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**Response to Oireachtas Committee on Justice and equality  
concerning online harassment, harmful communications and  
related offences**

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September 2019

## Introduction

Established in 1973, the National Women's Council of Ireland (NWC) is the leading national women's membership organisation in Ireland. NWC seeks full equality between men and women and we draw our mandate from a membership of over 180 groups and organisations across a diversity of backgrounds, sectors and locations. We also have a growing, committed individual membership. The Irish Observatory on Violence Against Women is chaired by NWC.<sup>1</sup>

NWC actively support and work with government to implement the aims of the National Strategy for Women and Girls and to develop an integrated and focussed programme of gender aware and gender proofed investment. It is important this vision is also aligned to UN Sustainable Development Goals and the UN Convention for the Elimination of Discrimination against Women recommendations to Ireland, as well as other UN convention recommendations.

The Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (the Istanbul Convention) which was recently ratified, is a significant, international, legal instrument in combatting domestic and sexual violence. Its purpose is to protect women from all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence. The Second National Strategy on Domestic, Sexual and Gender Based Violence<sup>2</sup> works to ensure its implementation.

## Key Recommendations

1. NWC strongly urges the Oireachtas Committee to consider how best to reflect the reality of these crimes and the experiences of its victims in any proposed legislation, in order to ensure a gender-sensitive and victim- and survivor-centric approach to the law such that these acts are overwhelmingly perpetrated against women and girls.
2. NWC strongly urges the Oireachtas Committee to take considerable care in determining the language they choose to incorporate into any new legislation concerning image-based abuse.
3. NWC urges the Oireachtas Committee to be cognisant of the threat to carry out an act of image-based abuse and the related issue of 'sextortion', whereby the victim might be blackmailed into paying money, sending further intimate images bilaterally or performing sexual acts, in order to ensure that these issues are adequately reflected in legislation.

<sup>1</sup> The organisations in the Observatory are Akidwa, Amnesty International, Cork Sexual Violence Centre, Dublin Rape Crisis Centre, European Women's Lobby through NWC Representative, Freedom from Pornography Campaign, Immigrant Council of Ireland, National Women's Council of Ireland, Pavee Point Travellers Centre, Ruhama, Women's Aid.

<sup>2</sup> Department of Justice (2016) *Second National Strategy on Domestic, Sexual and Gender Based Violence*. <http://www.cosc.ie/en/COSC/Pages/WP08000096>

4. NWCi supports Government proposals to legislate for voyeuristic offences, commonly referred to as 'upskirting' and 'downblousing'.
5. NWCi advocates for the creation of a discrete and separate offence for stalking. Stalking can occur both online and off line and any new offence should be cognisant of that fact.
6. NWCi supports Government plans to create an Online Safety Commissioner and believes that the Office of the Commissioner will empower and educate internet users, and provide direct means by which images can be removed at haste from the internet.
7. NWCi submits that there is an absolute need to expand the definition of 'communications' to include digital tools such as Facebook and other popular social media sites, apps such as Snapchat where posts are shared for 24 hours, online forums and message boards such as Reddit, and messaging apps such as Whatsapp (not referenced in the 2016 Report), whereby encrypted messages can be widely and instantaneously shared, including through large group messaging. In order to capture the scope of offences that may be perpetrated using digital forms of communication, NWCi strongly favours the definition of 'communications' used in the draft Bill of the Commission's 2016 report.
8. NWCi hopes that the Oireachtas Committee will carefully consider the need for broad legislation that will be able to keep up with changing technology and emerging offences, while taking into account that the law must be specific enough to be workable and to empower An Garda Síochána to investigate and press charges where appropriate.
9. NWCi stresses that we need the data to be collected disaggregated by sex of the victim and perpetrator, and the relationship between them.
10. NWCi urges the Oireachtas Committee to be aware of the highly gendered nature and direct targeting of women in certain online communities and consider whether circumstances exist by which such online abuse would give rise to the offence of harassment.
11. NWCi urges the Oireachtas Committee to consider what kind of measures would be possible to introduce in order to provide victims with anonymity, even if the offences are not categorised as sexual offences.

## Cyber violence as a form of gender-based violence

Online violence against women is an overt expression of the gender discrimination and inequality that exists offline. Violence against women is the most significant crime impacting on women internationally and in Ireland. In 2014, the EU Fundamental Rights Agency<sup>3</sup> reported that 25% Irish women had experienced a form of physical and/or sexual violence since the age of fifteen, and 8% experience physical and/or sexual violence each year. 79% of Irish women who have experienced sexual or physical violence have never reported it to an official body<sup>4</sup> and less than 3% of women students said they had ever reported their unwanted sexual experiences to An Garda Síochána.<sup>5</sup> 12% of Irish respondents in the FRA study had experienced stalking (including cyber stalking).

Cyberviolence, in all its forms (cyberstalking, online harassment, image-based abuse ect,) is known to have negative psychological, social, and reproductive health outcomes for those who experience such abuse. The link between online and offline abuse and violence disproportionately affects women, girls, and sexual and gender minorities.<sup>6</sup> It is beyond essential that the gendered nature of cyberviolence is recognised in the criminal law. It is also essential that training and awareness is integrated into any proposed law reform that recognises and highlights the correlation between online and offline abuse and the gendered nature of these crimes that disproportionality effect women, girls and sexual and gender minorities.

