

LAW SOCIETY SUBMISSION



ONLINE HARASSMENT, HARMFUL COMMUNICATIONS AND RELATED OFFENCES: POSSIBLE ISSUES TO ADDRESS

OIREACHTAS COMMITTEE ON JUSTICE AND EQUALITY

SEPTEMBER 2019

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1. The Law Society of Ireland ('the Law Society') welcomes the opportunity to contribute to the examination of issues of online harassment, harmful communications and related offences being undertaken by the Committee for Justice and Equality ('the Committee').
- 1.2. The Law Society is the educational, representative and regulatory body of the solicitors' profession in Ireland. This submission is based on the views of members of the Law Society's Human Rights and Equality Committee. The Committee is comprised of solicitors who have extensive experience and expertise in national and international human rights, privacy and criminal issues.
- 1.3. It should be noted that the Law Reform Commission 2016 Report on Harmful Communications and Digital Safety (hereinafter "the 2016 Report") provides extensive insights and comparative research, and was an invaluable reference in the preparation of this submission.
- 1.4. The Society is mindful in its observations that the appropriate balance needs to be struck between the right to freedom of expression on the one hand and the right to privacy on the other hand, and the range of policy and regulatory responses to that. This submission reflects the Society's recommendations for consideration by the Committee in its examination of this fast paced and changing area of law. The Society wishes to commend the approach of the Committee in consulting with relevant stakeholders to inform their research. We would also like to wish the Committee every success with the preparation of their Report.

2. Executive Summary

- 2.1 In preparing the submission, the Society notes the expanse of issues to be addressed in the Committee's work. They range across a wide number of legal areas. In this regard, the Society has chosen to focus on a general overview of the key issues that it considers the Committee should be aware of.
- 2.2 While outside of the scope of this submission, the Society would like to reiterate the need for a comprehensive response to hate speech and incitement to hatred online in any proposals for meaningful reform of online harassment and related offences. The Society highlighted this issue previously in its submission on Ireland's Combined 5th, 6th and 7th Periodic Report to the UN Committee on the Elimination of Racial Discrimination in January 2018.
- 2.3 The Committee should bear in mind European developments such as the revised Audiovisual Media Services Directive 2010/13/EU and e-Commerce Directive 2000/31/EC and the impact they will have on reform at a national level.
- 2.4 Any fixed definition of communication needs to be sufficiently broad to encompass changing technologies. Focus should be placed on harm inflicted and consideration given to also defining harmful content. A suggested definition might incorporate the following elements – “any content that seriously interferes with the peace or privacy of another person or causes alarm, distress or harm to that other person”.
- 2.5 Balancing the right to freedom of expression with the right to privacy is a delicate one. While criminal legislation is vital in punishing harmful activity, education is also important to create safer online spaces and empower users while regulatory oversight also plays a significant role. Criminal law needs to be nuanced and responsive to technological developments, while any reform needs to consider the proportionality of the response as well as the harm being caused.
- 2.6 The Society in line with the recommendations of the Law Reform Commission in their 2016 Report considers that existing legislation is not sufficient. It supports their proposal to repeal and replace section 13 of the Post Office (Amendment) Act 1951 with the specific offence of distributing a threatening, false, indecent or obscene message by any means of communication and with the intent to cause alarm, distress or harm or being reckless as to this.
- 2.7 The Society considers that the approach taken in Australia and New Zealand would be a useful model for Ireland to emulate in providing an online civil law mechanism. We urge the speedy establishment of the online Digital Safety Commissioner; and necessary legislative measures – both civil and criminal - in order to safeguard and adequately regulate the online sphere. To be explicit, self-regulation alone is an inadequate response to the serious issues presented by such platforms.

