Crime (Prejudice and Public Disorder) Law Consultation

Submissions and response

Contents

Overview

The consultation paper

The consultation initially ran from Monday 14th October to 9th December 2019. It was launched at the same time as the SoJP awareness campaign addressing hate crime in Jersey. It was hoped that the issue would be highlighted in the minds of the public and interesting enough to make comment upon.

At the end of November, only two submissions had been received. This raised concerns that the views of the public might not be fully represented, and the Minister approved an extension of the consultation to 10th January and an additional effort was made on social and other media to promote the consultation and seek submissions.

In fact, the last week of the planned consultation saw six additional responses received, and only four arrived during the extension (two of which were sent late in error).

The consultation paper contained 17 questions, with an option for binary yes/no answers and an opportunity to make a narrative response. Comments could be submitted by means of a dedicated email address or by post. There was no accompanying survey as it was anticipated that the narrative comments would be more informative than a quantitative count of yes/no answers.

The consultation was not issued in translated version, despite arguably being of special interest to members of the public not fluent in English. This was considered, but there were concerns about delay and cost and it would not have been realistically possible to precisely translate the Law in any case.

The submissions

13 submissions were received. Nine were from individuals, and four from other parties, one group of nine individuals, one joint submission from two charities, one from the States Police and one from the Comité des Chefs de Police (the Chef de Police of each Parish).

Only five of the submission followed the question structure, with the majority preferring to make a wholly narrative response, either addressing specific issues or the general principles engaged by the draft Law.

This report

This report attempts to address the themes of the responses rather than taking each in turn. The respondents were keen to see their views made public, either attributed to them or anonymously, so they are appended for consideration.

The following themes are addressed below. These have been chosen either because they arise repeatedly or are the focus of a submission-

1. The impact of the legislation on free speech generally, and specifically in relation to where the line is drawn between reasonable expression and criminal activity.

2. The lack of detailed definitions of some terms in the Law.

3. Issues of intent and ‘thought crime’

4. The protected characteristics in general, and specifically the treatment of ‘sex’.

5. Human Rights compliance.

6. The implications of managing minor drug offences at parish hall.

Timing

Work began on this report in January 2020, following the expiry of the extended consultation period. The intention had been to publish in March 2020, but resources were diverted to the Covid-19 pandemic response in early March and this work, like much government business, was delayed.

Consideration of the themes

1. Free speech in a free society

Several of the respondents have expressed a concern about the implication of the Law on free speech in our society. Drew Waller suggests that *"Sections 4-12 of the draft law clearly has the intent to violate a persons' rights to free expression and free assemble and associate if their speech or assembly is deemed to be offensive and prejudicial."* Mr Hathaway felt compelled *"to give a response in this consultation to defend and champion free speech and expression against some of the elements of this proposed law that appear to censor both".* Mr Baudains cautions that *"we must not allow ourselves to be bullied into having free speech censored for the benefit of one group".*

To summarise and paraphrase the concerns, which in some cases are articulated by discourse and examples that span several pages, the concerns focus on the need for a free society to maintain the right to free speech as a fundamental tenant, and the potential for the legislation to be used to silence legitimate debate.

Drew Waller notes that *"Race, age, sex, sexual orientation, gender re-assignment, pregnancy, maternity and disability are protected from discrimination. It is unreasonable to restrict the speech of individuals on topics that might be seen to be offensive to each of these protected classes".*

In fact, the Law does not mirror the discrimination law in its scope and only addressed race, sexual orientation, gender reassignment and disability as drafted (but see below), but that does not negate the point.

Free speech is an intrinsic right in most developed countries, but nowhere is it an absolute right. Although the details differ widely, all jurisdictions have some framework for limiting what an individual can say. This may be in the form of legal proscriptions to protect other citizens (hate crime and public order legislation like this) and the state itself (official secrets and national security legislation) as well as routes of access through the civil courts to obtain redress for slander, libel etc.

While there are valid reasons in a democratic society to balance free speech with other rights, it is encouraging to read the spirited defences of free and informed discourse received in several of the submissions. Where the arguments tend to fall down is in their direct relation to the law. Nothing in this legislation criminalises offending other people, even (as a facetious example) gay disabled people of other races undergoing gender transition. The respondents are perfectly free to criticise the life choices and opinions of others.

What would not be permitted is to agitate in some way that both stirred up prejudice against those people and was also insulting, threatening or abusive.

For example, posting an article demonstrating that criminality was predicted by race, or infections spread disproportionately by a particular group's sexual preference, would not serve to engage the law unless it made false or baseless claims to stir up prejudice.