## Structure of the Submission

This paper will:

1. Outline NWCI's key areas of concern in addressing harassment, harmful communications and related offences; and
2. Provide answers to the questions posed by the Oireachtas Committee on Justice and Equality (hereafter referred to as the 'Oireachtas Committee') in outlining the scope for public submissions on the proposed legislation.

<sup>3</sup> Fundamental Rights Agency (2014) *Violence Against Women: an EU-wide survey report*.

<sup>4</sup> Fundamental Rights Agency (FRA) (2014) *Violence Against Women: an EU-wide survey report*.

<sup>5</sup> Union of Students in Ireland (2013) *Say Something: A Study of Students' Experiences of Harassment, Stalking, Violence & Sexual Assault*. Dublin.

<sup>6</sup> Emma Louise Backe, Pamela Lilleston, and Jennifer McCleary-Sills, 'Networked Individuals, Gendered Violence: A Literature Review of Cyberviolence' (2018), 5 *Violence and Gender* 3. <http://doi.org/10.1089/vio.2017.0056>

## Part 1: Key areas of concern for NWCI in addressing harassment, harmful communications and related offences

We welcome the opportunity to respond to the Oireachtas Committee on Justice and equality consultation concerning online harassment, harmful communications and related offences. NWCI's comments reflect the lived experiences of the women that we have worked with and that have contacted us in huge numbers over many years. In considering the questions posed by the Oireachtas Committee, and in drafting our submission, NWCI considered the proposed Bill on Harassment, Harmful Communications and Related Offences and the related Bill drafted by the Law Reform Commission in 2016, as well as their 2016 Report on Harmful Communications and Digital Safety. Before addressing the substance of the consultation NWCI would like to draw the Committee's attention to a number of key areas of concern.

- A. Potential shortcomings in drafting gender-neutral legislation
- B. Terminology
- C. Capturing all abusive and exploitive acts
- D. The need to legislate for voyeuristic behaviour such as 'upskirting' and 'downblousing'
- E. The need to create a discrete and separate offence for stalking
- F. The issue of self-regulation of online harassment by social media companies

### A. Potential shortcomings in drafting gender-neutral legislation

At the outset, the NWCI would like to emphasise the targeted nature of this type of harassment, which predominantly affects women.<sup>7</sup> The Law Reform Commission's 2016 Report on Harmful Communications and Digital Safety while discussing some of the well-accepted definitions of this type of behaviour acknowledged the reality of the gender-sensitive definition as 'the intentional victim-shaming of individuals (overwhelmingly women)'.<sup>8</sup> If language describing such acts is drafted using solely gender-neutral language, without respect to the disproportionate impacts of these crimes on one gender, this may impact policy-making in the area and in turn affect practical measures such as the provision of services to women affected by these crimes.

### Recommendation:

<sup>7</sup> "Cyber Violence Against Women and Girls" European Institute for Gender Equality, 2017  
<https://eige.europa.eu/publications/cyber-violence-against-women-and-girls>

<sup>8</sup> "Harmful Communications and Digital Safety", Law Reform Commission (LRC 116-2016), 2016, p1

NWCI strongly urges the Oireachtas Committee to consider how best to reflect the reality of these crimes and the experiences of its victims in any proposed legislation, in order to ensure a gender-sensitive and victim- and survivor-centric approach to the law such that these acts are overwhelmingly perpetrated against women and girls.

## B. Terminology

Language is important. As a first step we ask the Committee to refrain from the use of the term 'revenge porn'. We believe that this term minimises what is a serious act of abuse. Revenge as it is commonly understood is something that is done to another person in reaction to a perceived wrong that they have experienced at the hands of that person – it thereby strongly implies the victim must have done something to deserve this. Porn is also associated with a commercial element indirectly implying that there is some sort of financial component to the act. It is a form of sexual abuse. Not pornography. Moreover, we must be cognisant of the origin of the term.

Erika Rackley, Professor of Law at Kent Law School believes it originates from Hunter Moore, the founder of a website entitled 'Is Anyone Up?', which facilitated users to post sexual photos of other people without their consent, as well as well as their personal information such as their name and address. While Mr Moore refused to take pictures down, he was eventually sentence to two years in jail. While it is not entirely confirmed that this term is wholly attributed to this person, we strongly oppose the use of any language that has such a potential origin.

Moreover as a term it fails to capture the nature and breadth of the online abusive and exploitative behaviour to which is it is linked. For example while it may cover the non-consensual distribution of intimate images without consent, we would argue that it fails to cover: the recording of an act of sexual assault with the goal of further humiliating a victim and/or to discourage them from reporting the crime; and 'sextortion', the act of threatening to expose a nude or sexually explicit image in order to get a person to fulfil a further action under duress, for example by sharing further images, paying the offender money, or performing sexual acts.

Like the Law Reform Commission in its 2016 report,<sup>9</sup> NWCI feels that 'abuse' is a more accurate description of the types of offence.<sup>10</sup> We recommend that the Committee refers to it as 'image-based abuse'.

### **Recommendation:**

NWCI strongly urges the Oireachtas Committee to take considerable care in determining the language they choose to incorporate into any new legislation concerning image-based abuse.

