



**RCNI Submission on  
Online Harassment, Harmful Communications  
and Related Offences to the  
Joint Oireachtas Committee on Justice and  
Equality**

**September 2019**

# RCNI Online Harassment, Harmful Communications & Related Offences: Submission to the Joint Oireachtas Committee on Justice and Equality September 2019

## Introduction – Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

## Introduction – This Submission

RCNI welcomes very much the opportunity of contributing to this examination of online harassment, harmful communications and related offences by the Joint Oireachtas Committee on Justice and Equality. This submission includes and expands on, various points made in our Observations on the Harassment, Harmful Communications and Related Offences Bill in 2017 (HHCRO 2017).<sup>1</sup> Our earlier submission on Cyber-Harassment, updated in 2017, is also relevant<sup>2</sup>. Online harassment remains very much a live issue for our clients, and its latest disturbing form is the recording of sexual violence incidents for distribution online (see more below).

Rape Crisis Centres must now deal with frequent complaints of several forms of sexual cyber-harassment from survivors of all ages, and especially from teenagers and young adults. Not all forms of cyber-harassment are addressed adequately in existing legislation, in our view. This cyber-harassment amounts to a form of sexual violence against its victims. It would be accurate to refer to it as image-based sexual abuse<sup>3</sup>, we think. 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.

Our hope is that HHCRO 2017<sup>4</sup> will provide a comprehensive and workable set of offences to combat at least the most 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 broadly supports the approach taken in this Bill.

## Structure of this Submission

This submission considers those possible issues on the Committee's list most relevant to the experiences of survivors who report sexual cyber-harassment behaviours to us. It follows the order of the list, and any recommendations for legislative or administrative change are listed at the end of

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<sup>1</sup> Available online through this web-link: <https://www.rcni.ie/wp-content/uploads/RCNI-Harassment-Harmful-Communications-and-Related-Offences-Bill-2017-LPD-4.pdf>

<sup>2</sup> Available online through this web-link: <https://www.rcni.ie/wp-content/uploads/RCNI-Cyber-Harassment-Submission-updated-post-LRC-Report-April-2017.pdf>

<sup>3</sup> This is the view put forward by Professor Clare McGlynn, Durham University, in her work. See e.g. her own website, <https://claremcglynn.com> and that of the University, <https://www.dur.ac.uk/law/staff>, for more information about her work in this area and links to some examples of it.

<sup>4</sup> Available online through this web-link:

<https://data.oireachtas.ie/ie/oireachtas/bill/2017/63/eng/initiated/b6317d.pdf>

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the submission. Under each of the list headings, the issue is cited in contrasting typeface and followed by our comments and recommendations, if any. Finally, the Appendix sets out the principal relevant criminal law provisions in England & Wales, Scotland, New South Wales respectively with web-links, and concludes with a list of useful non-legal references.

### The Possible Issues for Address

#### Definition of communication in legislation

1. There are currently significant gaps in legislation with regard to harassment and newer, more modern forms of communication. Is there a need to expand the definition of “communications” to include online and digital communications tools such as WhatsApp, Facebook, Snapchat, etc when addressing crimes of bullying or harassment?

**RCNI Response:** While it would not be appropriate to include a list of specific communications tools such as those listed in the legislation, we think there is a need for any definition of communications to be open-ended, and to include explicitly all online, digital and SMS/text communications tools. The definition should also be clear that not only static images but also all forms of moving image are included.

**RCNI Recommendation:** Amend and adopt the definition in Section 2 of the existing HHCRO 2017 to include explicitly all forms of online, digital and SMS or text communications tools, and to refer not only to static images but also moving images.

2. What lessons can be learned from models used in other jurisdictions such as the UK, New Zealand, Australia and other European countries where legislation is now in place to address these issues? How do we establish an appropriate model without compromising free speech?

**RCNI Response:** In our view, there is no form of sexual cyber-harassment (image-based sexual abuse) which is a legitimate expression of free speech. It is sexual violence and should be criminalised as such. In our desk-top examination of other jurisdictions, we have confined ourselves to certain other common-law and English-speaking countries, because it seems to us that these will provide the most useful models, both positive and negative. In general terms, RCNI’s view is that:

- (a) It is important that the legislation recognises that image-based sexual abuse is a form of sexual violence, and therefore, that there are specific sexual offences covering as many forms of this kind of abuse as possible. It seems to us entirely right therefore that Section 4(4) HHCRO 2017 should stipulate that distributing, etc, an intimate image without consent – is a sexual offence within the meaning of the Sex Offenders Act 2001 as amended (provided that the offence results in a sentence of imprisonment).
- (b) It is also important that, as the drafters of HHCRO 2017 have done at Section 4(1)(a), **threats** to distribute, record, etc intimate images are included. Our experience with our clients in recent times tells us that “sextortion” is increasing. **“Sextortion”** means demanding

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something (money, sex, more intimate images) from the victim on pain of having existing intimate images shared with another person, or distributed or published. The threat of their images being shared is a particularly nasty means of exerting control over that person. It is continuous, it is durable, it affects many aspects of a victim's life, indeed it is often experienced by its victim as another form of rape. It seems to us that Section 3 (Harassment) HHCRO 2017 should be amended to ensure that threats to harass in any way – are also criminalised, as many forms of harassment are sexual in nature. The legislation in some countries (e.g. England and Wales) does not refer to threats to distribute, record, etc intimate images.