That is the free exchange of ideas (right, wrong, or even grossly incorrect and offensive) that represents the underlying right to free speech. However, accompanying that imaginary study with a call to the audience to shun or attack a group of people on the grounds of their race or preferences would be an act of prejudice that might pass the threshold of a 'stirring up' offence under Article 3. However, if accused of such an offence a person has the

defence that that did not intend the material to be threatening, abusive or insulting and was not aware that it might be so.

Analysis of the offences and exemptions tend to address the specific protections for statements made in a religious context and about religion in Article 13. One commentator says *"The article 13 exemption is limited to the protected characteristic of religion and belief. The exemption is too narrowly drawn in this regard. It would not appear to encompass, for example, discussion, criticism or expressions of antipathy, dislike, ridicule or insult of any of the tenets of the transgender rights movement… it would be highly unsatisfactory were there to be, for example, any ambiguity as to whether a robust public lecture about transgenderism and/or homosexuality would benefit from the article 13 exemption in the same way that a seminar critiquing Catholicism or Islam undoubtedly would."*
Rev Waller adds *"The protections of freedom of expression outlined in article 13 of the draft law are not sufficient. While it is commendable that this article is included in the draft law, it's limited scope—protecting just speech that relates to criticisms of belief systems, sexual practice and the definition of marriage— is too narrow."*

The need to allow public debate of social, cultural and moral issues is recognised and there does not appear to have been any meaningful chilling effect on such discussion in those jurisdictions that already have comparable legislation in place (although those prosecuted for some offences do often identify free speech as an issue).

Again, while the arguments made are perfectly valid, they do not speak to what the law is intended to achieve. Article 13 does not try and offer some wide-ranging free speech exemption to the rest of the legislation, as that balance of rights is present in the structure of the offences themselves. In all cases where a criminal sanction is proposed, it either rests on some activity that is already illegal (the sentence aggravation provisions) or clearly stipulates that there must be prejudicial intention or recklessness behind some public activity that is insulting, abusive or threatening. The reasoned public discourse cited in the submissions would not fall within the scope of the law.

Instead, Article 13 is intended to meet a specific issue and is drawn from sections 29J and 29JA of the Public Order Act 1986 of England and Wales for that purpose.

The protection, intended as a counterpoint to the inclusion of religion as a protected characteristic, is designed to allow the established right of any religions or beliefs (including atheists) to criticise each other, in respect of such beliefs, sometimes in very strong terms. In essence it preserves the legitimate rights of freedom of expression and makes the law compatible with Articles 10 and 11 of the ECHR. It is also designed to avoid the need to force religions to change their position on sexual practices to accommodate the law. The same article also provides for views on sexual conduct or practices or the sex of parties to a marriage not to be considered as threatening or intended to stir up sexual orientation or hatred.

These counterbalancing protections can be visualised as allowing a preacher to denounce homosexuals as hellbound sinners from the pulpit, while a lively rally outside the place of worship condemns the religion as ludicrous and the attendees as brainwashed homophobes. The preacher may then move into why adherents of other religions are vile heretics, while across town another sermon castigates him and his congregation in the same terms.

This (admittedly inelegant) solution is necessary to recognise that the global nature and unchanging tenants of religious belief cannot be modified by a single jurisdiction's legislation. Also, the intrinsic superiority of one religion over others remains a feature of public discourse in a way that superiority of race or sexuality does not.

Conclusion

Free speech is an essential component of the democratic system, and the issues raised are entirely valid, but they assume that the Law will do things it is not intended to do. Other jurisdictions do not appear to have experienced a chilling effect on public discourse from comparable legislation. We recognise that titling Article 13 'Protection of Freedom of Expression' may cause confusion, as the reader will look here for balancing provisions against the offences created and find only a limited reference to religion. This may cause people to read past protections that exist within the definition of the offences themselves. The Legislative Drafter will be asked to consider how clarity in this area might be improved.

2. The lack of detailed definitions of some terms in the Law.

Concerns were raised that the Law relies on terminology that is not defined in detail within the law. Drew Waller considers that *"the definition of "prejudice" … is ambiguous and subjective",* and that *"the term "hostility" is overly broad and subjective and not well defined".*

Pastor Donaldson feels that *"the use of the word 'insulting' throughout the draft law is ambiguous … problematic*", and the fact that it is used *"opens the law up to misinterpretation and abuse because the definition of hate speech could be measured by how 'insulted' a third person seems to be by the speech".*

Mr Hathaway also addresses *"the definition of "prejudice" which [he does] not believe – as a lay reader – is specific enough … I do not believe that prejudice is adequately well defined enough under this description [of 'hostility towards]'…. Hostility can mean anything from opposition, or unfriendliness all the way up to antagonism or malevolence – as this is quite a range of sentiments and feels too imprecise a definition"*.

