

Abusive and Offensive Online Communications: An Irish Perspective¹

INTRODUCTION

- 1.1 The advent of web 2.0 has created numerous challenges for the law, and for the criminal law in particular, often throwing “legal orthodoxies into disarray”.² Information sharing has never been so easy - thoughts, opinions, images, and their combinations through “gifs” and “memes” can travel at high speed across jurisdictions and in a manner which lawmakers even 20 years ago could not have foreseen. As Walley and Kimber observe:

Whilst such material may unite individuals with online communities which reflect their goals and interests, the unfiltered speech platform which the internet enables creates unprecedented challenges, as the undoubted rise of online hate speech, defamation, cyberbullying and harassment demonstrates. The negative aspects of the human psyche still remain: in an online setting, these features become magnified and their capacity for harm enhanced.³

- 1.2 Such challenges, perhaps most particularly in the context of the criminal law, have proved to be especially taxing for policy-makers. In an Irish context at least, they are yet to be addressed.
- 1.3 The criminalisation of online activity can take two forms. The first is to create “online” versions of “offline” offences – or simply make existing offences applicable to an online setting. Walley and Kimber maintain that in this regard the law is not “digitally-fit” generally, but is most particularly in the context of online harassment, defamation and hate speech.⁴ The second form of criminalisation deals with new forms of offending which are only possible in an online context. McGlynn and Rackley, for example, have highlighted image-based sexual abuse as an example of how technological developments have facilitated and expanded the ways in which sexual violence can be perpetrated.⁵
- 1.4 It is worth noting that some offences, such as, for example, incitement to hatred, are framed in technologically-neutral language. Thus, despite being enacted in a time in which the internet was not widely used, the law is such that it can be applied in an

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² Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016), 6.

³ Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016), 2.

⁴ Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016), 3.

⁵ Clare McGlynn and Erika Rackley, ‘Image-Based Sexual Abuse’ (2017) 37(3) *Oxford Journal of Legal Studies* 534.

online context. Other offences, however, are written in such a way as to preclude their operation in an online context. They are thus not “digitally fit”.

- 1.5 A final point to note in this context is that, while at least on paper, an offence may be committed online and offline, Walley and Kimber observe that the volume of postings which the internet can generate, combined with the algorithmic effect of search engines keeping lawful and offensive material alive on a permanent basis, means that the impact of crimes online can be catastrophic for victims as compared to its offline counterpart.⁶
- 1.6 Irish law has, to date, failed to address the challenges of Web 2.0 through legislation. However, in 2016, the Law Reform Commission published its extensive and comprehensive *Report on Harmful Communications and Digital Safety*.⁷ McGlynn and Rackley describe the package recommended in the Report as proposing “one of the more comprehensive and effective approaches to tackling these forms of online abuse.”⁸ For the purposes of this analysis, their explanation for this glowing recommendation is particularly relevant:

[Ireland] has the opportunity to learn from the inadequacies of the English approach, recognise the benefits of the Scottish legislation, and take the best of the international mechanisms focussing on civil sanctions and actions.⁹

- 1.7 This report will detail the traditional legal responses to discrete forms of abusive and offensive communication which can be conducted in an online setting; describe the manner (if any) in which the law in Ireland has sought to address such forms of behaviour in the absence of bespoke legislation to address online offending; and present the reforms which have been proposed, as well as any critique of those proposals.
- 1.8 In this context, it must be acknowledged that the Irish Law Reform Commission’s *Report on Digital Safety and Harmful Communications* is an outstanding example of a law reform project on a subject which requires both breadth and depth of analysis. Indeed, for the purposes of this report, it was at times difficult not to simply quote from the Report at length in an effort to explain particular aspects of Irish law. This review should be read alongside that 241-page Report, which probes the issues in a depth not possible in this relatively short review.

INTERNATIONAL LAW IN AN IRISH CONTEXT

- 1.9 While freedom of expression is a fundamental human right, guaranteed across international agreements, conventions, and treaties, it is – of course – not absolute. A number of discrete international instruments limit the right to freedom of expression in

⁶ Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016).

⁷ Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

⁸ Clare McGlynn and Erika Rackley, ‘More than “Revenge-Porn”: Image-Based Sexual Abuse and the Reform of Irish Law’ (2017) 14 *Irish Probation Journal* 38, 45.

⁹ Clare McGlynn and Erika Rackley, ‘More than “Revenge-Porn”: Image-Based Sexual Abuse and the Reform of Irish Law’ (2017) 14 *Irish Probation Journal* 38, 45

a number of contexts, aimed at supporting and protecting the human rights of, for example, women or minority communities.

Convention on the Elimination of All Forms of Discrimination Against Women

1.10 The United Nations *Convention on the Elimination of All Forms of Discrimination Against Women*¹⁰ (CEDAW) provides that States Parties must condemn discrimination against women in all its forms, and pursue policies to end such discrimination. In the context of online abuse particularly, in its General Recommendation No. 36 the Committee on the Elimination of All Forms of Discrimination Against Women noted:

Adolescent girls are often exposed to online victimisation which takes many forms including: name calling, spreading of rumours, threats, disclosure of confidential information, images/videos, revenge porn, sexual harassment and sexual advances often from strangers.¹¹

1.11 Recently, the CEDAW Committee expressed concerns at the lack of legal protection against “emerging forms of gender-based violence, such as online stalking and harassment”.¹² It recommended that, in line with its general recommendation number 19 on violence against women, Ireland should:

Criminalize domestic violence and introduce a specific definition of domestic violence and other emerging forms of gender-based violence, such as online stalking and harassment...¹³

Convention on the Elimination of All Forms of Racial Discrimination

1.12 Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination*¹⁴ requires States Parties to:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group or persons of another colour or ethnic origin.

1.13 States are additionally required under the Convention to “declare illegal and prohibit organisations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organisations or activities as an offence punishable by law.”

¹⁰ United Nations, Treaty Series, vol 1249, p 13

¹¹ General Recommendation No. 36 (2017) on the Right of Girls and Women to Education, CEDAW/C/GC/36, 18, November 2017, para 70.

¹² Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Ireland, CEDAW/C/IRL/CO/6-7, 9th March 2017, 7.

¹³ Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Ireland, CEDAW/C/IRL/CO/6-7, 9th March 2017, 7.

¹⁴ United Nations, Treaty Series, vol 660, p 195.

