Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **Proposals criminalising the abusive sharing of intimate images are about to commence the Committee stage in the Irish legislative process. It remains to be seen whether government amendments address serious drafting issues which would give the new offences a dangerously broad scope.**

- **In its decision, handed down a few days ago in *Openbaar Ministerie* v *AZ* (C-510/19), the Grand Chamber of the CJEU addressed whether a public prosecutor could qualify as a judicial authority for the purpose of executing an EAW or consenting to the waiver of the speciality rule in respect of the prosecution of a person who has already been surrendered.**

Irish Legislation on Abusive Sharing of Intimate Images

Introduction

A few days ago, it was reported that legislative proposals to criminalise the non-consensual distribution of intimate images (popularly, but inadequately referred to as 'revenge porn') were brought before the Irish cabinet for approval. The aim is to have the proposals debated in the Dail (Lower House of Irish Parliament) in December. The government action was triggered, at least partly, in response to the public concern generated by recent media reports asserting the abusive sharing of tens of thousands of images of Irish women online.

For the most part, the government is running to catch up on this issue. The Irish Law Reform Commission published a report and recommendations in 2016. This was followed in May 2017 by the introduction of a Private Member's Bill in the Dail by the Irish Labour Party. That Bill, the Harassment, Harmful Communications and Related Offences Bill 2017, passed through the Second Stage of the legislative process unopposed and was referred to a parliamentary select committee (the third stage) in January 2018.

During the Second Stage debate, the government intimated that it supported the objective of the Bill but would be bringing forward amendments at the Committee Stage. There the matter has rested until now, and it remains to be seen what amendments the government will table when that Committee State gets underway in December. It seems clear, however, that the Bill as it currently stands suffers from a number of drafting issues which, if not addressed, will generate considerable interpretation problems and give some of the criminal offences a much wider ambit than might have been intended.

Objectives

The immediate purpose of the Bill, as introduced in 2017, was to prevent the internet being used as an instrument for

image-sharing abuse and, more broadly, online bullying. There was also a particular concern that young people were suffering extensively and severely from abusive online communications to the extent that lives were being destroyed and even lost. It was considered that the harm being inflicted was such that it warranted resort to the criminal law in response.

Critically, the existing Irish criminal law in this area was still framed in terms of phone and text communications. The Bill's proponents, therefore, were intent on updating it to address the internet dimension. It is important to note, however, that the Bill is not confined to abusive internet communications. Indeed, it extends more broadly to harassment, stalking and, what the Bill's proponents refer to as, aggravated bullying. At its core is the creation of several new criminal offences.

Harassment

The first offence in the Bill is presented under the heading of harassment. It penalises persistent communications with a third party about another person where such action seriously interferes with the peace or privacy of the other person or causes them alarm, distress or harm. It also extends to persistently communicating with, following, watching etc another person where any such action has the same adverse effect on that person. The offence is punishable on summary conviction by a class A fine and/or imprisonment for a term not exceeding twelve months. On conviction on indictment, it is punishable by a fine and/or imprisonment for a term not exceeding seven years.

The accused must act intentionally or recklessly with respect to the persistent communications etc. That, of course, is consistent with the general criminal law requirement that the accused must have (what criminal law students will recognise as) mens rea with respect to his prohibited actions.

Significantly, the Bill does not require the accused to have mens rea (intention or recklessness) with respect to the requirement that his actions seriously interfere with the peace or privacy of the other person or cause harm etc to that other person. In effect, the Bill is applying strict liability to this critical element. Accordingly, the accused could be guilty of the offence even though he did not intend to cause the specified harm or did not foresee the risk that his actions would do so. This runs contrary to criminal law principle and is a serious concern in an offence that can be punished by imprisonment for a term of seven years.

Significantly, if the court is satisfied that the accused was intentional or reckless with respect to the specified harm resulting from his actions, it can treat that as an aggravating factor in sentencing. In other words, mens rea in respect of the harmful consequences is not a requirement for guilt, but it can result in a heavier sentence.

Clearly this harassment offence goes far beyond online activity. Equally, it is not confined to the distribution of information or images of another person taken without their consent. Arguably, it is broad enough to reach the distribution of private information or images of the other person taken originally with their consent. It will be seen below, however, that the Bill provides a separate offence aimed more specifically at that. Equally, it is worth noting that the use of such information in committing the harassment offence can be relevant in sentencing.