Another respondent notes that "*what constitutes behaviour is not defined in the draft legislation. Does the defendant's behaviour have to active or can the offence be constituted by the defendant behaving passive* [sic] *i.e. by allowing a state of being or affairs to exist"?* The same individual also notes that *"what constitutes 'abuse' and "what constitutes 'insulting"* are not defined, and *"the term 'stir up prejudice' and 'prejudice is likely to be stirred' is (sic) not defined in the legislation at all*." They go on to say that this is a subjective analysis and identify that it is *"highly unusual for a key ingredient of a criminal offence to be reliant upon the alleged victim's subjective interpretation of the events alone".*

The issue of definitions in Law is often confusing. People are understandably concerned when they see Law relying on terms that they feel may be read differently by different parties, especially in relation to criminal offences.

We acknowledge that words can mean different things to different people, and laws address this in various ways. Attempts to clarify meaning may be in the form of applying a test to the facts, as we see for example in Article 5 of the draft Law, where a person *"commits an offence if –*

> *(a) the person intends by that action to stir up prejudice; or*
> *(b) having regard to all the circumstances prejudice is likely to be stirred up by that action."*

This test of 'does the activity meet the requirements of (a) or (b)' is a way of allowing the reader (be they a lay person, lawyer or court) to see what the law is trying to say.

Alternatively, a definition of the meaning may be used, as in Article 1, where we see for example- *"written material' includes any sign or other visual representation."*

The difficulty with these methods of definition (and any other possible methods of reaching clarity) is that there is no way to drill down to some universal understanding of meaning. We can only write definitions of words by using other words. As an example of the problem, the concern expressed above about 'hostility' being used is that it is subjective and undefined, but that word 'hostility' itself only appears as part of a definition of prejudice.

It is difficult to see how much clarity could be added by adding on additional layers of words to interpret. On the contrary, this would raise the risks of some internal contradiction appearing in the Law while increasing its length and complexity. Law is challenging enough

to read as it is, without requiring the reader to reference or memorise second and third order definitions as they proceed.

Ultimately, the interpretation of the meaning of words in law falls to a court. Typically, it will consider-

- The natural meaning of the words,
- where the natural meaning is unclear, what the law is trying to achieve,
- previous decisions of other courts regarding meaning (precedent), and
- how the law can be read and 'given effect in a way which is compatible with Convention rights'.[1]

This is not a specific issue raised by the draft Law but a general one in all legislative development. In any law, only a few of the words are defined, then often by cross-reference to other laws, even where they are central to its interpretation (one notable example being 'tourist' in the Tourism (Jersey) Law 1948).

Some clarity can be added by looking in more detail at the terms identified-

- Stirring up prejudice

With respect to the contributor, the objection that this term is 'ill-defined' does miss the point that the court is there to make decisions as to whether an offence has been committed. In this case, the court must decide if *"having regard to all the circumstances prejudice is likely to be stirred up by* [the] *action*". There is no meaningful difference between this and other decisions of law that courts must take.

- Inclusion and definition of insulting

In a similar vein, concern is raised that 'insulting' is not defined, where it refers to words, behaviour or material. This is seen as offering scope for the perception of the insulted party to affect whether or not an offence is committed.

There are two points to consider. Firstly, the court, not the victim, will decide if any action or material is insulting. Secondly there is nothing intrinsically wrong with insulting material, words or behaviour. The question of whether something is insulting is only ever considered by a court when it is trying to decide whether some offence of stirring up prejudice has been committed. Even then, the requirement that the material or actions be threatening, abusive or insulting serves to limit the scope of the offence, in that even if something 'stirred up prejudice' *it must also be* threatening, abusive or insulting to constitute an offence. Without this requirement it would be easier to commit the offence.

That being said, the respondents are quite correct in identifying that deleting 'insulting' would narrow the scope of the offence. However, it could leave a gap in the provision where a person could stop short of being threatening and be allowed to consciously and deliberately stir up prejudice (for instance by means of racial or other slurs) without recourse. The court would then be left to decide if some activity was 'abusive', another undefined term.

- Definition of 'hostility'

As noted above, this term only appears in an attempt to clarify what 'prejudice' means. The perceived need to define the definitions serves as an example of why a degree of interpretation must be left to the court.