- 1.14 Despite the obvious capability of the internet to create an environment in which possibilities for communicating racially discriminatory messages are amplified and disseminated, Ireland (along with a number of other States Parties) has entered a reservation to Article 4 to ensure that, in implementing the Article, “the right to freedom of opinion and expression ... may not be jeopardised.”¹⁵
- 1.15 Ireland has not introduced any enabling legislation in relation to the provisions. In its 2006 Report, the Committee on the Elimination of Racial Discrimination (CERD) expressed concern that existing legislative measures were insufficient to meet the standards of the Convention. In 2011, the United Nations Committee on the Elimination of Racial Discrimination¹⁶ highlighted its ongoing concern that “the legislative framework in [Ireland] does not cover all the elements of Article 4 of the Convention, and that racist motivation is not consistently taken into account by judges in sentencing for crime (Arts. 2 and 4)”.

The Universal Periodic Review Process

- 1.16 Also in 2011, as part of the United Nations Human Rights Council’s Universal Periodic Review (UPR) process, observers recommended that Irish authorities take steps to challenge racism, xenophobia, religious intolerance, and racial profiling through the introduction of legislation.¹⁷ The UN Human Rights Council also examined Ireland’s compliance with the International Covenant on Civil and Political Rights. Article 20 of the ICCPR provides:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, shall be prohibited by law.

- 1.17 In response to the advance list of issues raised by the Human Rights Committee, Ireland communicated that Ireland’s compliance was scrutinized on an ongoing basis by the Council of the European Union and the European Commission and as such, Ireland would “... consider any proposals made by the Commission that would enhance the existing protections in the [Prohibition of Incitement to Hatred Act 1989]” if it were required.¹⁸

Convention on Cybercrime

- 1.18 The Council of Europe’s *Convention on Cybercrime* was signed on 23 November 2001.¹⁹ The aim of the Convention is to adopt a common criminal policy on cybercrime, while recognising the need to maintain a balance between the interests of

¹⁵ Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ (2007) 17(3) Irish Criminal Law Journal 16.

¹⁶ Committee on the Elimination of Racial Discrimination, *Concluding observations on the Committee of Racial Discrimination: Ireland* (United Nations 2011) para 19.

¹⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review* (United Nations 2011).

¹⁸ Human Rights Committee, *List of issues in relation to the fourth periodic report of Ireland* (United Nations 2014).

¹⁹ Ireland signed the Convention on the 28th February 2002, but have not yet ratified it.

law enforcement and the need to protect and respect the fundamental human rights of individuals.

- 1.19 The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature through computer systems, provides that States Parties must at least consider the possibility of introducing four separate offences into their criminal codes. One of these measures (Article 4: racist and xenophobic motivated threat) must be introduced, while States Parties can derogate from the provisions of the Protocol in relation to the other three offences (Article 3: dissemination of racist and xenophobic material through computer systems; Article 5: racist and xenophobic motivated insult; Article 6: denial, gross minimisation, approval or justification or genocide or crimes against humanity). Article 7 provides for the introduction of an offence of aiding and abetting the commission of any offence established in accordance with the protocol.
- 1.20 While Ireland has not yet ratified the Convention, it has indicated that it intends to do so, and Ireland has been further encouraged to ratify the Protocol to the Convention.²⁰

ADDRESSING ONLINE OFFENDING IN AN OFFLINE LEGAL CONTEXT: THE OFFENCES

- 1.21 This section of this report will address some of the key forms of online offending which have been discussed and analysed in an Irish context to date. Firstly, it describes the law relating to the offence as it exists on the statute book. Secondly it describes how the offence is understood and operationalised in an offline context. Thirdly, it explains how the offence is currently addressed (if at all) when it is committed online. Fourthly, it describes any reforms which have been suggested in this context. It should be noted at this point that, while there may be gaps in the range of offences, or their particular application in an online context, that creating new offences, or online versions of existing offences, is only one of the ways in which the law must react to online offending. Specialist, new, and bespoke legal remedies are also required, such as the introduction of legislation which allows for – and indeed ensures – the takedown of legally offensive material by Internet Service Providers.²¹

Harassment

- 1.22 Prior to the introduction of the Non-Fatal Offences Against the Person Act 1997, the law in relation to offences against the person was complex and governed primarily by the Offences Against the Person Act 1861. The 1997 Act was introduced following the Law Reform Commission's *Report on Non-Fatal Offences against the Person* in 1994. It created what McIntyre et al refer to as a "simplified hierarchy of offences",²² namely:

²⁰ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.252.

²¹ For a detailed examination of options in this regard, see, Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016), chapter 3; and Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016), chapters 10-11.

²² TJ McIntyre, Sinéad McMullan, and Seán Ó Toghda *Criminal Law* (Round Hall 2012).

assault, assault causing harm, causing serious harm, syringe offences, false imprisonment, threats, coercion, harassment, and endangerment.

1.23 The offence of harassment is set out in section 10 of the Non-Fatal Offences Against the Person Act 1997. It provides:

(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.

(2) For the purposes of this section a person harasses another where—

(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and

(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

1.24 A person found guilty under the offence can be sentenced on summary conviction to a term of imprisonment not exceeding 12 months, a fine of up to €2,500 or both; or on conviction on indictment, to a term of imprisonment not exceeding seven years, a fine, or both. Section 10(3) also permits the court to grant an order preventing any further contact between the parties, breach of which itself amounts to an offence under section 10. In recommending the introduction of the new offence in 1994, the Law Reform Commission explained:

acts of harassment which interfere seriously with a person's right to a peaceful and private life should be captured by the criminal law and not simply those [acts] that give rise to a fear of violence [which are covered by the offence of coercion].²³

Addressing offending offline

1.25 In order to be convicted of harassment, there is a requirement that the defendant be proven to have "persistently" followed, watched, pestered, besetted or communicated with his victim.²⁴ An example of this is found in *DPP v Woods*²⁵ in which the defendant made over 2,000 telephone calls to his victim. The Court stated that harassment was a "very mild" way to describe the defendant's behaviour. The question arose in an Irish context – as it did in England and Wales²⁶ – as to whether "persistent" means

²³ Law Reform Commission, *Report on Non-Fatal Offences Against the Person* (LRC 45 – 1994).

²⁴ In its 2013 *Report on Aspects of Domestic Violence*, the Law Reform Commission recommended amendments to the 'persistent' requirement, and particularly recommended that that term be retained rather than replaced with the 'course of conduct' requirement utilised in, for example, England and Wales. Law Reform Commission, *Report on Aspects of Domestic Violence* (LRC 111-2013), para 2.102.

²⁵ Unreported, High Court of Criminal Appeal, 19 December 2002.

