



**RCNI Submission in response to the Law Reform
Commission Issues Paper on
Cyber-crime affecting personal safety, privacy and reputation
including cyber-bullying (LRC IP 6-2014), ie
Cyber-harassment
January 2015**

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Introduction

Rape Crisis Network Ireland welcomes the opportunity to make submissions on this Law Reform Commission Issues Paper on cyber-harassment, published in November 2014. Our network of member Rape Crisis Centres must now deal with frequent complaints of cyber-harassment in several forms from our clients, particularly older children and young adults. Not all forms of cyber-harassment are addressed adequately in existing legislation, in our view. Cyber-harassment can and does cause serious harm to its victims, and some cyber-harassment amounts to a form of sexual violence against those victims who experience it in a sexual context. Sexual violence in whatever form can and does have devastating impacts on its victims, and for this reason RCNI is interested in exploring legal options by which sexual cyber-harassment might be prevented and/or punished.

Submission Structure

Each set of questions in the Issues Paper is reproduced for easy reference, in green italics, under the relevant chapter heading, and any RCNI comments are added under each set of questions, using the same numbering.

ISSUE 1: WHETHER THERE SHOULD BE A SPECIFIC REFERENCE TO “CYBER- HARASSMENT” IN SECTION 10 OF THE 1997 ACT

1(a): Do you consider that section 10 of the Non - Fatal Offences Against the Person Act 1997 should be amended to include a specific reference to harassment by cyber means?

Section 10 of the *Non-Fatal Offences Against the Person Act 1997* is widely applicable and inclusively worded but in relation to tackling the relatively new phenomenon of cyber harassment there is room for improvement. Incidences of cyber-harassment are growing at an alarming rate. This is not an issue faced solely in our jurisdiction but in every nation. In Ireland we have a very high proportion of the population using social media: one study recorded that 61% of those surveyed were users of at least one of these services¹. The popularity of social media has arisen since the publishing of the 1997 Act and while it is still quite applicable to many types of cyber-harassment, such as sending sexually threatening messages and images to the victim, there is a need to update and expand its reach.

- The requirement of persistence is a major issue. Persistence is an understandable requirement in identifying traditional offline harassment but cyber-harassment can seriously interfere with a person’s peace and privacy while causing a great deal of distress in one single action. Numerous or protracted single incidents are not terms which necessarily relate to all aspects of the expansive nature of harassment online. These terms are far more relevant to cyber-stalking but do not take into account

¹ Ipsos MRBI (2013). Ipsos MRBI. Available at: <http://www.ipsosmrbi.com/social-networking-quarterly-survey-februar-2013.html>

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how damaging one single attack can be on an individual especially if the action is taken towards a victim on a public forum.

- The case of *R v Debnath*² is not an everyday example but rather a prolonged and extensive attack on an individual, albeit conducted mostly by indirect harassment (communication with others of false and damaging material of a sexual nature relating to the victim) and the mere question of whether all aspects of the attack could be covered by section 10 of the 1997 Act is a clear indication that changes need to be made to modernise harassment legislation to include cyber (and other) harassment by indirect means, that is, by communication with others or publication. The same can be said for the question mark over the applicability of section 10 of the 1997 Act in relation to the infamous iCloud leak of 2014.
- The year this Act was brought into law, harassment by text messages, phone calls and emails were the extent of electronic harassment. In 2015, there is a constantly evolving and expanding world of cyber communication which requires legislation that directly applies to it.

A specific reference to cyber-harassment is unquestionably necessary.

1(b): Do you consider that section 10 of the Non - Fatal Offences Against the Person Act 1997 should be amended to include indirect forms of harassment, including persistent posting online of harmful private and intimate material in breach of a victim's privacy?

The comments made by the Minister for Communications, Energy and Natural Resources in 2013³ that the 1997 Act deals with “direct communications with someone” but “it does not deal with communication about someone and is being interpreted in a very narrow sense by the courts” highlight a need for an amendment to include a reference to indirect harassment in section 10 of the 1997 Act. The use of indirect harassment, such as the sending of a sexually explicit photograph of the victim to his/her employer, has the potential to cause as much harm and distress to an individual as an incident of direct harassment, and the possibility of section 10 of the 1997 Act not being applicable in such an instance leaves a large number of options available to a would-be attacker where they may or may not suffer any legal ramifications for their actions under this act. In the English *Protection from Harassment Act 1997* the possibility of applying the Act in instances of indirect harassment is an example which should be followed in our jurisdiction, as it would provide a much wider range of protection for individuals targeted in this way. The *Criminal Justice and Courts Bill*⁴ which is currently going through parliament in the United Kingdom will make the publishing

² *R v Debnath* [2005] EWCA Crim 3472

³ Joint Committee on Transport and Communications Report on Addressing the growth of Social Media and tackling Cyberbullying (Government Publications, 2013) at 34.