The court can treat as an aggravating factor the offender's use of personal private information about the other person, if the information was obtained by virtue of a current or former intimate relationship with that other person. The same applies where the information was recorded through the use of an electronic device or software to monitor etc the other person without that person's knowledge and consent.

Distributing intimate image without consent

The second major offence in the Bill is recording, distributing or publishing an intimate image of another person without that person's consent, where such action seriously interferes with the peace and privacy of the other person or causes them alarm, distress or harm. A threat to take such action is also an offence. The act or threat must be done without lawful authority or reasonable excuse.

Clearly, the offence has a very broad reach. It is not confined to persons in a current or former intimate relationship. It can extend, for example to the actions of media photographers or to situations where the accused is a complete stranger to the targeted person. It also encompasses the behaviour often (and inadequately) referred to as 'upskirting' (see https://blogs.kent.ac.uk/criminaljusticenotes/2019/03/04/upskirting/)

Once again, the offence is worded in a manner that departs significantly from the general criminal law requirement of mens rea. Indeed, it has a distinctly strict liability aspect. Instead of the usual requirement that the accused was intentional or reckless with respect to recording, distributing or publishing an intimate image of another person without their consent, it is sufficient that he did it without lawful authority or reasonable excuse. It follows that the accused can be found guilty and punished simply where he has acted negligently, as distinct from intentionally or recklessly.

An even more severe departure from traditional criminal law principle arises with respect to harm caused to the targeted person by the accused's action. It seems that it will be sufficient that his action seriously interfered with the peace and privacy of the other person or caused them alarm, distress or harm. There is no requirement for the accused to have known, or to have foreseen the risk, that his action would have that result. Even if a reasonable person would not have foreseen the risk, that will not avail the accused.

This takes the criminal law into dangerous strict liability territory. Even though the maximum penalty for this offence on summary conviction is a class A fine and/or imprisonment for a term not exceeding six months, it does not follow that strict liability is acceptable. The offence is a serious sexual offence with immense implications for the character and future of the accused, including the possibility of a sexual offences order on conviction.

Interestingly, there is provision for the offence to be punished more severely when the "offence" was committed intentionally or recklessly, and a reasonable person would have realised that the acts in question would seriously interfere with the other person's peace and privacy or cause them alarm, distress or harm. In this event, the accused, where convicted on indictment, can be sentenced to a fine and/or imprisonment for a term not exceeding seven years.

This more severe punishment option suffers from poor drafting. Presumably, it should refer to the act of 'recording' etc (rather than 'the offence') being committed intentionally or recklessly. Moreover, strict liability is still retained for the requirement that the act seriously interferes with the other person's peace and privacy etc. The accused can be punished more severely even though he did not know or did not foresee that his act would have that result. Given that the penalty can be as severe as imprisonment for a term of seven years, this represents an unusual (and arguably unconstitutional) application of strict liability in the criminal law.

An intimate image in the context of this offence broadly refers to a visual recording of intimate parts of the person's body (including when covered by underwear) and images of the person engaging in sexual activity. It also extends to altered images of the person which have the same visual effect. Free and informed consent to the taking of the image does not deprive it of protection if, at the time of recording (and afterwards), there were circumstances that gave rise to a reasonable expectation of privacy.

Prohibited communications

The Bill includes two further offences aimed at harmful communications. The first is committed by a person who, by any means of communication, intends or is reckless as to causing alarm, distress or harm to another person. Clearly, this offence is not confined to, or even targeted at, the distribution of intimate images of another person. It can be satisfied, for example by making a loud noise in the vicinity of another person with the requisite intention or recklessness.

This offence is framed so broadly that it potentially criminalises many of the activities of practical jokers, as well as many traditional Halloween activities. Indeed, it is not even necessary that the targeted person should actually suffer alarm, distress or harm as a result of the communication. It is quite sufficient that the accused intended or was reckless as to that result.

The second offence is committed by a person who, by any means of communication, persistently distributes or publishes a threatening, false, indecent or obscene message to or about the other person. Unlike the first offence, this offence does not expressly require mens rea (intention or recklessness) at all. So, an accused can be guilty of the offence by making a communication which, unknown to him, had the prohibited character.

