

# LAW SOCIETY SUBMISSION

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## **SUBMISSION ON THE GENERAL SCHEME OF THE ONLINE SAFETY AND MEDIA REGULATION BILL**

OIREACHTAS JOINT COMMITTEE ON MEDIA, TOURISM, ARTS,  
CULTURE, SPORT AND THE GAELTACHT

18 MARCH 2021

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#### ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

## Introduction

The Law Society of Ireland (‘the **Society**’) welcomes the opportunity to make a submission to the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht (‘the **Committee**’) on the General Scheme of the Online Safety and Media Regulation Bill (‘the **General Scheme**’).

The General Scheme, which presents a welcome and ambitious scheme of legislative reform, establishes a new Media Commission, replaces the Broadcasting Act 2009 and, for the first time, creates a comprehensive legislative framework to regulate certain online services and content.

The scope of the proposed legislation is broad, encompassing the regulation of traditional forms of audiovisual media (television/radio providers and on-demand services) as well as aspiring to regulate internet content and communications.

While the General Scheme aims to implement the EU Audiovisual Media Services Directive 2018/1808 (the ‘**Audiovisual Media Services Directive**’), it is broader in its scope. In particular, it reflects many of the elements of the Law Reform Commission’s 2016 [Report on Harmful Communications and Digital Safety](#) and incorporates some of its recommendations.

The Society notes that a number of stakeholders have provided observations on the Bill and so, has sought not to duplicate same but to focus on those areas where it can be of most assistance to the Committee in making recommendations on improvements for consideration in the drafting of detailed legislation.

The Society has confined its observations to those relating to:

1. Integration of human rights and equality standards;
2. The definition of “harmful online content”; and
3. Individual remedies and “take downs”.

## 1. Integration of Human Rights and Equality Standards

### Head 9

Head 9 sets out objectives for the new Media Commission ('the **Commission**') in broad terms, at a high-level. The first two objectives are to:

*"1. Ensure that democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression are upheld.*

*2. Ensure that the number and categories of public service media made available in the State serve the needs of the people of the island of Ireland, having regard to the following:*

*(a) linguistic, religious, ethical and cultural diversity*

*(b) accessibility of services to people with disabilities."*

The Society welcomes this statutory recognition of the importance of democratic values and inclusion but believes that the wording could be further improved to more specifically articulate the values that such recognition seeks to promote.

In that regard, it is submitted that simply referring to "*the democratic values enshrined in the Constitution*" and particularly those relating to freedom of expression is unduly limited. It is a formulation which, in reality, may prove merely rhetorical rather than achieving the aim of iterating core principles in order to guide the Media Commission.

Separately, it has been noted by the Law Reform Commission, that the Constitutional guarantee around freedom of expression is particularly weak. It is subject to, and qualified by, various other considerations including the education of public opinion and the need not to undermine public order, morality and the authority of the State. In this regard, it is noted that the Irish Courts have tended to rely more heavily on Article 10 of the ECHR<sup>1</sup> in considering the right to freedom of expression, rather than Article 40.6. 1° of the Constitution.<sup>2</sup>

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<sup>1</sup> Article 10 of the European Convention on Human Rights provides that:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

<sup>2</sup> See Final Report on Harmful Communications and Digital Safety, Law Reform Commission at pp. 30-32.

It is also relevant that the proposed Bill intends to transpose EU law and therefore the EU Charter of Fundamental Rights (CFR) applies to the interpretation of the legislation and its implementation. While the General Scheme provides (at various parts) that the Commission shall have regard to “fundamental rights” of users and operators of designated online services, it is unclear how it will ensure that the Media Commission will have regard to protecting those rights in performing its functions where those “fundamental rights” have not been clearly identified in the legislation.

This broader view of fundamental rights (which includes rights protected under the ECHR and the CFR) is reflected elsewhere in the General Scheme and so, to ensure consistency and most importantly, to ensure that human rights are given fundamental importance and recognition by the Commission, it is recommended that, in addition to referring to the Constitution, this Head should be amended to encompass the fundamental rights protected by the CFR and the ECHR.

In relation to equality standards, the second objective (above) may intersect with various other pieces of legislation such as the Equal Status Acts 2000 to 2016, the Irish Sign Language Act 2017 (which contains specific provisions around the obligations of public bodies and specifically broadcasting services) and the Prohibition on Incitement to Hatred Act 1989.

