

STATES OF JERSEY

Economic Affairs Scrutiny Panel Harmful Telecommunications

THURSDAY, 26th MAY 2016

Panel:

Deputy S.M. Brée of St. Clement (Chairman)

Deputy D. Johnson of St. Mary (Vice-Chairman)

Connétable J.E. Le Maistre of Grouville

Witnesses:

The Chief Minister

The Minister for Home Affairs

Legal Adviser

Policy Director, Community and Constitutional Affairs

Director of Digital and Telecoms Policy

[11:00]

Deputy S.M. Brée of St. Clement (Chairman):

Welcome, Ministers, ladies and gentlemen, and members of the public and media. First of all, thank you very much for coming at such short notice, Chief Minister. I understand the Assistant Chief Minister is not well so please send him a speedy recovery from this panel.

The Chief Minister:

Thank you.

Deputy S.M. Brée:

This is a public hearing into the Draft Telecommunications (Amendment No. 3) and Crime (Miscellaneous Provisions) (Jersey) Law, that is P.19/2016. The purpose of this is to ask questions in certain areas and to seek clarification. Before we start, if I can remind everybody that this is a public hearing and if you could please familiarise yourselves, if you do not already know them, with the various signs around the room explaining the rules and regulations of a public hearing. If I could please ask everybody - that includes the member of the public and media - to ensure that any mobile phones or devices are at least switched to silent. Not aircraft mode, silent. To start with we are going to go round the table, for the sake of the tape, just doing introductions. My name is Deputy Simon Brée, I am the Chairman of the Economic Affairs Scrutiny Panel.

Deputy S.M. Brée:

Thank you very much indeed. Launching straight in, one thing I would ask is because we only have you for a short time, Chief Minister, as I understand it, you need to be left by, is it 12.00?

The Chief Minister:

Probably we can ... 12.10.

Deputy S.M. Brée:

Okay. What we shall try and do ...

The Chief Minister:

If you need those extra 10 minutes.

Deputy S.M. Brée:

... if I may politely request that any answers are kept, where possible, short and succinct as we can because we have quite a bit to be getting through. I know sometimes that comes as a difficulty to some people in a public hearing but we shall try.

The Chief Minister:

And you know I am one of these, Chairman, do you not?

Deputy S.M. Brée:

You may well think that, I could not possibly comment. First of all, just to look at the draft legislation. Now, to confirm, this was originally debated on 12th April, at which time the principles were approved by the States Assembly. It is due for its second reading on 14th June in front of the States Assembly, by which time States Members will have had a comments paper from us on this issue, with our thoughts and any recommendations. First of all I would like to just go a little bit back to the basics and looking at the rationale behind bringing the draft legislation to the States

Assembly. What was the need to bring these amendments, if you can be as short and succinct as possible?

The Chief Minister:

Can I just start by saying thank you very much indeed, Chairman, for being accommodating regarding the absence of Senator Ozouf, and I apologise that he is not able to be here. I also apologise that I have limited time. Inevitably, because it is not my direct responsibility, there might be times today when normally I would answer the question but I will ask officers to provide support. But in answer to your question, I think it was quite simply an updating of the regulation to make sure that our regulation was keeping pace with new forms of communication and, at the same time, trying to ensure that it was not so descriptive that it would not be able to be fit for purpose for when forms of communication and different channels of communication changed as well. So it was responding to the way that we communicate and the channels that we use.

Deputy S.M. Brée:

I suppose the question is, following on from that, what deficiencies were identified in the existing laws because, as we understand it, there are prosecutions that have taken place, both past and current. Were the existing laws not sufficient in that area to bring successful prosecutions?

The Chief Minister:

Probably it falls between 2 stools. It is fair to say that offences have been committed under the existing law. Various offences were taken to court over the past number of years. But it was still felt that it needed updating to make sure that it was capturing appropriately and dealing appropriately with the changed ways that we now communicate and the channels that we use.

Deputy S.M. Brée:

The process has been ongoing for a while. If I may ask, who or what prompted the start of the process to bring it to draft legislation?

The Chief Minister:

Who I am not aware of but I am sure others will be.

Director of Digital and Telecoms Policy:

The initial concern came from the previous Attorney General who believed that there might be a lacuna and need for some legislation and wanted us to make sure that was not the case. One of the things that we needed to look at was the fact that the types of offences, types of behaviour have changed vastly over the last year or so. So something like revenge pornography, which is now quite a well-known term, that was very new then and it was uncertain at the time because

there had not been any tests whether or not existing legislation would be fit for purpose. So we took the opportunity at that time to think: “Okay, is it working now?” but also: “Are there things that we can do to improve legislation to make sure that as technology changes and as behaviour changes the legislation remains fit for purpose despite those changes?”

Legal Adviser:

If I can just add a comment on that. That is absolutely right and of course when the initial correspondence went from the Attorney General there were questions at that stage about the interpretation of the definition of a telecommunications system specifically, which had not been used in relation to prosecutions of communications sent over social media. What has happened since that time is that there were prosecutions both in the U.K. (United Kingdom) under very similar legislation in their Communications Act 2003 and also subsequently in Jersey of communications sent by social media where they crossed the high threshold of the prosecution under this enactment. So that doubt was removed. But it was still ... I think we were quite agreed that it was essential that there was that careful consideration given to the modes of communication which are taking place now and the right ... whether the legislation remained fit for purpose in all other respects.

The Minister for Home Affairs:

If I may, there has also been some representation from States Members who attended the Commonwealth Parliamentary Association Conference recently where the issue of the Istanbul Convention was raised, particularly around revenge porn, and representations were made from those members who were concerned about whether or not we could meet the Istanbul Convention, and we feel in the department that it would be right and proper to do so. So we have got a number of pieces of work going on that will bring us into line with the Istanbul Convention and our part in this piece of work will do that.

The Connétable of Grouville:

Just to confirm, what we are saying here is that these offences are probably covered by the legislation but this is just removing any doubt whatsoever.

The Minister for Home Affairs:

Yes.