It is also worth noting that the accused's actions in this offence do not have to cause alarm, distress or harm to the subject of the communication (or anyone). It will be quite sufficient that it is threatening, false, indecent or obscene. There must be a particular concern that it criminalises false messages. Not only does that take the criminal law far into territory normally reserved for the civil law, but it also criminalises the communication of false messages which do not relate to any individual person. In other words, it criminalises fake news! It is not even necessary that the messenger is aware that it is fake news.

There is no doubt that these two offences are meant to address callous behaviour that can inflict severe harm on another person. It is important, however, that they are drafted in terms that target that behaviour. A scattergun approach that encompasses behaviour far removed from

the intended target will not promote the intended objective. It takes the criminal law into fields where it does not belong and can have unpredictable and undesirable effects.

Conclusion

The Irish Labour Party's Harassment, Harmful Communications and Related Offences Bill is a response to despicable behaviours which are inflicting immense misery on the lives of those affected. Criminalisation is entirely appropriate. Resort to criminalisation, however, carries with it a responsibility to ensure that the offences go no further than they need to go to punish and deter the repulsive behaviour. It is also important that they only criminalise perpetrators who have acted intentionally or recklessly with respect to their actions and the prohibited harm.

The Bill fails on both counts. This can be attributed partly to drafting weaknesses. However, it might also be attributed to a failure to appreciate that the criminal law can be a blunt weapon for dealing with injurious social behaviours that are complex and diverse in both their causes and manifestations. It needs to be carefully targeted and accompanied by other remedial solutions. It will be interesting to see if the government is any more imaginative when it introduces promised amendments at the Committee stage.

EAW and a Judicial Authority

Introduction

The European arrest warrant (EAW) is an instrument for the surrender of a person from one EU Member State to another for the purpose of being prosecuted for a criminal offence, or to serve a sentence already imposed, in the latter. It was introduced by Council Framework Decision 2002/584/JHA to replace the more cumbersome Council of Europe extradition arrangements with a speedier and simplified surrender facility between EU Member States.

By issuing an EAW, a judicial authority in one Member State can compel a judicial authority in another Member State to arrest and surrender a person in the latter State. The procedure has been stripped of many of the protections that the requested person enjoyed under the old extradition procedure. This has encouraged some Member States to pursue persons accused or convicted of 'run-of-the mill' type, offences even where those persons live in, or have moved to, another Member State. The consequences for the persons affected (and their families) can be severe by comparison with the gravity of the offence concerned.

One of the vital safeguards built in to the procedure is the requirement that an EAW can be issued only by a judicial authority in one Member State and can be executed only by a judicial authority in the other Member State. This should ensure that a person will only be subjected to the gross intrusions on his or her fundamental rights (eg, personal, privacy, family, fair trial) if a *judicial* authority is satisfied that the relevant law and procedure has been fulfilled. It would not be sufficient, for example, if the EAW was issued and/or executed by a political, police or other executive authority.

On the face of it, this seems a valuable protection. Much depends, however, on what is meant by a judicial authority. If it

means an independent judge or a court, then it should be a valuable protection. It may be a different matter if it merely refers to an official who must act judicially, in the sense that he or she reaches a decision after having heard and considered the representations for and against issuing/executing an EAW. The widely divergent practice across the EU has spawned a significant body of case law from the Court of Justice of the EU (CJEU) on what is meant by a judicial authority in this context.

The issue has come before the Grand Chamber of the CJEU again in *Openbaar Minsiterie* v *AZ* (C-510/19).

Facts

An EAW was issued by a Belgian judge for the surrender of the defendant from the Netherlands to stand trial on charges of forgery of documents and fraud. The EAW was executed by a judge in the Netherlands and the defendant was surrendered. After his surrender, the Belgian authorities issued a second EAW to the Dutch authorities essentially seeking permission to prosecute the defendant in respect of further similar offences committed before the defendant had been surrendered pursuant to the first warrant.

A prosecutor (rather than a judge) in the Netherlands consented to the Belgian request to prosecute the defendant for the further similar offences (equivalent of executing the second EAW). The defendant was tried, convicted and sentenced to imprisonment for three years in respect of all of the offences. He appealed on the basis that the prosecutor in the Netherlands was not competent to consent to his prosecution for the offences committed before he was surrendered pursuant to the first EAW. This raises what is known as the rule of speciality.

