

BEING ANTI-SOCIAL ON SOCIAL MEDIA

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Social media have been enthusiastically embraced by the world, and have become the preferred platform for connecting and interacting with others online. However, the escalation in the use of social media has opened the door for bullies to target their victims online. There is currently no legislation in Jersey specifically dealing with cyberbullying, and it has been announced that there will be a public consultation on this topic in spring 2015. This article considers the most common forms of cyberbullying committed through the use of social media, and the existing Jersey law offences that may be applied to such conduct.

Introduction

1 Social media have revolutionised the way in which we communicate. Online social networks such as Facebook, Twitter and LinkedIn have become the preferred platform for connecting and interacting with others online. In Jersey, approximately 90 per cent of the adult population now has access to the internet, and the majority use some form of social media.

2 However, the escalation in the use of social media has given rise to new legal challenges. It has opened the door for bullies to target their victims online and as a result, Jersey, like most countries, has seen an increase in cyberbullying in recent years. The Assistant Chief Minister has announced that there will be a public consultation on the topic of cyberbullying in spring 2015, following which legislative reforms may be considered.¹

3 This article examines the most common forms of cyberbullying committed through the use of social media, and the existing Jersey law offences that may be applied to such conduct.

What is “cyberbullying”?

4 The term cyberbullying has been defined as—

¹ Senator PFC Ozouf, States of Jersey Assembly, Hansard, 20 January 2015.

“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

Cyberbullying may encompass a wide range of online conduct, including the sending of abusive or threatening communications, harassment, revenge pornography, impersonating another on social media, “spamming”, and the sending of viruses or other malicious software. The number of ways in which cyberbullying may occur has increased with the development of the internet and social media, and will inevitably continue to grow as our use of the internet evolves.

5 The effects of cyberbullying can be particularly severe, causing victims to feel distressed or unsafe, and in some cases leading to self-harm or suicide. The online environment can give a slanted perception of reality, with the perceived anonymity and distance from the victim perhaps dulling the emotional reactions of the abuser. Cyberbullying on social media tends to have a large audience and allows bullies the opportunity to contact their victims at any time, wherever they may be.

6 Privacy tools are now available on most social media sites enabling users to protect their private information and control the extent to which other users may interact with them. However, these tools do not prevent bullies posting abusive material online. Their value is limited when the abuse remains in the public domain.

Abusive or threatening communications

7 Persons who send abusive or threatening communications on social media may fall foul of art 51 of the Telecommunications (Jersey) Law 2002 (“the 2002 Law”), which concerns the improper use of a public telecommunication system. Article 51 contains two offences (hereafter referred to as the “telecommunications offences”).

8 The first, provided in art 51(a), is engaged when a person 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.

9 The second, provided in art 51(b), is engaged when a person, 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.

² www.cyberbullying.org.

10 These offences carry a maximum sentence of six months' imprisonment and a fine of level 4 on the standard scale.³

11 The telecommunications offences only apply to the use of a *public* network, and thus have no application to workplace bullying which occurs by use of the employer's own private communications network (such as an internal instant messaging service).

12 A "public telecommunication system" means a telecommunication system the running of which is authorised by a licence that contains a condition designating the system as a public telecommunication system.⁴ A "telecommunication system" is defined widely as "a system for the conveyance of messages through the agency of energy".⁵ The term "energy" means "electric, magnetic, electro-mechanical, electro-chemical or electro-magnetic energy".⁶ These definitions appear to be sufficiently wide to cover communications sent *via* social media, the sending of which will require internet access provided to the public by a telecommunications provider.

13 Similar legislation in England and Wales, s 127 of the Communications Act 2003 ("the 2003 Act"), refers instead to an "electronic communications network", but the definition is similar, meaning a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description.⁷ The courts of England and Wales have accepted that a message sent on Twitter is sent by means of a "public electronic communications network"—

"The 'Twitter' website although privately owned cannot, as we understand it, operate save through the Internet, which is plainly a public electronic network provided for the public and paid for by the public through the various service providers we are all familiar with . . . The Internet is widely available to the public and funded by the public and without it facilities such as 'Twitter' would not exist. The fact that it is a private company in our view is irrelevant; the mechanism by which it was sent was a public electronic network and within the statutory definition . . . 'Twitter', as we all know is widely used by individuals and organisations to disseminate and receive information. In our

³ Telecommunications (Jersey) Law 2002, art 51.

