

**Submission to the Joint Committee  
on Media, Tourism, Arts, Culture,  
Sport and the Gaeltacht on the  
General Scheme of the Online  
Safety and Media Regulation Bill**

Irish Human Rights and Equality  
Commission

*March 2021*



**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
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## Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act'). In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to examine any legislative proposal and report its views on any implications for human rights or, equality.<sup>1</sup>

The Commission welcomes the opportunity to provide the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht with this submission on the General Scheme of the *Online Safety and Media Regulation Bill* (the 'General Scheme'), which it hopes will assist the Committee in its scrutiny of the Bill. The Commission has previously commented on the human rights and equality issues concerning the General Scheme and the transposition of the revised *Audio-visual Media Services Directive* (the 'Directive').<sup>2</sup>

The General Scheme and the Directive are both complex instruments with many different elements. Therefore, this submission has focused on a number of specific issues, primarily the role and functions of the Media Commission, the definition of harmful online content and age appropriate content, and the accessibility of services for people with disabilities. The Commission remains available to assist the Committee if further scrutiny of the General Scheme is required and on any specific issue that may arise.

## Regulating the media and the impact of online harm

The rapid development of information technology and on-line platforms pose evolving and complex challenges in relation to proportionate, yet effective regulation. In particular, online platforms offer a voice to everyone, including those who engage in

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<sup>1</sup> Section 10(2)(c) of the [Irish Human Rights and Equality Commission Act 2014](#).

<sup>2</sup> See IHREC, [Submission to the Citizens' Assembly on Gender Equality](#), March 2020, at pages 11-13; IHREC, [Review of the Prohibition of Incitement to Hatred Act 1989](#), December 2019, at pages 9-14; IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#), October 2019, at pages 47-51.

harmful speech. In this respect, although the scale of the harm is difficult to quantify, there is evidence of patterns of harmful speech. Those who are victimised include for example, groups such as women, particularly young women;<sup>3</sup> young people;<sup>4</sup> people from religious and ethnic minorities;<sup>5</sup> and LGBTI+ people.<sup>6</sup>

Another form of harmful and criminal behaviour conducted online is human trafficking. Modern communication technologies – namely the internet, social media and mobile applications – have significantly impacted the way in which organised crime groups involved in international trafficking in human beings operate. Europol have identified the advantages of technology for traffickers, which include, increased anonymity, the ability to take part in real-time and encrypted communications, the possibility of reaching a bigger audience (in terms of victims and clients), geographical mobility and controlling victims from a distance. Criminals are also capitalising on boom of e-commerce culture and on 'legislative discrepancies' in regulating and providing data.<sup>7</sup> Equally challenging for media and online regulators is the mass dissemination of 'fake news' or disinformation.<sup>8</sup> For example, recent research has demonstrated how

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<sup>3</sup> US Research; [Pew Research Centre – US Study](https://www.pewresearch.org/internet/2014/10/22/part-1-experiencing-online-harassment/)  
<https://www.pewresearch.org/internet/2014/10/22/part-1-experiencing-online-harassment/> Also see: [European Institute for Gender Equality \(2017\) \*Cyber Violence Against Women and Girls\*](#) And [Violence against Women: An EU-Wide Survey \(2014\) FRA](#).

<sup>4</sup> FRA MIDIS II 2017 survey of 25,515 respondents from ethnic minority and immigrant backgrounds across 28 member states found while most respondents experienced harassment motivated by hatred 'offline', or in-person rather than online that cyber-harassment is highest towards young respondents. Also see [Cyberbullying Among 9-16 Year Olds in Ireland – TU Dublin, 2013](#)  
<https://arrow.tudublin.ie/cgi/viewcontent.cgi?article=1031&context=cserrep>

<sup>5</sup> IHREC Hate Track – Tracking and Monitoring Racist Speech Online (DCU study co funded by Irish Research Council and IHREC) -  
<https://www.ihrec.ie/app/uploads/2018/11/HateTrack-Tracking-and-Monitoring-Racist-Hate-Speech-Online.pdf>

<sup>6</sup> Survey of 700 LGBT+ people in the UK. [https://www.report-it.org.uk/files/online-crime-2020\\_0.pdf](https://www.report-it.org.uk/files/online-crime-2020_0.pdf) 8 in 10 respondents experienced anti-LGBT+ hate crime and hate speech online in the last five years, half respondents experienced online abuse 10 or more times. Provoked negative emotional responses such as fear, anxiety, self-blame, and for some suicidal thoughts.

<sup>7</sup> Europol (2020) – The Challenges of Countering Human Trafficking in the Digital Era.  
<https://www.europol.europa.eu/publications-documents/challenges-of-countering-human-trafficking-in-digital-era>

Also see Centre for Communication Leadership and Policy, Annenberg (2011) [Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds](#). The [CEDAW Committee has said that](#) Coronavirus pandemic has made matters worse for victims of human trafficking. Online demand has been channelled through social media, dark web, and messaging platforms to access victims but hide the identity of the perpetrators. The Committee notes that online recruitment is increasing, as is the demand for child sexual abuse material.