²⁶ See, for example, *Kelly v DPP* [2003] Crim LR 45; *R v Hills* [2001] 1 FCR 569.

that the conduct must take place over a prolonged period of time, or whether a number of incidents over a relatively short period of time would suffice.

1.26 This question was ultimately addressed in the case of *DPP (O'Dowd) v Lynch*²⁷ where the accused (who was installing a kitchen) exposed himself repeatedly to two young children in their home. The question here was whether the series of incidents which took place over approximately three and a half hours was “persistent” for the purposes of section 10 in a prosecution for harassment. The Court found that the requirement for “persistence” was satisfied where:

- (1) there are incidents which are separated by intervening lapses of time;
- (2) incidents which are capable of being severed which immediately succeed each other (such as in the case at hand);
- (3) there is one unambiguous continuous act which has the “quality of persistence”.²⁸

1.27 Importantly, a single incident will not amount to harassment, however upsetting it is. All that said, Walley and Kimber state that “most practitioners” are of the view that the decision was “an unusual case, distinguishable on its own facts”.²⁹

Addressing offending in the absence of an online offence

1.28 The offence of harassment is an example of a “technologically neutral” crime, which is as applicable online as offline. This is clear from the language used in section 10(1) which provides that the harassment can be committed “by any means”, including the telephone. Placing stalking in the context of section 10, the Law Reform Commission states:

Just as stalking is commonly characterised as a sub-category of harassment, the Commission suggests that cyber-stalking that meets the test of persistence is best described as a form of cyber-harassment.³⁰

1.29 Given the technologically neutral nature of section 10(1) it is perhaps unsurprising that it has been used to address cyber-harassment. Successful prosecutions have been taken under section 10 involving the sending of “unwanted, inappropriate or harmful emails, text messages and posting harmful content online.”³¹

1.30 That said, there are deficiencies in the Act in the context of online harassment. For example, the Act presumes direct communication between the offender and their victim. Where harassment is happening online, this direct communication will not

²⁷ [2010] 3 IR 434.

²⁸ [2010] 3 IR 434, 443.

²⁹ Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016), 695.

³⁰ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.14.

³¹ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.16.

always be present. The offensive conduct may not be directly sent or addressed to the victim, but rather information regarding the victim may be disseminated across social media. The Law Reform Commission observes that the requirement to communicate with the victim “means that it is unlikely that section 10 could be interpreted as applying to all forms of indirect activity.”³² Similarly, the Commission was of the view that harmful messages posted on a private social media site such as Facebook may not be “direct” for the purposes of the legislation. That said, there have been prosecutions taken under section 10 for conduct which amounted to indirect harassment.³³ As there were guilty pleas in these cases, the law in the area remains unclear.

Stalking

- 1.31 While the offence of harassment was described as stalking in Dáil Debates, the Law Reform Commission in its 2013 Report differentiates between harassment and stalking, stating that the “offence of harassment is sufficiently broad in scope to encompass behaviour that is colloquially known as ‘stalking’.”³⁴ That said, the Commission in its 2016 Report, quoting Moulds, highlights the qualitatively different nature of the relationship the perpetrator assumes towards the victim in cases of stalking as against harassment:

Somebody might harass another person because they are not happy with them or whatever, but that is slightly different from the intimate relationship that stalker has with his victim. There is an emotional relationship between two people, and it is an unequal relationship.³⁵

- 1.32 The Commission, referring to the experiences of Scotland and England and Wales, recognised in that later report that there are advantages to introducing a specific offence of stalking. This is not only because of the practical effect, where the number of prosecutions increased, but also because identifying stalking as a distinct crime “carries particular importance for victims of stalking because of the ‘hidden’ nature of the crime as well as its more serious nature compared to harassment.”³⁶

Reform

- 1.33 It is interesting to note that while the Criminal Law (Sexual Offences) Act 2017 was passed following the publication of the Report of the Law Reform Commission, the Act does not address online harassment. Perhaps this is because legislators were of the view that the issue should be addressed through an amendment of the 1997 Act, or as part of a suite of online offences, as proposed by the Law Reform Commission,

³² Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116- 2016) at para 2.35.

³³ As discussed in Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116- 2016) at para 2.36.

³⁴ Law Reform Commission *Report on Aspects of Domestic Violence* (LRC 111-2013) 82.

³⁵ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116- 2016) at para 2.56.

³⁶ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116- 2016) at para 2.72.

though this is just speculation.³⁷ The Commission further noted that the requirement of persistence should remain, with one-off online offences being addressed through different provisions of the Bill.

- 1.34 Section 7 of the Commission's draft Bill attached to the report repeals section 10 of the Non-Fatal Offences Against the Person Act 1997 and replaces it with an offence which is amended in two ways: (a) harassment would expressly apply to any means of communication, including digital and online communications; and (b) that harassment should encompass indirect forms of communications, such as setting up fake online social media profiles.³⁸ Section 7(2) provides the essential ingredients of the offence: (a) the accused, by his or her acts intentionally or recklessly, seriously interfered with the other person's peace and privacy or caused alarm, distress or harm to the other person; and (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other person's peace and privacy or cause alarm, distress or harm to the other person. Section 7 retains the requirement of "persistence" which is a recognised aspect of harassment. Section 7(3) provides that the penalties for the offence are the same for harassment under section 10 of the 1997 Act.
- 1.35 The Commission recommended that a new stalking offence, separate from harassment, be introduced on the grounds that stalking is "more serious" and has a more "insidious character" as compared to harassment.³⁹ The Commission proposed that the elements of new stalking offences should be the same as the proposed new harassment offence. Under section 8(1) of the draft Bill a person commits an offence if he or she stalks another person by (a) persistently following, watching, pestering or besetting the other person, or (b) persistently communicating by any means of communication with the other person, or (c) persistently communicating with a third person by any means of communication about the other person.
- 1.36 In a Private Member's Bill recently introduced into the Dáil (discussed below), the new stalking offence is not included. Rather, where the offence of harassment involves stalking (as defined by the Commission), it is to be considered an aggravating factor in sentencing under section 3(3). Under section 3(4) it is proposed that where the offender and victim are or were in an intimate relationship, and in the course of or for the purposes of the offence, the defendant either made use of during the course of committing the offence private information regarding the victim, or used electronic equipment to record movements, activities or communications of that person without their knowledge, that is also to be considered an aggravating factor. This is clearly a

³⁷ It is interesting to note that Charleton, McDermott and Bolger discuss the crime of harassment in their chapter on sexual offences, rather than non-fatal offences because, they explain, 'this kind of offences is usually committed in the context of sexual or romantic attraction.' Peter Charleton, Paul Anthony McDermott and Marguerite Bolger, *Criminal Law* (Round Hall 1999), 732.