It is not evident that the General Scheme was drafted with regard to the separate legal obligations and standards which apply in the context of the above referenced legislation. For example, Head 70 deals with media rules and, in particular, the accessibility of content provided by media service providers to persons with a hearing and/or sight impairment. It makes specific reference to sign language but not to the Irish Sign Language Act 2017 which provides legal recognition for the Irish Sign Language and imposes corresponding duties on public bodies which include certain media service providers in the State.

A further example is the protection from discriminatory harassment across the nine protected grounds under the Equal Status Acts and how this protection integrates with the General Scheme.

### **Recommendations**

- (i) The objectives of the Media Commission should not only refer to the Constitution but also to analogous rights protected under the ECHR and the CFR.**
  
- (ii) The General Scheme should be proofed against other legislation which provides protections from discrimination including, but not limited to, the Equal Status Acts, the Irish Sign Language Act 2017 and the Prohibition of Incitement to Hatred Act 1989, to ensure that the standards in those other pieces of legislation are not undermined by anything contained in the proposed Bill which should promote equality of opportunity in the State.**

## Head 19

Head 19 sets out the membership of the Commission however, the detail of the skills required of a Media Commissioner is left to be determined in the proposed Bill.

It is suggested that, at a minimum, the Bill should address matters such as gender balance and the inclusion of appropriate human rights and equality expertise on the Commission.

While it is noted that the Commission may establish advisory committees, the Society considers that, in the context of the stated objectives of the Media Commission, human rights and equality should be a constant consideration which operates to inform the Commission's work.

In order to ensure that this is the case, such knowledge and expertise should be required as an essential attribute of at least one member of the Commission.

### **Recommendation**

**That the Bill should include a specific requirement regarding gender balance and should require that at least one member of the Commission will have appropriate expertise in matters regarding human rights and equality.**

## 2. The Definition of Harmful Online Content

Head 49 A sets out a number of categories of harmful online content as follows:

- (a) material which it is an criminal offence to disseminate under Irish [or Union law],
- (b) material, which is likely to have the effect of intimidating, threatening, humiliating or persecuting a person to which it pertains and which a reasonable person would conclude was the intention of its dissemination,
- (c) material which is likely to encourage or promote eating disorders and which a reasonable person would conclude was the intention of its dissemination, and,
- (d) material which is likely to encourage or promote [self-harm or suicide] or provides instructions on how to do so and which a reasonable person would conclude was:
  - (i) the intention of its dissemination; and
  - (ii) that the intention of its dissemination was not to form part of philosophical, medical and political discourse.

It is noted that there is provision to add further categories in the future without the need for primary legislation.<sup>3</sup>

In relation to the first category of material, it is possibly too open-ended and imprecise to properly constitute a meaningful definition for the purpose of regulating content hosted by online services. This is particularly the case where sanctions may be imposed for hosting content which is alleged to be harmful.

A more precise approach would be to set out the criminal provisions to which this definition should attach in a schedule to the proposed legislation (or similar mechanism) which could then be updated as additional categories of material emerge.

While it is understood that the intention behind this general category is to ensure that it will track any new criminal law developments regarding dissemination of harmful material, it is likely to be rendered either over or under inclusive and therefore problematic in terms of regulation.

An obvious example of this issue is provided by the transposition of Article 6 of the Audiovisual Media Services Directive which provides that:

*'1. Without prejudice to the obligation of Member States to respect and protect human dignity, Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any:*

*(a) incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;*

*(b) public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.*

*2. The measures taken for the purposes of this Article shall be necessary and proportionate and shall respect the rights and observe principles set out in the Charter.'*

Article 21 of the Charter identifies the following protected characteristics: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

This list of characteristics goes significantly further than the Prohibition on Incitement to Hatred Act 1989 which covers race, colour, ethnic or national origins, religion, sexual orientation or membership of the Traveller community, and therefore

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<sup>3</sup> In relation to other possible categories that might be included in the General Scheme, the Irish Human Rights and Equality Commission in its observations on the General Scheme has suggested the inclusion of a further category of "Misinformation" or "Disinformation" based on the societal harm which can be caused by the spread of such material through social media platforms. The Society considers that such an addition would require further consideration and possible consultation prior to inclusion given that it may involve a significant encroachment on the Right to Freedom of Expression and Opinion.

the proposal in the General Scheme would appear to fall immediately short of what is required by the Audiovisual Media Services Directive.