<sup>8</sup> See the 2018 'Action Plan Against Disinformation' (JOIN (2018) 36 final of 5 December 2018) builds on the policy approach defined in the Commission Communication 'Tackling online disinformation: a European approach' COM (2018) 236 final of 26 April 2018.

disinformation about COVID-19 posed a major threat to public health, and found that being exposed to information about the virus on social media is significantly associated with higher susceptibility to dis-information in Ireland, the UK and the USA.<sup>9</sup>

Separately, commenting on the impact of fake news on racist speech online, Commission-funded research found that:

“Racially-loaded toxic discourses feed on fake news and bogus statistics revolving around the alleged failures of multi-culturalism, no-go Muslim areas, and African youth gangs, terrorising locals.”<sup>10</sup>

Accordingly, the internet and media play a critical role, as both enablers and barriers to the full and meaningful participation in political and public life; offering a powerful opportunity to transmit information, share knowledge and support and broadcast to wider audiences. However, as outlined above, the media and online spaces can often serve as platforms for perpetuating misogyny, hate speech, and exploitation.

Developing a rights-based framework, in particular with regard to the regulation of harmful conduct online, within the proposed legislation inevitably entails challenging questions of accommodating, balancing and reconciling competing rights under the General Scheme. While the protection of persons, in particularly specific marginalised groups, from harm, including online harmful conduct, is a requirement under international human rights law; any measure should be balanced against competing fundamental rights including the rights to freedom of expression, privacy and freedom of assembly. Therefore, any proposed legislation must satisfy the requirements of legality, necessity and proportionality.

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<sup>9</sup> Royal Society Open Science (2020) Susceptibility to misinformation about COVID-19 around the world. <https://royalsocietypublishing.org/doi/10.1098/rsos.201199>. Also see European Commission Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions Tackling COVID-19 disinformation – Getting the facts right - Brussels, 10.6.2020 JOIN(2020) 8 final.

<sup>10</sup>DCU, Hate Track – Tracking and Monitoring Racist Speech Online (DCU study funded by IHREC) - <https://www.ihrec.ie/app/uploads/2018/11/HateTrack-Tracking-and-Monitoring-Racist-Hate-Speech-Online.pdf>, page 4.

## Background to the General Scheme

The General Scheme was approved by Government on 9 January 2020 and published on 10 January 2020. Subsequently, additional provisions were approved by Government on 24 November 2020.

According to the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, the purpose of the Bill will be to close the legal gap in addressing harmful online content and establish a robust regulatory framework to deal with the spread of harmful online content. It is stated that the Bill will provide for the appointment of an Online Safety Commissioner as part of a wider Media Commission, to oversee the new regulatory framework for online safety. The Commissioner will govern this new framework through binding online safety codes and robust compliance, enforcement and sanction powers. Online safety codes will deal with a wide range of issues, including measures to be taken by online services to tackle the availability of harmful online content, for example cyberbullying material, on their services. The General Scheme also seeks to transpose the revised Directive.

## Relevant Human Rights and Equality Framework

The provisions of the General Scheme, in particular the proposed creation of a framework to regulate forms of speech engage a number of fundamental rights protected under the Constitution, European Union law,<sup>11</sup> and international human rights law and in this respect, will require the careful and considered balancing of these rights. This challenge is reflected in recital 51 of the revised Directive:

“When taking the appropriate measures to protect minors from harmful content and to protect the general public from content containing incitement to violence, hatred and terrorism in accordance with *Directive 2010/13/EU*, the applicable fundamental rights, as laid down in the Charter, should be carefully balanced. That concerns, in particular and as the case may be, the right to respect for private and family life and the protection of personal data, the

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<sup>11</sup> As the State is implementing European Union law in the form of the revised Directive, the State has to respect the rights, observe the principles and promote the application of the Charter of Fundamental Rights of the European Union. See Article 51 of the Charter of Fundamental Rights of the European Union.

freedom of expression and information, the freedom to conduct a business, the prohibition of discrimination and the rights of the child.”

Core rights engaged by the General Scheme and considered under this part include:

- the right to freedom of expression
- the right to freedom of assembly and association
- the right to respect for private life and the right to the protection of personal data
- the principle of equality and the prohibition of discrimination, including hate speech and other harmful speech
- the rights of persons with disabilities
- the rights of the child

## Freedom of expression

The General Scheme clearly engages the right to freedom of expression, as protected under the Constitution, European and international law.<sup>12</sup> The right to freedom of expression includes the freedom to hold opinions and freedom to seek, receive and impart information and ideas of all kinds, without interference by public authority and regardless of frontiers. The Irish Courts have recognised that the right extends not only to citizens, but to organs of public opinion – the right to report the news and to comment on it.<sup>13</sup> It also arises in the content of the right to silence,<sup>14</sup> industrial relations<sup>15</sup> and journalistic privilege.<sup>16</sup> The European Court of Human Rights (the ‘ECtHR’) has found that the right “is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”<sup>17</sup> Freedom of expression is not absolute and is subject to qualifying provisions.<sup>18</sup>

However, while subject to restrictions the Irish courts have held that any interference

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<sup>12</sup> Article 40.6.1 of the Constitution, Article 11 of the Charter of Fundamental Rights of the European Union, Article 10(1) of the European Convention on Human Rights (the ‘ECHR’) and Article 19(2) of the International Covenant of Civil and Political Rights (the ‘ICCPR’).

<sup>13</sup> *Irish Times v Ireland* [1998] 1 IR 359 at 405

<sup>14</sup> *Heaney v Ireland* [1996] 1 IR 580

<sup>15</sup> *Marine Terminals Ltd v Loughman and Ors* [2009] IEHC 620

<sup>16</sup> *Mahon v Keena* [2009] IESC 64.

