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TO

THE LAW REFORM COMMISSION PUBLIC SEMINAR

ON

CYBERCRIME AFFECTING PERSONAL SAFETY, PRIVACY, AND REPUTATION, INCLUDING CYBERBULLYING

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LAW SOCIETY, BLACKHALL PLACE

INTRODUCTION

I am honoured to be invited to participate in this afternoon's seminar on what may be a difficult, controversial, but nonetheless important, area of law reform requiring our close attention.

The issues that we are dealing with this afternoon lie at an important intersection of changing social ideas, attitudes and values.

Among these are privacy, anonymity, freedom of expression and freedom to be informed in the digital age.

These issues lie at the heart of modern social experience and existence; therefore, any far-reaching law reform proposals which affects these aspects of daily existence very much needs to be considered, proportionate, and circumspect.

Obviously, online communication has transformed the capacity of the ordinary person to communicate opinions and information to others in a dramatic way. Up to 50 years ago, the ordinary individual's capacity to communicate was limited to a very small social circle, or else in a very limited way to the printed word, or, more rarely and in highly regulated circumstances, to radio and television broadcasting.

Likewise, in those days the ordinary individual would extremely rarely if ever become the subject of unlimited mass media attention or access in his or her private capacity.

Accompanying the power to disseminate the private citizen's opinion and information to others has been the emergence of another huge power – the search engine - which increasingly means that nothing however trivial is obscure or forgotten.

These factors bring dramatic and exponential change to the capacity of individuals to remain private citizens.

RIGHTS AND DUTIES

It is a truism that no-one has rights unless others owe them duties corresponding to those rights.

Particularly, in the world of the Internet we see a massive, worldwide, vocal constituency of advocates for the right of privacy, the right of anonymity, and the right to regulate the availability of data concerning the individual.

There does not appear to be a similar, worldwide, vocal constituency of advocates for the imposition of any duties on participants in the online cyber universe.

For instance, there is, I think, a radical distinction between a right to privacy, on the one hand, and a right to anonymity, on the other. Many people confuse privacy and anonymity and some use the term *"the right to be left alone"* in a manner which connotes elements of privacy and anonymity.

Is anyone, whether a great author or a relative nobody, to be free to write a full and frank autobiography giving chapter and verse of his or her private home life, siblings, parents, love life, personal dealings and acquaintances or to publish diaries along the same lines?

If such revelations can be made in book form (and few would doubt that it should be capable of being done), the question arises as to whether any or all of us should be equally free to publish such private intimacies of our dealings with and opinions of others in non-book form on the Internet in a manner which can displease, embarrass, betray or, even, grossly humiliate another person.

The exact line of distinction, if any, to be drawn between the published, printed autobiography, biography, memoir or diary, on the one hand, and serial exposure of personal facts relating to other persons by way of Internet gossip blogs or social media postings, on the other hand, presents difficulties.

I fully agree with the LRC Issues Paper when it points out:

- People behave differently online and feel disconnected from the consequences of their own behaviour.

- Anonymity can increase the anxiety of people whose behaviour or affairs are being published on the Internet.

- The instantaneous nature of the Internet can exacerbate the sense of harm and helplessness of persons whose private affairs are being discussed online.

- The scope of disclosure involved in Internet communication can magnify harm done to an individual to an extent impossible with print media or, even, broadcasting.

- The permanence of the Internet, compared with newspaper and broadcast activity also brings a new dimension to the potential suffering of individuals whose private affairs are discussed or publicised on the Internet.

So, there are differences between the print and cyber-media which have the capacity to tilt the scales in favour of new protections.

SECTION 10: HARASSMENT AND TROLLING

In this context, the offence of harassment set out in Section 10 of the Non-Fatal Offences Against the Person Act 1997 is, I think, now inadequate. Harassment in the 1997 Act requires that the perpetrator must actively follow, watch, pester, beset or *"communicate with"* the victim.