[1] Referring to the European Convention on Human Rights. This is a requirement for the judiciary arising from the Human Rights (Jersey) Law 2000, as one respondent addresses in detail.

Conclusion

These points go to the heart of the need to balance rights and protection, and the treatment of definitions in general is unlikely to be varied for the reasons above.

3. Policing intent and the issue of thought crime

The requirements for a crime to be defined as one 'of prejudice' include proving that the intent behind the action was prejudicial. Some respondents have taken the view that intent should not be a consideration of criminal Law. Drew Waller has *"grave concerns about the intent and scope of part 2 of this proposed Law* [Offences Motivated by Prejudice] *as it seems to be a* 'thought crime' *law*". He adds that *"The criminalisation of thought, even offensive thought, is contrary to the values of Britain and is in direct violation of Article 19 of the UN Universal Declaration of Human Rights … Prejudicial thought—even if offensive should not be made a crime unless it threatens or incites an actual crime against person or property".*

Mr Hathaway likewise feels that *"simply holding a sentiment or opinion should not be a 'thought crime".* He raises the additional concern that *"intent is a tricky business to ascertain which may weaken the law in valid cases … gathering evidence about 'intent' will be difficult for the [police]".*

The issue of criminalising intent is addressed in the consultation document at page 17, where broadly similar arguments made by academics are highlighted. The issue of 'thought crime' is often raised in jurisdictions where similar legislation is proposed, and the arguments around the subject are reasonably well established.

The proposed Law is not unique in considering the intent behind an action as a component of the offence. Consideration of intent is a standard feature of criminal law in most jurisdictions. For example, without the requirement to prove intent a person might find themselves subject to penalty under this law for their own choice of vocabulary which another may inadvertently find threatening.

For instance, the intention of the perpetrator is the only distinction between murder and manslaughter, or in a more extreme example, between careless driving (fatally running down a pedestrian by accident) and murder (using a car as a murder weapon by deliberately not slowing or turning). In these cases, identical physical actions causing identical outcomes are distinguished only by the thought process of the perpetrator.

In this way, the requirement for intent to be proven acts a limitation on the scope of the offence being created, rather than criminalising a thought or belief.

Conclusion

As Mr Hathaway identifies, the issue of proving intent is often a vexing issue for an investigator or persecutor. For a criminal act to become classified as a crime of prejudice the act must be criminal, regardless of motive or aim and it must be committed with a particular motive targeting some protected characteristic. It is this intent that proves the background to the motive. However, this is a standard challenge in criminal prosecutions, not a special feature of the proposed legislation.

4. The protected characteristics

The draft Law, as drafted for consultation, specifies that crimes committed out of hostility towards people with certain characteristics are 'crimes of prejudice'. These 'protected characteristics' are-

- Race
- Sexual orientation
- Gender reassignment
- Disability

Sex and age are were not included, and the consultation asked respondents their opinion on that.

No respondent thought that age should be included as a protected characteristic, although some gave thought to the need to ensure adequate safeguarding of the young and the elderly. This may well be because, to paraphrase the consultation at page 24, while we recognise criminals target the young and old as they are vulnerable, there is no evidence that they do so because they are specifically motivated by hostility towards young or old people.

No respondent thought that pregnancy and maternity should be included.

Several respondents thought that gender should be included, most notably the States of Jersey Police, who say that *"given the statistics around crimes against gender, particularly females, the police support having gender as a crime of prejudice"*. Another respondent says "*I can't understand why you would exclude sex. Women are a group of people who are constantly immersed and subjected to prejudice on the basis of their sex and have been since the dawn of time - and yet you are including the characteristic of sexual orientation and gender re-assignment"?*

As the report identifies, the inclusion of sex or gender is a complex issue. The issue most often addressed by recipients who commented on this point is the need to offer additional protection to women who suffer harm from men.

The Scottish government, for example, found that leading women's organisations were strongly opposed to adding gender to the hate crime law in favour of a standalone offence of misogynistic harassment.

The past few years have seen the introduction of the modernised Sexual Offences Law 2018, and the development of a dedicated Domestic Abuse Law scheduled for 2021. Assuming the States Assembly approves the Domestic Abuse Law, much of the harm directed by men towards women (which was the focus of the submissions) will be subject to specific legislation (although the offences in both Laws are or will be gender neutral, so will give wider protection).

