

XVI. NEW CHALLENGES, NEW LAWS: TACKLING HATE CRIMES AND CYBERBULLYING IN IRELAND

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1. The legal dimensions of hate speech and hate crime

1.1. The 1989 Prohibition of Incitement to Hatred Act and its critics

Ireland has had a specific law prohibiting hate speech since 1989.¹ The scope of the *Prohibition of Incitement To Hatred Act 1989* (hereinafter: PIHA) is not limited to hate speech in the narrow sense. Considered progressive at the time of its adoption,² the drafting of the PIHA, which some consider to be ahead of its time,³ was motivated by international obligations, notably the *International Covenant on Civil and Political Rights* (ICCPR) and the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination*, and by a general consensus on the need for a domestic law, irrespective of international obligations, in particular, to combat racially motivated incitement.⁴

The first element of the PIHA (Actions likely to stir up hatred) reads as follows:

2.—(1) It shall be an offence for a person—

1 It should be noted here that Ireland does not have a single criminal code covering both the general section and the specific offences. Instead, a combination of different laws and court decisions form the basis of substantive criminal law.

2 Schweppe et al., 2014, footnote 30 at p. 17.

3 Schweppe and Walsh, 2008, p. 56.

4 Cowhey, 2006, p. 35.

- (a) to publish⁵ or distribute⁶ written material,⁷
- (b) to use words, behave or display written material—
 - (i) in any place other than inside a private residence,⁸ or
 - (ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence,
- or
- (c) to distribute, show or play a recording⁹ of visual images or sounds, if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.¹⁰

According to the law, ‘hatred’ means hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation.¹¹

Under certain circumstances, the offender may be exempted from criminal responsibility:

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- 5 ‘Publish’ means publish to the public or a section of the public and cognate words shall be construed accordingly [PIHA, Section 1(1)].
 - 6 ‘Distribute’ means distribute to the public or a section of the public and cognate words shall be construed accordingly [PIHA, Section 1(1)].
 - 7 ‘Written material’ includes any sign or other visual representation [PIHA, Section 1 (1)].
 - 8 ‘Private residence’ means any structure (including a tent, caravan, vehicle, vessel or other temporary or moveable structure) or part of such a structure used as a dwelling but does not include any part not so used or any part in which a public meeting is being held; and in this definition ‘public meeting’ means a meeting at which the public are entitled to be present, on payment or otherwise and as of right or by virtue of an express or implied permission [PIHA, Section 2(3)].
 - 9 ‘Recording’ means any record from which visual images or sounds may, by any means, be reproduced, and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public and ‘distribute’, ‘show’ and ‘play’, and cognate words, in relation to a recording, shall be construed accordingly [PIHA, Section 1 (1)].
 - 10 For an evaluation of the provision, see Schweppe and Walsh, 2008, pp. 61–64. It should be noted that during the legislative process, it was suggested that ‘ridicule’ and ‘contempt’ should be criminalised, but the Minister of Justice resisted on the grounds that that would be too severe an encroachment on freedom of expression (Schweppe and Walsh, 2008, p. 59).
 - 11 PIHA, Section 1(1). It should be noted, however, that the term ‘hate’ itself is not defined in the PIHA, as critics of the Act have pointed out (e.g. Cowhey, 2006, p. 40; Schweppe and Walsh, 2008, p. 60). A possible definition of hate speech: ‘abusive speech that targets members of certain groups—typically minority groups—including racial groups, ethnic groups, religious groups, groups defined on the basis of sexual orientation and so on’ (Harel, 2021, p. 455.),

- (2) (a) In proceedings for an offence under subsection (1), if the accused person is not shown to have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting.
- (b) In proceedings for an offence under subsection (1) (b), it shall be a defence for the accused person—
 - (i) to prove that he was inside a private residence at the relevant time and had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the residence, or
 - (ii) if he is not shown to have intended to stir up hatred, to prove that he did not intend the words, behaviour or material concerned to be, and was not aware that they might be, threatening, abusive or insulting.

The second element is based on the broadcasts¹² likely to stir up hatred.

- 3.—(1) If an item involving threatening, abusive or insulting visual images or sounds is broadcast, each of the persons mentioned in subsection (2) is guilty of an offence if he intends thereby to stir up hatred or, having regard to all the circumstances, hatred is likely to be stirred up thereby.
- (2) The persons referred to in subsection (1) are:
 - (a) the person providing the broadcasting service concerned,
 - (b) any person by whom the item concerned is produced or directed, and
 - (c) any person whose words or behaviour in the item concerned are threatening, abusive or insulting.¹³

In many cases, the law exempts the offender from criminal liability.

- (3) In proceedings against a person referred to in *paragraph (a) or (b) of subsection (2)* for an offence under this section, if the person is not shown to have intended to stir up hatred, it is a defence for him to prove—
 - (a) that he did not know and had no reason to suspect that the item concerned would involve the material to which the offence relates, or
 - (b) in a case other than one to which *paragraph (a)* relates, that, having regard to the circumstances in which the item was broadcast, it was

¹² ‘Broadcast’ means the transmission, relaying or distribution by wireless telegraphy or by any other means or by wireless telegraphy in conjunction with any other means of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not [PIHA, Section 1(1)].

¹³ For an evaluation of the provision, see Schweppe and Walsh, 2008, pp. 64–66.

not reasonably practicable for him to secure the removal of the material aforesaid.

- (4) In proceedings against a person referred to in *subsection (2) (b)* for an offence under this section, it is a defence for the person to prove that he did not know and had no reason to suspect—
 - (a) that the item would be broadcast, or
 - (b) that the circumstances in which the item would be broadcast would be such that hatred would be likely to be stirred up.
- (5) In proceedings against a person referred to in *subsection (2) (c)* for an offence under this section, it is a defence for the person to prove that he did not know and had no reason to suspect—
 - (a) that an item involving the use of the material to which the offence relates would be broadcast, or
 - (b) that the circumstances in which such an item would be broadcast would be such that hatred would be likely to be stirred up.
- (6) In proceedings for an offence under this section, it is a defence for the person charged to prove that he did not know, and had no reason to suspect, that the material to which the offence relates was threatening, abusive or insulting.

The third element of the law is related to the preparation and possession of material likely to stir up hatred.

4.—(1) It shall be an offence for a person—

- (a) to prepare or be in possession of any written material with a view to its being distributed, displayed, broadcast or otherwise published, in the State or elsewhere, whether by himself or another, or
- (b) to make or be in possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published, in the State or elsewhere, whether by himself or another, if the material or recording is threatening, abusive or insulting and is intended or, having regard to all the circumstances, including such distribution, display, broadcasting, showing, playing or other publication thereof as the person has, or it may reasonably be inferred that he has, in view, is likely to stir up hatred.¹⁴

Section 4(2) provides for a number of defences in proceedings concerning an alleged offence under the section.

¹⁴ For an evaluation of the provision, see Schweppe and Walsh, 2008, pp. 66–68.

(2) In proceedings for an offence under this section, if the accused person is not shown to have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting.

It should be noted here that the regulation of online media did not arise at the time of the adoption of the PIHA, but the Department of Justice and Equality’s 2019 public consultation on the review of the Act highlighted that ‘The wording of the 1989 Act is broad enough to cover incitement via modern technologies and online behaviour. The definitions of “broadcast”, “publish”, “recording” and “distribute” in the Act are wide enough to cover online broadcasting, publication and social media discourse’.¹⁵

Under the PIHA, legal persons may also be held criminally liable if the offences covered by the Act are committed by corporate bodies:

7.—(1) Where an offence under this Act has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a person being a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence and shall be liable to be proceeded against and punished as if he were guilty of the first-mentioned offence.

Since the 2000s, the PIHA has come under criticism from several directions. Keogh even called the law a ‘paper tiger’, referring to its questionable effectiveness.¹⁶ In particular, the author criticised the phrase ‘having regard to all the circumstances, are likely to stir up hatred’, which, in his view, implies that the classification of the conduct at issue will depend upon the character of the person(s) *to whom the hateful communication is directed*.¹⁷ Keogh illustrated this with the following example: it is unlikely that a racist pamphlet is capable of foment hatred amongst ‘most right-minded citizens’, but material or speeches aimed at confirmed racists may be the subject of prosecution as their hatred is likely to increase or be reinforced. The author has also proposed removing the phrase ‘are threatening, abusive or insulting’, as this would allow the incitement offence

¹⁵ Department of Justice and Equality, 2019, p. 5.