- (c) In keeping with our view that image-based sexual abuse should be treated as a sexual offence, it seems right to us that the presence or absence of consent should be central to the definition of any offence involving intimate images. (This is not always the case in other countries' legislation). Accordingly, we welcome the fact that consent is defined at Section 4(2) HHCRO 2017. We would respectfully suggest that it is now appropriate to introduce the same definition of consent as in Section 9 Criminal Law (Rape) (Amendment) Act 1990 as amended by Section 48 Criminal Law (Sexual Offences) Act 2017.
- (d) Victims of image-based sexual abuse offences should have at least some of the same protections available to them as victims of contact sexual offences. It will be appreciated that **guaranteed anonymity** is critical for these victims. Accordingly, we welcome the provisions on protection of privacy at Section 11 HHCRO 2017. Our view is that these offences should be heard in camera also.
- (e) Motivations, such as the intent to cause alarm, fear or distress, or for sexual gratification, should be regarded as less important in the drafting of these sexual offences than **lack of consent**. The risk is that if listed possible motivations are too specific, many offences may not be capable of being prosecuted, and many perpetrators therefore may escape justice. The motive for these offences may be financial gain, or to look "cool" in front of the perpetrator's peer group, or even fear of someone else, or something else as yet unanticipated.

The suspicion is that the necessity to prove "intention to cause [the victim] distress" has made it difficult to secure convictions under Section 33 of the England & Wales Criminal Justice and Courts Act 2015. Out of 1,160 incidents of so-called "revenge porn" offences recorded from April 2015 to December 2015, only 11% resulted in the perpetrator being charged, and 61% resulted in no police action, with the police citing lack of evidence or victim withdrawal as principal reasons<sup>5</sup>.

- (f) Legislation should be worded very carefully to ensure that it does capture images which were originally non-intimate in nature and which have been altered later without the consent of the subject to "graft in" images of breasts, genitals, and anal regions belonging to

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<sup>5</sup> Research Spotlight by Clare McGlynn and Erika Rackley, "Image-Based Sexual Abuse": More than Just 'Revenge Porn'", available online at: <https://www.birmingham.ac.uk/schools/law/research/spotlights/ibsa.aspx>. (2016)

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other people, often with great skill, so that it is difficult to tell the original from the graft. This is sometimes called “**deepfaking**”.

Altering innocently taken images of fully clothed victims, whether by hacking their social media accounts or otherwise, to include intimate images of body parts belonging to a stranger, and then either circulating them without consent or threatening to do so, are increasingly common types of image-based sexual abuse. The legislation should be clear that images which contain “grafts” of intimate images from others beside the victim, and which are generated and distributed without consent, are covered, so that it is not possible for any defendant to argue that because the genitalia, breasts, or other intimate region **of the victim** is not depicted, the offence is not made out.

### RCNI Recommendations:

1. Consider amending Section 3 HHCRO 2017 to include threats to harass;
2. Amend the definition of consent in HHCRO 2017 to bring it into line with the definition contained in Section 9 Criminal Law (Rape)(Amendment) Act 1990 as amended by Section 48 Criminal Law (Sexual Offences) Act 2017<sup>6</sup>;
3. Ensure that the wording in Section 4 HHCRO 2017 captures the images produced by “deepfaking”.
3. How do we ensure that any legislation that is enacted is flexible enough to keep up with changing and advancing technologies, new apps and other online forums, including the more familiar social media sites?

**RCNI Response:** In our view, this can be achieved by ensuring that the legislation is drafted in such a way that it focuses most on what does not change, that is, that the images concerned are created, distributed, sold, published, etc without the consent of their subject, and are intimate in nature, whether or not the subject is clothed in the particular intimate area or not.

It may be helpful to focus on the victim subject’s perspective: what matters most to him or her is the damage which is done to so many aspects of their lives by the unlawful creation and disposal of intimate images either of their own genitalia, breast or anal area, or images purporting to be intimate images of these bodily areas. It matters less whether these images were created by a non-digital camera and distributed in hard copy to many colleagues, friends and relations, or created by a sophisticated hidden camera and distributed electronically to the same people (though of course, the reach of electronic images is potentially much greater). It seems to us that HHCRO 2017 as drafted does capture many prevalent and damaging forms of image based sexual abuse.

That said, any legislation in this area should be kept under constant review, ideally by a Digital Safety Commissioner or equivalent official, so that any novel forms of online abuse are identified and addressed with the minimum of delay.

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<sup>6</sup> Available online via this web-link:

<http://www.irishstatutebook.ie/eli/2017/act/2/section/48/enacted/en/html#sec48>

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**RCNI Recommendation:** Accordingly, RCNI recommends that the legislation should include a review clause and should give responsibility for carrying out the review to the Digital Safety Commissioner, or similar official, once s/he has been established. Pending the creation of a new Digital Safety Commissioner’s Office, or similar body, responsibility for reviewing the legislation should be given to the Department of Communications, Climate Action and the Environment.

### Harassment, stalking & other forms of online abuse

4. 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. What approaches are taken to addressing these issues in other jurisdictions?