<sup>17</sup> *Handyside v. the United Kingdom* (App No 5493/72) § 49; *Observer and Guardian v. the United Kingdom* (App No 13585/88) § 59.

<sup>18</sup> Article 40.6.1°: “The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.” Article 19(3) of the ICCPR states “The exercise of the rights provided for in paragraph 2 of this article carries with it



with the right must be proportionate.<sup>19</sup> In determining an interference, the ECtHR will consider whether there has been an interference in the form of a “formality, condition, restriction or penalty”<sup>20</sup> and thereafter, whether the interference pursues a legitimate aim, is a suitable means of achieving that aim and is necessary in a democratic society.<sup>21</sup>

The Court of Justice of the European Union (the ‘CJEU’) applies a similar test.<sup>22</sup>

The ECtHR has held that the right to freedom of expression also imposes positive obligations on the State, including the requirement to establish an effective mechanism for the protection of authors and journalists, in order to create a favourable environment for participation in public debate of all those concerned, enabling them to express their opinions and ideas without fear.<sup>23</sup> Even if these opinions and ideas run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter.

### Peaceful assembly and association

Linked to freedom of expression, the General Scheme also engages the right to peaceful assembly and association protected under the Constitution, the European Convention on Human Rights (the ‘ECHR’) and the Charter of fundamental rights (the

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special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

<sup>19</sup> *Independent Newspapers Ltd v Anderson* [2006] IEHC 62.

<sup>20</sup> *Wille v. Liechtenstein* (App No 28396/95) [GC], § 43,

<sup>21</sup> Article 10(2) of the ECHR states “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.” The ECtHR have held that exceptions under Article 10(2) of the ECHR must be construed strictly. See *Stoll v. Switzerland* (App No 69698/01) [GC], § 101, reiterated in *Morice v. France* (App No 29369/10) [GC] § 12 and *Pentikäinen v. Finland* (App No 1182/10) [GC], § 87

<sup>22</sup> Article 52(1) of the Charter provides “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

<sup>23</sup> *Dink v. Turkey* (App No 7124/09) § 137 and *Khadija Ismayilova v. Azerbaijan* (Apps No 65286/13 and 57270/14) § 158.

'Charter').<sup>24</sup> This right is not absolute and can be interfered with where it is likely to cause a breach of the peace, be a danger to others or a nuisance to the general public.<sup>25</sup> The UN Human Rights Committee in General Comment no. 37 set out that Article 21 protects peaceful assemblies, including assemblies used to pursue contentious ideas or goals;

"wherever they take place: outdoor, indoors and online; in public and private spaces; or a combination thereof."<sup>26</sup>

The Human Rights Committee provides that;

"States should ensure that the activities of Internet service providers and intermediaries do not unduly restrict assemblies or the privacy of assembly participants. Any restrictions on the operation of information dissemination systems must conform to the tests for restrictions on freedom of expression."<sup>27</sup>

## Privacy, protection of personal data and the right to one's good name

The right to privacy in communications is protected under Article 40.3 of the Constitution.<sup>28</sup> The right to one's good name is one of the personal rights protected under Article 40.3.2° of the Constitution. The right to respect for private and family life, home and correspondence is also protected under Article 8 of the ECHR, and the right has been expansively interpreted to apply to online activities<sup>29</sup> and reputation<sup>30</sup>. The

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<sup>24</sup> Article 40.6.1 of the Constitution, Article 11 of the ECHR and Article 12 of the Charter. *The People (Director of Public Prosecutions) v. Kehoe* [1983] I.R. 136, at 139; *Hyland v Dundalk Racing* [2014] IEHC 60, at 76.

<sup>25</sup> Similarly Article 11(2) of the ECHR allows for restriction to be placed where prescribed by law or necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

<sup>26</sup> Human Rights Committee, [General comment No. 37 \(2020\) on the right of peaceful assembly \(article 21\)](#), CCPR/C/GC/37, 17 September 2020, paras 6-7.

<sup>27</sup> Human Rights Committee, [General comment No. 37 \(2020\) on the right of peaceful assembly \(article 21\)](#), CCPR/C/GC/37, 17 September 2020, para 34.

<sup>28</sup> *Kennedy v Ireland* [1987] IR 587; *Schrems v. Data Protection Commissioner* [2014] 3 IR 75.

<sup>29</sup> Information associated with specific dynamic IP addresses facilitating the identification of the author of online activities, constitutes, in principle, personal data which are not accessible to the public. The use of such data may therefore fall within the scope of Article 8. See *Benedik v. Slovenia* (App No 62357/14) §§ 107-108.