The Chief Minister:

I think you could argue the uncertainty about the telecommunications channel without the change.

Legal Adviser:

Yes, I think that is right. We wanted to remove any doubt about the *mens rea* that was required in order to commit the offences and we also wanted to ...

Deputy S.M. Brée:

We go on to cover that issue a little bit later on, if we may.

Legal Adviser:

But the Chief Minister is quite right that what we ultimately wanted to do is to make sure that this covers communications sent otherwise than via a public telecommunications system.

The Minister for Home Affairs:

Also to provide protection for victims for the first time in terms of restraining orders that come into the ...

Deputy S.M. Brée:

Once again we go on to cover that a little bit later on, if we may. We are just merely looking at the initial rationale and purpose behind it. Any other questions, gentlemen, on this area?

The Minister for Home Affairs:

That is one of the purposes.

Deputy S.M. Brée:

Next we would like to go on and talk about the consultation that was done, that is contained within P.19/2016. John, would you like to start on this?

The Connétable of Grouville:

Yes, the consultation did not appear to go too well because there was not a lot of people responding. Do you have any reason why that would be?

Director of Digital and Telecoms Policy:

If I may, because I was dealing with the consultation. My experience in Jersey is that you often do not get a large number of responses to a consultation. It did get quite a lot of attention from the press and from people more broadly who did not then respond directly to the consultation, so it raised a large amount of debate both in public and within the States Assembly with different Members, while this may not have been reflected in the number of individuals who responded. It may also reflect the fact that although when this does happen it can be a very traumatic incident and it can cause a great deal of harm, incidents do not necessarily affect that many people. So those that did respond tended to be people who felt they had a personal connection with the issue

and had experienced it themselves. Certainly it may be that. But I am speculating slightly because I do not know why people who did not respond decided not to.

The Connétable of Grouville:

I think probably more meaningful was the survey that was done in 2013 where 755 people were asked their opinions and it appeared at the time, it may have changed, that somewhere between 3 and 2 per cent of people have experienced cyberbullying or threatening emails and ... what I was going to say was, it does not really matter how many people are being threatened, 3 per cent of our population is quite a large number of people and it does not really matter how many people are being bullied, we need to find a resolution to it.

The Minister for Home Affairs:

It is the impact on these people as well so that it is disproportionate perhaps to the percentage of people who are subject to the experience.

Deputy S.M. Brée:

On that front, the survey done in 2013, do you feel that possibly, as we all know, technology, the internet and communications generally are moving rapidly, every day it seems, do you feel that a survey done in 2013 is a correct and true reflection of the situation as at today?

The Chief Minister:

The reality is you cannot answer it in any other way than it is a reflection of the situation at the point of the survey. But as you said, Chairman, these issues certainly have been considered more by States Members, as the Minister has just said about the Istanbul Convention and C.P.A. (Commonwealth Parliamentary Association) events and there is more awareness of them in the community. There are more people who have access to smart phones, so there is a greater ability for it to take place, but we cannot say that it is an absolute reflection of today. Anecdotally one might fear the situation is getting worse not better but perhaps ... I do not know whether ...

Deputy S.M. Brée:

That is one question that I had. What evidence, if any, do you have to suggest that the situation has got worse since 2013?

Director of Digital and Telecoms Policy:

The evidence that we do have access to is of course the police cases, the incidents the police deal with. The Legal Adviser might want to go into some more detail but the top level statistics, which I think you may have discussed with a police representative, in 2014 the police managed 21 official complaints of online harassment. When we see in 2015 that increased and they investigated 34

harassment-type cyber offences and 22 offences under the Communications Act. So we are seeing from the number reported to the police some increase. That is of course only 2 years so again there is not trend data there. Again that may reflect, of course, increased awareness as much as increased incidents. But the other thing that we can look at is international data and the trends in Jersey do tend in this area to mirror quite closely those in places like the U.K., which has a similar level of take-up of the internet. So we can look at what is happening internationally as well.

[11:15]

Deputy S.M. Brée:

Any other questions on this area? We would now just like to move on to the broad area, if you like, of the legislation that is being proposed. David, would you like to ...?

The Deputy of St. Mary:

Perhaps I will start by making the basic point that this proposal obviously seeks to amend both the Telecommunications (Jersey) Law 2002 and the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008. I think I am not being unfair by saying the debate we had was much more emphasis on the telecommunications side rather than the criminal aspect. This perhaps is basically the public perception. Is there some reason why the 2 were lumped together, as it were? Should they possibly have been dealt with more separately and got a higher profile as a result?

The Minister for Home Affairs:

I think the 2 work symbiotically really, and they are interrelated. We decided to look at the broad aspect of how we are using telecommunications and how that impacts on people's lives. So at every point the 2 interrelate really. Perhaps not every point but particularly when you are looking into criminal aspects and harassment the 2 issues work well together. It was decided therefore that it was sensible to deal with them together rather than wait until further pieces of legislation that would cover crime and disorderly harassment would ... we can bring that into effect at an early stage.

The Deputy of St. Mary:

I am not being critical. I was just saying the mode of presentation, I think some States Members might have thought that the criminal aspect was an annex to the telecommunications side, not realising it was a separate item altogether. I just wanted to bring that out into the open really to suggest it is as important in the same area.

Deputy S.M. Brée:

One question I had with regards to the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 as amended that is being proposed is the significance of the change that is being proposed in the restraining orders, as Deputy Johnson was saying, not only refers to the telecommunications offences but we understand can be extended to cover many other offences as well. Could you explain what "other offences" this change is intended to produce or impact on, should I say?

The Chief Minister:

Can I just say: the first thing is the Deputy of St. Mary is absolutely right. It is an amendment to a totally different law and therefore it covers everything that that law can be applied to, but the Legal Adviser will give the detail of it.