¹⁶ Keogh, 2000.

¹⁷ Keogh, 2000, p. 180.

to encompass many of the more ‘subtle and sophisticated’ manifestations of hate speech.¹⁸

Cowhey’s objection in principle to the PIHA was that it approached the problem from the point of view of restricting freedom of expression. He argued that it would be more appropriate for the legislature – and thus the law enforcer – to regard incitement to hatred as a matter of public order. (He used the term ‘public order legislation’.) Cowhey claimed about PIHA, that ‘the major disadvantage of such legislation is that it can polarise sections of society, creating divisions because of the way in which racist abuse is dealt with’. Furthermore, he asserted that while various minority groups are interested in being protected from the threat of racist abuse, other parts of society (although they may agree with this aim) do not want to sacrifice their right to free speech.¹⁹ Cowhey also pointed out that ‘Another disadvantage of prosecutions under specific hate speech laws is that they politicise such prosecutions, giving the “oxygen of publicity” to those who espouse racist views’.²⁰ In his view, public order legislation would limit freedom of speech to a less overt (and far less controversial) extent than laws designed specifically to prevent hate speech – and restrictions on speech on public order grounds are more widely accepted.²¹

To illustrate the effectiveness of the PIHA, Cowhey also recalled that between 1989 and 2000 there were no successful prosecutions under the Act, and although prosecutions increased in later years, there were still only a few convictions.²² He argued that ‘the more specific the law is in relation to penalising hate speech, the more difficult it is to prosecute an offender, given the political implications and balancing of rights that such a prosecution entails’.²³ The author considered that prosecution under section 6(1)²⁴ of the *Criminal Justice (Public Order) Act 1994* may be more effective, ‘because there is no need to show that the behavior was intended or likely to stir up hatred; all that has to be shown is that the behavior was threatening, abusive or insulting in a public place with intention or recklessness as to whether a breach of the peace would

18 Keogh, 2000, p. 181.

19 Cowhey, 2006, p. 41.

20 Cowhey, 2006, p. 41.

21 Cowhey, 2006, p. 42.

22 Government of Ireland, 2004, p. 36. In 2017, the Irish Courts Service revealed that there had been 44 prosecutions and five convictions under the PIHA since 2000 (Gallagher, 2017, cited in Sweeney and Farmer, 2022, p. 23.).

23 Cowhey, 2006, p. 38.

24 Threatening, abusive or insulting behaviour in public place – ‘It shall be an offence for any person in a public place to use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned.’

be caused'.²⁵ Overall, Cowhey concluded that the PIHA has not proved effective in enforcing the obligations imposed by the two international conventions. In his view, there is a 'reluctance to use the Act at all' due to the difficulty in prosecuting offenders.²⁶

Schweppe and Walsh pointed out that at the time of the enactment of the PIHA, it was not widely believed that racially motivated hatred was a general problem in Ireland, so 'the Act was conceived as a minimalist measure designed to meet the requirements of Article 20(2) of the ICCPR', which states that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.²⁷ The authors identified several problematic points in the PIHA. Firstly, they claimed that the terms 'abusive' and 'insulting' have a more extensive and ill-defined scope, and the very existence of such broadly defined offences can have a chilling effect on the freedom of debate and the freedom to express one's views.²⁸ On the other hand, it has been held that the PIHA does not apply if, for example, a racist verbal insult is inappropriate for hate speech in the circumstances.²⁹

Taylor noted that the PIHA 'has a very specific and narrow focus, and purposely so'. Both 'hatred' and 'incitement' have a very high threshold, the reality is that there are likely to be relatively few circumstances where both are met.³⁰ The author witnesses 'an expectations gap' and 'a frustration gap' between community aspirations from this legislation and the reality of its limited application and implementation to date.³¹ Ryan criticised the absence of gender and gender

²⁵ Cowhey, 2006, p. 42.

²⁶ Cowhey, 2006, p. 43.; cf. Schweppe and Walsh, 2008, pp. 62–64. However, this is not unique to Ireland. For a UK perspective, see Coe, 2022, pp. 57–58. A fine line should be drawn between drafting legislation which under-/over-criminalise the hate speech.

²⁷ Schweppe and Walsh, 2008, pp. 55–56.

²⁸ Schweppe and Walsh, 2008, p. 59.

²⁹ A good example of this is the case of *DPP v O'Grady*. 'In the O'Grady case the defendant driver of a coach refused to allow a Gambian man to board at the public bus stop while the man was eating a sandwich. In doing so the driver subjected the individual to extremely derogatory remarks to the effect that he as a black man lacked the civilised standards of behaviour of the Irish white man. His conviction the District Court was overturned on appeal by the Circuit Court when it emerged that only two witnesses (apart from the Gambian man himself) had heard the offensive words and they were entirely supportive and sympathetic to the Gambian man. They were not incited to hate Gambians or non-whites as a result of the bus driver's conduct. Accordingly, an essential component of the offence had not been established and so the Circuit Court judge felt that it would be unsafe to uphold the conviction.' (Schweppe and Walsh, 2008, p. 61.)

³⁰ Taylor, 2011, p. 30.

³¹ Taylor, 2011, p. 31.

identity among the protected characteristics on which hatred is based, leaving transgender people outside the scope of its protection.³²

A 2014 report, aiming to progress the discussion of and generate an impetus for, legislative change in the area of hate crime in Ireland, has already directly concluded that ‘It is clear that the Irish legal system is largely incapable of punishing hate crimes adequately’.³³ The report called for a number of reforms related to the PIHA – for example, it suggested that the the Act should create four new hostility based offences: assault aggravated by hostility; harassment aggravated by hostility; criminal damage aggravated by hostility; and public order aggravated by hostility. In addition, the authors proposed to add new elements to the law, e.g. introducing an offence of subjecting another person to threatening, abusive or insulting words about his or her personal characteristics or perceived characteristics, with the result that the person feels threatened or fearful for his safety or for that of his companions or for his property.³⁴

Haynes and Schweppe in their country report claimed that PIHA ‘criminalises incitement to hatred, however it is aimed at criminalising hate speech and is thus purposefully narrow in its scope and by its nature not suited to addressing hate crime’.³⁵ Like Ryan in his above-mentioned paper, Haynes and Schweppe emphasized that PIHA is limited in terms of its protection of groups. By only naming race, colour, nationality, religion, ethnic or national origins, the Act ignores incitements to hatred against other communities, most obviously disabled people, intersex and transgender people, asylum seekers and refugees, and, arguably, the Roma community.³⁶ In their summary conclusion, they recommended the reform of the PIHA, in particular to address cyber hate and to protect a more inclusive range of groups.³⁷

1.2. Re-regulating hate crimes: the Criminal Justice (Hate Offences) Act 2024

In 2019, the Department of Justice and Equality launched a public consultation on the revision of the PIHA.³⁸ The lawmakers sought the views of experts and society on four main issues:

³² Ryan, 2013, p. 77.

³³ Schweppe et. al., 2014, p. 15.

³⁴ Schweppe et. al., 2014, pp. 46–47.

³⁵ Haynes and Schweppe, 2017, p. 11.

³⁶ Haynes and Schweppe, 2017, p. 58.

³⁷ Haynes and Schweppe, 2017, p. 203.

³⁸ Department of Justice and Equality, 2019

1. the list of protected characteristics covered by the PIHA and whether these should be changed;
2. the use of the term ‘hatred’ in the PIHA and whether this should be changed;
3. whether the wording of the PIHA is adequate to deal with online communications;
4. the need to prove the intent or likelihood of stirring up hatred and whether this should be changed.³⁹

Regarding the use of the term ‘hatred’ in the PIHA, the ministry’s paper recalls that the words or material must be intended or likely to stir up ‘hatred’ against one of the protected list of groups – and this is a high threshold.

