



**RCNI Observations on Harassment, Harmful  
Communications and Related Offences Bill 2017**

**Private Members' Bill**

June 2017

## RCNI Observations on Harassment, Harmful Communications and Related Offences Bill 2017 [PMB]

**Introduction and Background:** Rape Crisis Centres must now deal with frequent complaints of several forms of cyber-harassment, especially from teenagers and young adults. Not all forms of cyber-harassment are addressed adequately in existing legislation, in our view. Some cyber-harassment amounts to a form of sexual violence against its victims. Sexual violence in whatever form can and does have devastating effects. Therefore, RCNI is very much interested in exploring legal options by which sexual cyber-harassment might be prevented and/or punished.

RCNI welcomed the publication of the Law Reform Commission Report in September 2016, "Harmful Communications and Digital Safety"<sup>1</sup>, including the draft Bill at the end on Harmful Communications. We are in broad agreement with the approach taken in this Bill, and with regard to the creation of a Digital Safety Commissioner also. Our latest submission on this topic may be accessed on our website, and ideally should be read in conjunction with these Observations.<sup>2</sup>

**Forthcoming Legislation on Cyber-harassment:** RCNI also welcomes the commitment by the current Government to introduce legislation amending the Non-Fatal Offences against the Person Act 1997, which includes an offence of harassment. However, so far we have not seen the introduction of a Government Bill to address these increasingly urgent issues. Accordingly, we are delighted to see the publication of the **Harassment, Harmful Communications and Related Offences Bill 2017**.

Our hope is that the Government will adopt and adapt it to ensure that it provides a comprehensive and workable set of offences to combat at least all the common forms of the scourge of sexual cyber-harassment, and also, that politicians of all parties will support its passage. This legislation is needed now if potential perpetrators are to be deterred, and actual perpetrators are to be made accountable for their actions in our criminal courts.

RCNI supports the approach taken in this Bill, which is very similar to that taken in the draft Bill at the end of the Law Reform Commission Report cited above.

We do have a few comments on Section 4. See our annotated extract below for the details (the parallel provisions in the draft Law Reform Commission bill are also set out underneath the extract from your own Bill for ease of reference).

### **1. Harassment, Harmful Communications & Related Offences Bill 2017 – Section 4 (anti “revenge porn”) definition subsection 2:**

(2) In *subsection (1)*:

“intimate image” means a visual recording of a person made by any means including a photographic, film or video recording (whether or not the image of the person has been altered in any way)—

- **RCNI Comment:** *It seems to us that the wording in the LRC draft Bill on the same definition – is clearer and therefore, easier to follow, particularly with respect to the pronouns – using “the person’s” and “in the case of a female”, makes it clear which, or whose, images are being referred to;*

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<sup>1</sup> Available online through this weblink:

[http://www.lawreform.ie/\\_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf](http://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf)

<sup>2</sup> <http://www.rcni.ie/wp-content/uploads/RCNI-Cyber-Harassment-Submission-updated-post-LRC-Report-April-2017.pdf>

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(a) (i) of his or her genital organs or anal region or her breasts (whether covered by underwear or bare), or

(ii) in which the person is nude, is exposing his or her genital organs or anal region or her breasts, or

(iii) in which the person is engaged in sexual activity,

(b) in respect of which, if it was recorded with consent, at the time of the recording and afterwards there were circumstances that gave rise to a reasonable expectation of privacy;

- **RCNI Comment:** *We are not convinced that it should make any difference whether or not the image was originally recorded with consent of the person when it comes to deciding whether there were circumstances that gave rise to a reasonable expectation of privacy. The consent to the making of the images and consent to sharing the images are two distinct matters. Whether the person consented and indeed facilitated the taking of the images or if the images are a recording without their consent such as in a sexual violence incident, the person should surely be entitled to assert a reasonable expectation that these images should not be disclosed unless and until they consent to same. Even within the formal justice process for a victim of sexual violence upon reporting, the privacy provisions (anonymity, in camera hearings etc) protect these images so that she can maintain a reasonable expectation of privacy;*
- **RCNI Comment:** *We think the LRC wording below is better, because more precise: "and afterwards" can't be pinned down, whereas the LRC wording "at the time the image is communicated" pins it down exactly, and thereby gets at the harmful behaviour this Bill is intended to address*