³⁸ 7.(1) A person commits an offence where he or she, without lawful authority or reasonable excuse, harasses another person (in this section referred to as the other person) by — (a) persistently following, watching, pestering or besetting the other person, or (b) persistently communicating by any means of communication with the other person, or (c) persistently communicating with a third person by any means of communication about the other person.

³⁹ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.71 – 2.72.

step back from the recommendations made by the Commission, and loses the considerable merit in highlighting and recognising the particular nature of stalking as a bespoke criminal offence.

Threats and abusive messages

1.37 While section 10 of the 1997 Act can and is used to address communication which is persistent and ongoing, it does not and cannot address once-off behaviour. Indeed as we will see, the law seems currently mostly incapable of addressing such offending. Once-off behaviour is addressed through section 13 of the Post Office (Amendment) Act 1951 and section 5 of the Non-Fatal Offences Against the Person Act 1997. Section 2 of the Criminal Damage Act has also been utilised, as has the Criminal Justice (Offences Relating to Information Systems) Act 2017. Section 6 of the Criminal Justice (Public Order) Act 1994 provides that it is an offence for a person in a public place “to use or engage in any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned.” However, the section is so clearly limited to physical rather than online spaces, that it is not considered in this context.

1.38 Section 13 of the Post Office (Amendment) Act 1951 (as amended) provides:

(1) Any person who -

(a) sends by telephone any message that is grossly offensive, or is indecent, obscene or menacing, or

(b) for the purpose of causing annoyance, inconvenience, or needless anxiety to another person –

(i) sends by telephone any message that the sender knows to be false, or

(ii) persistently makes telephone calls to another person without reasonable cause

commits an offence.

1.39 On summary conviction, the maximum penalty is a fine not exceeding €5,000, or a term of imprisonment not exceeding 12 months, or both; on conviction on indictment, the sentence that can be imposed is a maximum fine is €75,000, a term of imprisonment not exceeding five years, or both. While section 13 does address the one-off offending that section 10 of the 1997 Act cannot, it is restricted in its operation to telephone and text (SMS) messages,⁴⁰ and does not cover the myriad other forms of communication now possible via social media.

⁴⁰ Section 13(5) of the Act defines ‘message’ as ‘including a text message sent by means of a short message service (SMS) facility.’

1.40 Under section 5 of the Non-Fatal Offences Against the Person Act 1997, it is an offence to make a threat to kill or to cause serious harm to any person. Section 5(1) provides:

A person who, without lawful excuse, makes to another a threat, by any means intending the other to believe it will be carried out, to kill or cause serious harm to that other or a third party shall be guilty of an offence.

1.41 On summary conviction, the maximum penalty is a fine not exceeding €1,905, or a term of imprisonment not exceeding 12 months, or both. On conviction on indictment, the sentence that can be imposed is a fine, a term of imprisonment not exceeding ten years, or both.

1.42 In the context of the offence of criminal damage, section 2(1) of the Criminal Damage Act 1991 as amended provides:

A person who without lawful excuse damages any property belonging to another intending to damage any such property or being reckless as to whether any such property would be damaged shall be guilty of an offence.

1.43 “Damage” is defined in section 1 as destroying, defacing, dismantling or, whether temporarily or otherwise, rendering inoperable or unfit for use or prevent or impair the operation of. On summary conviction, the maximum penalty is a fine not exceeding €2,500, or a term of imprisonment not exceeding 12 months, or both; on conviction on indictment, the sentence that can be imposed is a fine of up to €17,500, a term of imprisonment not exceeding ten years, or both.

1.44 Section 2 of the Criminal Justice (Offences Relating to Information Systems) Act 2017 makes it an offence to without lawful authority or reasonable excuse, intentionally access an information system by infringing a security measure. Section 3 of that Act makes it an offence to interfere with an information system without lawful authority and provides:

A person who, without lawful authority, intentionally hinders or interrupts the functioning of an information system by—

(a) inputting data on the system,

(b) transmitting, damaging, deleting, altering or suppressing, or causing the deterioration of, data on the system, or

(c) rendering data on the system inaccessible,

shall be guilty of an offence.

1.45 Section 5 of that Act makes it an offence to, without lawful authority, intentionally delete, damage, alter or suppress, or render inaccessible, or cause the deterioration of, data on an information system. On summary conviction, the maximum penalty for all three offences is a fine not exceeding €5,000, or a term of imprisonment not exceeding 12 months, or both; on conviction on indictment, the sentence that can be imposed is a fine, or a term of imprisonment not exceeding five years, or both.

Addressing offending offline

- 1.46 It is important to note in the context of section 5 of the Non-Fatal Offences Against the Person Act 1997 that a threat to harm is insufficient for the purposes of the section: it must be established that there was a threat to cause *serious* harm, defined in the interpretation section (section 1) of the Act as:

... injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ.

- 1.47 This was interpreted in *People (DPP) v Kirwan* as not requiring proof of an injury with “protracted or long term consequences”.⁴¹
- 1.48 It does require that the person making the threat intends that the victim believe it. Thus, if the defendant made the threat in jest, but it was honestly believed by the victim, it would not be an offence. According to *DPP v Dundon*, “it is the intent of the perpetrator and not the reaction of the victim which the section requires must be established by the prosecution.”⁴²

Operation of the online offence

- 1.49 In the context of the Criminal Damage Act, Hanly observes that the activities of hackers will typically fall within the definition of damage under section 2. He further considers the “lawful excuse” defence to the offences (in the context of (the now repealed) section 5, but the analysis also applies to section 2):

[I]t is not clear whether the “without lawful excuse” requirement relates to the operating or the accessing or both. If A uses a computer without permission to access his own files is he committing an offence?

- 1.50 Section 2 of the Act was used in 2014 where a man posted an offensive status update on his ex-girlfriend’s Facebook page after stealing her phone. In sentencing, Sheehan J was unsure as to how to assess the damage inflicted if nothing had been broken. Walley and Kimber again note that in the context of a guilty plea the application of the section to this sort of conduct was not the subject of judicial scrutiny, and:

... it remains to be seen whether the utilisation of the legislation for this type of activity would survive legal challenge in a trial, as the “damage” was clearly reputational with an intent to harass.⁴³

Addressing offending in the absence of an online offence

- 1.51 Generally speaking, what we see here is the prosecution seeking to utilise in digital contexts legislative provisions designed for analogue offending. The success of this approach remains highly uncertain since, even when a person has been convicted, this is typically because they pleaded guilty to the offence. Discussing the offence of

⁴¹ [2005] IECCA 136.