**RCNI Response:** With regard to so-called “revenge porn” offences, we must begin by saying that in our view, the term “revenge porn” is not appropriate to describe image based sexual abuse. It is not some form of naughty but essentially harmless sexy adult “fun”, as the word “porn” connotes, and it is not always by any means motivated by revenge. “Image-based sexual abuse” has no victim-blaming connotations (“she must have done something to deserve such a vengeful comeback”) and describes this form of abuse narrowly enough to get at its essential nature and broadly enough to cover many different forms of such abuse.

The relevant image-based sexual offence in England & Wales (Section 33 of the Criminal Justice and Courts Act 2015) has been criticized on the basis that its mens rea component (“intention to cause distress”) is far too narrow<sup>7</sup>. On the other hand, it is important that the law captures the gravity of an intentional or reckless act to create, distribute, etc an intimate image without the consent of its subject. The reality is that these images are created and/or shared in circumstances where the person creating or sharing them either knows, or ought to know, the impact of these activities on their victim. RCNI does not have a fixed view on how mens rea for these serious (ie non-accidental) offences should be formulated, provided that it is drafted broadly enough not to be confined to a specific intent to cause one effect, as in England & Wales, and provided also that it has an objective element (as does the current Section 10 Non-Fatal Offences against the Person Act 1997 offence of harassment (NFOAPA 1997)<sup>8</sup>.

With regard to “upskirting” and “downblousing” offences in other countries: RCNI notes that both Section 67A Voyeurism (Offences) Act 2019 in England & Wales, and Section 9 Sexual Offences (Scotland) Act 2009 in Scotland, are framed to include a lack of consent (with which we agree) and also, the purpose either of obtaining sexual gratification, or of humiliating, distressing or alarming the victim. As far as these two activities are concerned, it is hard to imagine any circumstances in which they could take place accidentally or for a legitimate purpose without humiliating or otherwise upsetting the victim. The alternate though specific purposes may make sense in this

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<sup>7</sup>Prof Clare McGlynn et al: “Shattering Lives and Myths”, research report dated July 2019

<https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf>

<sup>8</sup> Available online via this web-link:

<http://www.irishstatutebook.ie/eli/1997/act/26/section/10/enacted/en/html#sec10>

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context. We also think it makes sense to list, as they have done in Scotland, all the various ways in which these offences may be committed, to ensure they are all captured by the criminal law. This would have the effect of ensuring that voyeurism itself (ie without any recording component) is enshrined in our law.

Finally, we note that the wording in England & Wales could be interpreted to exclude any application to female breasts. We think that female breasts should be included explicitly in any new offence of “upskirting” or “downblousing” (as they are in the Section 4 HHCRO 2017 offence of “Distributing, etc, without consent”). On balance, we think it makes the most sense to enact a separate offence of “upskirting” or “downblousing”, formulated along the lines of the Scottish offence to ensure it captures the activity of looking, the preparation of recording equipment, the recording, and the distribution [etc] of intimate images without the consent of their subject, and whether or not the body parts in question are clothed are not.

### **RCNI Recommendations:**

1. Any formulation of the mens rea element with regard to any offence of Distributing [etc] intimate images without consent should not be drafted so narrowly as to be limited to the intent of causing one kind of effect, and should have an objective element;
2. “Upskirting” and “downblousing” offences should be separate from Distributing [etc] intimate images without consent offences and should list all relevant activities as forms of the offence, from simple voyeurism through to distributing the images obtained without consent.
5. New offences are proposed to cover these issues in Deputy Brendan Howlin’s Private Members Bill on this subject. Is the creation of new offences necessary, or is existing legislation sufficient? Should other forms of image-sharing issues - such as exposure - also be addressed?

**RCNI Response:** In the view of RCNI, there is no doubt that new offences are necessary to criminalise as broad a range of online harassment behaviours as possible. As the law stands at present, it is difficult if not impossible to criminalise one-off acts creating and/or distributing to others, intimate images of adults without their consent, because the current offence of harassment requires persistence and refers only to direct communications with the intended victim, not with third parties.

Any offence included in the legislation should distinguish carefully between intimate images which were created with consent originally, but were distributed, or threatened to be distributed without consent later. It may be best to have instead of one distribution [etc] offence, a range of at least three offences, one to cover the generation of intimate images without consent, another to cover the adulteration of non-intimate images to make them appear to be genuine intimate images, and still another to cover their storage, distribution, publication, sale, and so on, without consent. Threats to carry out any such generation, alteration, storage, distribution, etc, without consent should be included in the wording of each offence.

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It seems now very challenging to capture threats to create and distribute, etc, these images, for whatever reason, be it to cause humiliation, alarm, distress, or for sexual and/or financial gratification – if these threats are neither persistent harassment under Section 10 NFOAPA 1997, nor can be regarded as threats to cause serious harm under Section 5 NFOAPA 1997. However, we are glad to see that the clear intention of Section 4 HHCRO 2017 is to criminalise such attempts, and also, to include “deepfaked” intimate images.

It is also difficult for our law as it stands to capture a wide range of acts which might be described as voyeurism, “downblousing” or “upskirting”, if these activities do not involve child victims (and so might be prosecuted as child pornography offences). We think this group of voyeurism-related behaviours should have their own specific range of offences, along the lines of those in Section 9 Sexual Offences (Scotland) Act 2009.