Legal Adviser:

Just to sort of come back slightly to the question before, that this re-germination of the idea here partly was that we recognised that there was a problem in the telecommunications and these harmful communications in that arena because if somebody engaged in a course of harassing conduct then if they were convicted for that it would be possible to get this restraining order in respect of them. But if someone engaged in the first of those acts of harassment, whether it be the posting of a piece of revenge pornography, which can be absolutely devastating to the victim, it would not be possible to get a restraining order in respect of that person because they had not yet engaged in the course of conduct. That is what flags ... there was this issue but what we also recognised is that the equivalent harassment legislation in the U.K. was changed in 2004.¹ I think it came into effect in 2007.² The amendment provided the same access to restraining orders to protect the victim of any offence, so the UK has already made an equivalent amendment to the amendment we are making now. It can apply to any offence so if somebody is convicted - and only if they are convicted - if they are convicted of an assault on a person or if they are convicted of robbery or perhaps a rape even, it is entirely proper that if there was a concern that the perpetrator would go on to commit further acts of harassment against the victim or their family it should be possible to make a restraining order against them. There are civil remedies potentially that cover some of the same ground but they are expensive and they are not going to be available to a great number of members of the public in Jersey. So this is ensuring that everyone has the same protection regardless of the offences that have been committed. It applies following a conviction for any offence, the same as in the U.K. But it is important to recognise that there is a limit in respect of this in that you can only make a restraining order where you expect that the person might go on to commit further acts of harassment or violence against the victim or some other person, perhaps a member of their family. So it is not an open ... sorry, I am going against your rule on extended answers to questions, I know.

¹ By Section 12 of the Domestic Violence, Crime and Victims Act 2004

² Subsequently clarified as having come into force in September 2009

Deputy S.M. Brée:

I am watching the clock very carefully.

Legal Adviser:

I do not want to send anyone to sleep in the back there, but it is really - and we lawyers love the sound of our voice I know - important that that protection is comprehensive but also that we recognise there are limiting factors applying for the court to decide.

Deputy S.M. Brée:

Bearing in mind that this is a fairly major change to the sentencing options available to the courts across all offences, do you not feel, Chief Minister, that this should have been made more apparent in the debate on the principles?

The Chief Minister:

Certainly, Chairman, you will be aware I was not in the Assembly for that debate so I cannot really comment on the fullness of the explanation of the changes to this particular law, but I accept the point that you are making and the point the Deputy of St. Mary made. It is important that Members of the States are clearly aware of the implications of this change, not just in regard to the amendments to the Telecommunications Law. I imagine that the Minister would, during the Articles, have gone on to explain more fully the changes to those Articles rather than just the principle, but hopefully your comments will add further weight to the understanding that it is a completely different law and those changes are wide-ranging.

The Connétable of Grouville:

Would it have been better to have launched it as a separate proposition because then you would have known the 2 things were completely separate whereas certainly we initially thought one related specifically to the other when in actual fact it is far more important than that because it is much more broad-ranging?

The Chief Minister:

You have heard the rationale for bringing them together and I think that is a good rationale. I am not sure I can say much more ...

The Connétable of Grouville:

They could have been brought at the same time separately but perhaps it is ...

The Chief Minister:

Yes, I mean of course in practice that could have been the case. There was a good rationale for putting them together. One might argue the opposing rationale.

Deputy S.M. Brée:

If we now move on to just seeking a little bit of clarity about what the proposed legislation will mean. While I understand the comments that you made with regards to, if you like, future proofing the law, what do you believe will be intended by the amendments, particularly to the Telecoms Law I am referring there, because I think we have covered, for the moment, the restraining order side? What are you trying to achieve?

The Chief Minister:

We are trying to make sure that the law covers activities that are undertaken on modern ways of communication in a way that they might have been caught under the previous version of the Telecommunications Law in a way that we understood. Yet at the same time we are trying to make sure that freedom of speech is protected. It is fair to say that we possibly have a law here that not everybody is satisfied with. Those who are concerned about freedom of speech might not want any legislation like this. Those who are ultimately concerned that people cannot be harassed and revenge porn cannot take place might feel that it does not do enough to clamp down on that. So we very much have wanted to make sure that offences committed on those channels and in future types of communications channel, whatever that future might be, are covered by the law but at the same time recognising that the protection for freedom of speech is extremely important.

Deputy S.M. Brée:

Now a point of clarification, if you may. Under the proposed amendments our understanding of them is that any third party can make a complaint about any comment posted or sent and it is not about the victim or the subject of that comment. It is not necessarily about their view of it. Any member of the public can make a complaint about any comment that they may read, see or otherwise have access to, is that correct?

The Chief Minister:

Yes, I mean, we could go into the technical legal bit, which the Legal Adviser I am sure is itching to do.

Deputy S.M. Brée:

We may not have time for that, I am afraid.

The Chief Minister:

No. But my understanding is that this covers some activity and comments, which are difficult for some of us to talk about let alone for policy makers to get to grips with. I think in your briefings there are examples of such things as chatrooms - is that the correct word? - where people of like mind, that we would find perhaps difficult to understand, make comments, make arguments, which potentially would meet this test of what a reasonable person would find to be offensive, and we do need to cover that. Some of this is quite difficult. One has to try and step out of one's personal life experience - that is difficult to do - and think about our children as a whole. If there are things that they might have access to, views and offensive comments, in these chatrooms there surely must be some means of trying to say that is not acceptable, and that is what, I think hopefully in layman terms, I have covered what the legal technicality is trying to deal with. But I do not know if our Legal Adviser wants to add anything to that.

Legal Adviser:

No, I mean, I think that answers that point.

Deputy S.M. Brée:

David, do you want to ...?

The Deputy of St. Mary:

If I could just get into the text of the new Article 51, if I may? Two definitions trouble me slightly. First, the term "grossly offensive". Now are we effectively relying on case law to determine what that is? There is no one definition there, is there, so if there cannot be a definition ... I mean how is it ... it is an ongoing changing definition, I assume?