⁴ Telecommunications (Jersey) Law 2002, art 1(1). NB: "licence" means a licence granted under Part 5 of the 2002 Law.

⁵ Telecommunications (Jersey) Law 2002, art 1(1).

⁶ Telecommunications (Jersey) Law 2002, art 1(1).

⁷ Communications Act 2003, s 32.

judgment, it is inconceivable that grossly offensive, indecent, obscene or menacing messages sent in this way would not be potentially unlawful.”⁸

Similar logic can and should be applied when interpreting Jersey’s 2002 Law.

14 The telecommunications offences are potentially wide-ranging and may be applied to various forms of cyberbullying. The offence in art 51(a) of the 2002 Law is framed in almost identical terms to that provided by s 127(1)(a) of the 2003 Act, which was considered by the House of Lords in the case of *DPP v Collins*.⁹ Their Lordships’ judgment, which considers the offence in the context of “grossly offensive” messages, is likely to be regarded as highly persuasive for the interpretation of the similar Jersey offence. In that case, Collins had made racially offensive telephone calls to the offices of his Member of Parliament and had left racially offensive telephone messages. Lord Bingham found that the object of s 127 of the 2003 Act was not to protect people from the receipt of unsolicited messages which they might find objectionable, but to prohibit the use of a public network in a manner which contravenes the basic standards of society.¹⁰ The *actus reus* was the sending of a message of the prohibited character. The offence was complete when the message was sent. It made no difference whether the message was actually received, and the criminality of the accused’s conduct would not depend on whether anyone was offended by it.¹¹ It was a question of fact whether the message was grossly offensive, and that would be determined by considering the reaction of reasonable persons and the standards of an open and multiracial society.¹²

15 Lord Bingham concluded that the accused must have a culpable state of mind.¹³ The s 127 offence was not intended to criminalise the conduct of a person using language that was, for reasons unknown to him, grossly offensive to those to whom it related. However, a culpable state of mind would ordinarily be found where a message was couched in terms showing an intention to insult those to whom the message related, or giving rise to the inference that a risk of doing so had been recognised by the sender. The same would be true where

⁸ *DPP v Chambers* [2012] EWHC 2157 (Admin) at para 23. The High Court endorsed the approach taken by the Crown Court.

⁹ [2006] UKHL 40.

¹⁰ [2006] UKHL 40, at para 7.

¹¹ [2006] UKHL 40, at para 8.

¹² [2006] UKHL 40, at para 9.

¹³ [2006] UKHL 40, at para 11.

facts known to the sender about an intended recipient rendered the message peculiarly offensive to that recipient.

16 The offence in s 127(1)(a) of the 2003 Act was given further judicial consideration in the case of *Chambers v DPP*,¹⁴ which concerned an appeal against conviction for the sending of messages of a “menacing character”. Following an alert on Twitter, the appellant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He posted several ‘tweets’ on Twitter in his own name, including the following—

“Crap! Robin Hood Airport is closed. You’ve got a week and a bit to get your shit together otherwise I am blowing the airport sky high!”

17 There was no evidence that any of the appellant’s followers who read the tweet were alarmed by it. When it was eventually read some days later by those responsible for the airport’s security, it was not treated as a credible threat, although in compliance with standard practice it was reported to the police. The appellant maintained that his tweet was a joke and was not intended to be menacing. His conviction was quashed on appeal to the High Court, where it was held that, on an objective assessment, taking into account the context and all relevant circumstances, the tweet was not a message of the character prohibited by s 127 of the 2003 Act. Lord Judge, CJ noted that the appellant posted the message on Twitter for widespread reading, drawing attention to himself and his predicament. In his view, a serious threat was unlikely to be made by an identified person to a large public audience in ample time for the threat to be reported and extinguished. He further noted that the message was not directed to airport staff, and the language and punctuation adopted were inconsistent with the sender intending it to be taken as a serious threat. Lord Judge held the view that—

“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 and no doubt will continue at their customary level, quite undiminished by [s 127 Communications Act 2003].”¹⁵

18 As the tweet was found not to be of the prohibited character, the issue of the defendant’s state of mind did not arise. However, the court went on to consider briefly what the required *mens rea* would have

¹⁴ [2012] EWHC 2157 (Admin).

