight the need for a proportionate approach, which takes into account the unique characteristics of online communication, and which recognises that legislation alone cannot be expected to address harmful online behaviour. The enclosed quotations provide a flavour of the responses:

- '...it is important that online publication is dealt with in a very similar mannervto [sic.] off-line publication'

- 'For those that haven't experienced this form of assault it is difficult to imagine what it feels like. I can assure you that it takes over your life. Even when it is finished the assault leaves its affect [sic.] on you.'
- 'A civilised society should always be open to new or different ideas, absolutely including ideas that some, or even all, of those supporting the established order disagree with.'
- 'People have to be held to account for what they write online when its [sic.] knowingly offensive to others.'
- '...the global reach of the internet means that while any framework of law might be used to constrain local individuals, the anonymity which the internet provides, and the global reach, ensures that a determined individual can always find a mechanism to flout any restrictions.'

Jersey Consumer Council

The Jersey Consumer Council submitted a substantive response on behalf of its members. The response concentrated on the importance of protecting freedom of expression, supported the proposed approach (i.e. that any amendments to the law should be proportionate, future-proof and platform neutral) and highlighted the role that education has to play in tackling harmful online behaviour.

In summary, the response stated that:

- 'It is very difficult to find the balance between preserving the right to one's freedom of expression, whilst at the same time removing speech that is deemed to be hateful.'
- '...comments produced, be they online or offline should be treated equally, and as such individuals should be held to account, where necessary.'
- 'As stated in the consultation, a large proportion of internet users feel confident in using the internet and engaging in social media.'
- 'The Council firmly believe in the important role of education in all matters to help everyone make informed choices; education is fundamental to this topic...'

The Jersey Consumer Council's response is attached as an appendix to this document.

It should be noted that the responses to the consultation mainly offer personal opinion and highlight individual experiences. As such, they provide limited new quantitative evidence; however, they do support the original quantitative research that was commissioned as part of the development of the consultation, as well as other analysis and evidence gathered throughout the process (e.g. international case studies).

Minister/department response to this feedback:

Next steps

Working jointly between the Home Affairs Department, the Economic Development Department, the States of Jersey Police and the Law Officers Department, officers will prepare recommendations on the options that are open to the Council of Ministers for making amendments to legislation, drawing on all of the evidence above. It is worth noting that any recommendations will depend upon the legal advice given in preparing law drafting instructions.

Supporting documents attached:

Appendix 1 – Jersey Consumer Council response

Explanatory Note

This draft Law would make amendments for the purpose of introducing more effective sanctions against “cyberbullying” and other offensive or malicious uses of online social media in particular, and telecommunications in general. *Article 1* would amend the Telecommunications (Jersey) Law 2002 to expand the scope of the offence in Article 51 of that Law. The substituted Article 51 would prohibit improper use of any telecommunications system (not just a public telecommunications system such as the telephone network). An offence of sending a message or other matter that is (or conveys anything that is) grossly offensive or of an indecent, obscene or menacing character would be committed only if the sender knew or intended the message to be of such a character or was aware of the risk that the message would be viewed as such by a reasonable member of the public. An offence would also be committed where a person sends a false message or persistently uses a telecommunications system for the purpose of causing annoyance, inconvenience or needless anxiety to another. The penalty for an offence under Article 51 would be increased to a maximum of 2 years’ imprisonment and an unlimited fine (either or both of which may be imposed by the court, under Article 13(3) of the Interpretation (Jersey) Law 1954).

In the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, the amendments made by *Article 2* would have the effect of permitting the court to make or impose a restraining order on conviction for any offence (not only an offence of harassment), if the court is satisfied that it is necessary to do so to protect the victim or any person named in the order from further conduct which would amount to harassment, or from a perceived threat of violence. The penalties for an offence of harassment, and for breach of a restraining order, are increased correspondingly with the change to the Telecommunications (Jersey) Law 2002, to a maximum of 2 years imprisonment and an unlimited fine. New provision is also made for amendment or revocation of a restraining order, on the application of the Attorney General or the person against whom the order was made.