The direct behavioural nexus between the perpetrator and the victim does not necessarily exist in cases where individuals set out to disseminate online information concerning the victim but do not directly "*communicate with"* the victim on a personal basis.

Equally, the notion of *"persistence"* and direct communication or interaction with the victim simply does not capture many situations in which the malicious perpetrator can use the Internet anonymously to seriously interfere with the victim's peace of mind and privacy or to cause alarm, distress or harm to the victim.

Section 10 prohibits certain types of persistent behaviour which, among other things, causes *"distress"* to another.

If A decides to *"persistently"* use the Internet to disclose a true fact about B, the publication of which is humiliating, embarrassing, or discreditable, it will undoubtedly cause *"distress"* to B.

The question which then arises is as to whether B should in some way be able to restrain A from using the Internet in such a manner on the basis that it is causing B to be distressed by invoking either by civil or criminal law sanctions.

I think there is a strong case for amending Section 10 of the 1997 Act to make it clear that persistent activity on the Internet can constitute harassment even though the direct *"perpetrator to victim"* element implicit in the present offence is absent.

ANTI-SOCIAL BEHAVIOUR ORDERS

The Criminal Justice Act of 2006 provides for the issuance of ASBOs in respect of persons whose behaviour *"causes, or in the circumstances, is likely to cause, to one or more persons who are not of the same household, (a) harassment, (b) significant or persistent alarm, distress, fear or intimidation or (c) significant or persistent impairment of their use or enjoyment of their property"*.

Where someone ignores a behaviour warning the District Court is given jurisdiction to issue a non-criminal civil order prohibiting the respondent from doing anything specified in the order where it is satisfied that the respondent has behaved in an anti-social manner, that the order is necessary to prevent continued anti-social behaviour and is reasonable and proportionate in the circumstances.

It seems to me that this concept could easily be applied to cyber-bullying and trolling and that the terms of Part 11 of the 2006 Act could be adapted if necessary to ensure an effective non-criminal remedy for these kind of harmful abuses of the Internet.

The Act goes on to apply the ASBO procedure to children under the age of 18 in modified circumstances.

The necessity for a preliminary warning before a court application might be dispensed with in serious cases with the leave of the court.

AN INVASION OF PRIVACY OFFENCE?

This brings us to the question of non-persistent abuse of the Internet to cause distress to others, including one-off Internet publications.

While I was Minister for Justice, Equality and Law Reform, one of my major concerns was to have enacted into law the Defamation Bill which gave rise to the Defamation Act 2009.

It is well known that while I favoured the enactment of the defamation law, certain other members of the then Government were very anxious to *"handcuff"* any defamation law reform measure to a privacy bill.

Given that the right to privacy has been recognised by the Irish Supreme Court as one of the unenumerated personal constitutional rights of the citizen which the State is bound to protect and vindicate, it seemed to me to be preferable that the nature, extent and boundaries of the right to privacy were best suited to being established organically by the courts through case law.

I was conscious, as Minister in my dealings with the Attorney General, that the term *"privacy"* was a rather vague term, and that a statute which sought to recognise and protect the right to privacy without attempting to define its nature, extent and limitations would be inherently weak.

I was effectively obliged by my colleagues in Government to publish a Privacy Bill without any definition of privacy as a precondition to progressing the Defamation Bill through the Oireachtas.

The Privacy Bill languished ever since. And, I think, happily so.

I strongly believe that we should not have a statutory law of privacy and that we should leave the development of a coherent corpus of law on privacy to the courts dealing with actual cases rather than attempt to have the legislature deal with the matter in abstract.

Some legislation is probably needed to deal with some aspects of privacy law. For instance, the requirement in the Constitution that justice shall be administered in public *"save in such special and limited cases as may be prescribed by law"* suggests that there should be some form of statutory law giving the courts jurisdiction to ensure that privacy injunctions may, in certain circumstances, be held in private.