In this context, and in the context of whether a further “exposure” offence is needed, we note with interest that Section 45 (3) Criminal Law (Sexual Offences) Act 2017<sup>9</sup> (intentionally engaging in offensive conduct of a sexual nature) was used to prosecute successfully an act of “upskirting” in a public place in the recent past. However, the definition of offensive conduct in this Section is limited to conduct of which the victim is aware, or might reasonably be expected to be aware. Thus, as drafted, it would not cover acts of undetected installation and use of hidden cameras in a lavatory or changing room, for instance.

We consider that Sections 45 (1) and (2) cover acts of unwarranted exposure adequately and accordingly do not recommend that another exposure offence be created.

In summary, we think that HHCRO 2017 is needed, and as soon as possible. In our view, it does not need root and branch amendment, just some smaller adjustments. That said, we respectfully submit that a new specific offence criminalising the creation of audio or audio-visual records of sexual assaults including rape, and their distribution, would be valuable, because we are aware from our work with our clients that these offences are being recorded and those recordings shared on the internet, more and more frequently. We also suggest that consideration should be given, if not in HHCRO 2017 then elsewhere, to criminalising attempts to impersonate others online.

### **RCNI Recommendations:**

1. Consider separating the current proposed Section 4 HHCRO 2017 into three distinct offences, generation of intimate images without consent, alteration of images to make them appear to be intimate images without consent, and finally, their storage, distribution, publication, sale, etc. Notes: (1) threats to do any of these acts are included in the wording of each offence, and (2) the wording should cover any acts relating to images of both children and adults;

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<sup>9</sup> Available online through this web-link:

<http://www.irishstatutebook.ie/eli/2017/act/2/section/45/enacted/en/html#sec45>

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2. Ensure that the wording of any offence or definition used in any offence covers originally innocent images of the victim which have been altered to appear to include intimate images of third parties, so that it cannot be argued by the defence that the genitalia, anal region, etc of the victim are not in fact depicted in the intimate image in question;
3. Include separate voyeurism-related offences, to cover viewing victims without consent in intimate settings, installing equipment to record intimate images of them, recording such images, storing, distributing, publishing or selling them, in each case without consent;
4. Create a new offence of producing and distributing audio-visual images of acts of sexual violence without consent, and attach significant penalties to it.
5. Consider criminalising the intentional or reckless impersonation of others (real or fictional) in online interactions.
  
6. What kind of oversight and regulation of online service providers is possible/used in other jurisdictions? Currently, online providers are self regulated. Is a proactive, self-regulating approach from online companies to activities such as revenge porn and other forms of harassment preferable to the creation of more laws?

**RCNI Response:** We refer the Committee to our submission on Harmful Online Content made earlier this year to the Department of Communications, Climate Action and the Environment, in which we advocate for more regulation of online companies, and also to our original submission to the Law Reform Commission on Cyber-harassment, updated in 2017<sup>10</sup>, in which we suggested there should be easy, quick and straightforward takedown procedures, once an abuse has been reported. It will be seen that our recommendations address this issue in some detail<sup>11</sup>.

7. Is any data provided by online service providers in relation to the reporting or prevalence of activities such as upskirting/revenge porn/cyberbullying and other online behaviour that can be used to develop and draft future legislation?

N/A

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<sup>10</sup> A web-link to this submission as updated, can be found at footnote 2 above;

<sup>11</sup>RCNI Submission on the Regulation of Harmful Online Content and the Implementation of the revised Audiovisual Media Services Directive, available online at: <https://www.rcni.ie/wp-content/uploads/RCNI-Submission-on-the-Regulation-of-Harmful-Online-Content-and-the-Implementation-of-the-revised-Audiovisual-Media-Services-Directive.pdf>

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8. To what extent are An Garda Síochána equipped and resourced to deal with the issues arising from harmful online communications such as these?  
N/A
9. Should 'cyberstalking' be treated as a separate offence to online harassment? What constitutes stalking-type behaviour online? Is there a need to legislate specifically for this activity?  
N/A
10. Based on the findings of other jurisdictions such as in the UK, An Garda Síochána will require consistent training in order to maintain an appropriate level of knowledge with regard to indictable behaviours. Are resources available for this?  
N/A
11. Fake accounts/troll accounts used to harass or target others with abuse – what measures can be taken in relation to these without affecting freedom of expression?  
N/A
12. Do other jurisdictions have statutory measures to protect victim identities in cases of online harassment being released online post-hearings, etc?

**RCNI Response:** We are not aware of any such statutory measures in another comparable (common-law) jurisdiction. We suspect that this may be because to date, image based sexual abuse, in whatever form, has not been regarded as a sexual offence. In our view, it should be, because the nature and extent of its impacts on its victims are comparable to those of contact sexual offences. Accordingly, we welcome very much the approach taken to anonymity for victims of these offences in Section 11 HHCRO 2017.

RCNI also notes that some recent evidence with regard to the investigation and prosecution of offences of disclosure of private sexual photographs and films with intent to cause distress (Section 33 Criminal Justice and Courts Act 2015 in England & Wales), suggests that lack of anonymity is a very real deterrent for victims<sup>12</sup>.

RCNI also suggests that reporting rates would be increased, and withdrawal rates kept to a minimum, if not only anonymity were in place (as HHCRO 2017 indicates), but also, hearings in relation to these image-based sexual abuse offences (at least) were held in camera.