Legal Adviser:

Yes. So this is part of what we are, I suppose, trying to balance in terms of ... of course the values of society will change over time and if we try to pin down and define precisely in the legislation what amounts to something that is grossly offensive what we would end up doing in fact is limiting the utility of the offence and we would defeat the future-proofing objective of this legislation. What I can say about it is that these are the same terms that have been used in this legislation in Jersey, the Telecommunications Law as it stands at the moment. They are the same terms that are used in section 127 of the Communications Act in the U.K. and the courts here are already using case law on the application of those words in applying the Telecommunications Law. So we fully expect that they will continue to do so. To put it in a nutshell, what the case law in the U.K. has said on this is that really there should be quite a high bar to prosecution for this offence.

[11:30]

Really, what you are looking at is communications that contravene the very basic standards of decency in society. Now that does sound woolly, but I think the other safeguards on that are that for a prosecution to take place the Attorney General needs to be satisfied, in relation to any prosecution, that both the evidentiary test that somebody has committed the offence but also that it is in the public interest to pursue a prosecution. It may not be in the public interest to go about prosecuting jokes or banter, even if they cross the high threshold to commit the offence, which I do not expect they would, so there are a number of safeguards in place, both with this high bar being included in the legislation and the inclusion of the new *mens rea* and the prosecutorial discretion that should protect against abuse of this legislation.

The Deputy of St. Mary:

So in effect the term will be interpreted according to case law both here and in the U.K. largely?

Legal Adviser:

Here and in the U.K. and because it is a common English word it will be for the courts to look at ... by reference to the basic standards of society as they stand at the time what they think those words mean.

The Deputy of St. Mary:

Okay. Now my second point, which is perhaps even more challenging, is the *mens rea*, or the intent. Subsection (3) of 51 says: "This paragraph applies if the sender was aware of the risk that it will be viewed as grossly offensive, et cetera, by any reasonable member of the public." So to be guilty of this offence the sender has to be aware. There is reference here to a reasonable member of the public, an alternative way of putting it will be to say they will be guilty of an offence if a reasonable member of the public will interpret it as grossly offensive. All I am saying is that by putting the fairly strong *mens rea* obligation within that is it not a fairly easy charge to defend? The sender would say ... it might seemed a reasonable man of the public that an action was grossly offensive all the sender has to do is to say: "Not to me it was not."

Legal Adviser:

I think these kinds of issues confront the police and law enforcement on a fairly regular basis in terms of gathering evidence as to a person's intention. I can see entirely why you raised the point. What we wanted to do was to make it clear that the sender of the message has to be aware of the risk. When we talk about recklessness, that it is subjective recklessness. The person alleged to have committed the offence knows that there is a risk that they are sending a message that is offensive. That might in some cases be more difficult to prove than objective recklessness, but it is also arguably a better safeguard where free speech is concerned.

The Minister for Home Affairs:

If I may put it in very simplistic terms, I think the idea is that we have to be aware of our behaviour online and then via telecommunications just as we do in the street every day. Somebody may consider making an abusive comment to a person that they see on the street and that is just as offensive as it is if it was a tweet or a message in Snapchat or wherever it may be.

The Deputy of St. Mary:

The point I am making is that the recipient might interpret it as grossly offensive to him but if the sender can show ... and be cavalier about it by saying: "I was not aware it was going to provoke that reaction" then he is not going to be guilty, is he?

Legal Adviser:

If the sender is entirely unaware of the risk that the message would be grossly offensive or indecent then they would not be guilty of the offence. But if the message is of that character, by reference to the perspective of an ordinary member of the public, then it should not be impossible to prove whether or not the person, in all of their particular circumstances, was aware of that risk.

Policy Director, Community and Constitutional Affairs:

I think the ingredients of every offence are different and I think in this case it would be the skill of the police officer in the investigation to ask the question: "Would a reasonable member of the public consider it to be offensive if you have performed this particular act or you have published this particular tweet." So I think it is a difficult question to answer, and that is the skill of the investigating officers in drawing out the ingredients of the offence. Those will be the decisions that will be made as to whether the evidential test is passed before it goes through to the public interest test.

The Deputy of St. Mary:

I am just wondering whether a better interpretation or better definition would be that if a reasonable member of the public regards it as offensive then the sender is guilty.

Legal Adviser:

You could approach it in that way. The difficulty you would have then is that somebody who was entirely unaware of the risk that their message was grossly offensive could potentially be prosecuted for sending that message. The policy view is that that was not appropriate.

The Chief Minister:

You are hitting right on the nub of the difficulty of trying to frame a piece of legislation that protects those 2 sides of the coin. One is the freedom of speech and the other is stopping people from

behaving in this manner. I may be about to use an example which does not fit this, but I think you have got that example of the individual in Nottingham who sent a tweet or something about blowing up the Nottingham Airport, which was ...

The Deputy of St. Mary:

Robin Hood.

The Chief Minister:

... meant as a joke, as I understand it. But went all through to a prosecution and I am not sure if it was imprisonment or fine, but there has got to be an element of reasonable in it and that person was, I think it could be argued, simply trying to make a joke about the difficult situation they found themselves in, and had no intent of offending anyone or would even have thought that it would be offensive. It was just an amusing tweet and we really do not want to be creating legislation that would catch that sort of action.

The Deputy of St. Mary:

I also do accept that, equally I am just concerned that it might be difficult to get a prosecution on a first-time basis. Is that perhaps not the thrust of the legislation to have this in place so that if an offence is committed then maybe a police warning or whatever will be the next step. The perpetrator cannot thereafter say that he is not aware because he has been made so aware, is that the point?

Legal Adviser:

I think just to pick up on the points the Chief Minister is making. The Robin Hood airport case, *DPP v Chambers*, the person was prosecuted and it was clearly intended as a joke. Ultimately his appeal was successful and his conviction was overturned, and that was one of the cases that set out very clearly the *mens rea* test that in fact we are codifying to protect against similar prosecutions happening in the future here. In that case he clearly was not aware that his message would be viewed as menacing, which was the ground under which he was prosecuted. So that is an important safeguard within that *mens rea* element of the offence. Sorry, having diverted on to that I did not come back ... This is all about trying to achieve that balance between the competing Article 8 rights potentially of a victim and of a person wanting to send a message, and hopefully this strikes that.