Rule of speciality

The rule of speciality is one of the important protections for a wanted person in extradition law. Where a State has sought and secured the extradition of a person for one offence, it cannot (without his consent) take advantage of that to deal with him for another offence committed before he was extradited. This is known as the rule of speciality.

The EAW legislation curtails the protection offered by the rule of speciality. Among other things, it provides for an executing judicial authority, when requested by the issuing State, to consent to a waiver of the rule in respect of a specified offence committed before the defendant was surrendered to the issuing State. A key question for the CJEU in the instant case is whether that consent can be given by a prosecutor.

Judicial authority

The EAW legislation stipulates that it is for each Member State to determine their competent judicial authorities for issuing and executing EAWs. Nevertheless, the CJEU affirmed its established case law to the effect that what constitutes a judicial authority in this context is an autonomous concept of EU law. In other words, the judicial authorities designated in each Member State must possess certain minimum characteristics to qualify as such. That much was implicit in the legislative scheme and objectives of the EAW.

It does not follow that the concept of a judicial authority is confined to a judge or a court. It may extend to other authorities (such as a prosecutor) who participate in the administration of justice in the State

concerned. It cannot, however, extend to ministries or police services which are part of the executive.

To qualify as a judicial authority in this context, the body in question must be capable of exercising its responsibilities objectively (taking account all of the arguments and evidence from both sides) without being exposed to the risk of its decision-making powers being subject to external directions or instructions (especially from the executive). In other words, it must be independent. The domestic statutory or regulatory framework within which it operates must be sufficient to assure the relevant judicial authority in the other Member States that it acts independently in the discharge of its EAW decision-making.

Given the impact of the issue or execution of an EAW on the fundamental rights of the individual concerned, it is also essential that the entire procedure is carried out under judicial supervision.

The prosecutor

Applying these criteria, it is clear that a prosecutor can qualify as a judicial authority as he or she participates in the administration of justice. To qualify in any individual situation, however, the prosecutor must be independent from the executive in his or her decision-making in respect of an EAW. In addition, the prosecutor must exercise his or her responsibility under a procedure which complies with the requirements inherent in effective judicial protection. This means that his or her decisions on the issue or execution of an EAW must be capable of being subject to an effective judicial remedy in the State concerned.

Since consent to the waiver of the speciality rule (equivalent of executing an EAW for the offence in question) can only be given by a judicial authority, it cannot be given by a prosecutor unless he or she satisfied the requirements for a judicial authority. Under Netherlands law at the time, however, the Ministry for Justice and Security could issue general and specific instructions to a prosecutor in relation to the exercise of the powers and functions of his or her office (including those pertaining to an EAW). As such, a prosecutor in the Netherlands did not have the necessary independence from the executive to qualify as a judicial authority in this context.

It is worth noting that the prosecutor's consent to waive the speciality rule was subject to judicial review in the Netherlands. The availability of that judicial remedy, however, was not sufficient in itself to render the consent valid. The fact remained that the prosecutor did not enjoy the necessary independence from the executive to qualify as a judicial authority within the meaning of the EAW legislation.

Effect of the decision

The immediate effect of the CJEU's decision is that there was no valid consent to the prosecution of the defendant for the offences committed prior to his surrender to Belgium. The rule of speciality should kick in, therefore, to prevent Belgium from taking advantage of his presence there, having been surrendered pursuant to the EAW, to prosecute him for these other offences.

Conclusion

The CJEU's decision in this case provides further clarification on the concept of a judicial authority which lies at the very heart of the EAW. It also makes clear that where an executing Member State applies the speciality rule, consent to its waiver in

any individual case can only be given by a judicial authority. It would appear that the decision strengthens the concept of a judicial authority by emphasising the central importance of independence from the executive.

It does not follow that the decision offers complete clarity on the law in this area. The judgment, like many CJEU judgments, is terse and lacking in the sort of elaboration associated with common law judgments. It would hardly be surprising if the issue comes before the Court again in a different factual matrix.

It should also be noted that Netherlands law on the status or a public prosecutor has been amended to cure the weakness exposed in this case.