While it is noted that the Prohibition on Incitement to Hatred Act is under review, there are no current concrete proposals around replacement legislation,<sup>4</sup> and it is unfortunate that these two pieces of legislation are not running in tandem so that the first category of harmful content, insofar as it relates to hate speech, could be made substantially clearer.

At the time of writing, the Council of the EU adopted new rules addressing the dissemination of terrorist content online which require Member States to enforce the rapid removal of terrorist content where required. This development indicated that there will be categories of content disseminated online which will not be the subject of the co-regulation model envisaged by the General Scheme. This will have to be taken into account in drafting the Bill.

In relation to the second category of harmful content (material which is likely to have the effect of intimidating, threatening, humiliating or persecuting a person), it is noted that the General Scheme has identified categories of harmful material and focused on harmful behaviour online or 'cyberbullying' rather than providing exhaustive descriptions of what that material might be. This approach is preferred as it is said to be more responsive to the ever-evolving nature of harmful content which is disseminated online, where strict definitions are likely to become quickly outdated.

The Society largely supports this approach which allows the regulation (of harmful online content) to adapt to the changing nature of cyberbullying as time progresses. However, the Society questions whether it is appropriate to apply the same threshold (in terms of cyberbullying) to children and adults, and queries whether the same threshold should apply to a private person and a public figure?<sup>5</sup>

In this regard, the Society is mindful that other jurisdictions which have experience in regulating harmful online content, have adopted a differentiated approach to harmful online content as it is experienced by children and adults.

It is important that the protection of children is child centred and judged from that perspective. For example the Australian Online Safety Bill 2021 disaggregates material that is harmful to a child from material that is harmful to an adult<sup>6</sup>, recognising that material which may be perceived as threatening by a child, may be considered relatively innocuous by an adult.

The Australian Bill also makes direct reference to the Convention on the Rights of the Child (CRC) as a matter to which their eSafety Commissioner should have regard in carrying out their statutory functions, and this express reference to the CRC commends itself in the present context.

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<sup>4</sup> See Legislating for Hate Speech and Hate Crime in Ireland, Report on the Public Consultation 2020, Department of Justice.

<sup>5</sup> It is noted that, under Head 50 A and in relation to online safety codes, one of the matters to which the Media Commission may have regard is "the role of [public figures] in public discourse."



This approach is also more clearly aligned with the stated objective of the Media Commission set out at Head 9 to *“Protect the interests of children taking into account the vulnerability of children to harmful content and undue commercial exploitation”*.

There are a number of exclusions under Head 49 A which include a defamatory statement or material which violates data protection or privacy law. It is submitted that these exclusions do not serve any rational objective and should not be excluded.

Material which would constitute a defamatory statement, or material which, if disseminated, would constitute a breach of data protection legislation, is not mutually exclusive from the categories of online harmful content set out under this Head.

It is wholly conceivable that a defamatory statement might also constitute harmful online content. Whether there is a separate remedy available to deal with certain content hosted online does not rationally lead to the conclusion that it should not also be regulated under the proposed legislation.

In fact, it is likely that the exclusion of these categories of material will prove confusing for individuals and for designated online service providers, who will have to consider not only whether the material is harmful, but also whether it is caught by some other complex legal provision (most likely in the absence of adequate information to make such a determination).

**Recommendations:**

- (i) Category 1 - the criminal offences referred to should be specifically identified to make the scope of that category clear and a mechanism found by which further legislation relevant to the category can be added from time to time. At a minimum, this Head should be checked against the requirements of the Audiovisual Media Services Directive to ensure that all provisions are fully transposed into Irish law.**
- (ii) Category 2 - the Society recommends that a differentiated approach be taken as regards children and adults to ensure that the standard applied to such material in respect of children is understood from the perspective of the child (and the evolving capacities of the child), rather than treating children and adults as experiencing cyberbullying in the same way.**
- (iii) Remove the exclusion of defamatory statements or material that violates data protection law from Head 49 A.**