Notable among the submissions received was a proposal from the Law Society, which made the following recommendations to the legislator:

1. The protected characteristics covered by the PIHA should be broadened to include those based on gender, disability, civil status, family status and age, whether actual or perceived.
2. The key term of ‘hatred’ should be clearly defined in line with that employed by the European Commission against Racism and Intolerance and the UN Special Rapporteur.
3. Any review or reform of the legal framework of hate speech must also address the issue of online incidents of hate speech. Where it reaches sufficiently serious levels, there should be criminal measures in place to deal with such offences.
4. The mental element in the current legislation of intention to stir up is too high a threshold. The requirement to prove the offence of incitement to hatred should be lowered to recklessness.⁴⁰

In April 2021, the Minister for Justice received approval from the Cabinet to publish the *General Scheme of the Criminal Justice (Hate Crime) Bill 2021*. The draft was later thoroughly revised and renamed to *Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022* (hereinafter IVHHO Bill) and was published on 1 November 2022.⁴¹ The IVHHO Bill aimed to

- (a) repeal the PIHA and replace it with provisions creating new incitement to violence or hatred offences;

³⁹ Department of Justice and Equality, 2019, pp. 4–6.

⁴⁰ Law Society of Ireland, 2020, p. 5.

⁴¹ Available at: <https://www.oireachtas.ie/en/bills/bill/2022/105/>

- (b) provide for an offence of condoning, denying or grossly trivialising genocide, crimes against humanity and war crimes against persons on account of their protected characteristics;
- (c) provide for offences aggravated by hatred; and
- (d) provide for a provision requiring courts to take account of evidence of hatred on the part of the perpetrator against a person or a group of persons on account of their protected characteristics or any of those characteristics during sentencing for offences other than those created under the Bill.⁴²

The Bill Digest took as a starting point that the PIHA had been deemed ineffective in combatting hate speech, in particular online hate speech – thus, ‘Ireland does not currently have any specific hate crime legislation’.⁴³

Although the Government planned to have the measures enacted by the end of 2023, some politicians of the main government party (Fianna Fáil) raised concerns about proposed new hate speech laws.⁴⁴ Finally, the IVHHO Bill was passed by Parliament in October 2024 as *the Criminal Justice (Hate Offences) Act 2024* (hereinafter HOA), following several revisions and lengthy debates. Part 2 of the IVHHO Bill (titled ‘Prohibition of Incitement to Violence or Hatred’) addressed criminalised hate speech and included several new offences, such as ‘incitement to violence or hatred against persons on account of their protected characteristics’ and ‘condonation, denial or gross trivialisation of genocide, war crimes, crimes against humanity’. However, in the absence of political consensus, and in response to concerns about freedom of expression,⁴⁵ Part 2 on hate speech (roughly one-third of the bill) was withdrawn before the law was passed.⁴⁶

The new features of the HOA can be summarised as follows.

1. As for the definition of ‘hatred’, it means hatred against a person or a group of persons in the State or elsewhere on account of their protected characteristics or any one of those characteristics.⁴⁷ This wording omits a definition of the substance of ‘hatred’.⁴⁸

⁴² Sweeney and Farmer, 2022, p. 3.

⁴³ Sweeney and Farmer, 2022, p. 16. The same applies in the UK (Coe, 2022).

⁴⁴ Bray, 2023.

⁴⁵ Some argued that the original wording of the IVHHO Bill would have risked criminalising ‘ordinary, majority-held opinions’ about sex and gender (Daly and de Brún, 2024).

⁴⁶ Law Society Gazette, 2024a.

⁴⁷ HOA, Section 2.

⁴⁸ Schweppe and Haynes, 2022, pp. 12–14. Some regards this definition as circular, and consequently the definition risks being simplified to ‘hatred is hatred’ (Daly and de Brún, 2024).

2. Concerning the ‘protected characteristic’, in relation to a person or a group of persons, means any one of the following, namely—
 - (a) race,
 - (b) colour,
 - (c) nationality,
 - (d) religion,
 - (e) national or ethnic origin,
 - (f) descent,
 - (g) gender,
 - (h) sex characteristics,
 - (i) sexual orientation, or
 - (j) disability.⁴⁹

As can be seen, the HOA maintained race, colour, nationality, religion, national or ethnic origin and sexual orientation among the protected characteristics, whereas descent, gender, sex characteristics and disability have been added to the list. In contrast to the PIHA, the HOA also outlines the meaning of some of those protected characteristics:⁵⁰

- (a) references to ‘religion’ include references to the absence of a religious conviction or belief,
- (b) references to ‘descent’ include references to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of those characteristics still exist,
- (c) references to ‘national or ethnic origin’ include references to membership of the Traveller community [within the meaning of section 2(1) of the Equal Status Act 2000],
- (d) ‘gender’ means the gender of a person or the gender which a person expresses as the person’s preferred gender or with which the person identifies and includes transgender and a gender other than those of male and female,
- (e) ‘sexual orientation’ has the same meaning as it has in section 2(1) of the Equal Status Act 2000,
- (f) references to sex characteristics shall be construed as references to the physical and biological features of a person relating to sex, and

⁴⁹ HOA, Section 3(1).

⁵⁰ HOA, Section 3(2).

(g) ‘disability’ has the same meaning as it has in section 2(1) of the Equal Status Act 2000.

3. The HOA creates new, aggravated forms of certain existing criminal offences, where those offences are motivated by prejudice against a protected characteristic (e. g. damaging property aggravated by hatred; assault aggravated by hatred; harassment aggravated by hatred).⁵¹ Where possible, these aggravated offences carry an enhanced penalty, unless the penalty is already set at the maximum possible. There is also a safeguard built into all of the offences in this Part whereby a perpetrator may be convicted of the ‘ordinary’ form of the offence if there is insufficient evidence to prove the hate element.⁵²

It should be emphasized that the PIHA remain in force, but Minister for Justice Helen McEntee noted that it needed to be updated, ‘particularly in the context of modern online communications’.⁵³

2. Fighting cyberbullying: unpacking the toolbox

In the following, we will look at the tools available in the Irish legal system to deter and sanction cyberbullying. Firstly, to illustrate the seriousness of the problem, we outline how the prevalence of bullying in the online space has evolved in the light of research conducted over the last decade. We will then discuss the relevant legislation, with a special focus on the two most important laws: the *Harassment, Harmful Communications and Related Offences Act 2020*, which entered into force in 2021, and the *Online Safety and Media Regulation Act 2022*, which was adopted at the end of 2022.

2.1. Victims and offenders in the light of researches

In Ireland, research on the prevalence of cyberbullying among young people has been published since the early 2010s.⁵⁴ One of the first such surveys found that 9% of school children aged 12-18 years surveyed admitted to

⁵¹ HOA, Sections 5–8.

⁵² Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 – Explanatory Memorandum, p. 4.

⁵³ Law Society Gazette, 2024b.

⁵⁴ For an overview, see Gaffney and Farrington, 2018.

having been involved in such bullying, while 17% reported having experienced cyberbullying.⁵⁵

Another much larger survey of more than 3,000 people (aged 12-16) found similar results: 8.6% of respondents had been actively bullied online and 13.9% had been passively bullied.⁵⁶ The data also showed that only a quarter of victims shared their stories with their parents and/or another adult, and only 1% of respondents would report an adult if they witnessed online bullying. According to the author, these latter findings strongly suggest that all current policies and prevention and intervention strategies need to promote a culture of disclosure. She claims that ‘there is an urgent need for awareness-raising programmes that not only provide students with an understanding of cyber-bullying but also provide them with the skills to intervene’.⁵⁷

Based on a questionnaire completed by 876 high school students (ages 12-16), Corcoran and her colleagues concluded that 6.3% of respondents had been victims of cyberbullying during the previous three months, while only 1.6% of students admitted to being perpetrators; in addition, an additional 1% had both perpetrated and suffered online bullying.⁵⁸ The research also showed that victims of ‘traditional’ and online bullying share similar personality and self-concept.⁵⁹

Research conducted in Ireland in 2012-13 as part of the *Health Behaviour in School-aged Children* pilot survey on a relatively small sample (318) found that 14% of 15-18 year olds surveyed were bullied in a traditional way, 10% were cyberbullied and further 10% reported that they were victims of both traditional and cyberbullying.⁶⁰ The data also showed that ‘traditional’ bullying (in the real world) and cyberbullying go together in the majority of cases, meaning that a large proportion of victims are affected by both types of bullying.⁶¹ No less worrying is the finding that victims of bullying were more likely to report poorer health and less satisfied with their lives.⁶²

Ireland had the second-highest rate of cyber-victimisation in an 11-country survey conducted in partnership with Vodafone and international polling company YouGov. In the 2015 survey, which targeted 13-18 year olds, 26% of young

55 Cotte and McGilloway, 2011. The research explored four specific forms of cyberbullying (text message, email, phone call, and picture/video clip).