**RCNI Recommendation:** HHCRO 2017 should also include provision to hear cases related to online harassment, harmful communications and related offences, in camera, ideally whether or not their content amounts to image-based sexual violence.

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<sup>12</sup> See "Shattering Lives and Myths: A Report on Image-Based Sexual Abuse", McGlynn, C et al (July 2019), available online via web-link at footnote 5 above.

### Harmful online behaviour and young people

13. How do we most appropriately regulate social media platforms to prevent cyberbullying and inappropriate sharing of personal images?

**RCNI Response:** The Committee is respectfully referred to our Response to Question 6 above, at page 10 of this Submission.

14. For young people who participate in such online behaviour as consensual image sharing, how can it be ensured that they are not inadvertently criminalised when legislation is enacted? What safeguards can be put in place?

**RCNI Response and Recommendations:** It seems to us that there are two ways in which this issue could be approached. Our view is that they do not contradict but complement each other.

1. As Section 8(3) Criminal Law (Sexual Offences) Act 2017<sup>13</sup> now does, HHCRO 2017 could provide that there should be no prosecution of a young person for such an offence which is not by, or with the consent of the DPP; [ie it should in this regard be treated as a sexual offence, which would automatically go the DPP for a decision on prosecution];
2. There could be a version of a Section 4 HHCRO 2017 offence which provides for a lighter penalty if there is neither serious interference with another's peace or privacy nor alarm, distress or harm caused to them, but simply recording, distributing, etc of intimate images (or images purporting to be intimate ie altered images) without consent.

15. Deputy Brendan Howlin's Private Members Bill provides that those under 17 should not be fined/imprisoned but put into relevant education or supports. Would these supports be part of the same educational supports offered to all young people/schools or would they be a separate entity? Are current supports being utilised? Are there sufficient resources to provide for such a provision when enacted?  
N/A

### List of RCNI Recommendations in respect of the List of Possible Issues in order:

**Q1 RCNI Recommendation:** Amend and adopt the definition in Section 2 of the existing Harassment, Harmful Communications and Related Offences Bill 2017 to include explicitly all forms of online, digital and SMS or text communications tools, and to refer not only to static images but also moving images.

### Q2 RCNI Recommendations:

1. Consider amending Section 3 HHCRO 2017 to include threats to harass;

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<sup>13</sup> Available online via this web-link:

<http://www.irishstatutebook.ie/eli/2017/act/2/section/8/enacted/en/html#sec8>

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2. Amend the definition of consent in HHCRO 2017 to bring it into line with the definition contained in Section 9 Criminal Law (Rape)(Amendment) Act 1990 as amended by Section 48 Criminal Law (Sexual Offences) Act 2017;
3. Ensure that the wording in Section 4 HHCRO 2017 captures the images produced by “deepfaking”.

**Q3 RCNI Recommendation:** Accordingly, RCNI recommends that the legislation should include a review clause and should give responsibility for carrying out the review to the Digital Safety Commissioner, or similar official, once s/he has been established. Pending the creation of a new Digital Safety Commissioner’s Office, or similar body, responsibility for reviewing the legislation should be given to the Department of Communications, Climate Action and the Environment.

**Q4 RCNI Recommendations:**

1. Any formulation of the mens rea element with regard to any offence of Distributing [etc] intimate images without consent should not be drafted so narrowly as to be limited to the intent of causing one kind of effect, and should have an objective element;
2. “Upskirting” and “downblousing” offences should be separate from Distributing [etc] intimate images without consent offences and should list all relevant activities as forms of the offence, from simple voyeurism through to distributing the images obtained without consent.

**Q5 RCNI Recommendations:**

1. Consider separating the current proposed Section 4 HHCRO 2017 into three distinct offences, generation of intimate images without consent, alteration of images to make them appear to be intimate images without consent, and finally, their storage, distribution, publication, sale, etc. Notes: (1) threats to do any of these acts are included in the wording of each offence, and (2) the wording should cover any acts relating to images of both children and adults;
2. Ensure that the wording of any offence or definition used in any offence covers originally innocent images of the victim which have been altered to appear to include intimate images of third parties, so that it cannot be argued by the defence that the genitalia, anal region, etc of the victim are not in fact depicted in the intimate image in question;

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3. Include separate voyeurism-related offences, to cover viewing victims without consent in intimate settings, installing equipment to record intimate images of them, recording such images, storing, distributing, publishing or selling them, in each case without consent;
4. Create a new offence of producing and distributing audio-visual images of acts of sexual violence without consent, and attach significant penalties to it;
5. Consider criminalising the intentional or reckless impersonation of others (real or fictional) in online interactions.

**Q6/Q13: RCNI Response/Recommendation:** We refer the Committee to our submission on Harmful Online Content made earlier this year to the Department of Communications, Climate Action and the Environment, in which we advocate for more regulation of online companies, and for easy, quick and straightforward takedown procedures, once an abuse has been reported. It will be seen that our recommendations address this issue in some detail<sup>14</sup>.

**Q12 RCNI Recommendation:** HHCRO 2017 should also include provision to hear cases related to online harassment, harmful communications and related offences, in camera, ideally whether or not their content amounts to image-based sexual violence.

**Q14 RCNI Response and Recommendations:** It seems to us that there are two ways in which this issue could be approached. Our view is that they do not contradict but complement each other.