¹⁵ [2012] EWHC 2157 (Admin), at para 28.

been.¹⁶ With reference to Lord Bingham's judgment in *DPP v Collins*, the court concluded that the mental element would be satisfied if the offender were proved to have intended that the message should be of a menacing character or, alternatively, if he were proved to have been aware of or to have recognised the risk at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who sees it. The court emphasised that the mental element of the offence was directed exclusively to the state of mind of the accused, and that if he may have intended the message as a joke, even if a poor joke in bad taste, it was unlikely that the required *mens rea* would be established.

19 The courts of Jersey would most likely interpret the offence in art 51(a) of the 2002 Law in accordance with the approach taken in these judgments.

20 The rationale for the offence in art 51(b) of the 2002 Law appears to be similar, namely prohibiting the use of a public network in a manner which contravenes the basic standards of society. Thus, applying Lord Bingham's logic, the *actus reus* of that offence will concern the sending of a message, or other use of a telecommunication system, rather than the effect on the person towards whom the conduct is targeted. For the mental element, art 51(b) expressly requires that the accused carries out the conduct for the purpose of "causing annoyance, inconvenience or needless anxiety".

21 The telecommunications offences are a useful tool in dealing with cyberbullying on social media and other online forums. They may be applied to cases involving the sending of abusive or threatening communications online. By contrast to the harassment offence, there is no requirement to establish a course of conduct, and they may therefore be applied to one-off communications.

22 At first glance, the offence provided in art 51(a) of the 2002 Law may seem surprisingly wide in scope given that it concerns the sending of a message regardless of whether the message is received or the effect that it has on the recipient. However, the judgments referred to above indicate that there is a high threshold for criminal liability. The courts will focus on what would be considered tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.

23 The difficulty is that what is tolerable or acceptable in our society changes with time. The boundaries of the telecommunications offences are not clearly defined. Much will depend on the context and the

¹⁶ [2012] EWHC 2157 (Admin), at paras 35–38.

circumstances of the particular case. Therefore, the dividing line between what you can and cannot say on social media is not easy to draw.

24 It should also be noted that the offence in art 51(a) only applies to the sending of “a message or other matter”. It appears that messages sent on social media from one user to another are covered. Other communications, such as Facebook “statuses” and Twitter “tweets”, would probably be treated as messages notwithstanding that they are communicated to an audience rather than being directed to individual users. However, it is unclear whether the telecommunications offences can be applied to other forms of cyberbullying on social media, such as the creation of offensive webpages or “groups”.¹⁷

Harassment

25 The Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 (“2008 Law”) provides for the offence of harassment, which carries a maximum sentence of six months’ imprisonment and a fine of level 4 on the standard scale.¹⁸

26 States of Jersey Police figures show that there has been a steady increase in reports of harassment over the past three years, from 68 in 2012, to 73 in 2013 and 93 in 2014. The figures also show an increase in reports of cyberharassment. There were 68 cases reported to the Police in 2013–2014 in which the alleged harassment involved the use of social media and/or text messages alone.

27 The harassment offence concerns a person pursuing a course of conduct¹⁹—

- (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.

The victim must actually be harassed. Harassment is not clearly defined, but for these purposes it includes causing the victim alarm or distress.²⁰ According to the Oxford English Dictionary, to alarm someone is to make them feel frightened, disturbed or endangered. Distress means extreme anxiety.

¹⁷ Doubts have been raised. See Policy Memorandum on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (2011), at para 34.

¹⁸ Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, art 3(3).

¹⁹ Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, art 3(1).

²⁰ Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, art 3(4).

28 There must be a course of conduct. By contrast to the telecommunications offences, the harassment offence cannot be applied to conduct that occurs on only one occasion.²¹ It therefore has no application to one-off communications sent on social media. Moreover, the fewer the alleged incidents, and the longer the period between them, the less likely it is that they will be found to amount to a course of conduct.²²

29 In determining whether the accused ought to know that the course of conduct amounts to harassment, the question to be considered is whether a reasonable person in possession of the same information would think that the course of conduct amounted to harassment of the other person.²³ Thus, the *mens rea* for the offence is couched in objective terms and is wide in scope.