56 O’Moore, 2012, p. 213.

57 O’Moore, 2012, p. 220.

58 Corcoran et al., 2012, pp. 159–160.

59 Corcoran et al., 2012, p. 160.

60 Callaghan et al., 2015, p. 201.

61 Callaghan et al., 2015, p. 202.

62 Callaghan et al., 2015, p. 201.

people in Ireland said they had experienced online bullying, while 85% said they knew someone who had been a victim of cyberbullying. The survey also found that 60% of Irish children thought that cyberbullying was worse than face-to-face bullying.⁶³

However, the phenomenon of cyberbullying has also been researched in Ireland, not only from the perspective of children, but also from the perspective of teachers and parents. A survey of Irish and Northern Irish teachers published in 2015 suggests that teachers are also aware of the problem, and expressed a desire for more guidance from their respective government departments of education. The research also found that there is uncertainty surrounding the legal responsibilities of educational institutions, and that school leaders have tended to resort to ad hoc solutions rather than the evidence-based strategies and procedures proposed by the government, and have been involved in dealing with online aggression even when it has taken place outside of school and outside-of-school hours.⁶⁴ The survey of parents also confirms a general feeling of uncertainty: they are aware of the risk posed by cyberbullying, and they are either worried or unsure about whether their children are exposed.⁶⁵

The last comprehensive research on this topic was conducted in 2019-2020.⁶⁶ The research, based on face-to-face interviews with 765 children (aged 9-17) and one parent per child (765 parents in total), focused not only on cyberbullying but also on online safety in general, and also made relevant findings on the former.⁶⁷ 11% of the children surveyed said they had experienced cyberbullying in the previous year.⁶⁸ The overall picture is improved, however, by the fact that 60% of victims said they had suffered such abuse only once or a few times. The most common method of perpetration was a text message sent to the phone (41%) or a post on social media (38%).⁶⁹ Somewhat contradicting O'Moore's 2012 research cited above, the results also showed that 67% of victims of cyberbullying turned to their parents as a source of social support.⁷⁰

63 Gaffney and Farrington, 2018, pp. 104–105.

64 Purdy and McGuckin, 2015.

65 O'Higgins Norman et al., 2016, cited in Gaffney and Farrington, 2018, p. 135.

66 National Advisory Council for Online Safety, 2021.

67 In the survey, the researchers avoided the term cyberbullying because of its complexity, and instead used a more general description of the aggressive, offensive activities that can be classified as cyberbullying National Advisory Council for Online Safety, 2021, p. 47).

68 National Advisory Council for Online Safety, 2021, p. 48.

69 National Advisory Council for Online Safety, 2021, p. 49.

70 National Advisory Council for Online Safety, 2021, p. 53.

Compared to these figures, the National Anti-Bullying Research and Resource Centre's survey during the Covid-19 closure painted a more alarming picture. The survey, which involved 504 children (aged 11-18) and 504 parents, showed that 28% of respondents had experienced online bullying during the lockdown period.⁷¹

But what is the reason for the wide variation in the surveys? Foody and her co-authors conducted a meta-analysis of 39 studies published between 1997 and 2016 that looked at bullying (including both real-life and online bullying) among Irish and/or Northern Irish children aged 4-18 years.⁷² They concluded that the measured prevalence of bullying differs mainly due to factors such as methods of data collection, the answer scales, whether the study included a definition of bullying or not, and time frame for each tool.

Of particular interest from a victimological perspective is the 2020 study that examined the post-traumatic stress induced by traditional and online bullying in five Norwegian and four Irish young people (aged 12-18).⁷³ Bullying was associated with a range of adverse effects, from persistent fear to sleep disturbance and concentration problems. The key finding of the study was that those who were bullied in both ways had more symptoms of post-traumatic stress than those who were bullied 'only' face-to-face.

2.2. The legal background

From the above surveys it is clear that online harassment has been a real problem in Ireland for a long time. In comparison, there was no specific cyberbullying law until 2021, but this did not mean that the law enforcement was completely powerless to deal with such harassment. The following laws deserve closer attention in this context:

- (a) Post Office (Amendment) Act 1951
- (b) Non-Fatal Offences Against the Person Act 1997
- (c) Children First Act 2015
- (d) Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012
- (e) Harassment, Harmful Communications and Related Offences Act, 2020
- (f) Online Safety and Media Regulation Act 2022

⁷¹ National Anti-Bullying Research and Resource Centre, 2021, p. 4.

⁷² Foody et al., 2017.

⁷³ Sjørsø et al., 2020.

Not at all in terms of its importance, but rather in terms of chronology, the first law to be mentioned is the *Post Office (Amendment) Act 1951*, which has a specific section on telephone-related offences:

13.—(1) If any person—

- (a) sends any message by telephone which is grossly offensive or of an indecent, obscene or menacing character;
- (b) sends any message by telephone which he knows to be false, for the purpose of causing annoyance, inconvenience, or needless anxiety to any other person; or
- (c) persistently makes telephone calls without reasonable cause and for any such purpose as aforesaid;

he shall be liable upon summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both such fine and imprisonment.

In the previous years, acts of cyberbullying were primarily punished under the harassment provisions of the *Non-Fatal Offences Against the Person Act 1997* (hereinafter NFOAPA).⁷⁴ As the Irish Government has committed to introduce new stalking and non-fatal strangulation offences as part of their zero-tolerance approach to domestic, sexual and gender-based violence,⁷⁵ the harassment-related provisions of the NFOAPA were amended in 2023. As O’Sullivan and Staunton note, ‘the new section 10(1) will modify the existing offence of harassment by simplifying the language and extending it to cover situations where the victim retrospectively becomes aware of the harassing actions’.⁷⁶ Currently the provision on harassment reads as follows:

10.—(1) A person shall be guilty of the offence of harassment where—

- (a) the person, without lawful authority or reasonable excuse, persistently, by his or her acts, intentionally or recklessly, at the time when the acts occur or when the other becomes aware of them—
 - (i) seriously interferes with another’s peace and privacy, or
 - (ii) causes alarm, distress or harm to the other,

and

- (b) the person’s acts are such that a reasonable person would realise that the acts would seriously interfere with the other’s peace and privacy or cause alarm, distress or harm to the other, at the time when the acts occurred or when the other becomes aware of them.

⁷⁴ Law Reform Commission, 2016, p. 5. (points 20–22).

⁷⁵ O’Sullivan and Staunton, 2023, p. 11.

⁷⁶ O’Sullivan and Staunton, 2023, p. 54.

The 2023 amendment of the NFOAPA introduced a new stalking offence:

- (2) A person shall be guilty of the offence of stalking where—
 - (a) the person, without lawful authority or reasonable excuse, by his or her acts, intentionally or recklessly causes another, at the time when the acts occur or when the other becomes aware of them—
 - (i) to fear that violence will be used against him or her or another person connected to him or her, or
 - (ii) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities,and
- (b) the person's acts are such that a reasonable person would realise that the acts would cause the other, at the time when the acts occur or when the other becomes aware of them, to fear that violence will be used against him or her or another person connected to him or her, or serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities.

Unlike the previous wording of the NFOAPA, the revised version gives illustrative examples of what constitutes stalking and harassing behaviour:

- (3) Without prejudice to the generality of subsections (1) and (2), the acts referred to in those subsections include the following:
 - (a) following, watching, monitoring, tracking or spying upon a person;
 - (b) pestering a person;
 - (c) impersonating a person;
 - (d) communicating with or about a person;
 - (e) purporting to act or communicate on behalf of a person;
 - (f) disclosing to other persons private information in respect of a person;
 - (g) interfering with the property (including pets) of a person;
 - (h) loitering in the vicinity of a person;
 - (i) causing, without the consent of the person, an electronic communication or information system operated by a person to function in a particular way;
 - (j) breaching a court order—
 - (i) made pursuant to this section or Part 5 of the Criminal Justice (Miscellaneous Provisions) Act 2023, or
 - (ii) otherwise restraining the person from communicating with or about the other person or, within such distance as is specified in the order, approaching the other or the place of residence, education or employment of the other person.

Section 10(4) will allow for the imposition of an order restraining the convicted person from communicating with or about or being within a specified distance of the person stalked or harassed at various venues:

- (4) Where a person is guilty of an offence under subsection (1) or (2), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with or about the other person or that the person shall not approach within such distance as the court shall specify of the place of residence, education or employment of the other person.