## C. Capturing all abusive and exploitative acts

<sup>9</sup> Ibid.  
<sup>10</sup> ibid 1.

As mentioned above there are various forms of cyber violence, including, but not limited to, cyber stalking, non-consensual distribution of intimate images, gender-based slurs and harassment, 'slut-shaming', unsolicited pornography, 'sextortion', rape and death threats, 'doxing', and electronically enabled trafficking. It is important that all acts are captured by any proposed legislation. However, as we understand it while the UN, the Council of Europe and the EU institutions recognise cyber violence and hate speech online against women there are no commonly accepted definitions of the various forms of violence targeting women online.

As with intimate partner violence experienced offline, the European Institute for Gender Equality notes 'cyber violence can manifest as various forms of violence, including sexual, psychological and, as growing trends would indicate, economic, whereby the victim's current or future employment status is compromised by information released online. The potential for violence in the cyber-sphere to manifest psychically should also not be discounted'.<sup>11</sup> Everything is heightened and compounded when the victim knows their abuser.

There is a clear need for legislation to capture the act of image-based abuse as a form of harassment that a) may involve a once-off incident and b) is distributed to a third party(ies) rather than directed at the victim themselves. This act involves sharing images widely online in order to harass and humiliate the victim rather than sending harassing message(s) directly to the victim themselves. This phenomenon is a product of the digital age, as it is now possible to share an intimate image without consent through instant communication to a large audience.

The *Non-Fatal Offences Against the Person Act 1997* (hereafter 'the 1997 Act') does not cover one-off acts and acts that target third parties. Section 10 of the 1997 Act only addresses harassment in the context of persistent behaviour in order to target the victim. The scope of the law should be clarified in order to capture the type of once-off harmful communication involved in perpetrating image based abuse, as well as its categorisation as a form of harassment that typically involves sharing the intimate images with third parties online. Whether this should be captured through the creation of a separate offence(s) or through broadening the legal definition of 'harassment' will be considered later in this paper, in direct response to the questions posed by the Oireachtas Committee in its call for submissions.

In considering the different types of acts that are captured by image-based abuse, the issue of 'sextortion' and the threat to share intimate images without consent should be captured in the legislation. Threatening to share such images is a form of harassment as it is designed to intimidate, shame and isolate the victim. Indeed, the psychological impact on the victim may be as severe as the actual sharing of intimate images themselves, due to the control and fear that the perpetrator exerts over his or her victim in executing such a threat. Section 4 of Deputy Howlin's 2017 Bill briefly addresses this issue, noting that if a person 'threatens to record, distribute or publish, an intimate image of another person without the other person's consent' then they are guilty of an offence.<sup>12</sup>

<sup>11</sup> European Institute for Gender Equality, *Cyber violence against women and girls* (2018) at 2. See <https://eige.europa.eu/thesaurus/terms/1484>

<sup>12</sup> Harassment, Harmful Communications and Related Offences Bill, Section 4, p4.

**Recommendation:**

NWCI urges the Oireachtas Committee to be cognisant of the threat to carry out an act of image-based abuse and the related issue of 'sextortion', whereby the victim might be blackmailed into paying money, sending further intimate images bilaterally or performing sexual acts, in order to ensure that these issues are adequately reflected in legislation.

D. The need to legislate for voyeuristic behaviour such as 'upskirting' and 'downblousing'

NWCI supports Government proposals to legislate for voyeuristic offences, commonly referred to as 'upskirting' and 'downblousing'. The opportunistic nature of these offences and motivation of sexual gratification on behalf of the perpetrator differs from the offence of harassment as defined in the 1997 Act. 'Upskirting' also differs from the victim-shaming goal of the perpetrator in carrying out an act of image based abuse. The intention of such offences is not to humiliate or harass the victim; nonetheless the effect of such invasive behaviour can be deeply traumatic for the victim. In order to empower victims to file a complaint and provide clarity to the Gardaí in investigating these voyeuristic offences, Irish legislation should enumerate this form of harassment in order to provide clarity as to the scope of the law.

**Recommendation:**

NWCI supports Government proposals to legislate for voyeuristic offences, commonly referred to as 'upskirting' and 'downblousing'.

E. The need to create a discrete and separate offence for stalking

Like the 2016 Law Reform Commission report,<sup>13</sup> NWCI strongly favours the creation of a discrete and separate offence for stalking. Stalking is an elevated form of harassment and a 'hidden' crime designed to disempower its victims. Recognition of this offence as separate to harassment, with appropriately titrated penalties would bridge a necessary gap in Irish law. The experience of other jurisdictions indicates that there is a significant practical effect in creating a discrete offence of stalking, in terms of empowering victims to report the offence.<sup>14</sup> This issue is discussed further in the next section, in response to the Oireachtas Committee's question on cyberstalking.

A note on penalties and sentencing for the offence of stalking

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<sup>13</sup>       ibid, p67.  
<sup>14</sup>       ibid.



The Law Reform Commission, in recommending the introduction of legislation in this area, also recommended that a discrete offence for stalking carry the same penalties as the restated harassment offence. This argument was made on the basis that the seven-year maximum sentence for harassment is considerable and already greater than several other common law jurisdictions (in England and Wales for example, it is five years).<sup>15</sup> NWCI feels that the Oireachtas Committee should nonetheless consider the possibility of a greater penalty. The fact that the penalty of harassment is comparably high compared to other common law jurisdictions is a somewhat irrelevant fact. The argument for creating a discrete offence for stalking is based on the need to recognise that stalking is a more severe crime than harassment. Thus, the offence should logically carry a more serious penalty.