⁴² [2008] IECCA 14.

⁴³ Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016), 700.

harassment, Walley and Kimber note that there is doubt as to whether harassment effected via a single upload, or via anonymous postings on social media sites, could be effectively prosecuted under section 10. It is a particular feature of the internet that a single image uploaded once by an individual has the capacity to go “viral” and be seen by potentially millions of internet users across the world. As section 10 requires “persistent” acts, a single upload – no matter how many times it is shared, or how devastating the consequences for the victim – will be unlikely to qualify as “harassment” for these purposes. Unfortunately, however, given the limitations of section 13 of the Post Office (Amendment) Act 1951 to messages sent by telephone, at least on paper it is incapable of addressing a great deal of online offending. Walley and Kimber observe that section 13 has been used on at least one occasion to address sexually explicit and abusive messages which were posted on a teenager’s Bebo page.⁴⁴ As the offender pleaded guilty, the application of the section to the behaviour in question was not the subject of judicial scrutiny, and it is unlikely that such a prosecution would survive such analysis.⁴⁵

- 1.52 Some commentators have raised questions of principle over the use of section 13 to address the posting of offensive messages online. McIntyre queries whether section 13 should be used in relation to one-off online postings, suggesting that if it is amended to do so, it could be used to prohibit “a great deal of speech on the basis that some readers might find it grossly offensive.”⁴⁶ McIntyre and Crehan argue that while a menacing phone call is a “very intimate form of harassment”, a social media post “lacks this personal intimacy” and would “for example, make it a criminal offence to make any statement online, knowing it to be false.”⁴⁷ Indeed, they argue, the scope of the offence if simply converted to a digital context would be even wider:

... it would make everything on the internet, including the entire output of [the national broadcaster] RTÉ, subject to an offensiveness test. It would also criminalise any form of political art, which often is made with the explicit intention of causing offence, or at least annoyance. These examples are only three amongst a potentially infinite number of absurdities that would be caused by the proposed change to the Act.⁴⁸

- 1.53 In the context of section 5 of the Non-fatal Offences Against the Person Act 1997, McIntyre and Crehan note that there is nothing to preclude the use of the section in

⁴⁴ Pauline Walley and Cliona Kimber, *Cyber Law and Employment* (Round Hall 2016), 699.

⁴⁵ McIntyre suggests that a mistrial was entered in the case: TJ McIntyre, ‘Bebo, Bullying and the law’ IT Law in Ireland 23 July 2008 available at <http://www.tjmcintyre.com/2008/07/bebo-bullying-and-law.html>.

⁴⁶ TJ McIntyre, ‘Bebo, Bullying and the law’ IT Law in Ireland 23 July 2008 available at <http://www.tjmcintyre.com/2008/07/bebo-bullying-and-law.html>.

⁴⁷ TJ McIntyre and Fergal Crehan, *Submissions of Digital Rights Ireland to the Oireachtas Joint Committee on Transport and Communications hearings on social media and cyberbullying* 20 March 2013 available at https://www.scribd.com/document/131500297/Written-submissions-on-abuse-in-social-media#fullscreen&from_embed, 11.

⁴⁸ TJ McIntyre and Fergal Crehan, *Submissions of Digital Rights Ireland to the Oireachtas Joint Committee on Transport and Communications hearings on social media and cyberbullying* 20 March 2013 available at https://www.scribd.com/document/131500297/Written-submissions-on-abuse-in-social-media#fullscreen&from_embed 11.

the context of online communications.⁴⁹ They do, however, caution against over-zealous application of the section “bearing in mind”, they argue, “the many colloquial uses of language which, on an objective reading, might appear threatening.”⁵⁰ They note that the section requires that the defendant intends that the victim believe that the threat will be carried out, and argue in this context that it is “superior” to the offence under section 127(1) of the Communications Act 2003 in England and Wales.

Reform

- 1.54 In its 2014 Report, the Internet Content Governance Advisory Group recommended that section 13 be amended to include “electronic communications” within the scope of the measures through which messages can be sent.⁵¹ However, the Law Reform Commission was of the view that this would not be sufficient to address once-off harmful digital communications. It further noted that the offence as currently constituted requires more extensive reformulation in order for it to apply to more modern forms of communication, particularly when considered in the context of the principle of legality.⁵² The Commission recommends the removal of the terms “grossly offensive” and “menacing” and their replacement with “threatening” given the likelihood of the former two terms being successfully challenged for vagueness.
- 1.55 Section 6 of the draft Bill appended to the Report of the Commission extends section 13 of the Post Office (Amendment) Act 1951 to include all forms of communications, including messages distributed online through social media that are sent to the person and also about the person. Section 6(2) provides that the essential ingredients of the offence: (a) the accused, by his or her acts intentionally or recklessly, seriously interfered with the other person’s peace and privacy or cause alarm, distress or harm to the other person; and (b) persistently. Section 6(3) provides that the penalties for the offence are the same for harassment under section 10 of the 1997 Act.

Hate speech

- 1.56 In Ireland, the only legislative recognition of hate speech is through the Prohibition of Incitement to Hatred Act 1989.⁵³ This Act prohibits expressions of hatred, including the dissemination of graphic or textual materials, which have the intention of provoking hatred against “... a group of persons in the State or elsewhere on account of their

⁴⁹ TJ McIntyre and Fergal Crehan, *Submissions of Digital Rights Ireland to the Oireachtas Joint Committee on Transport and Communications hearings on social media and cyberbullying* 20 March 2013 available at https://www.scribd.com/document/131500297/Written-submissions-on-abuse-in-social-media#fullscreen&from_embed.

⁵⁰ TJ McIntyre and Fergal Crehan, *Submissions of Digital Rights Ireland to the Oireachtas Joint Committee on Transport and Communications hearings on social media and cyberbullying* 20 March 2013 available at https://www.scribd.com/document/131500297/Written-submissions-on-abuse-in-social-media#fullscreen&from_embed, 10.

⁵¹ Internet Content Governance Advisory Group, *Report of the Internet Content Governance Advisory Group* (Department of Communications, Climate Action and Environment 2014).

⁵² Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.87.