"consent" means the agreement by choice of a person who has the freedom and capacity to make that choice"

- **RCNI Comment:** *Consent: should that now mirror the new positive definition of consent to sexual activity in Section 48 of the Criminal Law (Sexual Offences) Act 2017? This is an old LRC definition, adopted in fact in the UK in their Sexual Offences Act 2003, but we didn't adopt it ourselves! The new wording in CL(SO)A 2017 which inserts a new Section 9 into the 1990 Act, reads: "'9. (1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act."*

### 2. Harmful Communications & Digital Safety Report September 2016 LRC draft Bill:

"intimate image" means a visual recording of a person made by any means including a photographic, film or video recording (whether or not the image of the person has been altered in any way)—

- **RCNI Comment:** *We wonder about this wording, which is in both LRC and Bill versions: is it comprehensive enough to cover an image of an intimate region of another person which has been "grafted on" to a non-intimate image of the person by means of Photo-shopping or other similar process? We know that that is the intention, and that in fact, this wording mirrors that in Canadian legislation; however, if the intimate part of the image depicts in fact intimate regions of another person, can it be said to be "of the person's genital or anal region [etc]"? We would hate to see a perpetrator of "upskirting" or "downblousing" or sextortion, get off a charge under this Section by arguing that in fact the "person's actual genital or anal region [etc]" has not been recorded by any means*

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- *We are inclined to think a more specific qualification clause might tie this one off: instead of “(whether or not the image of the person has been altered in any way)”, insert e.g: “(whether or not the image of the person or any part of it, has been altered in any way)”*
- *Another approach to the same concern might be to add in “(iv)” after (a) (iii) in the definition and before “and”: “which purports to depict the person’s genital or anal region or in the case of a female of her breasts (whether the genital or anal region or, as the case may be, the breasts are covered by underwear or are bare), or purports to depict the person nude, or as exposing his or her genital organs or anal region or in the case of a female, as exposing her breasts, or which purports to depict the person as being engaged in explicit sexual activity”*

(a)(i) of the person’s genital or anal region or in the case of a female of her breasts(whether the genital or anal region or, as the case may be, the breasts are covered by underwear or are bare), or

(ii)in which the person is nude, is exposing his or her genital organs or anal region or in the case of a female is exposing her breasts, or

(iii)in which the person is engaged in explicit sexual activity,  
and

(b)in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy (and such circumstances can include that the recording was made when the person whose image was recorded was in a public place), and

(c)in respect of which the person depicted retains a reasonable expectation of privacy at the time the image is communicated;”

### **Law Reform Commission Report draft Bill**

#### **Explanatory Note extract:**

“The definition of “intimate image” implements the recommendation in paragraph 2.207 that this should include the definition used in the Canadian Criminal Code, namely a visual recording of a person made by any means including a photographic, film or video recording: (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity, and (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy, and (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the image is communicated.

The definition of “intimate image” also implements the recommendation in paragraph 2.208 that the definition used in the Canadian Criminal Code should be supplemented to ensure that it includes what has been described as “upskirting” and “downblousing”, that is, an image of the person’s genital or anal region or in the case of a female of her breasts, whether the genital or anal region or, as the case may be, the breasts were covered by underwear or were bare.

The definition of “intimate image” also implements the recommendation in paragraph 2.209 that it should include “photo-shopping,” that is, where part of a person’s image, usually his or her face, is superimposed on the intimate parts (nude, or partially nude) of another person’s body”.

**Conclusion:** Rape Crisis Network Ireland regards this Bill as a very positive step towards a fully comprehensive criminal law regime in the area of sexual cyber-harassment.

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We look forward very much to working with the Labour Party on this Bill as it makes its way through the Oireachtas.

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