



**An Bille um Chiapadh, Cumarsáid Dhochrach agus
Cionta Gaolmhara, 2017**
**Harassment, Harmful Communications and
Related Offences Bill 2017**

Meabhrán Míitheach
Explanatory Memorandum



**AN BILLE UM CHIAPADH, CUMARSÁID DHOCHRACH AGUS
CIONTA GAOLMHARA, 2017
HARASSMENT, HARMFUL COMMUNICATIONS AND
RELATED OFFENCES BILL 2017**

EXPLANATORY MEMORANDUM

Purpose of Bill

This Bill is by its long title an Act ‘to consolidate and reform the criminal law concerning harmful communications, to repeal certain provisions of the Post Office (Amendment) Act 1951 and the Non-Fatal Offences against the Person Act 1997, and to provide for related matters’.

The Bill draws in part from the recent report of the Law Reform Commission on Harmful Communications and Digital Safety. That report appended a draft Bill with two substantive parts, reflecting the analysis and structure of the report as a whole.

While the starting point for the Law Reform Commission was to consider communications in the digital and online world, its report concluded that the existing criminal law, covering online and offline communication, already addresses some of the harmful communications of concern. However, the Commission also identified some gaps that require reform, notably where new forms of communication are used in harmful ways that were not anticipated previously.

The Report therefore proposed that the existing criminal law, together with measures to deal with new forms of harmful communications, be consolidated into a single piece of legislation.

Thus, the first substantive part of their proposed Bill was aimed at updating and reforming criminal law, in a technology neutral way applying to both online and offline communications.

The second part of the Commission’s report, and draft Bill, concerned proposals for a statutory civil system of oversight and regulation, to promote and safeguard positive digital safety. They propose the creation of an online regulator, the Digital Safety Commissioner.

The Commission point out that their draft is sketchier in relation to this part because funding, staffing and related matters raise policy issues that are outside their remit.

The creation of a new statutory independent agency is also outside the remit of a Dáil Private Member’s Bill. The purpose of this Bill is confined, accordingly, to implementing the thrust of the Commission’s proposals in relation to criminal law reform.

Provisions of Bill

Section 1 provides in standard form for the short title of the Act.

Section 2 defines certain terms used in the Bill. Chiefly, “communication” is defined as meaning the communication of information by any means and as specifically including –

- communication by spoken words, other audible means, behaviour, writing, sign or visible representation, and
- the communication of information that is generated, processed, transmitted, received, recorded, stored or displayed by electronic means or in electronic form.

The section also makes it clear that this Act is not to be construed as altering any rule of law or amending any enactment so as to prohibit or unduly restrict the exercise of the rights of peaceable assembly or peaceful picketing, or any other constitutional right.

Section 3 deals with the offence of harassment, currently found in the Non-Fatal Offences against the Person Act 1997. It provides that a person who, intentionally or recklessly and without lawful authority or reasonable excuse, persistently follows, watches, pesters or besets another person, or persistently communicates with another person, or persistently communicates with a third person about another person, is guilty of harassment where those acts seriously interfere with the peace and privacy of the other person or cause alarm, distress or harm to the other person.

A person guilty of harassment is liable on summary conviction to a Class A fine or to imprisonment for 12 months or both, or on conviction on indictment to a fine or imprisonment for 7 years or both.

If the court is satisfied that the defendant by his or her acts **both** seriously interfered with another person’s peace and privacy, **and** caused alarm, distress or harm to the other person, the court may take that into account as an aggravating factor in determining sentence.

Where the court is satisfied that the defendant and the person against whom the offence was committed are or were in an intimate relationship and that, in the course of or for the purposes of committing the offence –

- the defendant made use of personal information about the other person, or
- the defendant made use of any electronic device or software in order to monitor, observe, listen to or make a recording of the other person or his or her movements, activities and communications, without the other person’s knowledge and consent,

the court may take that fact into account as an aggravating factor in determining the sentence to be imposed on the defendant.