⁵³ For a more detailed analysis of the operation of the Act, see Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation” (sic). Section 2(1) of the Act provides:

It shall be an offence for a person—

(a) to publish or distribute written material,

(b) to use words, behave or display written material—

(i) in any place other than inside a private residence, or

(ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence,

or

(c) to distribute, show or play a recording of visual images or sounds,

if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

1.57 A person found guilty under the offence can be sentenced on summary conviction to a term of imprisonment not exceeding six months, a fine of up to €1,904 or both; or on conviction on indictment, to a term of imprisonment not exceeding two years, a fine of up to €12,700, or both.

1.58 Introduced in order to allow Ireland to ratify the International Convention on Civil and Political Rights,⁵⁴ and to address the broader anti-discrimination provisions of the United Nations Covenant on the Elimination of All Forms of Racial Discrimination,⁵⁵ at the time of its enactment, it was relatively progressive, including sexual orientation as a protected characteristic prior to the decriminalisation of homosexuality in 1993.

Addressing offending offline

1.59 The first general point to note in relation to the Prohibition of Incitement to Hatred Act 1989 is that, even accepting its limited application, it has proved ineffective at combating criminal expressions of hatred, with only a small number of convictions secured under the Act.⁵⁶ It would appear from statistics produced by the Courts Service that there were 44 prosecutions and only five convictions under the Act between 1989 and 2017.⁵⁷ There are a number of reasons why the Act has been

⁵⁴ Michael O’Flaherty, ‘Implementation of the International Covenant on Civil and Political Rights – Ireland before the Human Rights Committee’ (1993) 11 Irish Law Times 225.

⁵⁵ Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 55.

⁵⁶ European Commission on Racism and Intolerance, *Third Report on Ireland* (ECRI 2007). See also, Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008).

⁵⁷ Conor Gallagher, ‘Courts service reveals five convictions for hate crime since 1989’ *The Irish Times* (Dublin, 19 July 2017).

ineffectual, ranging from the language it uses, to the range of victim groups it purports to protect. However, perhaps the primary reason for this is the prevailing view as to the internal requirements of the offence – what Keogh describes as the “Achilles heel” of the Act.⁵⁸ The fact that the prosecution must establish that the defendant either intended to, or in the circumstances, was likely to, stir up hatred has arguably resulted in so few prosecutions under the Act.

Addressing offending in the absence of an online offence

1.60 Kane and O’Moore note that the Act is a technologically neutral one, as appropriate to addressing online expressions of hatred as it is to those occurring offline.⁵⁹ That said, while it is generally difficult to secure a conviction under the Act where the alleged offence is committed in an offline context, the 1989 Act has proven particularly ineffectual in combating online hate speech, arguably because of the “stirring up” requirement. The Law Reform Commission refers to a particularly egregious example of this. In the so-called “Traveller Facebook case” the accused had created a Facebook page entitled “Promote the use of knacker babies for shark bait.”⁶⁰ The Commission notes that the case was dismissed in the District Court on the basis that there was reasonable doubt as to whether there had been intent to incite hatred against the Traveller community.⁶¹ Indeed, Keogh observes that such is the application of the “stirring up” requirement, a conviction will only be secured in cases where “racist material is sent between racists but not when the victim group is directly targeted.”⁶²

1.61 It is hard to see why this interpretation of the Act has become so embedded in the Irish understanding of the provisions. The Act explicitly states that the offence is committed where stirring up is intended *or is likely*. The second limb of the test is surely capable of being utilised in the context of the particularly offensive content of the posts in the Traveller Facebook case. Indeed, McIntyre and Crehan describe the decision in the case as “bewildering”, and suggest that the failure of the prosecution in the case did not stem from any deficiencies in the legislation.⁶³ They describe the decision as an unfortunate one, given the “chilling effect” that it is inevitably going to have on further prosecutions.⁶⁴ That said, in *Re the European Arrest Warrant Act*

⁵⁸ Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) Bar Review 178.

⁵⁹ Sinead Kane and Mona O’Moore, ‘The EU Directive for Victims of Crime: how it applies to victims of bullying’ (2013) 23(3) Irish Criminal Law Journal 83.

⁶⁰ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.245, 2.246. The term ‘knacker’ is a particularly offensive slur used against members of the Irish Traveller community.

⁶¹ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016)..

⁶² Conor Keogh, ‘The Prohibition of Incitement to Hatred Act 1989 – A Paper Tiger?’ (2001) 6(3) Bar Review 178, 181.

⁶³ TJ McIntyre and Fergal Crehan, *Submissions of Digital Rights Ireland to the Oireachtas Joint Committee on Transport and Communications hearings on social media and cyberbullying* 20 March 2013 available at https://www.scribd.com/document/131500297/Written-submissions-on-abuse-in-social-media#fullscreen&from_embed, 12.

⁶⁴ TJ McIntyre and Fergal Crehan, *Submissions of Digital Rights Ireland to the Oireachtas Joint Committee on Transport and Communications hearings on social media and cyberbullying* 20 March 2013 available at

2003: *Minister for Justice and Law Reform v Petrášek*,⁶⁵ a question arose as to the correspondence between the Czech law of “defamation of the ethnical group, race and persuasion”⁶⁶ and the 1989 Act. The warrant stated that Petrášek verbally attacked a Romany family, and “scolded them, and called black swines (sic), Negro swines three women (sic) ... He shouted at them that he would speak only with whites”.⁶⁷ In addressing whether correspondence existed between Irish law and Czech law in the case, counsel for the respondent stated that the facts did not satisfy the ingredient relating to intention, or the ingredient of stirring up hatred. The Court was not impressed with these arguments, and finding correspondence to the 1989 Act Edwards J stated:

The conduct described speaks for itself in this Court's view, and an intention to stir up hatred in the case of the s.2 offence ... alternatively the creation of a likelihood that hatred would be stirred up in the case of the s.2 offence ... can all be inferred from the description of the underlying facts provided.⁶⁸

- 1.62 Thus, while there did not seem to be any evidence that anyone was in fact “stirred up” (the apparent prerequisite to a prosecution under section 2 as set out in previous cases and referenced by the Law Reform Commission), Edwards J nonetheless found that the facts, as presented, corresponded to section 2 of the 1989 Act. Whether this signals a potentially broader interpretation of the Act in the future remains to be seen.

Reform

- 1.63 The Law Reform Commission has further analysed the utility of the Act in an online context.⁶⁹ Given the fact that the internet, as the Commission observes, offers a “substantial means to promoted hatred and facilitate hate speech”,⁷⁰ if the 1989 Act were to have any effective application, it is perhaps in this context that it could be most readily utilised. The Commission notes that online hate speech is criminalised by the Act, but any difficulties already identified in terms its efficacy offline are compounded in an online context. Referring to the “Traveller Facebook case”, the Commission recommends that the Act and the criminalisation of hate speech be subject to broad reform. This is particularly relevant in a context where, as the Commission observes, “[o]nce an abusive comment is made it can spread very fast, be viewed by many people and remain accessible long after the content was posted.”⁷¹ That said, the Commission recommended that online hate speech laws be

https://www.scribd.com/document/131500297/Written-submissions-on-abuse-in-social-media#fullscreen&from_embed, 12.