The *Children First Act 2015* (hereinafter CFA) regulates the obligation to report harm to children in a fairly detailed way. The CFA imposes this obligation on so-called mandated persons, which include about 30 professionals who come into contact with children by virtue of their profession, vocation or duties (such as medical practitioners, dentists, psychologists, social care workers, and teachers).⁷⁷ If a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person, that a child has been harmed, is being harmed, or is at risk of being harmed, he or she shall, as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to the Child and Family Agency.⁷⁸ The obligation also applies if the child reports the harm to the mandated person.⁷⁹ The CFA defines harm as assault, ill-treatment or neglect of the child in a manner that seriously affects or is likely to seriously affect the child's health, development or welfare, or sexual abuse of the child, whether caused by a single act, omission or circumstance or a series or combination of acts, omissions or circumstances, or otherwise.⁸⁰

The *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012* penalises the concealment of crimes against children (and other vulnerable groups). This makes it an offence to know that a child has been subjected to an offence defined by law (e.g. murder, rape, sexual assault) and not to disclose information that would facilitate the apprehension, prosecution or conviction of the offender to the police as soon as possible. In some instances, the bullying itself might fall into the categories of child harm that warrant disclosure to the state authorities.⁸¹

⁷⁷ CFA, Schedule 2.

⁷⁸ CFA, Section 14(1).

⁷⁹ CFA, Section 14(2).

⁸⁰ CFA, Section 2.

⁸¹ Daly, 2021.

2.3. *New act on online harassment: necessary but not sufficient?*

Since the 2010s, however, it has become increasingly clear that the NFOAPA is inadequate to curb new types of harassment in the online space that cause significant harm to victims – although there are examples of people being convicted under the Act for harassing communications on Facebook.⁸² A serious problem was that the definition of harassment as just described presupposes repeated acts of a repetitive nature (let us remember the term ‘persistently’), and the NFOAPA does not provide guidance on how many incidents are necessary to exhaust the definition.⁸³

In parallel with the proliferation of smartphones and the rise of social media, the concept of image-based sexual abuse (hereinafter IBSA) has emerged in Irish legal literature,⁸⁴ emphasising that the existing legal framework cannot effectively combat the new phenomena. In essence, IBSA refers to the taking and/or dissemination of images of private sexual content without consent.⁸⁵ According to the authors of the term, it is a broader concept than other terms used in the media (e.g. revenge porn) and can therefore be applied to a wider range of offences.⁸⁶ McGlynn and Rackley have included the following acts in the scope of the IBSA:⁸⁷

- (a) ‘Revenge porn’: a malicious ex-partner distributes private, sexual images without consent of the person(s) in the images.
- (b) Hacked or stolen images: theft and distribution of private photos of celebrities, often for financial gain.
- (c) Domestic abuse and violence: sharing – or the threat of sharing – private sexual images without consent of all the individuals involved is also used as a measure of coercion and control in abusive relationships.

82 For a description of the case, see Browne, 2019. The case: a 61-year-old man harassed an actress friend on Facebook with false and abusive comments, mainly about the victim’s qualities as a mother to her two teenage sons. The court sentenced the man to eight months’ imprisonment suspended for two years and a fine of 1,500 euros under the harassment provisions of the NFOAPA. As the report on the case points out, the prosecution for harassment under current law can be successful even when some of the evidence does not relate to a perpetrator making direct contact with an injured party.

83 Lynch, 2015.

84 McGlynn and Rackley, 2017a; McGlynn and Rackley, 2017b; McGlynn et al., 2017; Bowie, 2020.

85 McGlynn and Rackley, 2017a, p. 534.

86 McGlynn and Rackley, 2017a, pp. 535–536.

87 McGlynn and Rackley, 2017b, pp. 39–42. For a more detailed discussion of each type of offence, see McGlynn et al., 2017, pp. 29–36.

- (d) ‘Upskirting’: using a smartphone or other devices (e.g. camera hidden in the perpetrator’s shoes) to take photos under the target’s clothing (without their knowledge) and then distribute the images.
- (e) Sexualised Photoshopping: a pornographic image is superimposed onto an individual’s head/body part, such that it looks as if that individual is engaged in the pornographic activity.
- (f) Sexual extortion: the perpetrator forces the victim to take and/or share a private sexual image of themselves with the perpetrator, mainly through blackmail.
- (g) Recordings of sexual assault and rape.

The harmful effects of IBSA at the level of the individual are primarily manifested in the violation of personal and bodily integrity, human dignity and privacy, and the suppression of sexual autonomy and expression.⁸⁸ However, the negative consequences are also felt at the societal level, as the spread and possible ‘acceptance’ of IBSA carries the ‘cultural harm’ of encouraging other sexual misconduct in the longer term.⁸⁹

So, according to some, before the *Harassment, Harmful Communications and Related Offences Act 2020* (hereinafter: HHCROA) came into force, unlike most British, American and Australian jurisdictions, Irish law at present offers inadequate protection for victims of sexual cyber-harassment.⁹⁰ The above-quoted offence of harassment in the NFOAPA is not suitable to sanction a single IBSA because of the term ‘persistently’, nor is it suitable to punish non-consensual distribution of images to third parties.⁹¹

In Ireland, the draft HHCROA was published in April 2017 and revised legislation, taking into account the feedbacks of the experts, came into force in February 2021. It should be stressed that the HHCROA is specifically designed to sanction certain unlawful and harassing acts committed in the online space.

The HHCROA lists and criminalises three types of offence. The first element is related to publishing an intimate image:

2. (1) A person who distributes, publishes or threatens to distribute or publish an intimate image of another person—
 - (a) without that other person’s consent, and
 - (b) with intent to cause harm to, or being reckless as to whether or not harm is caused to, the other person,

⁸⁸ McGlynn and Rackley, 2017a, pp. 545–549.

⁸⁹ McGlynn and Rackley, 2017a, pp. 549–551.

⁹⁰ Bowie, 2020, p. 141.

⁹¹ Bowie, 2020, pp. 141–142.

is guilty of an offence.

The law also clarifies when a cause of harm can be established:

- (2) For the purposes of subsection (1), a person causes harm to another person where—
 - (a) he or she, by his or her acts, intentionally or recklessly seriously interferes with the other person's peace and privacy or causes alarm or distress to the other person, and
 - (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other person's peace and privacy or cause alarm or distress to the other person.

It is noteworthy that, according to the interpretation provisions of the HHCROA, 'harm' includes also psychological harm.⁹²

To facilitate the application of the law, the HHCROA defines the term 'intimate image' in detail:

'intimate image', in relation to a person, means any visual representation (including any accompanying sound or document) made by any means including any photographic, film, video or digital representation—

- (a) of what is, or purports to be the person's genitals, buttocks or anal region and, in the case of a female, her breasts,
- (b) of the underwear covering the person's genitals, buttocks or anal region and, in the case of a female, her breasts,
- (c) in which the person is nude, or
- (d) in which the person is engaged in sexual activity.⁹³

The second offence is recording, distributing or publishing intimate image without consent:

- 3.** (1) Subject to subsection (2), a person is guilty of an offence where—
 - (a) he or she records, distributes or publishes an intimate image of another person without that other person's consent, and
 - (b) that recording, distribution or publication, as the case may be, seriously interferes with that other person's peace and privacy or causes alarm, distress or harm to that other person.

⁹² HHCROA, Section 1.

⁹³ HHCROA, Section 1.

- (2) Subsection (1) shall not apply to a person who distributes or publishes an intimate image for the purpose of the prevention, investigation or prosecution of an offence under this section.

This second element differs from the previous one in that in the first one the purpose of the offence is explicitly to cause harm to the other person.

The third offence sanctioned by the HHCROA is distributing, publishing or sending threatening or grossly offensive communication:

- 4.** (1) A person who—
- (a) by any means—
 - (i) distributes or publishes any threatening or grossly offensive communication about another person, or
 - (ii) sends any threatening or grossly offensive communication to another person,
 - and
 - (b) with intent by so distributing, publishing or sending to cause harm, is guilty of an offence.
- (2) For the purposes of subsection (1), a person intends to cause harm where he or she, by his or her acts, intentionally seriously interferes with the other person's peace and privacy or causes alarm or distress to the other person.