The Deputy of St. Mary:

We understand the need to keep the balance between freedom of speech and prosecuting appropriately.

The Connétable of Grouville:

While on that point, obviously we want to preserve the concept of freedom of speech and we all agree with that, but it does mean that the bar will be set very high, so prosecutions will be few and far between. Do you think the 2 to 3 per cent of people who think they are being cyberbullied, certainly a proportion of those will not find any comfort in this law at all?

The Chief Minister:

I am the least knowledgeable person sitting at this side of the table. If you separate out the offences that we might be getting, so it is probably ... if you take revenge porn I imagine, and I am not in the courts or a lawyer, it is easier to be able to show that there was an intent and they knew what they were doing when they started firing off those emails of pictures around their contacts because they are sent with an intent. It will of course be more difficult in other areas potentially.

The Connétable of Grouville:

The point is you could be rude, you can be offensive - so long as it is not grossly offensive - and that will be upsetting some of the 3 per cent. But they will not have any comfort in this law. Only that if it goes too far. I am just wondering whether people are aware of that fact and whether they should be made aware of that fact because I think people might be expecting more from this law than they ever possibly deliver because of the protection of freedom of speech.

The Minister for Home Affairs:

Is that not where the restraining orders and the ability to determine restraining orders comes in because that then gives the ability to protect the victim from ...

Deputy S.M. Brée:

The restraining order can only be brought in if a person is found guilty of an offence. The point that we are looking at as a panel is that the bar for prosecution, we are not even saying successful prosecution, but the bar for a prosecution is very high. The C.P.S. (Crown Prosecution Service) guidelines issued in March 2016, guidelines on prosecuting cases involving communication sent via social media, stresses the point that the bar is a very high one and that no prosecution should be brought unless some very, very difficult tests have been met. The panel's point is the ability to bring successful prosecutions, and only from then can you then issue a restraining order, it is likely to be very difficult, would you agree with that?

Director of Digital and Telecoms Policy:

May I add a couple of points to that because I absolutely agree with the panel, it is a high bar and deliberately so from a policy perspective but I recognise your concern. I think there are 2 things I would like to add to the discussion. One is that, as the guidelines you have got there illustrate, you

have to take into account the person who is sending the message as well, whether it is somebody who is young or innocent or naive, that there is public ... you have to think about whether or not you would want to prosecute that person. The other very important point is we do not want to be having a different set of standards for online behaviour than we would have in the real world. I could be rude to somebody - I am not - but I can be rude to somebody in the pub. We need to make sure that we are treating people in the different ... the online world and the offline world are not really 2 different things anymore to lots of people. We need to make sure our legislation reflects that.

Legal Adviser:

One thing maybe to add is that this piece of legislation will not operate in a vacuum. So there are other ... as you say, there will be people who will not be satisfied because they will see that this is a high bar to prosecution, this is not new and in some respects the courts already apply these *mens rea* elements in cases, but what we are doing is setting them out in the law to make it absolutely clear that there is a high bar to pass before someone may be treated as having committed a crime. So there are other remedies available to people who want to pursue them, for instance an action in defamation or in breach of confidence or other civil remedies, civil restraining orders, that people can pursue if they think that that is appropriate to their circumstances. They might have lower thresholds but this is about the criminal law and the policy view is that this offence should have a high threshold.

The Deputy of St. Mary:

Just on the *mens rea* aspect for the moment, you mentioned the different ages. For young people, and this is not largely ... yes, it is largely for their benefit too, would an education system which gives them guidance as to usage of social media be regarded as making them aware in advance so that they are more easy to prosecute afterwards?

The Minister for Home Affairs:

That is already happening as well. The E-Safety Committee have been set up. Education are a key player in that committee and also Prison Me No Way is including E-Safety as part of their courses when they go out to schools. So there is a great deal of work being done with young people so that they are aware of the potential pitfalls of their behaviour online as well as other ethics that are dealt with, like drugs and ...

The Deputy of St. Mary:

So technically, I am not saying it would happen in practice, if someone did receive a message which was grossly offensive to them it might be difficult for the sender to say: "I was not aware" if they had an education on that basis.

[11:45]

The Minister for Home Affairs:

Very much so, yes.

The Deputy of St. Mary:

So prosecution would be easier then. Okay.

The Connétable of Grouville:

Chairman, can I ask a question about revenge porn? Could you confirm or otherwise that it does not just have to be done as an act of revenge. That in actual fact a partner who sends an explicit photograph of their partner is also committing an offence if that partner becomes ... they would probably split up after that obviously, but it was not done as a matter of revenge it would still be covered under the law in the same way. So “revenge porn” is a bit of a misnomer in other words?

Legal Adviser:

Yes, that is right is the short answer. The U.K. has enacted this specific revenge pornography offence³ which relates to the distribution of a private sexual image of someone without their consent and with the intention of causing them distress. We have not adopted that because we have already seen prosecutions be successful under the Telecommunications Law as it stands so we have not needed to create a similar offence here, but revenge is not a key ingredient of the U.K. offence or of this offence. It is just that is the most common scenario in which it takes place.

The Connétable of Grouville:

It is important the public are aware that it actually is broader; quite rightly so, in my opinion.

Director of Digital and Telecoms Policy:

I think the Legal Adviser raised an important point about education. Legislation cannot be seen in a vacuum, education is crucial to this and that is all part of it. Make sure we give them how to play, how to protect themselves on both sides of the coin.

Deputy S.M. Brée:

If I may, I would like to move on to an area that the Chief Minister has already raised, which are concerns about freedom of speech. A number of people, both fellow politicians and various bloggers around the Island, have approached me with grave concerns about this legislation and its

³ In the Criminal Justice and Courts Act 2015

potential to impinge on free speech. How would you counter the argument that this proposed amended legislation will impinge on the right of free speech?