⁶⁵ [2012] IEHC 212.

⁶⁶ [2012] IEHC 212, para 37.

⁶⁷ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016). para 38.

⁶⁸ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016). para 42.

⁶⁹ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016).

⁷⁰ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016). at para 2.245.

⁷¹ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016). at para 2.247.

reformed as “part of an overarching reform of hate crime” rather than independently of any such all-embracing reform.⁷²

Image-based sexual abuse

1.64 McGlynn and Rackley reject the euphemisation of image-based sexual abuse, described variously as “distributing intimate images”, or “revenge porn”, clearly stating that such offences are better conceptualised and described as image-based sexual abuse. They explain why the label attached to such offences is so important:

It matters because it informs and shapes our response to these actions. It matters because it risks causing misunderstanding of the nature of the harms, which in turn will have adverse impacts on attempts to prevent and tackle this phenomenon. And it matters because ... these actions should be recognised and categorised as sexual offences.⁷³

1.65 Unless the victim in the case is under the age of 17, it is unlikely that the publication of such imagery currently constitutes an offence under Irish law.

Addressing offending in the absence of an online offence

1.66 In the same way that indirect harassment is arguably not covered by section 10 of the Non-Fatal Offences Against the Person Act 1997, the Law Reform Commission states that it is unlikely that an offence of image-based sexual abuse – where the images are not sent directly to the victim – meet the requirement under section 10 that the defendant was “communicating with” the victim. The Commission does, however, acknowledge that if it were posted to a social media page to which the victim had access, a successful prosecution might ensue.

Reform

1.67 The law relating to sexual offences was recently updated and codified in the Criminal Law (Sexual Offences) Act 2017. While the Law Reform Commission had recommended the introduction of offences relating to image-based sexual abuse only two years previously, the legislation does not address any form of abuse that is online in nature, and only deals with offline sexual offences.

1.68 The Law Reform Commission’s Report recommends the introduction of two offences. The first (and more serious) is set out in section 4(1) of Commission’s draft Bill. If enacted this would make it an offence for a person to distribute or publish an intimate image of another person without the other person’s consent, or to threaten to do so. Section 4(2) provides that the offence can occur with a “once-off” act, unlike harassment and stalking. Under section 4(2) the essential ingredients of the offence are: (a) the accused, by his or her acts intentionally or recklessly, seriously interfered with the other person’s peace and privacy or cause alarm, distress or harm to the other person; and (b) his or her acts are such that a reasonable person would realise

⁷² Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.255.

⁷³ Clare McGlynn and Erika Rackley, ‘More than “Revenge-Porn”: Image-Based Sexual Abuse and the Reform of Irish Law’ (2017) 14 *Irish Probation Journal* 38, 43.

that the acts would seriously interfere with the other person's peace and privacy or cause alarm, distress or harm to the other person. One act of distributing an image could be sufficient to constitute an offence under section 4. Under section 4(3) a person who commits an offence under this section is liable (a) on summary conviction to a Class A fine or to imprisonment for a term not exceeding 12 months or to both, or (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding seven years or to both.

- 1.69 A less serious version of the offence is set out in section 5 of the Commission's draft Bill. It would make it an offence to take, distribute or publish, an intimate image of another person without the other person's consent. Section 5(2) provides that a person by his or her actions seriously interfered with the other person's peace and privacy or cause alarm, distress or harm to the other person. It is a strict liability offence because it does not require the accused to act intentionally or recklessly. The offence simply occurs by taking, distributing or publishing an intimate image without consent. It can be a once-off act. Section 5(3) provides that the offence is a summary offence, being a Class A fine and/or up to six months imprisonment.

Distribution of child sexual abuse images

- 1.70 Section 8 of the Criminal Law (Sexual Offences) Act 2017 creates a new offence of using information and communication technology to facilitate sexual exploitation of a child.⁷⁴ Section 8(1) provides that a person who uses such technology to communicate with another person (including a child) for the purpose of facilitating the sexual exploitation of a child by that person or another person shall be guilty of an offence, punishable to a term of imprisonment of up to 14 years. Section 8(2) of the Act provides, "a person who by means of information and communication technology sends sexually explicit material to a child shall be guilty of an offence" punishable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months, or on conviction on indictment to imprisonment for a term not exceeding five years. "Sexually explicit material" is defined in section 8(4) as "any indecent or obscene images or words."

THE LAW REFORM PROCESS

Law Reform Commission Report

- 1.71 In its *Report on Harmful Communications and Digital Safety*, the Law Reform Commission prepared draft legislation which it included as an Appendix to the Report, alongside an explanatory memorandum to the draft Bill.⁷⁵ As has been outlined in the analysis above, the Commission recommended the creation of new criminal offences to address the following:

- harassment, including online activity such as posting fake social media profiles;

⁷⁴ Section 8(3) provides that proceedings cannot be brought under the section against a child under the age of 17 except by, or with the consent of, the Director of Public Prosecutions.

⁷⁵ Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116-2016), pp 162-187.

- once-off distribution of an intimate image with intent to cause harm (“revenge porn”);
- other once-off posting of intimate images without consent (“up-skirting, down-blousing”);
- threatening and abusive online communications, (including threatening to send indecent images); and
- a new stalking offence separate from harassment.

1.72 As already noted, the Commission highlighted the inefficacy of current legislation in the context of hate speech, and recommended that the law in this regard be reformed in the context of a broader reconsideration of the law in relation to hate crime. It is important to note in relation to the draft Bill that the Commission spent some time considering the application of the principle of legality to digital communications offences highlighting in particular the decision of the Indian Supreme Court in *Shreya Singhal v Union of India*.⁷⁶ The Commission noted:

Singhal illustrates the difficulty with offences which use imprecise terms such as “grossly offensive” and “menacing”. Frequently, these terms are not defined in the relevant legislation and so it is left to the courts and those prosecuting these offences to determine the appropriate standard.⁷⁷

1.73 This issue, the Commission, found, was particularly relevant in the context of a single upload of a threatening, false, indecent or obscene message, and guided its recommendations for reform of section 13 of the of the Post Office (Amendment) Act 1951.