If a separate offence however is created for stalking without increasing the penalty attached, the serious nature of the offence of stalking might mean that in practice, the maximum penalty of seven years will usually be imposed. This might raise questions however about whether it is reasonable to then ever impose the maximum seven-year penalty in sentencing a person convicted of harassment, as the offence, while serious, would be considered a less serious offence compared to stalking. In practice a Judge might be recalcitrant to impose the maximum sentence available for harassment, in order to avoid treating the offence as if it were on a par with the separate offence of stalking. This in turn may impact the victims' perceived sense of justice, particularly if they have delivered an impact statement in Court on the date of sentencing for the offence of harassment.

#### **Recommendation:**

Create a discrete and separate offence for stalking. Stalking can occur both online and off line and any new offence should be cognisant of that fact.

#### **F. The issue of self-regulation of online harassment by social media companies**

While discussed in further detail in the next section, NWCI would like to highlight the issue of regulation as a key concern. NWCI welcomes Government plans to create an Online Safety Commissioner and believes that the Office of the Commissioner will empower and educate internet users. Victims will have a neutral source available in which they can be informed of their rights, as well as being able to access a second avenue of redress if, for example, a social media site chooses not to strike a piece of harmful content.

Self-regulation of online harassment by a social media company such as Facebook is inherently flawed. By default, this form of regulation works off of the assumption that the victim holds a Facebook account and is a user of the product, and is thus in a position to make a complaint to the company through their account and request that the harmful content in question be struck.

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<sup>15</sup> *ibid*, p68.

Self-regulation poses a particular challenge in the context of SMS and messaging apps; Whatsapp for example uses a system of encrypted messaging, and also facilitates mass sharing of images to other users. It is unclear whether a victim is even able to contact Whatsapp directly if a harmful image is shared through the messaging app. In addition to this, Facebook as product owner of Whatsapp does not track messages for harmful content as messaging is encrypted. The Office of the Online Safety Commissioner however would provide a clear avenue for the victim to seek counsel and request that action be taken to remove a piece of harmful content where appropriate.

### **Recommendation:**

NWCI supports Government plans to create an Online Safety Commissioner and believes that the Office of the Commissioner will empower and educate internet users, and provide direct means by which images can be removed at haste from the internet.

## **Part 2:**

### **Questions posed by the Oireachtas Committee on Justice and Equality**

The Oireachtas Committee has outlined fifteen questions covering possible areas under the scope of submission on this matter. The NWCI has provided answers and analysis concerning these questions below.

#### **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?**

The 2016 Law Reform Commission report on Harmful Communications and Digital Safety rightfully highlights the gap in the law concerning section 10 the *Offences Against the Person Act 1997* (hereafter referred to as the 1997 Act), which does not reference harassment by means of electronic and digital communication, aside from one specific reference to harassment by telephone.<sup>16</sup> The report cites statistics from Women's Aid UK, noting that 41% of domestic violence victims availing of its services had been tracked or harassed through use of an electronic device.<sup>17</sup>

NWCI submits that there is an absolute need to expand the definition of 'communications' to include digital tools such as Facebook and other popular social media sites, apps such as Snapchat where posts are shared for 24 hours, online forums and message boards such as Reddit, and messaging apps such as Whatsapp (not

<sup>16</sup> ibid 2, p55.

<sup>17</sup> ibid.

referenced in the 2016 Report), whereby encrypted messages can be widely and instantaneously shared, including through large group messaging.

Whatsapp is a particular communications tool that has not been widely referred to in the research on online harm and safety. The encrypted nature of its messaging poses a particular challenge for regulation. Whatsapp is owned by Facebook, who faced an unexpected challenge in monitoring the spread of disinformation (or so-called 'fake news') during the 2018 Brazilian General Election,<sup>18</sup> whereby Whatsapp was the primary platform used by those seeking to spread what Facebook refers to as 'coordinated inauthentic behaviour' in its content policy.<sup>19</sup> NWCI recommends that instant messaging tools such as Whatsapp be clearly reflected in any definition of communications, and cautions the Oireachtas Committee to not solely focus on social media sites in discussing the issues of online harassment.

In fact, due to the encrypted nature of messaging on Whatsapp, the expectation of companies to self-regulate is in even murkier territory; for example, a victim of online harassment or image-based abuse may not even realise that he or she is in a position to make a complaint to Facebook as owner of the product. The process of appealing a post on a site such as Facebook is an easier and clearer process for the user of the product. For a victim of such harassment, clarified legislation would clearly state possible recourse through the law and access to an Online Safety Commissioner in order to ensure the removal of such content.

Whatsapp is just one example of the complex nature of this area and the absolute need to expand the existing definition of 'communications'. NWCI notes the difference in the definition of 'communications' under the 2017 Bill tabled by Deputy Brendan Howlin TD, compared to the more detailed and specific definition of communications under the Law Reform Commission's proposed 2016 Bill. In order to capture the scope of offences that may be perpetrated using digital forms of communication, NWCI strongly favours the definition of 'communications' used in the draft Bill of the Commission's 2016 report.