The Chief Minister:

I think the debate we have just had gets to this point... we cannot, on the one hand, think that the bar is too high, and there were I think are excellent questions from members of the panel about the bar being set so high. You have to have the bar set high in order to protect ... the other side of the coin is that by having a high bar you are protecting free speech. Therefore the lower you bring the bar down the less you are able to make an argument that you are protecting free speech. That is where the challenge of this legislation is; it is at its very core. You have a higher bar, you have got greater protection for free speech. You have a lower one you have got less protection.

Deputy S.M. Brée:

So in your opinion the bar for bringing a prosecution has been set at a sufficiently high level so as not to impinge on free speech, is that correct?

The Chief Minister:

It is always difficult. What policy makers have got to do is step away from their own circumstances because it would be easier to make an argument that the bar is too high. But I, in my role, equally accept that it is really important that people do have the ability and have access to freedom of speech. Therefore I think on balance, trying to take those 2 things into consideration, bear in mind I am a father with 2 young children so I could have a natural inclination I do not want ... all that I see happening, I want the toughest legislation in order to deal with anything that might affect them adversely. Yet, on the other hand, I want people in our community to be able to speak freely about every issue that they may wish to. Therefore, on balance, we came to the view that this was the correct approach. But I fully accept what the Constable was saying, that for some people they think it is not tough enough because it does not deal with their individual situation because that does not meet this test. So there are those safeguards for free speech where the bar is set, and of course we should never fall into the belief that it is easy to make a prosecutorial decision because you have always got the overlay of the public interest. The overlay of the public interest in this regard perhaps also means that the barrier is set high.

Deputy S.M. Brée:

Okay, so really to anybody who is concerned that this is an attempt to stifle various political commentators or bloggers or it is an attempt to impinge on the right of free speech, you are quite confident that the bar, as we call it, for bringing a prosecution is set sufficiently high to negate that concern and also the fact that Article 10 of the European Convention on Human Rights does state that you are also ... but also is to those comments that offend, shock or disturb. So from a purely,

if you like, police authority and law officers side of things you are confident that there is going to be no usage of this proposed amendment to the law to stifle free speech?

The Chief Minister:

Absolutely, I am confident that it is ... we just had a wide-ranging discussion about why that would be the case. Of course they are operational decisions for the police and the prosecutorial service. But it would seem to me from the way that the legislation is framed that it could not be used in that regard. In fact, I would be fascinated to hear why it was that it was felt that this high bar was too low. I think that most people make the argument the Constable made that perhaps it is too high.

The Connétable of Grouville:

I was not making that argument.

The Chief Minister:

Okay, sorry.

The Connétable of Grouville:

I was just pointing it out because I think there will be people who will think the bar is high. I understand it has to be high.

The Chief Minister:

Absolutely, yes.

Deputy S.M. Brée:

With regards to the, again ... we are still on the subject of, if you like, freedom of speech, should any person make a complaint to the police authorities about they believe that somebody has made a comment about somebody else that is grossly offensive, or whatever it may be, what guidelines are the police working to at the moment to deal with such complaint? Are there some official guidelines that are being provided to the police?

The Minister for Home Affairs:

I cannot answer on behalf of the police; that would be something for a police representative to refer to. I believe that they are quite able to take on board such complaints and deal with them in a manner that would be ...

Deputy S.M. Brée:

No, I was trying to establish, you mentioned that obviously part of the process was the evidence gathering by the police. It would be ... I think it is very important to understand what guidelines the

police have been provided with from the law officers as to what constitutes an offence under the law, with respect to those areas that are not black or white, i.e. there is going to be a large amount of grey areas, if you want to call it that, and whether or not any official guidance has come down either from the law officers or from the Minister as to what actions or comments constitute ...

The Minister for Home Affairs:

That is largely a matter for the courts and the subjectivity of the courts. That is where cases are tested and that is the whole point of having case law. I could consider ...

Legal Adviser:

Sorry, I am not aware of specific guidance on this at the moment but I think what we would need to do in any event on the passage of this legislation is make sure that everyone is ... we would need to look again at any guidance anyway and make sure it reflects the high bar in the *mens rea*, which is now going to be inserted into the legislation. Maybe that is something that could be taken away to think about.

Director of Digital and Telecoms Policy:

If I could just add that in terms of the way the police are handling things at the moment - the police are not here and I cannot speak on their behalf - but you talk about shades of grey, which I think is an interesting way of putting it. When we look at how the police have dealt over the last few years with a case that has come to them, there is a mixture of approaches in terms of words of advice, guidance given, so they are taking into account the sheer range of type of events already. What we are trying to do in this legislation is give a bit more guidance there. But as the Legal Adviser says, once legislation is passed more is needed with that.

Legal Adviser:

In case it assists - I will try not to drone on - but I mentioned earlier that the courts here are applying case law from the U.K. on the application of a very similar or essentially identical offence that applies there to these kinds of communications. In the Robin Hood airport case, which the Chief Minister mentioned earlier, Lord Judge who is giving the leading decision in that case where they quashed the conviction said: "Satirical or iconoclastic or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it, should no doubt and will continue at their customary level quite undiminished by section 127 of the 2003 Act." Our courts would be applying the same approach that we should not be trying to interfere with those kinds of, albeit distasteful communications, communications that might not cross that high bar.

Deputy S.M. Brée:

So the U.K. case law, which has obviously partially determined originally guidelines on prosecuting cases issued by the C.P.S., i.e. does it get to court, you are satisfied that the courts in Jersey will follow the advice possibly of the C.P.S. in saying, and I quote from their report: “A prosecution is unlikely to be both necessary and proportionate where the content of the communication did not obviously go beyond what could conceivably be tolerable or unacceptable in an open and diverse society which upholds and respects freedom of expression”?

Legal Adviser:

I do not think it would necessarily be the case that we would follow the guidance provided by the C.P.S. The Attorney General is an independent prosecutorial decision maker and I think the C.P.S. approach is in line with the case law, so I would expect that the approach will be similar, but the AG would not follow the directives of the C.P.S.

Deputy S.M. Brée:

No, but they would take into consideration the C.P.S. guidelines.