Similar to the PIHA, body corporate may be held criminally liable under the HHCROA:

- 6.** (1) Where an offence under this Act is committed by a body corporate and the offence is proved to have been committed with the consent or connivance of, or to be attributable to any wilful neglect of, a person who, when the offence was committed, was a director, manager, secretary or other officer of the body corporate or of a person purporting to act in such a capacity, that person, as well as the body corporate, is guilty of an offence and is liable to be proceeded against and punished as if guilty of the first-mentioned offence.

The HHCROA contains an important specific provision on under-17s: where a child under 17 years of age is charged with an offence under the Act, no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions.⁹⁴

⁹⁴ HHCROA, Section 8.

While experts have hailed the HHCROA as a significant step forward, it has of course also been criticised. Some of the criticisms pointed out – already after the publication of the draft HHCROA – that it would be more appropriate to use the term IBSA instead of ‘harmful communication’ in the title of the law, as this term more vividly describes the acts to be sanctioned. It also follows that these offences should be recognised as sexual offences.⁹⁵ On the one hand, because the images which are the subject of the offences are sexual in nature, which is precisely why they go viral and why there is a ‘market’ for such images. On the other hand, the communications surrounding the images (comments, threats, etc.) also contain sexual content. As McGlynn and Rackley emphasize, ‘The women in the images are harassed and abused for transgressing expected norms of women’s sexuality. They are castigated for exercising sexual agency (for taking sexual images or ‘allowing’ them to be taken)’.⁹⁶ Thirdly, it must also be borne in mind that such images violate the right to sexual freedom and sexual autonomy of the victim, who is usually a woman. “The impact of image-based sexual abuse is that all women are made to feel constrained in their sexual choices and expression” – warn the authors.⁹⁷

Some of the experts also criticised the wording of the provisions of the HHCROA. As explained above, the act of recording, distributing or publishing an intimate image without consent is punishable if the recording, distributing or publishing seriously interferes with that other person’s peace and privacy or causes alarm, distress or harm. According to McGlynn and Rackley, it follows that it requires the prosecution to prove – presumably by requiring evidence from the victim-survivor – that the defendant actually interfered with a victim’s peace/privacy or caused actual harm to her/him. This is problematic in two respects. On the one hand, ‘there is a real danger this provision reifies an ‘ideal victim’ by predetermining what is seen to be the ‘appropriate’ response from victims-survivors’. The authors argue that, while many victims of harassment suffer significant harm, there are some who ‘only’ feel anger towards the perpetrator – which is not in principle sufficient to establish the facts. On the other hand, it is also more difficult to prosecute when the victim of harassment is unaware that a crime has been committed against her (e.g. because she did not realise that intimate pictures of her had been shared on social media). McGlynn and Rackley also point out that, because of the above criteria, this is a far more restrictive provision than is provided in most other (for example, Scottish or British) jurisdictions.⁹⁸

⁹⁵ McGlynn and Rackley, 2017b, pp. 42–43.

⁹⁶ McGlynn and Rackley, 2017b, p. 43.

⁹⁷ McGlynn and Rackley, 2017b, p. 43.

⁹⁸ McGlynn and Rackley, 2017b, pp. 45–46.; cf. Bowie, 2020, pp. 146–147.

‘Without consent’ as a factual element has also been criticised. The draft HHCROA initially included a definition of consent as ‘the agreement by choice of a person who has the freedom and capacity to make that choice’. This solution was criticised by Bowie on the grounds that the draft did not specify the circumstances in which consent could *not* be deemed to have been given.⁹⁹ However, this definition was removed from the final version of the HHCROA, so that concerns remained.

Bowie also drew the attention of the lawmaker to two forms of cyberbullying and sexual harassment to which, in her view, the HHCROA does not apply.¹⁰⁰ One of these is audio recordings of sexual assaults or abuse, on which the author does not elaborate, but if we assume that the definition of intimate images is based on visual representation, it is at least questionable to what extent an audio recording can be considered to be a factual matter.¹⁰¹ The other type of offence is deepfaking, where the perpetrator, usually using artificial intelligence software, manipulates the victim’s face by superimposing it on a picture or, more recently, a video of another person, thus swapping the two faces. Bowie believes that the HHCROA’s definition of an intimate image is not sufficiently inclusive to encompass deepfake forms of offending.

In addition to the previous two forms of harassment, Bowie also mentioned a third form, cyberflashing, which involves sending strangers unsolicited images of an obscene and sexual nature through online messaging platforms.¹⁰² According to the author, it is paradoxical that under the *Criminal Law (Sexual Offences) Act 2017*¹⁰³ the exposure of a person’s genitals with ‘intent to cause fear, distress or alarm to another person’ in a public place is characterized as a criminal offence (provided that the offence is intended to cause fear, distress or alarm), yet the distribution of images online featuring genitalia is not defined as such. The fact that this type of harassment is not covered by either the first or second elements of the HHCROA can be explained by the fact that these offences punish the recording, distribution, etc. of images of *another* person, but cyberflashing can also be committed with a photograph of one’s *own* genitals. It should be stressed, however, that the unsolicited sending of such images is likely to fall under the third element of the HHCROA (distributing, publishing or sending

⁹⁹ Bowie, 2020, pp. 147–148.

¹⁰⁰ Bowie, 2020, pp. 149–151.

¹⁰¹ Although the above definition of an intimate image includes the phrase ‘including accompanying sound’, if it is an exclusionary-lag sound recording, it can hardly be an intimate image.

¹⁰² Bowie, 2020, p. 151.

¹⁰³ Criminal Law (Sexual Offences) Act 2017, Section 45(1).

threatening or grossly offensive communication), as these images may also be capable of causing harm.

2.4. Safe even online? The Online Safety and Media Regulation Act 2022

As Facebook has admitted,¹⁰⁴ online communication was already covered by the existing PIHA, as it is possible to engage in abusive, insulting and hateful communication on social media. However, the PIHA is less applicable to regulating the online world, as the Irish government has recognised.¹⁰⁵ It is telling that in July 2020, a prominent lawyer publicly called on the Minister for Justice to set up a committee to review the regulatory options for social media. According to the lawyer, while the economic benefits Facebook and other tech giants had brought to Ireland cannot be ignored, ‘They nonetheless should incur a duty to protect citizens and the international community from online attacks, harassment, hate speech and fake news, which can often result in devastating consequences for the victims’.¹⁰⁶

An important step towards the proposed legislation was Online Safety and Media Regulation Bill, which was published in December 2020.¹⁰⁷ Two years later, in December 2022, the long anticipated *Online Safety and Media Regulation Act 2022* (hereinafter OSMRA) was signed into Irish law. The OSMRA aims to create a new online safety framework regime, taking into account the Audiovisual Media Services Directive (Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010) and to respond to the rise and spread of certain harmful online content. The OSMRA brings about a major overhaul of media and content regulation in Ireland by amending the *Broadcasting Act 2009*, implementing the revised Audiovisual Media Services Directive and aligning the regulation of traditional broadcasting services and audiovisual on-demand media services. As a summary of the law put it, ‘The new measures under the Act are wide-ranging, affecting not only traditional media broadcasters but also many audiovisual media services/internet service providers, including video-sharing platform services, who previously only faced limited regulatory oversight’.¹⁰⁸ It is also noteworthy, that the OSMRA brings video-sharing platform service, such as YouTube, within the scope of Irish regulation for the first time.

¹⁰⁴ Gallagher, 2020.

¹⁰⁵ Gallagher, 2020.

¹⁰⁶ The Irish News, 2020.

¹⁰⁷ For the background and presentation of the Bill, see Howlett, 2022a; Howlett, 2022b; Farmer, 2022.

¹⁰⁸ Woods et al., 2023.

The OSMRA covers all electronic and online media, including on-demand providers, video-sharing services and the so-called relevant online service, which means ‘a video-sharing platform service the provider of which is under the jurisdiction of the State, or any other information society service [...], the provider of which is under the jurisdiction of the State, and on which user-generated content is made available (directly or through providing access to another service)’.¹⁰⁹ The new regulatory framework for online safety will be overseen by an Online Safety Commissioner as part of the wider MC.