Private Member’s Bill 2017

1.74 Deputy Brendan Howlin of the Labour Party introduced a Private Member’s Bill in 2017 intended to implement the recommendations of the Commission’s 2016 Report. Introducing the Bill, he stated:

I believe the Internet is a public space, and I believe that, as with all public spaces, our people deserve to be protected there just as they would utilising a public park or a public roadway. Some will disagree. Some see the Internet as a great libertarian or anarchist play space but the view of the Labour Party is that this space is truly important, is growing in importance and needs to be regulated.⁷⁸

1.75 The Harassment, Harmful Communications and Related Offences Bill 2017⁷⁹ has now completed its second stage in the Dáil. The stated purpose of the Bill is to consolidate and reform the criminal law concerning harmful communications, to repeal certain

⁷⁶ (2015) Writ Petition (Criminal) No 167 of 2012.

⁷⁷ Law Reform Commission *Report on Harmful Communications and Digital Safety* (LRC 116, 2016) at para 2.158.

⁷⁸ <https://www.oireachtas.ie/en/debates/debate/dail/2018-01-31/28/>.

⁷⁹ Available at <https://www.oireachtas.ie/en/bills/bill/2017/63/?tab=bill-text>.

provisions of the Post Office (Amendment) Act 1951 and the Non-Fatal Offences Against the Person Act 1997. The main provisions propose to:

- Extend the existing offence of sending threatening or indecent messages to apply to all threatening, false, indecent and obscene messages using any form of online or traditional method of communications.
- Extend the existing offence of harassment as contained in section 10 of the Non-Fatal Offences Against the Person Act 1997 to include all forms of communication, including through online or digital communications harassment.

1.76 While the Bill clearly draws from the Commission's draft Bill in the 2016 Report, there are a number of points of difference between the two. There is no explanation for such departures in the Explanatory Memorandum to the 2017 Bill.⁸⁰ The main differences of note in the context of this paper are:

- In the Private Member's Bill, stalking is not a separate offence. Instead, stalking is considered an aggravating factor to the offence of harassment, as is online harassment or stalking by an (ex) partner.
- In the Private Members Bill, the two new offences suggested by the Commission in relation to image based sexual abuse under section 4 and 5 of the draft Bill are combined into one section.
- With regard to distribution of intimate images, disability is considered an aggravating factor.

1.77 The Government did not oppose the Bill and accepted its content, stating that it intended to use it as a platform for legislation.⁸¹ Tánaiste (Deputy Prime Minister) Simon Coveney stated:

There is a need to look at the responsibility of those who are responsible for online platforms to see how we can screen and remove inappropriate information and protect people in an appropriate way while ensuring we enjoy the benefits of technology. It is difficult to get the balance right and most Western democracies are struggling with it.⁸²

⁸⁰ The Explanatory Memorandum is available at <https://data.oireachtas.ie/ie/oireachtas/bill/2017/63/eng/memo/b6317d-memo.pdf> .

⁸¹ Dáil Debates, Wednesday, 9 May 2018. Available on-line at: <https://www.kildarestreet.com/debates/?id=2018-05-09a.56>.

⁸² Dáil Debates, Thursday, 25 January 2018. Available on-line at: <https://www.kildarestreet.com/debates/?id=2018-01-25a.127> .

- 1.78 Equally, the Minister for Justice Equality and Law Reform, Charles Flanagan, noted that the Bill was “broadly similar” to legislation being drafted in his department, though he raised a number of concerns with certain aspects of the Bill.⁸³
- 1.79 The Minister refined his concerns primarily to a consideration of section 4 (the distribution of an intimate image with intent to cause harm). He pointed out a number of difficulties with the offence as set out in the Private Member’s Bill. First, he highlighted the fact that the element of intent to cause harm, included in the Commission’s draft Bill for the more serious offence, was removed from the 2017 Bill creating what is in essence a strict liability offence. He adverted to the fact that there were further procedural difficulties with the offence, though declined to elaborate on them, suggesting that they be dealt with in Committee Stage. Further, he argued that the vulnerability of the victim is a factor that a court already takes into account at sentencing stage and thus this part of section 4 is redundant. He also questioned why vulnerability of the victim is limited to section 4 of the Bill and not extended to other sections. He also queried whether it was appropriate that the offence be treated as a sexual offence for the purposes of the Sex Offenders Act 2001, given that “less serious adolescent behaviour” could result in a young person being subject to the Act.

Hate speech and hate crime

- 1.80 Naturally, where any of the offences described above are perpetrated with a hate element, they could be considered hate crimes in England and Wales, and thus potentially subject to a sentence enhancement under relevant legislation. In Ireland, however, there is no such legislation, and the criminal justice process is often unable to address such offending, with the hate element of a crime often “filtered out” or “disappeared” from the process.⁸⁴ In its Combined 5th, 6th, and 7th Periodic Report to the UN Committee on the Elimination of Racial Discrimination, the State noted that the National Migrant Integration Strategy contains a commitment to reviewing racially motivated crime, with a view to strengthening the law in relation to hate crime and online hate speech.⁸⁵

CONCLUSION

- 1.81 It is clear from Dáil Debates on the 2017 Private Member’s Bill that the Department of Justice and Equality is currently drafting a Bill which seeks to address many of the gaps in the law in relation to abusive and offensive online communications in an Irish context. A key element of this will be the establishment of a Digital Safety Commissioner, currently under consideration by the Department of Communications, Climate Action, and Environment. Parallel to these developments, it appears that legislation which seeks to address hate speech and hate crime, both offline and online

⁸³ Dáil Debates, Harassment, Harmful Communications and Related Offences Bill 2017: Second Stage [Private Members], Wednesday, 31 Jan 2018. Available on-line at: <https://www.oireachtas.ie/en/debates/debate/dail/2018-01-31/28/>.

⁸⁴ For a detailed account of this, see Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).

⁸⁵ Available at [http://www.justice.ie/en/JELR/UNCERDIRL5_6_7PR_DRAFT_for_CONSULTATION_\(003\).pdf/Files/UNCERDIRL5_6_7PR_DRAFT_for_CONSULTATION_\(003\).pdf](http://www.justice.ie/en/JELR/UNCERDIRL5_6_7PR_DRAFT_for_CONSULTATION_(003).pdf/Files/UNCERDIRL5_6_7PR_DRAFT_for_CONSULTATION_(003).pdf).

is being developed by the Department of Justice and Equality. Until such legislation is introduced, Ireland will continue to grapple with Web 2.0 with laws designed for an analogue world.