Legal Adviser:

It would be an individual decision to be made in any individual case and we need to look at the guidance but I think that is, in general, the approach, I would expect.

The Chief Minister:

You would not expect the Attorney General just to take the C.P.S.’s guidelines off the shelf and say: “They are the ones that we are going to follow” but the C.P.S. guidelines are what is being followed in enactment of the U.K. law and therefore needing to ... what cases go before the U.K. courts and therefore lead in time to what the judgments are, those judgments are part of the decision-making process, or would be in our courts, but of course the Attorney General may consider developing guidelines now. Because you have got the same in one law as the other, you might reasonably expect those guidelines to be similar in approach.

Deputy S.M. Brée:

Thank you.

The Connétable of Grouville:

Chairman, can I ask a question about accusations and allegations? My understanding, and you might be able to confirm this, is that provided you do not know something is wrong you can make an allegation, and it will not be covered by this law, that would be covered by the common law of libel as opposed to this law. So as long as they do not know it to be false I can accuse anybody of anything really.

Legal Adviser:

Yes, this is the second sort of limb of that offence in Article 51(4)(a), yes. We brought that part of the offence forward directly from the existing Telecommunications Law. It is cast in exactly the same way. Yes, if you are not making repeated use of the telecommunications system, if what you are doing is just you are using it on the one occasion to make a communication, albeit for the purpose of causing annoyance, but you send something that you do not think is false then you will not have committed the offence.

[12:00]

The Connétable of Grouville:

So again a very high bar in a way because as long as you do not know somebody has not done something wrong you can accuse them of it. It would only be if there was evidence that you knew that they had not done the thing you accuse them of, so again it is a very high bar and it does allow freedom of speech again.

Legal Adviser:

Yes, you are right. It is if you know it is false, yes.

Deputy S.M. Brée:

Okay, any other areas on this sort of ...?

The Deputy of St. Mary:

No, freedom of speech is covered well, I think.

Deputy S.M. Brée:

Okay. One of the questions I had, going back a little bit, and sorry I do not mean to jump around but one of the things that I was interested in, obviously a lot of the sort of offences that this draft legislation is envisaged to cover relate to possibly cyberbullying. Now that obviously tends to be much more prevalent among younger people. I am thinking about below the age of 16, the handling of those sort of cases, because effectively if there is evidence gathered by the police that cyberbullying has taken place but it is between somebody, say, aged 14 to somebody in the same class as them aged 14, how does this law apply to a juvenile of that age?

The Minister for Home Affairs:

The criminal ages of responsibility are set out so if it was between the age of 10 and 14 they would only be responsible or it would only be possible to bring prosecution with the Attorney General's

consent for a very serious offence or murder. But above the age of 14 then there is criminal responsibility in full, in its entirety, I would imagine the charges can be brought and the prosecution could be brought and it would be dealt with by the Youth Court.⁴

Deputy S.M. Brée:

Okay, no, it was just to clarify.

Legal Adviser:

You are absolutely right, the Attorney General has recently issued a direction to Centeniers in relation to the prosecution of young child offenders, so those aged over the criminal age of responsibility, 10 up to the age of 14, it says that a prosecution should not take place of anyone under 12 without the Attorney General's express consent, and under 14 without his consent or that of the Crown Advocate. It would be in exceptional circumstances. That is partly because of the strength and value of the Parish Hall Inquiry system, which provides an alternative method of resolving these types of issues and alternative prosecutions in those cases. I do not know if you know anything about that.

Policy Director, Community and Constitutional Affairs:

I think the vast majority of these offences in young people will be dealt with in a Parish Hall Inquiry system, which would be entirely appropriate. I think if the offence was so serious you can think of circumstances whereby that might happen, as the Minister says, they would be prosecuted and heard by the Youth Court and/or potentially even the Royal Court with the enhanced sentencing option. But that would be very unlikely.

Deputy S.M. Brée:

Any other questions at the moment on sort of these areas, gentlemen? No. That does quite nicely bring us on to our next area we wanted to talk about, which was sentencing. A number of questions on sentencing. The first one is the sentencing policy. Is there any difference between the sentencing policy for convictions under this particular amendment between Jersey and the U.K. or have you followed basically the U.K. guidelines?

⁴ Subsequently clarified: The age of criminal responsibility is currently set out in the Criminal Justice (Young Offenders) (Jersey) Law 1994. A person can be held criminally responsible from the age of 10. However, under a direction issued by the AG to the Honorary Police, if a child is over 10 years of age, but under 14 they may only be prosecuted with the Attorney General's consent or consent of a Crown Advocate and there is a presumption that this will only occur in exceptional cases for very serious offences. Above the age of 14 the AG's direction does not apply and the prosecution could be brought and it would probably be dealt with by the Youth Court.

Legal Adviser:

The approach to sentencing in Jersey and the U.K. is very different. In sentencing in the U.K. for criminal offences, that is largely or entirely a matter for the court, whereas in Jersey the conclusions as to the sentence would be moved by the Attorney General. There is a difference of approach between the 2 jurisdictions. I could not comment, I am afraid, in detail; I do not have the information available to say what the precise differences might be in terms of the sentencing policy. Something we should perhaps write on afterwards.

Director of Digital and Telecoms Policy:

I think in terms of revenge pornography, the sentencing is similar in that it is 2 years under the new ...

Deputy S.M. Brée:

I mean that does raise ...

Legal Adviser:

Do you mean the maximum sentence?

Director of Digital and Telecoms Policy:

Yes.

Deputy S.M. Brée:

Yes, I am talking about the maximum sentence as allowed under the proposed law.

Legal Adviser:

Sorry, we are slightly at cross purposes. Sorry. The maximum sentence that can be imposed under this revised legislation would be the same as the maximum sentence that can be imposed with the revenge pornography offence, which has just been introduced in the U.K.

Deputy S.M. Brée:

So it is broadly following U.K., sort of, procedure?

Legal Adviser:

It is broadly following ...

Deputy S.M. Brée:

Or practice, should I say?