3. Scope of Changing Communications

- 3.1 The Committee is clearly cognisant that there are significant gaps in the current legislation with regard to harassment and newer, more modern forms of communication. While the Society commends the Committee for its awareness of the significant gaps in current legislation, it would also like to draw its attention to developments at the European level which will need to be taken into consideration when examining relevant national legislation. This includes the revised Audiovisual Media Services Directive 2010/13/EU, which was adopted by the Council on 6 November 2018 which Member States have 21 months to transpose into national law. Also, the e-Commerce Directive 2000/31/EC is relevant as it gives certain immunities to internet sites that host content.
- 3.2 The Society believes that any definition of communication would have to be extremely broad to keep abreast of advancing technologies. Otherwise, it faces being out of date very quickly and unable to provide adequate protection. It supports the approach of the Law Reform Commission in their 2016 Report, which recommends that section 10 of the Non-Fatal Offences Against the Person Act 1997 be repealed and replaced with a harassment offence expressly including harassment by all forms of communication.
- 3.3 The 2016 Report also suggested that the amendment include a definition of communication. It proposed that a definition of communication would “extend to any form of communication including by letter, telephone (including SMS text message) or digital or online communication such as through a social media site or other internet medium.” Such a definition might be sufficiently broad to encompass newer and changing digital and online platforms. Furthermore, the Society considers that within any definition, focus should be placed on the harm inflicted and that it might also be beneficial for harmful content also to be defined. Any definition should refer not only to content but also to the impact it has on the victim.
- 3.4 Rather than focusing solely on the form of communication and instead on the harmful nature of content, this circumvents any challenges in staying abreast of changing and advancing technologies. Education of prosecuting authorities so that they are familiar with different types of technologies as well as public awareness campaigns are also vital in maintaining flexibility and effectiveness in dealing with the shifting technological landscape. In England and Wales, the Crown Prosecution Service provides general principles for prosecutors to assist them in determining when prosecution should be followed.

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4. Balancing the Right to Freedom of Expression and the Right to Privacy

- 4.1 Freedom of expression is not an absolute right and must be balanced with other rights, particularly the right to privacy as well as the right to be free from harassment. The Law Reform Commission in their 2016 Report set out four broad principles guiding their approach to reform in the area and they are useful to consider in the context of balancing of these rights. These can be summarised as:
- (i) the wider context within which law reform proposals should be considered, with particular emphasis on solutions that involve education and empowerment;
 - (ii) the need to take account of relevant rights and interests, including to ensure an appropriate legal balance between the right to freedom of expression on the one hand and the right to privacy on the other hand;
 - (iii) the principle of technology neutrality, necessitating a focus on regulating actions and behaviour rather than simply the means used; and
 - (iv) a proportionate legal response that recognises the particular roles of criminal law, civil law and regulatory oversight: namely, that criminal law is used only where activity causes significant harm, and that civil law and regulatory oversight involve an efficient and effective take down procedure and appropriate statutory framework
- 4.2 The right to freedom of expression and the right to privacy are both protected by the Irish Constitution and the European Convention on Human Rights. Freedom of expression is recognised under Article 40.6.1, while privacy is one of the unenumerated rights stemming from Article 40.3.1. Both the Constitutional Review Group and the Oireachtas Joint Committee on the Constitution recommended that Article 40.6.1 should be amended with wording adopted similar to Article 10 ECHR. Article 8 of the ECHR provides for respect for private and family life while Article 10 provides for the right to freedom of expression.
- 4.3 Case law from the European Court of Human Rights has indicated a move away from robust protection of the right to freedom of expression towards protection of the right to privacy. In *Delfi AS v. Estonia*, a case involving hate speech, the Grand Chamber held that the “rights and interests of others and of society as a whole may entitle contracting states to impose liability on internet news portals without contravening article 10 of the Convention...”. In *MTE & Index v. Hungary*, the first post *Delfi* case considering the liability of online intermediaries, the Court found a violation of article 10 and noted that notice and take down requirements could act as useful tools in balancing the rights of all involved.
- 4.4 In New Zealand a Children’s e-safety Commissioner can request or formally notify persons to remove material from social media and apologise to the victim in cases of cyber bullying. Some commentators have criticised this approach as encroaching too far upon the right to freedom of expression.

- 4.5 Australia's most recent law passed in response to the horrific terrorist attack in Christchurch which was broadcast live on Facebook is the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019. It provides for a new law that can penalise platforms and their executives for a failure to control what it calls "abhorrent violent material." It has faced considerable criticism from organisations and academics for its encroachment on the right to freedom of expression, its legal ambiguity and lack of consultation with experts and civil society prior to enactment.
- 4.6 Lessons can be learned from other jurisdictions such as New Zealand and Australia of the vital importance of a comprehensive consultation process before enacting any new legislation as well as the need to consider carefully the implications of both the right to privacy as well as the right to freedom of expression. Central to any reform is the need to consider the proportionality of the response as well as the harm that it is targeting.
- 4.7 The German example of the Network Enforcement Act (NetzDG law) is relevant also, in that this legislation in Germany now compels ISPs to take down harmful content within 24 hours; provides a set of strict procedures that need to be complied with and may result in significant fines (as a proportion of revenue). The counter argument to using such forceful methods against ISPs is that it may lead to self-censorship; where platforms limit debate and publication where there may be a risk of penalty. In that regard it has been accused by some civil liberty groups and NGOs as draconian.