Section 4 creates a new offence of distributing an intimate image without consent. It provides that a person who without lawful authority or reasonable excuse –

- takes, distributes or publishes, or threatens to take, distribute or publish, an intimate image of another person without the other person’s consent, and
- by his or her acts seriously interferes with the peace and privacy of the other person or causes alarm, distress or harm to the other person,

is guilty of an offence and is liable on summary conviction to a Class A fine or to imprisonment for 6 months or both. If the offence is proven to have been committed intentionally or recklessly, the maximum sentence in

the District Court is increased to 12 months and the offence is punishable on conviction on indictment by an unlimited fine or imprisonment for 7 years or both.

Where the court is satisfied that the offence was committed against a child or against another person who, by reason of a disorder of the mind, an intellectual disability, or a physical impairment or disability, was restricted in his her or her capacity to guard himself or herself against harm by another person, the court may take that fact into account as an aggravating factor in determining any sentence to be imposed on the defendant for the offence.

This offence is made a “sexual offence” for the purposes of the Sex Offenders Act 2001, unless the defendant was not sentenced to any punishment involving deprivation of liberty for a limited or unlimited period of time, or made subject to any measure involving such deprivation of liberty.

Section 5 deals with prohibited messages. A person who –

- with intent to cause alarm, distress or harm to another person, or being reckless as to whether he or she causes alarm, distress or harm to another person, or
- persistently,

distributes or publishes a threatening, false, indecent or obscene message to or about the other person is guilty of an offence.

The offence is punishable on summary conviction by a Class A fine or imprisonment for 12 months or both and, on conviction on indictment by an unlimited fine or imprisonment for 7 years, or both.

Section 6 deals with the liability of directors and officers of corporate bodies and provides that, where an offence is committed by a body corporate and is proved to have been committed with the consent or connivance of a director, manager, secretary or other officer of the body, or of a person purporting to act in such a capacity, then that person is also guilty of an offence.

Section 7 is a jurisdictional rule. It states that proceedings may be brought for an offence if, at the relevant time, either the defendant or the person against whom the offence is alleged to have been committed was in the State.

Section 8 deals with double jeopardy. It states that a person acquitted or convicted of an offence outside the State shall not be proceeded against for the same offence under this Act.

Section 9 provides that summary proceedings for an offence may be instituted at any time within 2 years from the date on which the offence was committed.

Section 10 provides that proceedings against a person under the age of 17 shall not be taken except by or with the consent of the Director of Public Prosecutions.

Section 11 provides for the protection of privacy of victims. The section is broadly modelled on reporting restrictions in the Criminal Law (Rape) Act 1981 as amended and provides that, in general, no matter likely to lead members of the public to identify a person as a person in relation to whom the offence is alleged to have been committed shall be published in a publication available to the public or broadcast, except as authorised by a court direction.

The defendant may apply to court for a direction to have reporting restrictions removed. The court must give such a direction if satisfied that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses and that the conduct of the applicant's defence is likely to be adversely affected if the direction is not given.

Section 12 provides for the forfeiture to the State of any apparatus, equipment or other thing used in the course of committing the offence.

Section 13 deals with civil restraint orders and provides that the Circuit Court may make an order, having regard to the evidence and if the court is satisfied that it is in the interests of justice so to do, that a person shall not, for such period as the court may specify:

- communicate by any means of communication with or about a named person, or
- that the respondent shall not approach within such distance as the court shall specify of the place of residence or employment of a named person.

This is based on the comparable powers in the Non-Fatal Offences against the Person Act 1997.

Section 14 places the power to issue what is sometimes referred to as a Norwich Pharmacal order (named after an English case in which this order was first made) on a statutory footing. Both the High Court and the Circuit Court are empowered to make the order. A Norwich Pharmacal order requires a person to disclose the name of another person against whom the applicant intends to bring civil proceedings. In the type of cases with which this Bill is concerned, this would involve applying to an internet service provider, a social media site or a telecoms company to reveal the name of a person who has posted harmful communications online but who has disguised his or her real identity. At present, a Norwich Pharmacal order can only be issued by the High Court, which involves significantly more cost than would be the case if such an order could be applied for and made in the Circuit Court.

Section 15 repeals section 13 of the Post Office (Amendment) Act 1951 and section 10 of the Non-Fatal Offences against the Person Act 1997.

Brendan Howlin TD,
May, 2017.