REVENGE PORN AND INTIMATE MATTER

As the discussion paper points out, the Canadian legislature is currently considering a Bill entitled *"Protecting Canadians from online crime Bill"*, which, *inter alia*, seeks to create an offence in the following terms:

> *"Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct is guilty:*

(a) of an indictable offence and liable to imprisonment for a term of not more than five years, or

(b) of an offence punishable on summary conviction".

The term *"intimate images"* is defined by the proposed section as including *"a photographic film or video recording in which the person is nude or is exposing his or her genital organ or anal region or her breasts or is engaged in explicit sexual activity in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy, and in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed."*

I believe such a measure would be appropriate for enactment in Ireland to discourage *"revenge porn"* and to penalise gross and gratuitous invasions of the sexual privacy of men and women by means of the Internet in circumstances likely to cause them major distress.

An obvious issue that arises is as to whether criminal sanctions are needed to protect individuals in addition to civil remedies. Civil remedies against an impecunious perpetrator can be of very little value to a victim.

A civil remedy in damages is worthless against teenagers and *"men of straw"*.

PRIVATE OR INTIMATE FACTS – WIDER PROTECTION?

A question that then arises is as to whether non-pictorial descriptions of intimate behaviour should fall into the same category.

Should such material be the subject of a limitation or restriction in criminal law when disseminated on the Internet, and, if so, should any non-pictorial intimate information be the subject of greater restriction on the Internet than it would be, for example, if described in an autobiographical work or a biographical work or diary in book form at present?

The difficulty, however, with a criminal offence outlawing a single act amounting to a serious online invasion of privacy is that privacy is not an easy concept to formulate.

If I decide to write my autobiography, I may well decide to reveal facts about members of family, friends, acquaintances or opponents which they would far prefer to keep private.

While a photograph taken, say, on a phone camera in the context of an intimate sexual relationship may well be made the subject of an offence such as that proposed in Canada,

could a verbal description of such intimacy, if printed, whether online or in a book, be criminalised? And if so, why?

As I understand the development of UK privacy law, the underlying principle cited in aid of restraining publication of photographs or *"kiss and tell"* stories in newspapers or online is a development of the law relating to the duty of confidentiality.

But this poses the question as to whether autobiographers or biographers should be restrained, in principle, from publishing intimate facts about other people on the basis that of their very nature there is some entitlement to a confidentiality-based privacy in respect of them.

I must say that I have the greatest of difficulty in accepting that any breach of privacy, *per se*, should be criminalised online where it would not be criminalised in offline publication.

ANONYMITY

Because the Internet facilitates anonymous or pseudo-anonymous communication, it greatly increases the capacity of users to be abusive, offensive, defamatory and obscene without the usual social and moral restraints.

One of the ways in which victims of Internet abuse could best be protected is the introduction of workable standards and entitlements to strip Internet users of anonymity by insisting that ISPs establish an easy-to-use procedure to unmask people who breach the ISP's own customer contracts by abusing the Internet to insult others.

Just as the Irish High Court has recently ruled that ISPs can be obliged by injunction to use a *"three strikes and you're out"* policy for persistent breach of copyright, it seems to me that there is scope, perhaps at regulatory level, to entitle people by means of a simple process to unmask Internet users who abuse the Internet to hurt and damage others.

Self-restraint and common decency in the use of the Internet would, I think, be greatly encouraged by depriving those who infringe basic standards of Internet use of the guarantee of anonymity.

SUMMARY

- I do not believe that we need a general criminal law prohibiting the posting of offensive or distressing matter on the Internet.

- I do believe that Section 10 of the Non-Fatal Offences Against the Person Act should be *"tweaked"* to deal with Internet-based behaviour analogous to harassment.

- I do think that some equivalent of the Canadian proposal to outlaw *"revenge porn"* type behaviour is needed.

- I strongly believe that ISPs should set standards, and then deal with infringement of those standards in a way that un-masks anonymous or pseudo-anonymous breaches of those standards and that the regulators should insist on such an approach by the ISPs.

- I do not believe that a privacy-based legal remedy should be made available by statute as I believe that judge-made organic law on the right to privacy is preferable.