Digital communications include email, messaging platforms and apps such as Whatsapp, social media sites such as Facebook, online forums and messaged boards such as Reddit, apps for temporary image sharing such as Snapchat, as well as SMS, 'airdrop' and Bluetooth-facilitated sharing technology. Like the Law Reform Commission, NWCI sees a clear need to reflect the reality of digital communications in legislation in order to provide clarity as to the scope of the offence of harassment.

NWCI also cautions legislators to be cognisant of the incorrect interchangeable use of the terms 'bullying' and 'harassment' in describing these offences and how they are carried out online. 'Bullying', while a serious issue that can have a severe psychological impact on its victims, is not a crime, whereas 'harassment' is a crime as defined in the 1997 Act. This paper will discuss these terms in the context of 'trolling', cyberbullying and cyberstalking.

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<sup>18</sup> "Disinformation Spreads on Whatsapp Ahead of Brazilian Election", New York Times, 19 October 2018 <https://www.nytimes.com/2018/10/19/technology/whatsapp-brazil-presidential-election.html>

<sup>19</sup> Community Standards, Facebook <https://www.facebook.com/communitystandards/>

**Recommendation:**

NWCI submits that there is an absolute need to expand the definition of 'communications' to include digital tools such as Facebook and other popular social media sites, apps such as Snapchat where posts are shared for 24 hours, online forums and message boards such as Reddit, and messaging apps such as Whatsapp (not referenced in the 2016 Report), whereby encrypted messages can be widely and instantaneously shared, including through large group messaging. In order to capture the scope of offences that may be perpetrated using digital forms of communication, NWCI strongly favours the definition of 'communications' used in the draft Bill of the Commission's 2016 report.

## **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?**

There are a number of useful lessons learned from the adoption of recent legislation in this area in New Zealand, England and Wales, and Scotland. NWCI hopes that the Oireachtas Committee will carefully consider the following examples and experiences of other jurisdictions:

### **2.1. Stalking**

In Scotland, the *Criminal Justice and Licensing Act 2010* includes a specific stalking offence.<sup>20</sup> In England and Wales, the *Protection of Freedoms Act 2012* inserted two new stalking offences into previous legislation, on the basis that the existing law was too broad and did not go far enough to identify and prosecute the severity of stalking in comparison to other, less serious cases of harassment.<sup>21</sup> A positive and practical impact has been noted arising from the introduction of such legislation, with an increase in the number of charges brought from 2012 to 2014.<sup>22</sup> Northern Ireland is also considering whether it is necessary to introduce a specific stalking offence.<sup>23</sup>

### **2.2. Offences designed to target one-off harmful digital communications**

Legislation was enacted in New Zealand in 2015 to introduce an offence of 'causing harm by posting a digital communication'.<sup>24</sup> It defines 'harm' as 'serious emotional distress' – this may be an unhelpfully vague definition. Two similar offences are enumerated in law in England and Wales,<sup>25</sup> with robust guidance from the Crown Prosecution Service on the use of these offences; this may be a useful guide in

<sup>20</sup> Criminal Justice and Licensing Act (Scotland) 2017, section 39

<sup>21</sup> *ibid* 2, p65

<sup>22</sup> *ibid* p67

<sup>23</sup> *ibid*

<sup>24</sup> New Zealand Harmful Digital Communications Act 2015

<sup>25</sup> Section 1 of the Malicious Communications Act 1988, Section 127 of the Communications Act 2003

addressing concerns of vague definitions.<sup>26</sup> One practical concern with such offences is that they may pose confusion to the Gardaí in deciding whether to charge for harassment or for this specific offence. Thus, defining one-off harmful communications under the umbrella of 'harassment' under the new legislation may be preferable.

### 2.3. Definition of 'intimate'

Deputy Howlin's 2017 Bill offers a comprehensive definition of what 'intimate images' might entail, including the key inclusion of intimate body parts covered by underwear. This is in line with Scottish legislation,<sup>27</sup> and is beneficial in ensuring that acts such as 'upskirting', in which the victim is typically clothed, can be categorised as an offence.

Scottish legislation also provides coverage for photoshopped images<sup>28</sup> – i.e. the victim's head might be superimposed onto a nude body to falsify an intimate image. England and Wales however specifically excludes altered photographs from its definition of intimate images.<sup>29</sup> NWCi urges the Oireachtas Committee to consider the scope of legislating for photoshopped or altered images and video footage in order to provide clarity on whether this would constitute a form of digital harassment.

### 2.4. Threat to release intimate images

The *Abusive Behaviour and Sexual Harm (Scotland) Act 2016* introduced an offence of threatening to disclose an intimate photograph or film, in recognition of the controlling that the offender holds over the victim in threatening to distribute the intimate image or footage.

### 2.5. Intent to cause distress

England and Wales requires a specific intent for content to have been disclosed in order to cause distress, under its distribution of intimate images offences.<sup>30</sup> No such requirement exists under comparable offences in Canada or Victoria (Australia).<sup>31</sup> Such context may protect minors from being charged with this offence. Deputy Howlin's draft bill states that the 'reckless' distribution of images is grounds for an offence.<sup>32</sup> While this is beneficial in pursuing a victim-centric approach to prosecuting this offence, the question of intent is an important one for the Oireachtas Committee to consider and balance against other issues, including that of criminalising young people.