⁴ New law to tackle revenge porn - Press releases - GOV.UK. 2015. *New law to tackle revenge porn - Press releases - GOV.UK.* [ONLINE] Available at: <http://www.gov.uk/government/news/new-law-to-tackle-revenge-porn>.

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of “revenge porn” a specific offence punishable by up to 2 years in prison. This move to target “revenge porn” is an example of the active and forward thinking that we need to utilise in tackling this problem to ensure that if a case such as *R v DeSilva*⁵ did arise in Ireland that we would have adequate legal means to handle such an incident.

1(c): Do you consider that section 10 of the Non - Fatal Offences Against the Person Act 1997 should be amended to provide expressly that it should have extra-territorial effect, provided that either the victim or the perpetrator is based within the State?

Amending section 10 of the 1997 Act in relation to extra-territorial effect is necessary as the openness and global reach of cyber-communications means that an attack may be perpetrated by an individual in one jurisdiction on another individual in any other jurisdiction. The location of an individual at the time of an incidence of harassment should not negate the protections which could be afforded to a victim. There is a possibility for conflict with rights or laws of other jurisdictions but this is not a reason to abandon entirely the inclusion of such protective measures.

ISSUE 2: WHETHER THERE SHOULD BE AN OFFENCE OF SERIOUSLY INTERFERING THROUGH CYBER TECHNOLOGY WITH ANOTHER PERSON’S PRIVACY

2(a): Do you consider that there should be an offence introduced that would criminalise once-off serious interferences with another person’s privacy where carried out through cyber technology?

Criminalising once-off serious interferences with another’s privacy through cyber technology is a necessity. The potential harm that can be caused by a once-off action, such as the circulation of intimate sexual photographs or videos without the consent of the subject, is too significant not to be addressed. An update of section 13 of the *Post Office (Amendment) Act 1951 (as amended in 2007)* is required to include the transmission of electronic communications as the use of social media and other online communication services is too commonplace for them to remain unmentioned in a specific manner. While the *Criminal Damage Act 1991* served to reflect the advancement in technology that had taken place up until that point, the advancements in technology since 1991 are above and beyond what was envisaged at that time and new legislation that reflects 21st century communications is vitally important.

The protection afforded by the *Data Protection Act 1988* and the *Data Protection (Amendment) Act 2003* provide a level of protection for individuals regarding the posting of harmful content but the lack of protection where content is posted to private social networking pages needs to be rectified. Private social networking pages which are available for individuals other than the person the content is in relation to can amount to a breach of their privacy and amount to indirect harassment of the individual.

⁵ R v DeSilva 2011 ONCJ 133

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As stated in this issues paper⁶ voyeurism, where it takes the form of a once-off observation or recording of an individual carrying out a private act may not meet the persistence test in section 10 of the 1997 Act. The United Kingdom and the Australian State of Victoria have criminalised such acts⁷ and such offences should be created here also as this kind of behavior can have severely detrimental effects on the victim.

The proposed measures in this issues paper would be capable of tackling the problem of once-off activity and could as outlined within the paper bring more attention to the protections available to the public who usually are more informed of the criminal law than the civil law. The global reach and permanence of content published online necessitates measures which are capable of addressing once-off and ongoing activities.

2(b): If such an offence were to be introduced, do you consider that it should have extraterritorial effect?

There is a need for extra-territorial effect in any legislation dealing with cyber-harassment. The online harassment of an individual, whether direct or indirect in form, should be prevented by our laws as far as possible regardless of the geographical location of the perpetrator.

2(c): Do you consider that any further reforms to the criminal law are needed to target harmful cyber behaviour affecting personal safety, privacy and reputation?

Any new legislation in this area should be drafted with the inevitable evolution of cyber-communication in mind. For example: the development of communication services such as Snapchat⁸ and Cyberdust⁹ which differentiate themselves from their competition by promising the permanent deletion of communications after a predetermined period of time illustrate the next stage of cyber communications. These services provide an individual with the opportunity to transmit explicit and/or private material to a number of other people with no permanent record of the transmission and in the case of Cyberdust, if a picture is taken of a transmission it cannot be used to identify the sender. Such developments must be taken into account as technology advances to ensure that gaps in the protection available to individuals do not form which could be exploited by sexual predators, both those who are strangers and those who are known to their victims, who would attempt to abuse cyber-technology to find ways to abuse or continue to abuse those victims.