Law Society Recommendation: Balancing the right to freedom of expression with the right to privacy is a delicate one. While criminal legislation is vital in punishing harmful activity, education is also important to create safer online spaces and empower users while regulatory oversight also plays a significant role. Criminal law needs to be nuanced and responsive to technological developments, while any reform needs to consider the proportionality of the response as well as the harm being caused

5. Online Harmful Communications

- 5.1 Online harassment can take the form of non-consensual taking and distribution of intimate images or videos, otherwise known as ‘revenge porn’, ‘upskirting’, ‘downblousing’ and other forms of sharing of imagery online without consent. The Society suggests that the use of the term ‘revenge porn’ may not adequately convey the seriousness of the theft or misappropriation involved in such acts. Professor Clare McGlynn of Durham University, together with Erica Hackley developed the concept of image-based sexual abuse which encapsulates the nature and extent of the harms of all forms of non-consensual taking and/or sharing of private sexual images (including ‘revenge porn’ and ‘upskirting’).
- 5.2 Voyeurism as a specific offence does not currently exist in Ireland. Several jurisdictions have chosen to introduce specific legislation to deal with some of these issues. Following a campaign by Gina Martin, England and Wales introduced the *Voyeurism Act 2019* which provides that an offence is committed when a person operates equipment beneath another person’s clothing or if they record it with the purpose of obtaining sexual gratification or to humiliate, alarm or distress the other person.
- 5.3 New Zealand also provides for the specific offence of voyeurism, in the form of a visual recording (for example, a photograph, videotape, or digital image) using any device. Section 216H of the *Crimes Act 1961 (New Zealand)* as amended, provides that it is an offence where a person intentionally or recklessly makes an intimate visual recording of another person.
- 5.4 In Canada, Section 162.1(3) of the *Canadian Criminal Code* provides that any person who ‘knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of another person knowing the person depicted in the image did not consent, or being reckless as to this, is guilty of an offence’.
- 5.5 In Australia, the state of Victoria introduced offences relating to the distribution of intimate images in broader circumstances than in the particular context of “upskirting”. Section 41 DA of the *Summary Offences Act 1966* provides for the intentional distribution of an intimate image of another person which is contrary to community standards of acceptable conduct, which involves, *inter alia*, consideration of the circumstances, degree that privacy is affected and nature and content of image.
- 5.6 Section 33 of the *Criminal Justice and Courts Act 2015* introduced an offence of ‘disclosing sexual photographs and films with intent to cause distress’ in England and Wales. For the offence to be committed, specific intent to have disclosed the content to cause distress must be proven.
- 5.7 In Scotland, it is an offence under the *Abusive Behavior and Sexual Harm (Scotland) Act 2016* to disclose or threaten to disclose an intimate photograph or film. Notably, it also applies to threats to disclose intimate photographs and films and therefore offers a more comprehensive approach than the English offence. In England, the *mens rea* required is

intent, however, in Scotland and in Canada, the law goes broader and includes recklessness.

- 5.8 In New Zealand, section 22 of the *Harmful Communications Act 2015* criminalises 'causing harm by posting a digital communication'. The Act defines harm as 'serious emotional stress'. The definition of posting a digital communication extends to the posting of intimate videos and images.
- 5.9 Section 38 of the *Criminal Justice & Licensing (Scotland) Act 2010* provides for an offence of threatening and abusive behaviour and is applicable whether it involves a single event or a course of action. It applies where a person is acting in a threatening or abusive manner, which is likely to cause a reasonable person to suffer fear or alarm and this is intended or they are reckless as to the behaviour causing fear or alarm.
- 5.10 In Ireland, section 10 of the *Non-Fatal Offences Against the Person Act 1997* is limited to persistent behaviour and thus does not cover a single act that seriously interferes with a person's peace and privacy or causes him or her alarm, distress or harm. This creates a lacuna in relation to certain behaviour which cannot be prosecuted, such as the distribution of intimate images of adults if it is not carried out persistently.
- 5.11 The Society endorses the proposal of the Law Reform Commission in its recommendation to repeal and replace section 13 of the Post Office (Amendment) Act 1951 with the specific offence of distributing a threatening, false, indecent or obscene message by any means of communication and with the intent to cause alarm, distress or harm or being reckless as to this. The Act also presumes that communication is direct between the offender and their victim, whereas online communication is often about the victim and not directed to them.