1. As Section 8(3) Criminal Law (Sexual Offences) Act 2017 now does, HHCRO 2017 could provide that there should be no prosecution of a young person for such an offence without the consent of the DPP; [ie it should in this regard be treated as a sexual offence, which would automatically go the DPP for a decision on prosecution];
2. There could be a version of a Section 4 HHCRO 2017 offence which provides for a lighter penalty if there is neither serious interference with another's peace or privacy nor alarm, distress or harm caused to them, but simply recording, distributing, etc of

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<sup>14</sup>RCNI Submission on the Regulation of Harmful Online Content and the Implementation of the revised Audiovisual Media Services Directive, available online at: <https://www.rcni.ie/wp-content/uploads/RCNI-Submission-on-the-Regulation-of-Harmful-Online-Content-and-the-Implementation-of-the-revised-Audiovisual-Media-Services-Directive.pdf>

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intimate images (or images purporting to be intimate ie altered images) without consent.

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**Date:** 19 September 2019

**Rape Crisis Network Ireland clg**

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Appendix 1: Image-Based Sexual Abuse provisions from England & Wales, Scotland, and Australia (NSW), followed by Non-Legal List of Sources of Expert Commentary

I England & Wales:

<http://www.legislation.gov.uk/ukpga/2015/2/section/33>

Criminal Justice & Courts Act 2015:

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### 33 Disclosing private sexual photographs and films with intent to cause distress

(1) It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made—

(a) without the consent of an individual who appears in the photograph or film, and

(b) with the intention of causing that individual distress.

(2) But it is not an offence under this section for the person to disclose the photograph or film to the individual mentioned in subsection (1)(a) and (b).

(3) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.

(4) It is a defence for a person charged with an offence under this section to show that—

(a) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and

(b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.

(5) It is a defence for a person charged with an offence under this section to show that—

(a) he or she reasonably believed that the photograph or film had previously been disclosed for reward, whether by the individual mentioned in subsection (1)(a) and (b) or another person, and

(b) he or she had no reason to believe that the previous disclosure for reward was made without the consent of the individual mentioned in subsection (1)(a) and (b).

(6) A person is taken to have shown the matters mentioned in subsection (4) or (5) if—

(a) sufficient evidence of the matters is adduced to raise an issue with respect to it, and

(b) the contrary is not proved beyond reasonable doubt.

(7) For the purposes of subsections (1) to (5)—

(a) “consent” to a disclosure includes general consent covering the disclosure, as well as consent to the particular disclosure, and

(b) “publication” of journalistic material means disclosure to the public at large or to a section of the public.

(8) A person charged with an offence under this section is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.

(9) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both), and

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine (or both).

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(10) Schedule 8 makes special provision in connection with the operation of this section in relation to persons providing information society services.

(11) In relation to an offence committed before section 154(1) of the Criminal Justice Act 2003 comes into force, the reference in subsection (9)(b) to 12 months is to be read as a reference to 6 months.

(12) In relation to an offence committed before section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force, the reference in subsection (9)(b) to a fine is to be read as a reference to a fine not exceeding the statutory maximum.

### Commencement Information

11S. 33 in force at 13.4.2015 by S.I. 2015/778, art. 3, Sch. 1 para. 27

<http://www.legislation.gov.uk/ukpga/2019/2/section/1>

### Voyeurism (Offences) Act 2019:

#### 1 Voyeurism: additional offences

(1) The Sexual Offences Act 2003 is amended as set out in subsections (2) to (4).

(2) After section 67 (voyeurism) insert—

#### “67A Voyeurism: additional offences

(1) A person (A) commits an offence if—

(a) A operates equipment beneath the clothing of another person (B),

(b) A does so with the intention of enabling A or another person (C), for a purpose mentioned in subsection (3), to observe—

(i) B's genitals or buttocks (whether exposed or covered with underwear), or

(ii) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and

(c) A does so—

(i) without B's consent, and

(ii) without reasonably believing that B consents.

(2) A person (A) commits an offence if—

(a) A records an image beneath the clothing of another person (B),

(b) the image is of—

(i) B's genitals or buttocks (whether exposed or covered with underwear), or

(ii) the underwear covering B's genitals or buttocks,

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in circumstances where the genitals, buttocks or underwear would not otherwise be visible,

(c)A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and

(d)A does so—

(i)without B's consent, and

(ii)without reasonably believing that B consents.

(3)The purposes referred to in subsections (1) and (2) are—

(a)obtaining sexual gratification (whether for A or C);

(b)humiliating, alarming or distressing B.

(4)A person guilty of an offence under this section is liable—

(a)on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both;

(b)on conviction on indictment, to imprisonment for a term not exceeding 2 years.

(5)In relation to an offence committed before the coming into force of section 154(1) of the Criminal Justice Act 2003 (increase in maximum term that may be imposed on summary conviction of offence triable either way), the reference in subsection (4)(a) to 12 months is to be read as a reference to 6 months.”

(3)In section 68 (voyeurism: interpretation), after subsection (1) insert—

“(1A)For the purposes of sections 67 and 67A, operating equipment includes enabling or securing its activation by another person without that person's knowledge.”

(4)In Schedule 3 (sexual offences for purposes of notification requirements), after paragraph 34 insert—

“34A(1)An offence under section 67A of this Act (voyeurism: additional offences), if—

(a)the offence was committed for the purpose mentioned in section 67A(3)(a) (sexual gratification), and

(b)the relevant condition is met.