Legal Adviser:

... the U.K. There are a number of different penalties that are changed within this piece of legislation. We have increased the penalty following conviction for the offences in Article 51 of the Telecommunications Law. We have also increased the penalty for the offences of harassment and for the breach of a restraining order in the Crime (Disorderly Conduct and Harassment) Jersey Law, all of them to 2 years and a fine. So just to be clear, this is a maximum of 2 years' imprisonment and you would also be liable to a fine potentially, and the fine would be an unlimited fine. But that does not necessarily mean you would receive a fine for any particular offence.

Deputy S.M. Brée:

Well this is a concern that we have is that according to the draft legislation: "A person guilty of an offence under this Article shall be liable to imprisonment for a term of 2 years and to a fine." Why is it an unlimited fine?

Legal Adviser:

That provides ... do you want to comment on that? It provides the maximum flexibility to reflect the nature of the offending could vary quite substantially. A serious act of revenge porn could have an absolutely devastating effect on the victim of those whereas other acts might not be as serious but might ...

The Minister for Home Affairs:

Almost exactly what I would say, thank you very much.

Deputy S.M. Brée:

So how is that expected to work then if there is the ability of the court to hand down a sentence of whatever they wish with regards to a fine?

Legal Adviser:

In practice, the court, as I mentioned a moment ago, what happens is that the Attorney General will move conclusions as to the appropriate penalty in each case. There would be practices established to the appropriate penalty to move in, in different cases, and depending on the severity of the offence committed. There is a science there. I am afraid I am not a prosecutor by trade so I cannot go into all of the ... and which is partly why we are saying if you need us to answer questions on sentencing policy, that is something I think we would need to come back to you on.

The Connétable of Grouville:

There is a question I would like to ask: is it dependent on the crime or the ability of the person to pay?

The Minister for Home Affairs:

It is dependent on the crime.

Policy Director, Community and Constitutional Affairs:

Again every offence is different and you would have aggravating and mitigating factors and those would be what the court would take into consideration when deciding upon the level of fine to apply.

The Deputy of St. Mary:

Sorry, leading on from what was said before, I am not suggesting for one moment there would be a book of rules, sort of, watch for each one but a code will evolve presumably and have regard particularly to fines imposed both in Jersey and the U.K., so there will be a certain stance to begin with.

Legal Adviser:

Yes, it would be within the range of potential ... a practice would develop within the Law Officers' Department as to where you would expect the penalty to be pitched for different types of offending behaviour within the context of this offence. Jersey's approach to sentencing in this respect, as I say, is quite different from the U.K. In that context the sentence is very much a matter for the ... in the court's discretion whereas here the court does have discretion but it generally operates in accordance with conclusions moved by the Attorney General.

Deputy S.M. Brée:

The other area of sentencing that naturally follows is following the successful conviction of somebody under the proposed Articles: restraining orders. Do you believe that they are an important part of, if you like, the armoury to combat this or do you believe that restraining orders are very difficult to monitor and police in this particular telecoms area?

The Minister for Home Affairs:

I think it is very important for the tool of a restraining order to be available to the authorities so that the victim has recourse. If they feel that a restraining order has been breached they can approach the police and request assistance and protection from the very crime that they have already been a victim of.

Deputy S.M. Brée:

How will the restraining order be monitored, i.e. how will it be monitored to ensure that somebody is not breaking the conditions of any restraining order?

Policy Director, Community and Constitutional Affairs:

There will be no pro-active monitoring of the restraining orders. But what it will do is give the framework for dealing with any unwanted behaviour that is listed in the restraining order. But it would be incongruous to suggest that the police would have a list of restraining orders available and that they would proactively be monitoring that. So the onus would be on the victim to be keeping close contact with the police. But the point is that the police are able to deal instantly with the unwanted behaviour in a way that they could not at the moment.

Deputy S.M. Brée:

This proposal, as we have established, will give the ability for the use of restraining orders in quite a number of other offences. Do you feel it appropriate to be extending restraining orders to a large number of other offences when it is contained within really a document or a proposal that relates to telecommunications amendments? The basic question, and we have asked it before, is would it not have been much more appropriate, much more open to have brought 2 propositions?

The Minister for Home Affairs:

I think we have been through this argument at an earlier point during this hearing. The Chief Minister encapsulated both sides of the argument a little bit by whether the bar is too high or too low; it is a different approach to bring the 2 elements of the law together simultaneously. It was considered at the time that it was the right thing to do because of the crossover. I take the point that there are elements where this law is not simply related to telecommunications, therefore we could have taken it separately but it was simply ...

Deputy S.M. Brée:

For expediency sake you felt it was more ...?

The Minister for Home Affairs:

Yes.

Deputy S.M. Brée:

Better to do it this way. Okay, we have covered that area.

The Chief Minister:

Chairman, could I beg your indulgence ...

Deputy S.M. Brée:

We have almost finished. If you can bear with us just for a few minutes more. We have covered most of the areas that we have had concerns about. The main question we have is, and it is going to be a difficult one possibly to answer, but bearing in mind the very high bar that is set within this legislation, and rightfully so in my opinion to protect freedom of speech, do you believe that it really will provide the protection that it is purported to set out to do?

The Chief Minister:

It will provide the protection that it is set out to provide. I think the point that you have made as a panel today is there is a question about whether the public will quite understand what protection it is providing and in what type of cases it is providing that protection, which I think, if I may say, your comments and your review, and even your public hearing today, is going to be helpful in informing the public just what this legislation does and equally what it does not do. I think it is a good question.

Deputy S.M. Brée:

I think that is probably time. Thank you very much for appearing in front of us. Apologies if we have kept you slightly late but thank you for your standing in for the Assistant Chief Minister. Ladies and gentlemen, thank you very much.

The Chief Minister:

Can I thank you again, Chairman and panel, for the quick work that you have done on that and for turning around, as you said, your comments paper prior to the 14th? We are extremely grateful for the work that you have done. So, thank you.

Deputy S.M. Brée:

Thank you.

[12:15]