<sup>30</sup> In order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life. This requirement pertains to both social and professional reputation. See *Denisov v. Ukraine* (App No 76639/11) [GC], § 112

CJEU has increasingly emphasised the importance of privacy and data protection online in recent years.<sup>31</sup>

The right to private life and right to data protection need to be carefully balanced against the right to freedom of expression, in particular in the context of anonymous online speech and applications for social media companies to take down offending material.<sup>32</sup> The ECtHR has held that the right to respect for private life and the right to freedom of expression deserve equal respect.<sup>33</sup> In cases involving the balancing of rights, the ECtHR has identified a number of relevant criteria to examine, including the:

- contribution to a debate of public interest;
- degree of notoriety of the person affected;
- subject of the news report;
- prior conduct of the person concerned;
- content, form and consequences of the publication;
- way in which the information was obtained and its veracity; and,
- gravity of the penalty imposed on the journalists or publishers.<sup>34</sup>

### Prohibition on discrimination including discriminatory hate speech

Article 40.1 of the Constitution and Article 14 of the ECHR guarantee respectively; equality under the law and the right to enjoy rights and freedoms without discrimination.<sup>35</sup> As the General Scheme intends to transpose EU law, the prohibition of discrimination under Article 21 of the Charter, which is expressly referred to in Recital 47 and Article 6 of the revised Directive, is of relevance to the State's implementation of the Directive in national law. Article 21 places an obligation on the State to ensure any discrimination based on any ground such as 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 shall be prohibited.

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<sup>31</sup> See *Digital Rights Ireland*, C-293/12; *Google Spain* C-131/12; *Schrems*, C-362/14; *Tele2 Sverige*, C-293/15.

<sup>32</sup> See *Muwema v Facebook Ireland Ltd* [2018] IECA 104 at [30]-[35].

<sup>33</sup> See *Couderc and Hachette Filipacchi Associés v. France* (App No 40454/07) [GC], § 91; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App No 931/13) [GC], § 123; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [2017] ECHR 608 [GC], § 77.

<sup>34</sup> *Couderc and Hachette Filipacchi Associés* §§ 90- 93; *von Hannover v. Germany (No. 2)* (2012) 55 EHRR 15 [GC], §§ 108-113; *Axel Springer* §§ 89-95; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App No 931/13) [GC], § 165.

<sup>35</sup> Article 2(1) of the ICCPR requires States to respect and ensure the rights under the Covenant without distinction.

Incitement to hatred is prohibited under EU law<sup>36</sup> and under international human rights instruments including the *International Covenant on Civil and Political Rights*<sup>37</sup> and the *International Convention on the Elimination of Racial Discrimination*.<sup>38</sup> While these human rights instruments expressly prohibit incitement to hatred on the grounds of racial, national, religious and ethnic origin, the underpinning principle of non-discrimination means they should be understood to prohibit incitement that targets any of the broader categories protected under international human rights law.<sup>39</sup>

### Accommodating competing rights – the problem of hate speech and other forms of harmful speech

The proposed legislation inevitably requires the careful balancing between competing rights. In this regard, it is extremely important that any interference on freedom of

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<sup>36</sup> The EU Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law requires Member States to punish certain acts carried out in a manner likely to incite violence or hatred against a group of persons or one or more of its members as defined by reference to race, colour, religion, descent or national or ethnic origin. These acts include publicly inciting to violence or hatred, including by public dissemination or distribution of tracts, pictures or other material, and publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes. See EU [Council Framework Decision 2008/913/JHA](#).

<sup>37</sup> Article 20(2) ICCPR requires States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Measures taken to prohibit incitement to hatred in accordance with Article 20(2) are subject to the conditions set out in Article 19(3) ICCPR. See Para.50 Human Rights Committee (2011) [General Comment No. 34 – Article 19: Freedoms of opinion and expression CCPR/C/GC/34](#). Article 4 of the UN Convention on the Elimination of All Forms of Racial Discrimination provides that States Parties must condemn all racist propaganda and also “undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention”, including by declaring such acts a criminal offence. General Recommendation No. 35 (2013) on combating racist hate speech provides valuable guidance on this obligation. In its Concluding Observations of December 2019 on Ireland’s most recent reports, the CERD Committee specifically recalled this General Recommendation in recommending that Ireland strengthen its legislation in this field and inter alia ensure that “*the online safety and media regulation bill, which is under development, is in line with international human rights standards and expeditiously enact the bill*” (CERD/C/IRL/CO/5-9, paragraph 20).

<sup>38</sup> Article 4 of the International Convention on the Elimination of Racial Discrimination (CERD) contains various obligations to condemn and take active measures to eradicate all incitement to or justification of discrimination based on ideas of racial or ethnic superiority. Ireland has lodged a reservation/interpretative declaration under Article 4 such that “the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. The UN Committee on the Elimination of Racial Discrimination has continuously recommended withdrawal of Ireland’s reservation/interpretative declaration to Article 4 CERD. See Committee on the Elimination of Racial Discrimination: (2011) [Consideration of reports submitted by States parties under article 9 of the Convention Concluding Observations of the Committee on the Elimination of Racial Discrimination, Ireland](#); (2019) [Concluding observations on the combined fifth to ninth reports of Ireland](#).

<sup>39</sup> [Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression](#), A/74/486, October 2019, para.9.

expression and/or privacy or data protection rights satisfy the principle of proportionality.