(2)Where the offender was under 18, the relevant condition is that the offender is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months.

(3)In any other case, the relevant condition is that—

(a)the victim was under 18, or

(b)the offender, in respect of the offence or finding, is or has been—

(i)sentenced to a term of imprisonment,

(ii)detained in a hospital, or

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(iii)made the subject of a community sentence of at least 12 months.”

(5)In Schedule 1 to the Children and Young Persons Act 1933 (offences against children and young persons with respect to which special provisions of Act apply), for “and 67 of the Sexual Offences Act 2003” substitute “ , 67 and 67A of the Sexual Offences Act 2003 ”.

(6)In paragraph 10 of Schedule 34A to the Criminal Justice Act 2003 (child sex offences for the purposes of section 327A), for “or 67” substitute “ , 67 or 67A ”.

(7)In paragraph 33 of Schedule 4 to the Modern Slavery Act 2015 (offences to which defence in section 45 does not apply), in paragraph 33 (offences under Sexual Offences Act 2003), after the entry for section 67 insert— “ section 67A (voyeurism: additional offences) ”.

## II Scotland

<http://www.legislation.gov.uk/asp/2009/9/contents>

### Sexual Offences (Scotland) Act 2009

#### 9Voyeurism

(1)A person (“A”) commits an offence, to be known as the offence of voyeurism, if A does any of the things mentioned in subsections (2) to (5).

(2)The first thing is that A—

(a)without another person (“B”) consenting, and

(b)without any reasonable belief that B consents,

for a purpose mentioned in subsection (6) observes B doing a private act.

(3)The second thing is that A—

(a)without another person (“B”) consenting, and

(b)without any reasonable belief that B consents,

operates equipment with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B doing a private act.

(4)The third thing is that A—

(a)without another person (“B”) consenting, and

(b)without any reasonable belief that B consents,

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records B doing a private act with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at an image of B doing the act.

**[F1(4A)**The fourth thing is that A—

(a)without another person (“B”) consenting, and

(b)without any reasonable belief that B consents,

operates equipment beneath B's clothing with the intention of enabling A or another person (“C”), for a purpose mentioned in subsection (7), to observe B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

(4B)The fifth thing is that A—

(a)without another person (“B”) consenting, and

(b)without any reasonable belief that B consents,

records an image beneath B's clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person (“C”), for a purpose mentioned in subsection (7), will look at the image.]

(5)The **[F2sixth]** thing is that A—

(a)installs equipment, or

**[F3(b)**constructs or adapts a structure or part of a structure, with the intention of enabling A or another person to do an act referred to in subsection (2), (3), (4), (4A) or (4B).]

(6)The purposes referred to in subsection (2) are—

(a)obtaining sexual gratification,

(b)humiliating, distressing or alarming B.

(7)The purposes referred to in subsections (3) **[F4, (4), (4A) and (4B)]** are—

(a)obtaining sexual gratification (whether for A or C),

(b)humiliating, distressing or alarming B.

### Textual Amendments

**F1S. 9(4A)(4B)** inserted (1.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), **ss. 43(2)(a)**, 206; S.S.I. 2010/357, **art. 2(b)**

**F2Word in s. 9(5)** substituted (1.12.2010) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), **ss. 43(2)(b)(i)**, 206; S.S.I. 2010/357, **art. 2(b)**

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**F3S.** 9(5)(b) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), **ss. 43(2)(b)(ii)**, 206; S.S.I. 2010/357, **art. 2(b)**

**F4**Words in s. 9(7) substituted (1.12.2010) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), **ss. 43(2)(c)**, 206; S.S.I. 2010/357, **art. 2(b)**

### 10 Interpretation of section 9

(1) For the purposes of section 9, a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy, and—

(a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,

(b) the person is using a lavatory, or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) For the purposes of section 9(3) **[F1 and (4A)]**, operating equipment includes enabling or securing its activation by another person without that person's knowledge.

(3) In section 9(5), "structure" includes a tent, vehicle or vessel or other temporary or movable structure.

## III Australia

<https://www.legislation.nsw.gov.au/#/view/act/2017/29/sch1>

**Crimes (Amendment) (Intimate Images) Act 2017 NSW**

### Crimes Amendment (Intimate Images) Act 2017 No 29

Repealed version for 27 June 2017 to 25 August 2017 (accessed 10 September 2019 at 01:03)

[Schedule 1](#)

Schedule 1 Amendment of [Crimes Act 1900 No 40](#)

[1] Section 91I Definitions

Omit the definition of private parts from section 91I (1). Insert instead:

private parts means:

(a) a person's genital area or anal area, whether bare or covered by underwear, or

(b) the breasts of a female person, or transgender or intersex person identifying as female.

[2] Part 3, Division 15C

Insert after Division 15B:

Division 15C Recording and distributing intimate images

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### 91N Definitions

(1) In this Division:

distribute includes:

- (a) send, supply, exhibit, transmit or communicate to another person, or
- (b) make available for viewing or access by another person, whether in person or by electronic, digital or any other means.

engaged in a private act means:

- (a) in a state of undress, or
- (b) using the toilet, showering or bathing, or
- (c) engaged in a sexual act of a kind not ordinarily done in public, or
- (d) engaged in any other like activity.

image means a still or moving image, whether or not altered.

intimate image means:

- (a) an image of a person's private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, or
- (b) an image that has been altered to appear to show a person's private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy.

private parts means:

- (a) a person's genital area or anal area, whether bare or covered by underwear, or
- (b) the breasts of a female person, or transgender or intersex person identifying as female.

record an image means record, take or capture an image, by any means.