## 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?

<sup>26</sup> "Social Media – Guidelines on prosecuting cases involving communications sent via social media", Crown Prosecution Service, revised 21 August 2018 <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media>

<sup>27</sup> Abusive Behaviour & Sexual Harm (Scotland) Act 2016

<sup>28</sup> ibid

<sup>29</sup> Criminal Justice and Courts Act 2015 section 35 (5) (b)

<sup>30</sup> ibid

<sup>31</sup> ibid 2, p87

<sup>32</sup> ibid 5

The 2016 Law Reform Commission report offers useful analysis of where this issue has arisen in other jurisdictions, noting the benefits of greater specificity in comparable Scottish legislation versus similar laws enacted in New Zealand and England and Wales.<sup>33</sup> NWCI is concerned by the potential to enact vague legislation concerning digital communications offences; this problem could arise from using broad definitions of key terminology and by failing to enumerate the various forms of communication by which a person can be harassed, in addition to the forms of harassment that have arisen as a result of said forms. On the other hand, legislation that is too specific will require amendment – this is something we are already seeing with the need to amend legislation specifically for the offence of 'upskirting'.

### **Recommendation:**

NWCI hopes that the Oireachtas Committee will carefully consider the need for broad legislation that will be able to keep up with changing technology and emerging offences, while taking into account that the law must be specific enough to be workable and to empower An Garda Síochána to investigate and press charges where appropriate.

## **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?**

See the analysis under question 2 which also covers this question.

### **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?**

NWCI sees a clear need to update the definition of 'harassment' to reflect the realities of digital communication, as well as legislating for voyeuristic offences such as so-called 'upskirting' as discussed earlier in this paper. In our earlier analysis of lessons learned from other jurisdictions, reference was made to the specific offences created for distribution of one-off images and intimate images in other jurisdictions. The creation of such offences in England and Wales demonstrably increased the levels of reporting of this type of offence.<sup>34</sup> As discussed earlier, this may however create confusion for law enforcement concerning which offence to prosecute for – harassment, assault, child pornography, or these new offences concerning one-off actions.

As previously discussed, there is a clear need for legislation to capture acts of image-based abuse as an offence that is typically a once-off incident (as opposed to persistent harassment), as well as a form of harassment that shames the victim by distributing the

<sup>33</sup> ibid 2, p90  
<sup>34</sup> ibid, p87

images to third parties (rather than sending harassing messages directly to the victim). Whether legislating for this offence is best achieved through broadening the definition of 'harassment' or through the creation of separate offence(s) is an issue that demands further consideration, including the policy and practical implications that this would have for law enforcement authorities.

**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?**

In terms of self-regulation, NWCi has elected to consider Facebook's content policy as a brief case study that may inform the work of the Oireachtas Committee. Facebook's 'Community Standards'<sup>35</sup> are published online, with select information omitted in the interests of preventing terrorists and violent extremists from 'gaming' the system and finding ways to circumvent policy guidelines.

Facebook explicitly states that it errs on the side of allowing content in issues of disputed posts, with the exception of nude and sexual content. This is in the interests of avoiding nude or intimate imagery of underage persons that would give rise to an offence of child pornography. This means that content that would fall under the category of image-based abuse will be immediately struck down by moderators under Facebook's community standards. Facebook has in fact been criticised for having too pedantic an approach to nude content, and was forced to amend its Community Standards in order to allow images of exposed breasts in the context of breastfeeding an infant.<sup>36</sup> Facebook also attracted criticism in Norway for continuously striking uploads of the Pulitzer-prize winning photograph 'Napalm Girl', which depicts a nude child in Vietnam running down a street, her clothes having literally been burnt off her body from the effects of Napalm.<sup>37</sup>

This approach would indicate that self-regulation by social media companies is effective in targeting the kind of intimate imagery associated with image-based abuse. Several problems arise nonetheless. First, self-regulation as a system assumes that the victim in question uses Facebook and, through their presumed account, will file a complaint to Facebook moderators and request that the content be struck.

Second, Facebook has one content policy that is applied globally; it in no way alters or differentiates its content according to legal jurisdiction. This means that in order to ensure compliance with domestic legislation, interventionist regulation would be

<sup>35</sup> ibid 13

<sup>36</sup> "Facebook Clarifies Nudity Policy: Breastfeeding Photos Are Allowed", Huffington Post UK, 30 March 2015 [https://www.huffingtonpost.co.uk/2015/03/16/breastfeeding-facebook-nudity-policy\\_n\\_6877208.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAACTeKM4p5ErYpeccg92zgZ1Vn1MX3QJXror-ghExBcvjIqRymom59ooV-DU5FFYopg192Ehnme0OcvKGdIDM-RumvMu9AkNVTNSS-XjSfs\\_ItKDNzdv47gg0jQ7qsdF8atVu\\_sh3dY4j6wUw-3nyEEmQrD8Mtgf5ApRbi-lxLCyzm](https://www.huffingtonpost.co.uk/2015/03/16/breastfeeding-facebook-nudity-policy_n_6877208.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAACTeKM4p5ErYpeccg92zgZ1Vn1MX3QJXror-ghExBcvjIqRymom59ooV-DU5FFYopg192Ehnme0OcvKGdIDM-RumvMu9AkNVTNSS-XjSfs_ItKDNzdv47gg0jQ7qsdF8atVu_sh3dY4j6wUw-3nyEEmQrD8Mtgf5ApRbi-lxLCyzm)

<sup>37</sup> "Facebook deletes Norwegian PM's post as 'napalm girl' row escalates", The Guardian, 9 September 2016 <https://www.theguardian.com/technology/2016/sep/09/facebook-deletes-norway-pms-post-napalm-girl-post-row>

necessary. The proposed creation of an Online Safety Commissioner would educate social media users and empower victims by providing an alternative avenue for recourse. It also provides an avenue of complaint for those who may not have a Facebook account – it is not clear where a complaint would be directed to the company if not through an existing account.