There has been relatively limited consideration of these issues in the Irish context. However, the ECtHR has been careful to establish limits to freedom of expression with regard to hate speech. The ECtHR has adopted two approaches in determining the limits of freedom of expression in respect of incitement to hatred:

- i) in certain cases where the comments amount to hate speech and negate the fundamental values of the Convention, such speech is excluded from protection of the Convention by reason of Article 17 of the ECHR (prohibition of abuse of rights); and
- ii) in other cases, where the speech in question is hate speech but is not apt to destroy the fundamental values of the Convention, the Court has imposed restrictions on speech under Article 10(2) ECHR.<sup>40</sup> The ECtHR factsheet on hate speech, updated on September 2020 provides a valuable summary of the key case-law on this issue.<sup>41</sup>

Only certain, more severe hate speech expressions meet the threshold of incitement to hatred, meaning that not all hate speech acts merit a criminal law response. In this regard, the *UN Rabat Plan of Action* sets out a range of factors that should be considered when assessing the severity of a hate speech act and whether it constitutes incitement to hatred.<sup>42</sup> As noted by the UN Special Rapporteur on the promotion and protection of the freedom of opinion and expression ('the UN Special Rapporteur'),<sup>43</sup> restrictions on lesser forms of hate speech must meet the strict standards of international human rights law, such as those set out in Article 19(3) of the International Covenant of Civil and Political Rights (ICCPR) requiring that any restrictions on expression must satisfy the conditions of –

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<sup>40</sup> See [Factsheet of the European Court of Human Rights on Hate Speech](#).

<sup>41</sup> [https://www.echr.coe.int/documents/fs\\_hate\\_speech\\_eng.pdf](https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf)

<sup>42</sup> This six-part threshold test includes consideration of the context in which the speech took place, the status of the speaker, the intent involved, the content and form of the speech, the extent of the speech act, and the likelihood of the act imminently inciting others to hatred. See United Nations, Rabat Plan of Action, [A/HRC/22/17/Add.4](#), para.29.

<sup>43</sup> [Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression](#), A/74/486, October 2019, para.20.

- Legality: provided by law that is precise, public, and transparent, avoids providing authorities with unbounded discretion, and gives appropriate notice to those whose speech is regulated. Rules should be subject to public comment and regular legislative or administrative process. Procedural safeguards, especially those guaranteed by independent courts or tribunals, should protect rights.
- Legitimacy: justified to protect one or more of the interests specified in Article 19(3), namely the rights or reputations of others, national security, public order, or public health or morals.
- Necessity and proportionality: demonstrated by the State as necessary to protect the legitimate interest and the least restrictive means to achieve the purported aim.<sup>44</sup>

The Special Rapporteur recommends that States pursue measures other than criminalisation and prohibition – such as education, counter-speech, and the promotion of pluralism – to address all kinds of ‘hate speech’.<sup>45</sup>

### Accessibility for persons with disabilities

Accessibility is a general principle of the *UN Convention of the Rights of Persons with Disabilities* (the ‘CRPD’) under Article 3, as well as a standalone provision under Article 9. Article 9 requires that States take measures to ensure accessibility for persons with disabilities on an equal basis to others, including access to information and communications technologies, systems and the internet. The Committee on the Rights of Persons with Disabilities has affirmed that the duty of States to ensure access for persons with disabilities should be seen from the perspective of equality and non-discrimination, stating that the:

“denial of access ... constitutes an act of disability-based discrimination that is prohibited by article 5 of the Convention”.<sup>46</sup>

Article 21 of the CRPD provides that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of

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<sup>44</sup> United Nations, [Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression](#), A/74/486, October 2019, para.20. See also Human Rights Committee, [General comment No. 34 Article 19: Freedoms of opinion and expression](#), CCPR/C/GC/34, 2011, paras.22-36.

<sup>45</sup> [Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression](#), A/74/486, October 2019, para.28.

<sup>46</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 2 \(2014\) Article 9: Accessibility](#), CRPD/C/GC/2, at para.34.

communication of their choice. It requires private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities; and the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities.<sup>47</sup> Article 30 of the CRPD, which recognises the right of persons to take part on an equal basis with others in cultural life, also provides that persons with disabilities shall enjoy access to cultural materials, television programmes, films and other cultural activities in accessible formats.

The Committee on the Rights of Persons with Disabilities have stated that:

“[w]ithout access to information and communication, enjoyment of freedom of thought and expression and many other basic rights and freedoms for persons with disabilities may be seriously undermined and restricted.”<sup>48</sup>

The Committee on the Rights of the Child has recommended that States develop, implement and monitor legislation and policies to ensure the accessibility of digital media for children with disabilities, including by incorporating accessibility requirements in policies related to private sector, international cooperation and public procurement.<sup>49</sup>

## Rights of the child

The *UN Convention on the Rights of the Child* (the ‘CRC’) provides children with the right to have their best interests assessed and taken into account as a primary consideration in all actions or decisions that concern them.<sup>50</sup> This includes the actions and decisions of legislative bodies in respect of the adoption of any law or regulation that affects children, which should be governed by the best interests of the child.<sup>51</sup> The CRC also recognises the right of children to be heard in relation to matters that affect

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<sup>47</sup> Article 21(c)-(d).

<sup>48</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 2 \(2014\) Article 9: Accessibility](#), CRPD/C/GC/2, 22 May 2014, para 21.

<sup>49</sup> UN Committee on the Rights of the Child, [Report of the 2014 Day of General Discussion: “Digital media and children’s rights”](#), para.108.

<sup>50</sup> Article 3(1) [Convention on the Rights of the Child](#).