### 3. Individual remedies and “take downs”

#### Head 50 A to Head 54 B

In relation to individual remedies or redress for individual victims of harmful online content, there is no defined remedy for an individual who is the subject of cyberbullying. This issue was addressed in the Law Reform Report on Harmful Communications and Digital Safety as follows:

*“The Report acknowledges that available processes and remedies may not be effective, and that the potential cost, complexity and length of civil proceedings may prevent victims of harmful digital communications from obtaining redress in court. A victim of harmful communications should be able to have a readily accessible and effective takedown procedure available to him or her.”*<sup>7</sup>

The Report set out the various remedies available to victims of cyberbullying and reported on the Australian and New Zealand provisions around same, before concluding that the Australian model commended itself for various reasons.

The Law Reform Commission recommended that:

*“The Commission thus recommends that the Office of the Digital Safety Commissioner of Ireland should be established to promote digital and online safety as well as overseeing and regulating an efficient and effective procedure for takedown of harmful digital communications. The work of this Office would apply to material relating to both adults and children.”*<sup>8</sup>

It is evident from the General Scheme that this specific recommendation has been eschewed, and that the model now being proposed is for the newly established Media Commission to issue codes of practice and to then monitor general compliance with same, rather than dealing with individual’s complaints.

The model is hoped to be preventive and one which will ensure that online platforms are proactively dealing with harmful content and putting in place user complaint processes without the necessity for the Media Commission to intervene.<sup>9</sup>

Separately, there are provisions which compel compliance with the codes of practice or rules issued by the Media Commission and a facility to receive complaints of systemic issues with a designated online service (at Head 52 B).

While these are appropriate measures to achieve a level of collective compliance with the codes amongst designated online services, the only specific provision which addresses individual complaints is Head 52 C which somewhat strangely imposes a requirement on the “user” (or group of users) and the designated online service to “consider mediation as a method of reaching a mutually acceptable agreement to resolve the dispute”.

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<sup>7</sup> See Final Report on Harmful Communications and Digital Safety, Law Reform Commission para.46, p.10.

<sup>8</sup> Ibid., at para 3.69 (pg.141-142)

<sup>9</sup> See Head 50 A (2) (c).

The requirement to consider mediation is in no way facilitated by the Media Commission nor is it tied in with the functions of the Media Commissioner such that if mediation fails, the Media Commission would then have seisin of the complaint.

It is unclear what statutory obligation can be placed on an individual to even consider mediation as a means to resolve a dispute. There is also a danger that it could be used by designated online service providers to delay/avoid dealing with complaints.

In any event, failure to include a remedy in the legislation for an individual who alleges that they are a victim of cyberbullying would appear to be a serious omission.

While, in theory, the model set out in the General Scheme will minimise the need for dispute resolution between individuals and internet service providers, it cannot be expected that such disputes will not arise and yet the General Scheme provides no remedy for this, nor does it provide an efficient system of take down of harmful on-line content.<sup>10</sup>

While the Harassment, Harmful Communications and Related Offences Act 2020, addresses the serious issues of ‘revenge porn’, ‘upskirting’ and similar behaviour, it is not a comprehensive criminal law response to all cyberbullying, nor is it intended to be.

Finally, it is noted in relation to the various Heads which deal with codes of practice and complaints handling by designated online services that there is reference to a “user” or “users”.

This suggests that a member of the public is not automatically covered but that they must in some way be a “user” of the online service? It is assumed that this is not the intention but it is important that either the terms user/s are defined in the Bill or replaced with language which covers all members of the public who may become the victim of cyberbullying, whether users of the online service or not.

#### **Recommendations:**

- (i) Implement the Law Reform Commission’s recommendation that there be a body “*overseeing and regulating an efficient and effective procedure for takedown of harmful digital communications*” in the Bill so that individuals have an immediate remedy in the event of a failure to adhere to codes of practice.**
- (ii) The terms user/s should either be defined to include all members of the public or removed entirely.**

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<sup>10</sup> It is noted that the [current UK proposal](#) is to place a general statutory duty of care on online service providers around a user’s safety where they are the victim of cyberbullying but a defence to same will exist where the online provider is in compliance with the relevant regulatory framework.

## **Conclusion**

The Society appreciates the invitation to comment on the Bill.

We hope that the Committee will find our recommendations to be useful and will be glad to engage further in respect of same.

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