The OSMRA is reforming the media oversight system by creating a new and potentially powerful Media Commission (hereinafter MC), which will have a range of powers to promote online safety, including various investigative and sanctioning powers. The MC have the responsibility to oversee the updated regulations for broadcasting, audio-visual on-demand media services and video-sharing platform services. The Online Safety Commissioner, as part of the wider MC

An important innovation of the law is the definition of harmful online content:

- 139A.** (1) For the purposes of this Act, online content is ‘harmful online content’ if it is one of the following 2 kinds:
- (a) content that falls within one of the offence-specific categories of online content defined in subsection (2);
 - (b) content that—
 - (i) falls within one of the other categories of online content defined in subsection (3), and
 - (ii) meets the risk test defined in subsection (4).
- (2) The offence-specific categories of online content are—
- (a) the categories listed in Schedule 3,¹¹⁰ and
 - (b) any category specified for the purposes of this paragraph by order under section 139B.
- (3) The other categories of online content are:
- (a) online content by which a person bullies or humiliates another person;

¹⁰⁹ OSMRA, Section 3(1)(t).

¹¹⁰ Schedule 4 lists 42 types of harmful online content (offence-specific categories), e.g. online content by which a person

- publishes or broadcasts matter likely to lead members of the public to identify a person as the complainant in relation to a charge of a sexual assault offence
- counsels the suicide of another
- harasses another
- distributes or publishes or threatens to distribute or publish an intimate image.

- (b) online content by which a person promotes or encourages behaviour that characterises a feeding or eating disorder;
 - (c) online content by which a person promotes or encourages self-harm or suicide;
 - (d) online content by which a person makes available knowledge of methods of self-harm or suicide;
 - (e) any category specified for the purposes of this paragraph by order under section 139B.
- (4) Online content meets the risk test for the purposes of subsection (1)(b)(ii) if it gives rise to—
- (a) any risk to a person's life, or
 - (b) a risk of significant harm to a person's physical or mental health, where the harm is reasonably foreseeable.

The explanatory note of the OSMRA explicitly refers to the fact that these points include incitement to violence or hatred, as well as cyberbullying.

However, the OSMRA enables the MC to specify other harmful online content:

- 139B.** (1) If the Commission makes a proposal to the Minister that a category of online content should be specified for the purposes of section 139A(2) (b) or (3)(e), the Minister may make an order giving effect to the proposal.

As for the designation of online services, the MC may designate a relevant online service as a service to which online safety codes may be applied.¹¹¹ Concerning the online safety codes, the OSMRA stipulates the following:

- 139K.** (1) The Commission may make codes ('online safety codes'), to be applied to designated online services in accordance with section 139L.
- (2) An online safety code may make provision with a view to ensuring—
- (a) that service providers take appropriate measures to minimise the availability of harmful online content and risks arising from the availability of and exposure to such content,
 - (b) that service providers take any other measures that are appropriate to protect users of their services from harmful online content,
 - (c) that service providers take any other measures that are appropriate to provide the protections set out in Article 28b(1)(a), (b) and (c) of the Directive, and

¹¹¹ OSMRA, 139E(1).

- (d) that service providers take any measures in relation to commercial communications on their services that are appropriate to protect the interests of users of their services, and in particular the interests of children.

The complaints handling is also worth a deeper look. Under the OSMRA, the Online Safety Commissioner will be able to create a scheme for nominated bodies such as expert NGOs or charities to bring forward issues with online services to the Commissioner's attention. As O'Neill notes 'This is considered an important and innovative means of ensuring that there is a mechanism for the regulator to tap into the insights of those who work closely with children and adults impacted by harmful online content'.¹¹²

Not surprisingly, OSMRA has also been criticised by professionals. Some of the criticisms point to the overly broad definition of the range of services that would be covered by the Act. On the other hand, it was claimed that the Online Safety and Media Regulation Bill may conflict with the Digital Services Act, which is taking shape in the EU arena, raising the question of whether it would not be more appropriate for the Irish legislator to wait for the adoption of the Digital Services Act.¹¹³ In addition, a non-profit organisation dedicated to supporting the civil liberties and human rights of people has argued that the definition of harmful online content is extremely vague and could seriously infringe on freedom of expression.¹¹⁴

The OSMRA, as noted above, extends its scope even more clearly to social media platforms, which almost immediately provoked opposition from Facebook. Following the publication of the Bill, the company indicated that there should be a carve-out provision in the legislation to exempt intermediaries from liability for content posted on their platforms – otherwise intermediaries could be held liable for content over which they have no control.¹¹⁵

3. From school policies to hotlines: ways of prevention

In Ireland, the prevention and treatment of bullying in schools has been a priority since the early 1990s. Significantly, as early as 1993, the Department

¹¹² O'Neill, 2022, p. 3.

¹¹³ Kirk et al., 2022.

¹¹⁴ Slaterry, 2021. The same dilemmas have arisen in relation to the UK's draft legislation on the same subject (Coe, 2022).

¹¹⁵ Slaterry, 2021.

for Education published a guide to curb the phenomenon,¹¹⁶ and in 1998 an anti-bullying programme was piloted in 42 primary schools in County Donegal, involving teachers, parents and pupils, and, by definition, focusing ‘only’ on combating offline aggression.¹¹⁷ Following the researches conducted in the early 2010s – referred to above – the government’s Anti-Bullying Working Group published a comprehensive 126-page report titled *Plan On Bullying* (hereinafter: Report) in early 2013, in which, among other things

- set out some of the definitions and research around what constitutes bullying and the different types and forms of bullying behaviour,
- assessed who are the most affected groups (both perpetrators and victims),
- summarised the possible effects of harassment,
- presented the perceptions of children and young people,
- outlined the school’s responsibilities, and
- outlined what the school’s tasks are and made recommendations to reduce the bullying phenomenon.¹¹⁸

The Report, which covers both offline and online bullying, stresses that schools alone cannot solve this problem and that a complex strategy involving parents, children, the media and authorities is needed. (‘Bullying is a complex social issue and can occur in many different settings including in the home, in wider family and social groups and during sporting and youth club activities’).¹¹⁹ It suggests that when bullying is discussed in relation to schools, it should include

- deliberate exclusion, malicious gossip and other forms of relational bullying,
- cyberbullying,
- sexual bullying and
- identity based bullying (specifically including homophobic bullying, transphobic bullying, racist bullying and bullying of those with disabilities or special educational needs).¹²⁰

The Report also pointed out that cyberbullying differs from offline forms of bullying in a number of ways. One of these is that it can be perpetrated essentially anywhere and at any time, and the home is no longer a safe haven from

¹¹⁶ Department for Education, 1993.

¹¹⁷ Farrington-Ttofi, 2009, p. 49.

¹¹⁸ Department for Education and Skills, 2013a.

¹¹⁹ Department for Education and Skills, 2013a, p. 10.

¹²⁰ Department for Education and Skills, 2013a, p. 28.

bullying. In addition, young people posting messages on the Internet do not feel as responsible for their actions as they might otherwise. A further difference is that cyberbullying against children is often hidden from parents due to the nature of online communication, and in many cases the identity of the perpetrator is not known.¹²¹

Following the Report, the Department for Education and Skills soon published the *Anti-Bullying Procedures for Primary and Post-Primary Schools* (hereinafter *Procedures*),¹²² which some consider to be the most important development in Ireland in the last 20 years in addressing the issue.¹²³ The primary aim of the *Procedures* is to provide guidance to school leaders on how to prevent bullying, how to intervene and how to deal with the harmful consequences of bullying. First and foremost, the *Procedures* require school leaders to develop an anti-bullying policy.¹²⁴ It should be stressed that the document gives a broad definition of bullying: ‘unwanted negative behaviour, verbal, psychological or physical, conducted by an individual or group against another person (or persons) and which is repeated over time’.¹²⁵ The *Procedures* explicitly states that, in line with the concept of the Report, this definition includes cyberbullying and identity-based harassment, and then provides a seven-item illustrative list of what constitutes bullying (physical aggression, intimidation, isolation/exclusion and other relational bullying, cyber-bullying, name-calling, damage to property and extortion).¹²⁶ As for cyberbullying, the *Procedures* note that it is carried out through the use of information and communication technologies and, thus, does not require face-to-face contact, and can occur at any time. The *Policies* devote a great deal of space to the development of good practice, identifying a trusting school climate and the cooperation of school management, teachers, pupils and parents as the most important factors.¹²⁷

Some three years later, a survey of 918 school principals looked at the number of reported cases of bullying in schools and the attitudes of institutions.¹²⁸ The survey found that nearly 80% of schools in the survey reported nine or fewer

121 Department for Education and Skills, 2013a, pp. 37–38.

122 Department for Education and Skills, 2013b.

123 Foody et al., 2018, p. 129.

124 Department for Education and Skills, 2013b, p. 5. It should be noted, however, that a 2013 survey already showed that all 44 schools included in the study implemented policy to counter traditional bullying and the majority (32 of 44 respondents) addressed cyberbullying within this policy (Corcoran and McGuckin, 2014).