<sup>51</sup> Committee on the Rights of the Child, [General comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration \(art. 3, para. 1\)\\*](#), CRC/C/GC/14, at para. 31.

them, including legislative matters,<sup>52</sup> and to have their views be given due weight in accordance with their age and maturity.<sup>53</sup>

Article 13 CRC protects the right of children to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, through any media of the child's choice,<sup>54</sup> while children's right to privacy is protected under Article 16 of the CRC.<sup>55</sup> In the context of media, Article 17(e) of the CRC requires that States;

“Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being”.<sup>56</sup>

These and all other CRC rights must be respected and ensured for all children on an equal basis, in line with the Convention's underpinning principle of non-discrimination.<sup>57</sup> Observing the risk that children are under if exposed to inappropriate or offensive material, the Committee on the Rights of the Child have urged States parties “to regulate media production and delivery in ways that protect young children”.<sup>58</sup> The Committee recommend that States should adopt human rights-based laws and policies which integrate children's safe access to digital media with the full protection of rights under the CRC.<sup>59</sup> The Committee have said that a balance must be struck between children's right to information and freedom of expression, and the requirement to regulate the media to protect children from harmful information, especially pornographic materials and materials that portray or reinforce violence, discrimination and sexualized images of children.<sup>60</sup> The Committee recommends that States should ensure a clear and predictable legal and regulatory environment, which requires ICT industries operating in the State to respect children's rights,<sup>61</sup> while States should also

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<sup>52</sup> Committee on the Rights of the Child, [General Comment No. 12 \(2009\) The right of the child to be heard, CRC/C/GC/12](#), at para.72.

<sup>53</sup> Article 12 [Convention on the Rights of the Child](#).

<sup>54</sup> Article 13 [Convention on the Rights of the Child](#).

<sup>55</sup> Article 16 [Convention on the Rights of the Child](#).

<sup>56</sup> Article 17 [Convention on the Rights of the Child](#)

<sup>57</sup> Article 2 [Convention on the Rights of the Child](#).

<sup>58</sup> Committee on the Rights of the Child, [General Comment, No. 7 \(2005\) Implementing child rights in early childhood, CRC/C/GC/7/Rev.1](#), 20 September 2006, para 35.

<sup>59</sup> UN Committee on the Rights of the Child, [Report of the 2014 Day of General Discussion: “Digital media and children's rights”](#), para.85-86.

<sup>60</sup> Committee on the Rights of the Child, [General comment No. 16 \(2013\) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16](#), 17 April 2013, para 58.

<sup>61</sup> UN Committee on the Rights of the Child, [Report of the 2014 Day of General Discussion: “Digital media and children's rights”](#), para.96.



establish monitoring mechanisms for the investigation and redress of children's rights violations in the digital sphere.<sup>62</sup>

The Committee of Ministers of the Council of Europe has put forth *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*.<sup>63</sup> Regarding national legal frameworks, the guidelines advise that a comprehensive legal framework should:

- provide for preventive and protective measures in relation to the digital environment;
- provide support measures for parents and carers;
- prohibit all forms of violence, exploitation and abuse;
- include effective remedies, recovery and reintegration services;
- establish child and gender-sensitive counselling, reporting and complaint mechanisms;
- encompass child-friendly mechanisms for consultation and participation; and
- set up accountability mechanisms to fight impunity.<sup>64</sup>

More broadly, States should create a clear and predictable legal and regulatory environment which helps businesses and other stakeholders meet their responsibility to respect the rights of the child in the digital environment throughout their operations.<sup>65</sup>

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<sup>62</sup> UN Committee on the Rights of the Child, [Report of the 2014 Day of General Discussion: "Digital media and children's rights"](#), para.96.

<sup>63</sup> Underpinned by core principles aligned to those espoused in the CRC, the guidelines set out operational principles and measures to respect, protect and fulfil the rights of the child in the digital environment in respect of: access to the digital environment; the right to freedom of expression and information; participation, the right to engage in play and the right to assembly and association; privacy and data protection; the right to education; the right to protection and safety; and remedies. See Council of Europe, [Guidelines to respect, protect and fulfil the rights of the child in the digital environment](#), Recommendation CM/Rec (2018)7 of the Committee of Ministers.

<sup>64</sup> Council of Europe, [Guidelines to respect, protect and fulfil the rights of the child in the digital environment](#), Recommendation CM/Rec (2018)7 of the Committee of Ministers, at para.73.

<sup>65</sup> Council of Europe, [Guidelines to respect, protect and fulfil the rights of the child in the digital environment](#), Recommendation CM/Rec (2018)7 of the Committee of Ministers, at para.78.

# Observations on the General Scheme

## The Media Commission (Part 2)

### Principles underpinning objectives and functions of the Commission

Part 2 of the General Scheme provides for the Media Commission, its structure, functions and powers. Under the General Scheme, the Media Commission has been afforded significant and far-reaching powers regarding the regulation of speech in broadcasting, online and in respect of on demand services which will not only engage human rights and equality issues outlined above, but will require the careful balancing of these competing rights.<sup>66</sup>

Head 9 which sets out the objectives of the Media Commission, provides in paragraph (1) that the Media Commission shall:

“[e]nsure that democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression are upheld.”