(2) A person may be regarded as having distributed an image to another person whether or not the other person views or accesses the image.

### 91O Meaning of consent in intimate image offences

(1) This section applies to all offences under this Division.

(2) A person consents to the recording of an intimate image if the person freely and voluntarily agrees to the recording of the intimate image.

(3) A person consents to the distribution of an intimate image if the person freely and voluntarily agrees to the distribution of the intimate image.

(4) A person who consents to the recording or distribution of an image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the recording or distribution of that image or any other image on another occasion.

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(5) A person who consents to the distribution of an image to a particular person or in a particular way is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image to another person or in another way.

(6) A person who distributes an image of himself or herself is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.

(7) A person does not consent to the recording or distribution of an intimate image:

(a) if the person is under the age of 16 years or does not otherwise have the capacity to consent, including because of cognitive incapacity, or

(b) if the person does not have the opportunity to consent because the person is unconscious or asleep, or

(c) if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or

(d) if the person consents because the person is unlawfully detained.

(8) This section does not limit the grounds on which it may be established that a person does not consent to the recording or distribution of an intimate image.

### 91P Record intimate image without consent

(1) A person who intentionally records an intimate image of another person:

(a) without the consent of the person, and

(b) knowing the person did not consent to the recording or being reckless as to whether the person consented to the recording,

is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.

(2) A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions.

### 91Q Distribute intimate image without consent

(1) A person who intentionally distributes an intimate image of another person:

(a) without the consent of the person, and

(b) knowing the person did not consent to the distribution or being reckless as to whether the person consented to the distribution,

is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.

(2) A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions.

### 91R Threaten to record or distribute intimate image

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(1) A person who threatens to record an intimate image of another person:

(a) without the consent of the other person, and

(b) intending to cause that other person to fear that the threat will be carried out,

is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.

(2) A person who threatens to distribute an intimate image of another person:

(a) without the consent of the other person, and

(b) intending to cause that other person to fear that the threat will be carried out,

is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.

(3) A threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional.

(4) A person may threaten to distribute an image whether or not the image exists.

(5) In proceedings for an offence against this section, the prosecution is not required to prove that the person alleged to have been threatened actually feared that the threat would be carried out.

(6) A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions.

91S Court may order rectification

(1) A court that finds a person guilty of an offence against section 91P or 91Q may order the person to take reasonable actions to remove, retract, recover, delete or destroy any intimate image recorded or distributed by the person in contravention of the section within a period specified by the court.

(2) A person who, without reasonable excuse, contravenes an order made under this section is guilty of an offence.

Maximum penalty: 50 penalty units or imprisonment for 2 years, or both.

(3) An offence against this section is a summary offence.

91T Exceptions

(1) A person does not commit an offence against section 91P or 91Q if:

(a) the conduct alleged to constitute the offence was done for a genuine medical or scientific purpose, or

(b) the conduct alleged to constitute the offence was done by a law enforcement officer for a genuine law enforcement purpose, or

(c) the conduct alleged to constitute the offence was required by a court or otherwise reasonably necessary to be done for the purpose of legal proceedings, or

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(d) a reasonable person would consider the conduct of the accused person acceptable, having regard to each of the following (to the extent relevant):

- (i) the nature and content of the image,
- (ii) the circumstances in which the image was recorded or distributed,
- (iii) the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted in the image,
- (iv) the degree to which the accused person's actions affect the privacy of the person depicted in the image,
- (v) the relationship between the accused person and the person depicted in the image.

(2) In this section:

law enforcement officer means a police officer or other person who exercises law enforcement functions under a law of this State, another State, a Territory or the Commonwealth.

[3] Section 428B Offences of specific intent to which Part applies

Insert in paragraph (b) of the Table, after the matter relating to section 91:

91P (intentionally record intimate image)

91Q (intentionally distribute intimate image)

## IV Non legal sources of information and expert commentary

Article by Prof Clare McGlynn, "Beyond Revenge Porn: The Continuum of Image-Based Sexual Abuse"

Feminist Legal Studies (2017) Volume 25, Issue 1, pp 25-46 (McGlynn C, Rackley, E & Houghton, R

<https://link.springer.com/article/10.1007/s10691-017-9343-2>

Prof Clare McGlynn et al: "Shattering Lives and Myths", research report dated July 2019

<https://claremcglynn.files.wordpress.com/2019/06/shattering-lives-and-myths-final.pdf>

Irish Probation Journal, Volume 14, October 2017:

More than Revenge Porn: Image-Based Sexual Abuse and the Reform of Irish Law (McGlynn, Clare and Rackley, Erika)

[http://www.probation.ie/EN/PB/0/12D6F4D1961C4695802581D0003D92D9/\\$File/ClareMcGlynn\\_ErikaRackley\\_IPJ.pdf](http://www.probation.ie/EN/PB/0/12D6F4D1961C4695802581D0003D92D9/$File/ClareMcGlynn_ErikaRackley_IPJ.pdf)

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