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6. Regulation

- 6.1 Harassment whether it takes place on or off-line, and non-consensual sharing of intimate images are criminal behaviour and where a perpetrator is identified they should be prosecuted. In terms of online harassment, consideration must be given to the responsibility of online service providers. There are several Directives that have an impact on national regulation.
- 6.2 The *Audiovisual Media Services Directive 2010/13/EU* applies to social media and video sharing platforms and establishes principles requiring a National Regulatory Authority that ensures that there are services in place to meet those principles. The principles primarily refer to the need to protect minors from harmful online content, protect the public from incitement to hatred or violence and to protect the public from content, the distribution of which constitutes a criminal offence under EU law including public provocation to commit a terrorist offence, child sexual abuse material offences and offences of racism and xenophobia.
- 6.3 The *e-Commerce Directive 2000/31/EC* gives certain immunities to internet sites that host content. It provides that an internet site that hosts content or is a 'mere conduit of information' or provides a caching service is immune from liability for content provided that the site either (a) doesn't have actual knowledge of illegal activity or information or (b) is not aware of facts from which illegality is apparent.
- 6.4 The Court of Justice (CJEU) interpreted the extent of this immunity in *L'Oreal v eBay C-324/09* where the court set the standard as to whether or not a website operator could be said to have acquired an 'awareness' of illegal activity in connection with its services. This test was whether 'a diligent economic operator would have identified the illegality and acted expeditiously'.
- 6.5 The Society is concerned that online providers are not properly placed to self-regulate due to the fact that such platforms are economically dependent upon sharing of images and content for profit. Thus, it is not in their self-interest to self-censor. Levels of self-regulation vary widely in relation to online safety with some providers such as Facebook taking considerable but not always adequate efforts with others such as online dating sites making almost none.
- 6.6 It is evident that there is strong economic rationale for the platform to minimise barriers to the sharing of information and images. The development and application of Community Standards by more responsible providers is welcome, the extent to which they uphold international and national norms; as opposed to develop their own private contractual standard, needs to be carefully monitored. While community standards play a pivotal role in monitoring online behaviour and action, legislative intervention is necessary and vital to deal with on line content that is neither prevented nor addressed or indeed redressed through community standards.
- 6.7 Monitoring the effectiveness and appropriateness of procedural safeguards of the platforms' community standards are vital considering the impact such platforms have on

the democratic, social and economic integrity of a State or community. For example, in the area of hate speech and political speech, case law and treaty provisions at European and international level suggest a test based-approach to restrictions to freedom of expression. These include questions such as whether the restrictions are necessary in a democratic society, whether there is a pressing social need (context and climate) and whether the regulation is proportionate to the legitimate aims.

- 6.8 Other jurisdictions including New Zealand and Australia have taken significant steps towards regulating this area. New Zealand introduced the *Harmful Digital Communications Act 2015*, which provides that the most serious criminal offences are to be prosecuted. In addition, a new complaints agency is tasked with advising what people can do to solve a problem; investigating serious complaints and attempting to reach settlements between complainants and content authors; liaising with internet service providers and other intermediaries seeking take down/ moderation of harmful content. A speedy civil court process is also provided for.
- 6.9 Also in 2015, Australia introduced the *Enhancing Online Safety Act 2015* establishing a new civil law mechanism to provide for prompt removal of harmful online content. It has an eSafety Commissioner which promotes online safety, administers a cyber-bullying scheme, co-ordination of various government services for vulnerable people, a complaints system and system for dealing with cyber bullying.
- 6.10 The Law Reform Commission recommends the provision of an online Digital Safety Commissioner and the government has already committed to developing this office. The Society is supportive of such an initiative and hopeful that this will be brought to fruition shortly.

Law Society Recommendation: The Society considers that the approach taken in Australia and New Zealand would be a useful model for Ireland to emulate in providing an online civil law mechanism. We urge the speedy establishment of the online Digital Safety Commissioner; and necessary legislative measures – both civil and criminal - in order to safeguard and adequately regulate the online sphere. To be explicit, self-regulation alone is an inadequate response to the serious issues presented by such platforms.

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