Article 3 would give the title by which this Law may be cited and provide for it to come into force 7 days after it is registered.



Jersey

DRAFT TELECOMMUNICATIONS (AMENDMENT No. 3) AND CRIME (MISCELLANEOUS PROVISIONS) (JERSEY) LAW 201-

A LAW to amend further the Telecommunications (Jersey) Law 2002 and to amend the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008

Adopted by the States [date to be inserted]
Sanctioned by Order of Her Majesty in Council [date to be inserted]
Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Telecommunications (Jersey) Law 2002 amended

- (1) The Telecommunications (Jersey) Law 2002¹ is amended in accordance with paragraphs (2) and (3), and in those paragraphs a reference to an Article is to an Article of the same number in that Law.
- (2) In Article 1(1), in the definition “message” for the word “means” there shall be substituted the word “includes”.
- (3) For Article 51 there shall be substituted the following Article –

“51 Improper use of telecommunications system

- (1) A person (the ‘sender’) who, by means of a telecommunication system, sends a message or other matter that is (or conveys anything that is) grossly offensive or of an indecent, obscene or menacing character, is guilty of an offence if either paragraph (2) or (3) applies.
- (2) This paragraph applies if the sender knew or intended the message to be grossly offensive or of an indecent, obscene or menacing character.
- (3) This paragraph applies if the sender was aware, at the time of sending the message, of the risk that it would be viewed as grossly

offensive or of an indecent, obscene or menacing character by any reasonable member of the public.

- (4) A person who, for the purpose of causing annoyance, inconvenience or needless anxiety to another –
 - (a) sends, by means of a telecommunication system, a message that the person knows to be false; or
 - (b) persistently makes use of a telecommunication system, is guilty of an offence.
- (5) In paragraphs (2) to (4), ‘message’ includes a message or other matter, and anything conveyed by the message.
- (6) The States may make Regulations amending this Article if it is considered necessary to do so to take account of changes in technology, and such Regulations may contain –
 - (a) provision consequentially amending or modifying, for the purposes of this Article, an expression used or defined in this Law; and
 - (b) incidental, supplemental or consequential provision.
- (7) A person guilty of an offence under this Article shall be liable to imprisonment for a term of 2 years and to a fine.”.

2 **Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 amended**

- (1) The Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008² is amended in accordance with paragraphs (2) to (5), and in those paragraphs a reference to an Article is to an Article of the same number in that Law.
- (2) For Article 3(3) there shall be substituted the following paragraph –

“(3) A person who commits an offence under paragraph (1) shall be liable to imprisonment for a term of 2 years and to a fine.”.
- (3) For the heading to Article 5 there shall be substituted the following heading –

“Restraining orders”.

- (4) In Article 5 –
 - (a) in paragraph (1) the words “under Article 3(1)” shall be deleted;
 - (b) in paragraph (2) for the words “in order to ensure that the person will not commit a further offence under Article 3(1)” there shall be substituted –

“for the purpose of protecting the victim of the offence, or any other person named in the order, from conduct by the person against whom the order is made, which would, if carried out –

 - (a) amount to harassment of the victim or other person named in the order; or

(b) be likely to cause the victim or such other person to be in fear of violence against them.”.

(5) For Article 6(2) there shall be substituted the following paragraph –

“(2) A person who commits an offence under paragraph (1) shall be liable to imprisonment for a term of 2 years and to a fine.”.

(6) For Article 7(1) and (2) there shall be substituted the following –

“(1) An order under Article 5 may be amended or revoked by the court which made the order, on the application of –

(a) the Attorney General; or

(b) the person against whom the order was made.

(2) The court to which an application is made under paragraph (1) may amend or revoke the order if (and to the extent that) the court is satisfied that it is appropriate to do so.”.

3 Citation and commencement

This Law may be cited as the Telecommunications (Amendment No. 3) and Crime (Miscellaneous Provisions) (Jersey) Law 201- and shall come into force 7 days after being registered.

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- ¹ *chapter 06.288*
² *chapter 08.115*