30 There are three statutory defences to harassment. It is a defence to prove that the course of conduct²⁴—

- (a) was pursued for the purpose of preventing or detecting an offence;
- (b) was pursued under an enactment or customary law or so as to comply with a condition or requirement imposed by a person under an enactment or customary law; or
- (c) was reasonable in the particular circumstances.

31 The leading authority in Jersey on the offence of harassment is the Royal Court's judgment in the case of *Chapman v Att Gen*,²⁵ which concerned an appeal against conviction and sentence from the Magistrate's Court.

32 The background is significant. The appellant had been in a relationship with the complainant from April 2010 to November 2011. They had a child together. The complainant also had a child from a

²¹ Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, art 3(5).

²² In the UK case of *Pratt v DPP* [2001] EWHC 483, the Administrative Court held that two incidents almost three months apart were "close to the line" but nevertheless sufficient to establish a course of conduct. The court commented that—

"The issue for the Court is whether or not the incidents, however many they may be, can properly be said to be so connected in type and in context as to justify the conclusion that they can amount to a course of conduct."

²³ Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, art 3(2).

²⁴ Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, art 4.

²⁵ 2014 (1) JLR 84.

previous relationship. The break-up of the relationship between the appellant and the complainant was acrimonious, and there were ongoing legal proceedings concerning the appellant's contact with the child.

33 In May 2012, the complainant made a statement to the police alleging harassment by the appellant by means of abusive text messages sent between June 2011 and April 2012. The appellant was issued with a harassment notice by the police which advised him to cease any behaviour towards the complainant which might cause her further harassment. The appellant then ceased communicating with the complainant for a period of approximately six months. In the meantime, there were further proceedings in the Family Court relating to the appellant's contact with the child.

34 There were then three incidents which the Prosecution alleged constituted a course of conduct amounting to harassment. Two of the three incidents involved communications on Facebook.

35 The first incident was a comment posted by the appellant on the "Feathers Healing" Facebook page. The complainant had been attending a spiritual course run by "Feathers Healing" and posted a message on their Facebook page praising the course and her mentors. In response, the appellant posted the following comment—"whose looking after the children, whilst your taking your journey Kim???"

36 The complainant received an automated email from Facebook informing her of the appellant's comment. She accidentally clicked a link which took her to the appellant's own Facebook page, where she saw that he had posted the following comment (the second incident):

"Still having problems with adulter and abuser ex-girlfriend Kim, please men and women be very careful of this woman, she doesn't mind either sex . . . total nut case."

37 The third incident involved the appellant sending the complainant a Christmas card which contained some photographs. The card contained the following message:

"Kim

I found these photo's in my personal stuff you packed. I don't require them; I have left a few of you and [the older child] for [the child's] sake for the future if she stays over."

38 The Magistrate held that these three incidents, considered in the context of the relationship history, caused the complainant distress and amounted to harassment.

39 On appeal, the Royal Court stressed that it is a matter of judgment on the facts of each case whether the course of conduct complained of

is of sufficient gravity to justify the sanction of the criminal law.²⁶ In assessing the gravity of the conduct, the court endorsed the approach adopted by Simon J in the English case of *Dowson v Northumbria Police (Chief Constable)*,²⁷ in which it was held that the following must be proved in order for the claim of harassment to succeed—

- “(1) There must be conduct which occurs on at least two occasions,
- (2) which is targeted at the claimant,
- (3) which is calculated in an objective sense to cause alarm or distress, and
- (4) which is objectively judged to be oppressive and unacceptable.
- (5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.
- (6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: ‘torment’ of the victim, of an order which would sustain criminal liability.”