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<sup>66</sup> The Commission's functions include: ensuring the provision of open and pluralistic broadcasting and audio-visual media services; the promotion and protection of the interests of the public in relation to audio-visual, audio and online content; the enforcement of relevant statutory provisions; the preparation of codes and rules; the establishment of complaints mechanisms; provision of a regulatory environment that will sustain independent and impartial journalism; and, reviewing online safety and media service related legislation. Head 11 provides for core powers of the Commission such as the issuance of notice and warnings; the conduct of investigations and inquiries; the imposition of administrative financial sanctions; and the prosecution of summary offences. The General Scheme proposes to create a regulatory system whereby the Media Commission is empowered to issue notices and thereafter warnings to non-compliant regulated entities, per Head 12. Head 13 provides for the provision of codes of practice. The Media Commission can investigate broadcasters, broadcasting contractors and regulated entities, including powers of search, inspection and production, including applying to the District Court for search warrants, per Heads 14A to 15C. Such investigations can occur where there are reasonable grounds for believing a broadcasting contractor is not complying with its contract, or where a broadcaster is breaching a code or rule. Head 15D provides for the preparation of reports in relation to investigations taken and Head 15E provides for the power to impose a compliance notice or warning, or financial administrative sanction for improper conduct arising from this. Improper conduct is not defined. It also provides for procedural safeguards in relation to where a decision may be made. These include that the Media Commission may hold an oral hearing and may provide to the regulated entity the report and a period within which to make submissions. Where a decision is made, it is to be made in writing with the reasons therefor. Heads 16A provides for the imposition of administrative financial sanctions. It provides that in imposing such sanction, regard must be had to a range of factors, including the appropriateness and the proportionality to the breach or failure to co-operate, seriousness, turnover, any excuse or explanation, harm, the duration of the breaches and repetition, amongst others. Head 16A(2), provides a formula for the calculation of such a sanction. This is appealable, both in substance and in quantum, to the Circuit or High Court, depending on the amount of the sanction. Where this is not appealed, per Head 16C, the Media Commission shall apply to the Circuit Court to confirm the imposition, which can be dispensed with on the election of the regulated entity under Head 16D. Head 18 provides for categories of summary and indictable penalties.

The objectives of the Media Commission also include having regard to linguistic, religious, ethical and cultural diversity (paragraph 2(a)), accessibility of services for persons with disabilities (paragraph 2(b)), and the protection of children (paragraph 4). These are welcome inclusions, however, they are not consistently reflected throughout the General Scheme. The Media Commission will play a critical role in balancing and protecting core fundamental rights, including - freedom of expression, freedom of association, privacy rights, equality and non-discrimination, hate speech and dis-information. Therefore, further and more detailed consideration of these human rights and equality issues is required.

Also, in addition to an obligation to comply with the Constitution there should be express reference to the Media Commission's obligation to comply with the Charter, and the *European Convention on Human Rights Act 2003* (the 'ECHR Act 2003'). Moreover - similar to section 42 of the 2014 Act there should be a specific statutory obligation that requires the Media Commission, in the performance of its functions, to have due regard to the need to eliminate discrimination, promote equality of opportunity and protect human rights. This is important given the Media Commission's role in developing regulatory tools and processes, including codes of practice, conducting investigations and also its power to convey licenses to broadcasters and operate registration systems for on-demand audio-visual services. Equally it would inform how the Media Commission approaches and prioritises public awareness strategies and educational initiatives.<sup>67</sup>

**The Commission recommends that the General Scheme, and specifically Heads 9 and 10 should be revised to ensure a more detailed consideration of the core human rights and equality issues involved in the role and functions of the Media Commission, including freedom of expression, and association, privacy rights, equality and prohibition of discrimination, including hate speech and dis-information**

**The Commission recommends that specific reference is made under Head 8 to the Charter, the ECHR Act 2003.**

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<sup>67</sup> See Head 10 of the General Scheme. For example, in terms of education and training the Media Commission could play a key role in training broad-castors and journalists on respectful coverage of marginalised groups

**The Commission further recommends that legislation should include a specific statutory requirement that the Media Commission, in the performance of its functions, to have due regard to the need to eliminate discrimination, promote equality of opportunity and protect human rights.**

### Independence (Head 8)

Article 30 of the Directive requires that a designated regulatory authority shall be:

“legally distinct from the government and functionally independent of their respective governments and of any other public or private body”.

In order to guarantee independence, Article 30 includes requirements of functional independence, budget and appointments.<sup>68</sup>

Accordingly, it is welcome that the General Scheme provides an express statutory guarantee of independence under Head 8. In general terms, the provisions of the General Scheme would appear robust insofar as limiting the extent to which the Government and Minister can influence or affect the day-to-day running of the Media Commission, particularly with regard to membership of the Media Commission, as well as operational decision-making.

In terms of financial independence, it is significant to note that Head 40 provides the Media Commission with the power to impose a levy on regulated entities and further that Head 26 provides that the Commission Chair will be the Accounting Office.

However, in order to strengthen financial independence, it is submitted that the Media Commission’s grant for budgetary allocation should be the subject of a separate vote in the Oireachtas, particularly where its funding comes from grants otherwise than from the Minister under Head 30.

**The Commission recommends that grants for budgetary allocation to the Media Commission should be subject to a separate vote in the Oireachtas.**

Head 19 provides for the appointment and dismissals of members of the Media Commission. Appointments are made on the recommendation of the Public Appointments Service (Head 19(4)). Head 19(12) allows for the Minister/Government

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<sup>68</sup> See Article 30(1)-(5). Also see CJEU jurisprudence C-518/07 *Commission v Germany*; Case C-614/10 *Commission v Austria*; Case C-288/12 *Commission v. Hungary*.

to remove from office a member of the Commission who has become incapable through ill-health of performing efficiently his or her duties or:

“whose removal appears to the Minister or Government to be necessary in the interests of the effective economical performance of the functions of the Commission.”