The Office of the Commissioner would also have the benefit of encouraging Facebook and other social media sites to have a pro-active approach to regulation. The Oireachtas Committee may be interested in considering additional means of ensuring compliance. For example, a forthcoming EU Directive and proposed domestic UK legislation both plan to impose fines on social media companies for failing to remove pro-terrorism content within a designated time frame.<sup>38</sup> As the EMEA HQ of many large tech companies, Ireland has an opportunity to be a leader in this area and from the outset clarify extra-territorial application of harassment offences.

Finally, this paper earlier highlighted the inability of companies to monitor the content of SMS messaging and encrypted messaging apps such as Whatsapp. If an intimate image were non-consensually distributed using Whatsapp, which facilitates wide and instantaneous image-sharing, including through large groups, the victim in question would need to seek legal recourse through law enforcement in order to ensure that the company removes the content and, if directed, identifies the IP address or phone number associated with the user(s) who shared said content. This reinforces the need for an Online Safety Commissioner in Ireland.

## **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?**

Data on cyber violence in the EU and beyond is scarce and consequently very little is definitively known about the actual percentage of victims of cyber violence against women and girls and the prevalence of harm.

Despite the obligations contained in the Victim's Rights Directive and the Istanbul Convention, comprehensive disaggregated comparable data is rarely available.

According to a Study issued by the FEMM Committee '[i]llegal hate speech online targeting gender identity is equivalent to 3.1% of reports to internet platforms in the EU and 14% of women in the EU have experienced cyber stalking since the age of 15.'<sup>39</sup>

### **Recommendation:**

<sup>38</sup> "Remove terror content or be fined millions, EU tells social media firms", The Guardian, 13 September 2018 <https://www.theguardian.com/media/2018/sep/13/social-media-firms-could-face-huge-fines-over-terrorist-content>

<sup>39</sup> FEMM Committee Cyber violence and hate speech online against women (2018) at 40. See [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL\\_STU\(2018\)604979\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf)



We need the data to be collected disaggregated by sex of the victim and perpetrator, and the relationship between them.

**8. To what extent are An Garda Síochána equipped and resourced to deal with the issues arising from harmful online communications such as these?**

We believe that they would need additional resources and support.

**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?**

This paper earlier advocated for the creation of a discrete offence for stalking. It would follow that 'cyberstalking' would constitute a form of stalking and thus should be considered as a separate and discrete offence. Establishing what constitutes 'cyberstalking' versus online harassment is a more difficult question that must be carefully considered, in order to determine whether 'cyberstalking' should be specifically enumerated in legislation for the offence of stalking.

In reporting on the issues surrounding online abuse, popular media often uses the terms 'cyberstalking' and 'online harassment' interchangeably. This paper later discusses the often highly gendered nature of internet 'trolls' and whether their behaviour constitutes cyberbullying or gives rise to the legal offence of harassment. The rise of women journalists and writers who are routinely subjected to 'cyberstalking' is a related issue worthy of consideration by the Oireachtas Committee.<sup>40</sup>

The phenomenon of 'doxing' is a helpful element in defining the terms of and actions involved in 'cyberstalking'. 'Doxing' occurs when the offender publishes the personal details (home address, phone number, social security numbers, banking details etc.) of an individual online, with the intent of harassing and causing the victim distress, as well as creating a situation where the victim may fear for their own safety.<sup>41</sup>

A related and particularly pernicious phenomenon in the American online gaming community is the act of 'swatting',<sup>42</sup> whereby the offender 'doxes' the home address of a gamer and waits until said gamer is participating in an online 'live stream' of a community gaming event. The offender will report a false terrorist or shooting threat to the police, alleging that the victim in question is about to carry out a terrorist attack or mass atrocity, supplying the victim's home address to the authorities. A SWAT team or similar emergency responders are then typically dispatched to the victim's house, and all those participating in the gaming live stream can watch the victim be apprehended by the authorities live on camera. In multiple tragic incidents, emergency responders have mistook the recorded sound of gunshots and violence emanating from the video game

<sup>40</sup> "When It's Your Job to Be Online, Cyberstalking Can Be Inescapable", Vice Media, 7 December 2018 [https://www.vice.com/en\\_us/article/nepq3w/mental-health-effects-cyberstalking](https://www.vice.com/en_us/article/nepq3w/mental-health-effects-cyberstalking)

<sup>41</sup> "Doxing and Cyberbullying", Cyberbullying Research Center (USA) <https://cyberbullying.org/doxing-and-cyberbullying>

<sup>42</sup> "An Ohio gamer gets prison time over a 'swatting' call that led to a man's death", CNN, 14 September 2019 <https://edition.cnn.com/2019/09/14/us/swatting-sentence-casey-viner/index.html>

playing on a speaker for an actual live shooting, killing the wrongly assumed perpetrator on the spot.<sup>43</sup>

**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?**

We believe that it is likely that this will require additional resources.