40 The court stressed that it is necessary to—

“stand back and look at the appellant’s conduct on all three occasions to see whether it constituted a course of conduct amounting to harassment; as part of a campaign of harassment. It is the course of conduct that has to amount to harassment, not the individual occasions which form part of that course of conduct.”²⁸

41 Applying these principles to the case against *Chapman*, the Royal Court concluded that the message posted by the appellant on his own Facebook page was unacceptable, but the other two incidents were not sufficiently serious to take the course of conduct over the line that justifies criminal liability. The course of conduct was unattractive and unreasonable, but was not of such gravity as to attract the sanction of the criminal law.²⁹ Chapman’s conviction was accordingly set aside.

42 Thus, the harassment offence was interpreted restrictively, with the aim of ensuring that only conduct of sufficient gravity is made subject

²⁶ 2014 (1) JLR 84, at para 23.

²⁷ [2010] EWHC 2612, at para 142 (in which the civil tort of harassment was alleged, which to succeed must be of an order to sustain criminal liability).

²⁸ 2014 (1) JLR 84, at para 47.

²⁹ 2014 (1) JLR 84, at para 52.

to criminal sanction. However, it is not always easy to distinguish conduct that is unattractive and unreasonable from that which warrants criminal liability. Similar to the telecommunications offences, much will depend on the context and the particular circumstances of the case.

43 The main advantage of the harassment offence over the telecommunications offences is that, upon conviction, the Prosecution may apply for a restraining order.³⁰ Restraining orders may be drafted to meet the particular risks presented in the case. In cases involving cyberharassment, this may include prohibiting contact (by any means online or offline) with the victim, and prohibiting the offender from posting any material relating to the victim on social media. A 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 twelve months' imprisonment and a fine of level 4 on the standard scale.³¹ Restraining orders play a significant part in managing the risks to the victim and preventing further harassment. For this reason, where a course of conduct can be established, prosecutors will usually proceed under the harassment legislation rather than prosecute multiple charges of telecommunication offences.

“Revenge porn”

44 “Revenge porn”, also known as “non-consensual pornography” concerns the publication or distribution of sexually explicit material in circumstances where the person depicted consented to the creation of the material for private purposes, but has not consented to its publication or distribution.

45 Revenge porn usually occurs following the acrimonious breakdown of an intimate relationship. Private images and personal data can be posted online and immediately shared with innumerable persons. Once shared, images can be impossible to track down and remove from the internet. The images may be hosted on websites based in other jurisdictions, and requests to remove the content may be ignored. In some cases, asking for removal has resulted in more attention being drawn to the images.

46 Revenge porn can have devastating consequences for the victim, causing permanent damage to reputation, family life, future

³⁰ Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, art 5.

³¹ Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, art 6(2).

relationships, and career prospects. The potential consequences may be more serious for someone living in a small community like Jersey.

47 Serious cases involving revenge porn have attracted significant media attention in recent years. In 2010, a teacher from Caerphilly in Wales was reported to have committed suicide after an ex-boyfriend posted naked pictures of her on Facebook.³² In 2012, a Canadian citizen was reported to have committed suicide due to the cyberbullying she suffered after she was blackmailed into exposing herself on a webcam, images of which were then distributed online.³³ In 2014, the nanny of the UK Prime Minister David Cameron became a victim of revenge porn, when private photographs of her were published by an ex-partner.³⁴

48 Earlier this year, in the US, Kevin Bollaert was found guilty of creating a revenge porn website called UGotPosted.com, which hosted more than 10,000 sexually explicit photographs of women.³⁵ The website encouraged ex-partners to submit embarrassing photos of victims for revenge. Accompanying most of the photos were victims' names, addresses and identifying information such as links to social media accounts. Those who wanted to have the pictures removed were directed to another one of Bollaert's websites, ChangeMyReputation.com, which charged large sums of money for the material to be taken down. Bollaert made significant profits from this scheme. This case was the first in the US in which a revenge porn website operator was successfully prosecuted.

49 Although there have so far been very few reports of revenge porn in Jersey, there have been a worrying number of reports of such conduct in the UK. According to information from eight police forces in England and Wales that kept data on this issue, there were 149 allegations of revenge porn made between 1 January 2012 and 1 July 2014.³⁶ The number of reports seems to be increasing.

³² news.bbc.co.uk/1/hi/wales/8534899.stm.

³³ www.theguardian.com/uk-news/2014/apr/18/dutch-webcam-suspect-british-victim.