125 Department for Education and Skills, 2013b, p. 5.

126 Department for Education and Skills, 2013b, pp. 9–10.

127 Department for Education and Skills, 2013b, pp. 21–35.

128 Foody et al., 2018. It should be noted that the researchers contacted the principals of all 4028 schools with the questionnaires, but only 23% returned (p. 130).

cyberbullying incidents per term, meanwhile, very few principals (2%) reported more than 20 bullying incidents in their school across term.¹²⁹ However, the authors were somewhat sceptical about these figures, as surveys based on interviews with pupils suggest that far more bullying occurs.¹³⁰ Notwithstanding, it is undoubtedly a positive development that no less than 99.8% of the schools surveyed reported having an anti-bullying policy present in their school, and 99% agreed with the question 'staff in my school are clear on what steps to take to tackle bullying behaviour'. A similar proportion of respondents said that

the school had procedures for the formal noting and reporting of bullying. In contrast, just over half of schools have a specific member of staff had been appointed to investigate and tackle bullying in the school.¹³¹ The research leaders stressed that further research is needed to investigate the nature and type of these policies and if indeed they are detailed enough and indicated that bullying victims should be dealt with primarily by professionals, as teachers have limited capacity to do so.¹³²

In addition to school-focused prevention efforts, awareness-raising and educational programmes are also noteworthy. These include the *Internet Safety Awareness Centre*,¹³³ which offers educational materials and advice to children, parents and teachers on how to avoid online dangers, including cyberbullying.¹³⁴ The website shows that a number of innovative initiatives have been taken in recent years to reduce online bullying and Internet awareness. Some examples of initiatives and projects include:

- (a) In 2013, a *Cyberbullying Awareness Event* was organised involving hundreds of secondary school students from County Limerick, where students acted out online bullying situations and then shared their experiences.¹³⁵
- (b) In 2014, the *CyberPsychology Research Centre* launched *Cyber Pal*, an initiative to provide advice to young children on how to deal with cyberbullying situations and to encourage safe and responsible online behaviour.¹³⁶
- (c) In 2015, a free online training material and handbook for teachers was produced to give them an idea of how to deal with cyberbullying in the school context.¹³⁷

129 Foody et al., 2018, p. 131.

130 Foody et al., 2018, p. 134.

131 Foody et al., 2018, pp. 132–133.

132 Foody et al., 2018, pp. 134–135.

133 <https://www.webwise.ie/>

134 <https://www.webwise.ie/parents/cyberbullying-a-guide-2/>

135 <https://www.webwise.ie/news/cyberbullying-awareness-event-2/>

136 <https://www.webwise.ie/teachers/new-cyber-pals-initiative-to-mark-sid2014-2/>

137 <https://www.webwise.ie/teachers/myselfie-and-the-wider-world-is-launched/>

- (d) In 2018, the *Webwise Youth Panel* was announced, inviting teenagers to share their ideas on how to reduce cyberbullying and promote a harassment-free online life at national level.¹³⁸
- (e) Also in 2018, the *Best Anti-Cyberbullying Campaign* competition was launched, open to schools and youth organisations.¹³⁹
- (f) In 2020, a comprehensive guide to help and support victims of cyberbullying was published, outlining how to support victims of online bullying.¹⁴⁰
- (g) In 2021, Respectful Online Communication and Cyberbullying Webinar was launched designed for post-primary teachers, exploring how to address the topic of cyberbullying and promote respectful communication.¹⁴¹

In addition to the Internet Safety Awareness Centre, it should also be noted that there is a dedicated research institute in Ireland dealing with the phenomenon of harassment. The *Anti-Bullying Centre*, based at the University of Dublin, takes a multidisciplinary approach to researching forms of bullying and online safety issues, with a number of projects, training programmes and academic publications.¹⁴²

Finally, there are also platforms for reporting various insults. The *Childline* site is specifically aimed at children and minors, and provides advice on a wide range of problematic situations, from unwanted pregnancy to cyberbullying and relationship violence.¹⁴³ Reporting can be done online or by phone. The other important platform is the Hotline,¹⁴⁴ a website that has been operating since 1999, where illegal online content, including abuse of intimate images, can be reported.¹⁴⁵ It should also be mentioned that the police also have a dedicated information page for dealing with cyberbullying abuse.¹⁴⁶

138 <https://www.webwise.ie/trending/join-the-webwise-youth-panel/>

139 <https://www.webwise.ie/uncategorized/best-anti-cyberbullying-campaign/>

140 <https://www.webwise.ie/news/youth/be-an-upstander-not-a-bystander/>

141 <https://www.webwise.ie/teachers/advice-teachers/respectful-online-communication-and-cyberbullying-post-primary-webwise-webinar/>

142 <https://antibullyingcentre.ie/about-us/>

143 <https://www.childline.ie/>

144 <https://www.hotline.ie/>

145 <https://www.childline.ie/>

146 <https://www.garda.ie/en/crime-prevention/online-harassment.pdf>

Summary

As this chapter has highlighted, the legal framework of both hate speech (more recently known as hate crime) and online harassment in Ireland is undergoing significant changes, with the Harassment, Harmful Communications and Related Offences Act 2020 and the Online Safety and Media Regulation Act 2022 having signed into law three years ago and one year ago, respectively. The harassment-related provisions of the Non-Fatal Offences Against the Person Act 1997 were amended in 2023 as part of the Government's zero-tolerance approach to domestic, sexual and gender-based violence. In addition, the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 is currently before Seanad Éireann. It is also clear from the above that the legislator only started discussing the legislation after several years of public consultation, allowing sufficient time for the views of various professional and civil society organisations to be heard.

As regards the reform of the regulation of hate speech, we have seen that the 1989 law has been subject to criticism from several quarters since the 2000s, pointing out that the basic elements of the Prohibition of Incitement To Hatred Act set the bar too high for proof and that some of the elements are not sufficiently precise. There have been very few convictions under the law, which critics say proves that the legislation is inadequate and outdated. The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 reflects a new approach, as the basic offences are more inclusive (guilt can be established regardless of whether the communication that was the subject of the offence was 'effective' in inciting hatred), and the Bill creates new, aggravated forms of certain existing criminal offences, where those offences are motivated by prejudice against a protected characteristic.

In the context of cyberbullying, we have highlighted that such offences were previously sanctioned under the Non-Fatal Offences Against the Person Act, which covers harassment, but since the 2010s it has become increasingly clear that this law is inadequate to curb the new type of harassment committed in the online space, which causes significant harm to victims. The Harassment, Harmful Communications and Related Offences Act which came into force in 2021, was specifically designed to sanction certain unlawful harassment offences committed online. As indicated above, there has been a strong emphasis in Irish legal literature on the criminalisation of image-based sexual abuse. The new HHCRO is particularly innovative in that it seeks to punish the dissemination, publication or threat of dissemination or publication of intimate images by means of detailed provisions. In addition, the law provides for a specific offence of threatening or grossly offensive communication. It should be emphasised

that the wording of the latter provision implies that communication about or to another person is also punishable, thus penalising defamatory acts committed behind the victim's back. Although the HHCRO is clearly seen by experts as a step forward, it has not been without its critics.

The Online Safety and Media Regulation Act 2022 is also a milestone. The basic aim of the law is to curb harmful content online, but the Act is highly divisive and, according to some, a serious blow to freedom of expression because of its overly vague wording. Ireland became one of the first EU Member States to adopt systemic regulation of online platforms in line with the EU Digital Services Act.

As we have shown in relation to cyberbullying against children, Ireland has been a major focus for the prevention and management of bullying in schools since the early 1990s. While a number of significant achievements have been made, led by the Department for Education and with the meaningful involvement of professional bodies (such as the mandatory anti-bullying policy for all schools), recent research suggests that schools still have much to do. We have also seen a remarkable number of awareness-raising and educational programmes, projects, initiatives, etc., in addition to legal instruments, which are helping to change attitudes towards cyberbullying, thus reducing the often 'invisible' bullying activities that blight the lives of thousands of young people.

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