The UK Law Commission published a consultation paper in 2020 seeking the views of professionals and the public on hate crime. One of the key questions was whether the law should be expanded to address *"offences hostility based on characteristics such as sex and gender, being an older person or other characteristics".*[2]

[2] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/07/6.5286-LC_Hate-Crime_Information-Paper_A4_FINAL_030719_WEB.pdf p11.

The consultation paper concluded (in relation to gender) that *"there is a strong in-principle case that can be made for inclusion given the wealth of evidence of targeting of women, and the additional harm that this causes"* However it acknowledges, as do we, that in certain contexts such as domestic abuse and sexual offences, there is a risk that by using gender-based aggravation we could be "double counting" insofar as a defendant's culpability is concerned. This will need to be discussed with the Law Officer's Department.

Since the Law Commissions report has only just been published any resulting legislative change will need to be carefully considered by the UK Government before a bill is developed. The earliest possible date for change in the UK legislation is late 2021, more realistically 2022, and we do not consider it reasonable to wait until then to progress this legislation. Therefore, based on the feedback from this consultation, and discussions with the Children, Education and Home Affairs Panel, the Minister has decided to revise the Law prior to lodging to incorporate sex (in the terms advised by the drafter) as a protected characteristic.

Conclusion

The conflicting positions have been considered in light of the effect on the detail of the Law, and the implications for application and enforcement etc. However, there is clearly a desire by some parties to see sex included as a protected characteristic. The risk of additional harm has identified a demonstrable need to protect vulnerable persons and together with the proposed Domestic Abuse legislation, including sex as protected characteristic affords the best safeguarding opportunities. In line with the conclusion of the UK Law Commission it is recommended that there is a case for sex or gender based protection based protection and sex should be included as a protected characteristic.

5. Considerations around Human Rights

Considerations around human rights appear in one form or another throughout the responses, to underpin other arguments. One submission is solely concerned with compliance with the European Convention on Human Rights (the ECHR) and the Human Rights (Jersey) Law 2000 (the 2000 Law).

The submission from Ollie Taylor et al, paraphrased, notes that under the 2000 Law, Jersey courts can declare domestic legislation to be incompatible with the ECHR. It then asks, *"whether any such declarations are planned to be made"*.

This cannot really be answered, as such a declaration would be made by a court considering some specific issue which engaged the Law once it was in force. Government cannot answer for the courts, and the courts cannot predict the issues that will be presented with, so the answer must be no.

It must be recognised that the ECHR is a treaty of the Council of Europe, and compliance with the established doctrine of human rights is a condition of participation. Of the 47 members states, 40 have some provision for hate crime or equivalent in their legislation[3]. It is therefore most unlikely that the essential provisions of this draft Law would be incompatible with the ECHR.

Conclusion

The Minister will be advised by the Law Officers as to the ECHR compliance status of this legislation in the normal manner. Similar legislation is widely enacted in ECHR signatory counties, and the issue of balancing rights is not novel for Jersey.

[3] List of EU members states referenced against Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights reporting https://hatecrime.osce.org/

6. Managing drug offences at the parish hall enquiry

The proposal is that in specific circumstances a Centenier should be able to deal with repeated offences of Class B or C drug possession at a Parish Hall Enquiry. Currently only first offences can be dealt with at that level, any repeated offending leads to the Magistrate's Court.

Christopher Benjamin, a *"Jersey born and locally based campaigner for the evidence based reform of our drug laws"* appears to agree with the proposition but feels that it does not go nearly far enough. He presents evidence of the harms of various legal and illegal drugs and suggests that it is short-sighted to limit the management of drug offences to Class B only. He argues that those addicted to Class A drugs are *"very often some of the most vulnerable in our society"* and as such we should move away from criminalising their possession of drugs as well. He feels that recreational Class A drug users should also avoid criminal prosecution for 'personal use' as it is disproportionate to have them *"end up with a potentially life ruining criminal record".*

Mr Benjamin's submission is more concerned with the general treatment of drugs by society than specifically about the terms of the proposed Law. However, his point about the distinction between Class B/C and A is noted.

Drew Waller disagrees with the proposal, but no narrative is given.

The States Police consider that this would provide flexibility to assist in relieving the burden on the criminal justice system from dealing with individuals who are very occasionally found to be in possession of drugs, but caution that some checks may not identify that these offences have been committed.

The Comite des Chefs approves of the proposed treatment of drug offences and other minor offences.

Conclusion

The proposal would be helpful to the States of Jersey Police and Honorary Police, would avoid unnecessary court appearances.

In addition, this would allow a greater focus on the public health aspects of drug use and an increasing emphasis on rehabilitation and treatment, to reduce reoffending.