³⁴ www.independent.co.uk/news/uk/home-news/david-cameron-nanny-sex-pictures-charities-issue-revenge-porn-warning-9512015.html

³⁵ See www.dailymail.co.uk/news/article-2937452/California-man-28-convicted-running-revenge-porn-site-extortion-scheme.html; and www.theguardian.com/culture/2015/feb/03/revenge-porn-website-operator-convicted-san-diego-kevin-bollaert.

³⁶ www.bbc.co.uk/news/uk-31429026.

50 In Jersey, posting sexually explicit material onto the Internet may constitute the sending of a message of the character prohibited by the telecommunications offences. The focus will be on whether the message or communication is grossly offensive, indecent or obscene, not whether the image itself is grossly offensive, indecent or obscene.

51 Revenge porn could also form part of a course of conduct amounting to harassment.

52 Where the material depicts a person under the age of 16, there may be a contravention of the Protection of Children (Jersey) Law 1994, art 2.³⁷

53 Thus, Jersey has legislation in place which may be applicable to cases of revenge porn.

54 It is interesting to note recent developments in this area in England and Wales. Given the potentially devastating and long-lasting consequences that might be suffered by a victim of just a single incident of revenge porn, it was argued by some campaigners and legal commentators that new legislation was needed specifically to address such conduct.³⁸ Such legislation has now been introduced in the form of the Criminal Justice and Courts Act 2015. At the time of writing, the provisions relating to revenge porn have not yet come into force. The Act creates an offence of “disclosing private sexual photographs and films with intent to cause distress”.³⁹ The offence applies to the disclosure of private sexual photographs or films where the disclosure is made without the consent of an individual who appears in the photograph or film, and with the intention of causing that individual distress. The offence applies to material disclosed on social media or sent by text, or shared physically.⁴⁰ The maximum penalty for this new offence is two years’ imprisonment and a fine.⁴¹

55 Scotland and Northern Ireland are currently considering the case for similar legislation. Jersey should do the same.

Conclusion

³⁷ Article 2 concerns indecent photographs or pseudo-photographs of children.

³⁸ See, for example, J Mitchell “Censorship in Cyber-Space: Closing the Net on ‘Revenge Porn’” (2014) 25(8) Ent LR 283–290.

³⁹ Criminal Justice and Courts Act 2015, s 33.

⁴⁰ For these purposes, a person “discloses” something to a person if, by any means, he or she gives or shows it to the person or makes it available to the person: Criminal Justice and Courts Act 2015, s 34(2).

⁴¹ Criminal Justice and Courts Act 2015, s 33(9).

56 Jersey already has legislation in place that may be applied to various forms of cyberbullying through the use of social media.

57 The sending of grossly offensive, indecent, obscene or menacing messages on social media, or the persistent use of social media for the purpose of causing annoyance, inconvenience or needless anxiety to another, is criminalised by the telecommunications offences.

58 Online conduct which is targeted at an individual or group of individuals and calculated to cause alarm or distress may form part of a course of conduct amounting to harassment.

59 Revenge porn can usually be treated as one of the above.

Does Jersey need a new set of criminal offences specifically addressing cyberbullying?

60 Whatever conclusion is reached following the public consultation, any new legislation would need to strike a careful balance between the competing interests of privacy and freedom of expression.⁴² The law should not criminalise what is in effect innocuous behaviour which results in mere irritation or annoyance. Regulation must not be too overbearing and stifling of typical online behaviour. The European Court of Human Rights has made it clear that freedom of expression protects not only speech which is well received and popular, but also speech which is offensive, shocking or disturbing.⁴³ Therefore, just because the content expressed in a communication is in bad taste, controversial or unpopular, this is not in itself sufficient reason to engage the criminal law. Any restriction on freedom of expression must be necessary and proportionate. With these considerations in mind, it seems unlikely that a new set of offences could extend criminal liability much further than the offences already in existence.

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⁴² Note that the European Convention on Human Rights was incorporated into Jersey law by the Human Rights (Jersey) Law 2000.

⁴³ *Sunday Times v UK (No 2)* (1992) 14 EHRR 123—

“Freedom of expression constitutes one of the essential foundations of a democratic society . . . it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also as to those that offend, shock or disturb . . .”