**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?**

The fact that most of the offences up for discussion in the proposed legislation revolve around the distribution of intimate images or video footage negates some of the concerns around free speech and the internet. The question of online harassment in the form of 'trolling' however should be considered, particularly in the context of social media sites such as Twitter and online forums and message boards. 'Trolling' of a sexual and harassing nature against women in the online community is a matter of increasing concern. The online gaming community especially has had significant controversy around particularly vitriolic online abuse against women gamers.<sup>44</sup>

In drafting legislation to protect against digital harassment, NWCi urges the Oireachtas Committee to clearly delineate between 'bullying' and 'harassment' in its definitions of and examples used concerning online abuse. Bullying is a matter that can be self-regulated by the platform; however, 'harassment' is a legal matter and concerns an elevated level of online abuse. In determining what constitutes harassment, the Oireachtas Committee should be cognisant of the risk of creating an offence for something that is said online, but that would otherwise be legal if said offline. Within the confines and timelines of this submission, NWCi cannot concretely offer a recommendation concerning where these lines fall.

**Recommendation:**

NWCi urges the Oireachtas Committee to be aware of the highly gendered nature and direct targeting of women in certain online communities and consider whether circumstances exist by which such online abuse would give rise to the offence of harassment.

**12. Do other jurisdictions have statutory measures to protect victim identities in cases of online harassment being released online posthearings, etc?**

<sup>43</sup> ibid

<sup>44</sup> "Hey dude, do this': the last resort for female gamers escaping online abuse" The Guardian, 23 October 2017 <https://www.theguardian.com/culture/2017/oct/24/hey-dude-do-this-the-last-resort-for-female-gamers-escaping-online-abuse>

In the UK, victims of image-based abuse are not granted anonymity, as the relevant offences are categorised as communications offences, rather than sex crimes. This has incurred criticism from victim's advocacy groups who are calling for the offences to be re-categorised as sexual offences, in order to protect victim identities.<sup>45</sup> The British Government has since instructed the UK Law Commission to review existing legislation in order to consider its re-categorisation.<sup>46</sup>

Given the shame and humiliation endured by a victim of image-based abuse, without anonymity he or she may be recalcitrant to report the offence as they may feel that they would risk being 're-victimised' in the context of the judicial system and media reporting. The victim's right to privacy has already been breached once, causing distress and possible long-term psychological implications. It follows that protection of the victim's identity might a) encourage reporting of the crime and b) provide dignity to the persons affected in the interests of adopting victim- and survivor-centred legislation. McGlynn and Rackley argue that such anonymity is vital in order to protect complainants from further harm, noting that similar laws in Israel are categorised as sexual offences.<sup>47</sup>

### **Recommendation:**

NWCI urges the Oireachtas Committee to consider this context in related jurisdictions and at a minimum consider what kind of measures would be possible to introduce in order to provide victims with anonymity, even if the offences are not categorised as sexual offences.

## **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?**

**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?**

**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?**

<sup>45</sup> "Revenge porn laws 'not working', says victims group" BBC New, 19 May 2019 <https://www.bbc.com/news/uk-48309752>

<sup>46</sup> "Victims of revenge porn could get anonymity in shake-up of laws to tackle new online sex crimes" The Telegraph, 25 June 2019 <https://www.telegraph.co.uk/politics/2019/06/25/victims-revenge-porn-could-get-anonymity-shake-up-laws-tackle/>

<sup>47</sup> "More than 'Revenge Porn': Image-Based Sexual Abuse and the Reform of Irish Law" Claire McGlynn & Erika Rackley, Irish Probation Journal Volume 14, October 2017

In considering these questions concerning young people, NWCI as an organisation dedicated to the protection and promotion of women's rights will defer to experts on youth. NWCI does however support the language in Deputy Howlin's Bill noting that young people should not be criminalised for such actions. From a policy perspective, NWCI is supportive of preventive actions such as comprehensive sexual education as part of school curriculums.

### Important Reading

NWCI has found the following resources to be of great use.

Stevens, S. (2018) Digital Harassment of Women Leaders: Issues and Solutions Factsheet, VAWG Helpdesk Research Report No. 214. London, UK: VAWG Helpdesk. See [Digital Harassment of Women Leaders: Issues and Solutions Factsheet](#); See also <http://www.sddirect.org.uk/media/1631/q-210-digital-harassment-of-women-leaders-evidence-review.pdf>

Amnesty International and Element AI release largest ever study into online abuse against women (2018) See <https://www.amnesty.ie/crowdsourced-twitter-study-reveals-shocking-scale-of-online-abuse-against-women/>

FEMM Committee Cyber violence and hate speech online against women (2018) See [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL\\_STU\(2018\)60497\\_9\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)60497_9_EN.pdf)

European Institute for Gender Equality, Cyber violence against women and girls (2018). See <https://eige.europa.eu/thesaurus/terms/1484>

Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective (A/HRC/38/47) (2018)

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