ISSUE 3: WHETHER CURRENT LAW ON HATE CRIME APPLIES TO ACTIVITY THAT USES CYBER TECHNOLOGY AND SOCIAL MEDIA

Q3: Do you consider that the Prohibition of Incitement to Hatred Act 1989 and the Criminal Justice (Public Order) Act 1994 adequately address hate speech activity disseminated through cyber technology and social media?

⁶ P. 19

⁷ *ibid*

⁸ <https://www.snapchat.com/>

⁹ <http://www.cyberdust.com/>

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RCNI does not consider that it has either the mandate or the expertise to express a meaningful or helpful opinion on this point.

ISSUE 4: PENALTIES ON CONVICTION FOR OFFENCES

Q4: Do you consider that the current penalties under the offences which can apply to cyber-harassment and related behaviour are appropriate?

The current penalties available are probably capable of providing adequate and suitable sanctions on most individuals who commit an offence under the relevant acts and allow for appropriate sentencing in the general run of cases, however RCNI considers that higher maximum penalties, particularly in the case of section 10 of the Non-Fatal Offences against the Person Act 1997 (harassment in general), should be available so that the extreme gravity of the consequences for their victims, of campaigns of pre-meditated cyber (and other) harassment, both sexual and non-sexual, could be reflected in appropriate cases.

RCNI also considers that higher maximum penalties for all the relevant offences listed would send out a powerful signal to at least some potential perpetrators that harassment, including cyber-harassment, is a serious crime and will be punished accordingly.

ISSUE 5: WHETHER CURRENT CIVIL LAW REMEDIES ARE ADEQUATE

5(a): Do you consider that in addition to section 10(5) of the 1997 Act there should be a separate statutory procedure, to provide for civil remedies for cyber-harassment and serious interferences with an individual's privacy, without the need to institute a criminal prosecution?

As already stated above, it would be desirable to expand the reach of section 10(3) of the 1997 Act to include indirect communications as although these do not constitute communication with the other party they can still cause distress or otherwise interfere with the other party's day to day life and cause further harm. Section 10(5) of the 1997 Act should be amended to include explicit reference to indirect communications, as it appears that such communications are not already included in the scope of this subsection.

5(b): Do you consider that any further reform of civil proceedings, over and above those in the 2014 Report of the Internet Content Governance Advisory Group, are required?

RCNI endorses the recommendations of the 2014 Report of the Internet Content Governance Advisory Group insofar as they concern the reformation of rules on discovery against a person not a party to proceedings whether known or not yet known, as the identity of the holder of data is not always readily identifiable online.

5(c): Do you consider that complaints of cyber-harassment and other harmful cyber activity affecting personal safety, privacy and reputation should, without prejudice to any criminal proceedings, be considered by a specialist body that would offer non-court, fast yet enforceable remedies?

A specialist body would be of great benefit for many reasons. It could provide expertise in a field that is rapidly expanding and developing which may not always be available to many

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judges at present. Having a fast and enforceable separate body could have the additional effect of encouraging more victims of cyber-harassment to come forward without the distress that the prospect of criminal proceedings can cause to many members of the public. In a recent study 10% of Irish male teenagers surveyed reported being bullied online and 12% of Irish female teenagers surveyed reported being bullied online¹⁰. These figures show that a significant number of young people are receiving unwanted communications online and if this trend continues or increases a specialist body may be quite necessary to relieve the potential pressure the courts could face.

5(d): Do you consider that further reforms are required to make effective any orders in civil proceedings that would have extra-territorial effect, including in their application to websites located outside the State; and if so do you have any comments on the precise form they should take?

Further reforms to civil proceedings which would have extra-territorial effect may not be necessary at present as within Europe there are procedures available to pursue online defamation cases and other civil proceedings. The biggest obstacles may be found in cases where one party resides in the United States of America as court orders may not be enforced where they are deemed to be in conflict with their guarantee of free speech in the First Amendment of the US Constitution. In cases such as these, it may be that the way forward is for the responsible Government agencies in this country to work with the many multi-national search engine and social media companies based here to secure their agreement to help restrict and/or remove access to any online material which is shown to contravene the privacy and other rights of its victims.

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¹⁰ Machold, C., Judge, G., Mavrinac, A., Elliott, J., Murphy, AM., and Roche, E. (2012) Social Networking Patterns/Hazards Among Irish Teenagers Irish Medical Journal Volume 105(9) (October 2012)