This grants extensive powers to the Government in relation to dismissals, and it is unlikely that this would satisfy the requirements of the Directive under Article 30. Furthermore, it is noted that such powers are not comparable with similar legislation establishing independent statutory bodies – such as the Data Protection Commissioner<sup>69</sup> or, the Irish Human Rights and Equality Commission<sup>70</sup>.

**The Commission recommends that Head 19, paragraph (12) be amended to exclude reference to removal of members of the Media Commission in the interests of the effective and economical performance of the functions of the Commission.**

### Financial sanctions (Head 16)

Head 16A provides for the Media Commission to impose administrative financial sanctions of regulated entities in serious breach of their obligations. Administrative financial sanctions are subject to the confirmation of the court (Head 16C) and/or appeal to the court (Head 16B), unless the regulated entities elect for the Media Commission to impose a sanction without the confirmation of a court (Head 16D). This is an important function of the Media Commission and in principle, the power to impose financial sanctions is compatible with the constitutional (subject to court oversight)<sup>71</sup> and human rights law. However, given high level nature of provisions of the

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<sup>69</sup> Section 17(3) provides that the Minister may remove a Commissioner from office if they are satisfied that may remove a Commissioner from office if they are satisfied that a Commissioner— (a) has become incapable through ill health or otherwise of effectively performing the functions of the office, or (b) has engaged in serious misconduct.

<sup>70</sup> Section 14(2) provides that “The Government may remove a member of the Commission from office, but only on one or more of the following grounds: (a) the member has, without reasonable excuse, failed to discharge his or her functions for a continuous period of not less than 3 months prior to the date of the dismissal beginning not earlier than 6 months before the date of dismissal; (b) the member has become incapable through ill health of performing his or her functions or has committed stated misbehaviour; and then, and only then, where a resolution is passed by both Houses of the Oireachtas calling for the member’s removal.”

<sup>71</sup> When the GDPR was given effect in Ireland, the Data Protection Act 2018 made express provision for confirmation of administrative fines before the Courts, because of a concern that, if this power was vested in the Data Protection Commission alone, it would encroach upon the judicial power under the

General Scheme, it is not possible to provide a definitive assessment of the proposed procedures.

However, it is clear that in exercising these functions that the Media Commission must act in accordance with fair procedures and constitutional justice, as guaranteed under Irish law and EU law.<sup>72</sup> Specifically, Recital 50 of the Directive provides that:

“[t]he right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter. The provisions of Directive 2010/13/EU should not, therefore, be construed in a way that would prevent parties from exercising their right of access to the judicial system.”

**The Commission recommends that the operation of financial sanctions must not infringe upon the right to fair procedures and right to an effective remedy.**

### Expertise of Commission Members (Head 19(5))

Head 19, paragraph 5 provides that an appointment of a member to the Media Commission:

“shall not be made unless the person who the [Minister/Government] proposes to appoint possesses, in the opinion of the [Minister/Government], sufficient expertise in, or experience of, one or more of the following areas, namely, [specify areas]”.

As the proposed powers granted to members under this legislation will have significant implications for human rights and equality, it is important that expertise and experience extend beyond, media, ICT and digital environments. Expertise in the field of human rights and equality issues should be included in the list of areas under this provision. In addition, consideration should be given to those with expertise and/or experience in the protection of children in the media and digital environment, accessibility of the media and ICT for persons with disabilities, and the impact of hate speech and incitement to hatred on marginalised groups. Moreover, consideration should be given to adopting a similar provision to section 13(13) of the 2014 Act, which states that:

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Constitution. This being so, it is an important feature of the General Scheme that administrative financial sanctions are, save where regulated entities have expressly agreed otherwise (Head 16D), subject to confirmation by the Court and/or appeal to the Court (Heads 16B and 16C).

<sup>72</sup> *East Donegal Cooperative v. Attorney General* [1970] IR 31.

“[i]n making recommendations for appointment of persons to the Commission under this section, the Service, and the Government shall have regard to the need to ensure that the members of the Commission broadly reflect the nature of Irish society.”

This would support the importance of pluralism within the context of media regulation, which is central component to the right to freedom of expression.

**The Commission recommends that the list of areas under Head 19, paragraph 5 should include expertise and/or knowledge of human rights and equality.**

**The Commission also recommends that consideration should be given to ensuring the membership of the Media Commission reflects the nature and diversity of Irish society.**

## Online Safety (Part 4)

### The Role and Functions of the Online Safety Commissioner

One of the intentions of the General Scheme, according to the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, is to provide for the:

“appointment of an Online Safety Commissioner as part of a wider Media Commission to oversee the new regulatory framework for online safety.”<sup>73</sup>

The Department state that the Online Safety Commissioner under the regulatory framework will:

- designate online services and categories of online services for regulation
- make online safety codes and decide which codes apply to which online services
- assess the compliance of online services with online safety codes,
- audit any complaint or issues handling processes that online services operate,
- operate a “super complaints” scheme for nominated bodies such as expert charities<sup>74</sup> to bring issues with online services to the Commissioner’s attention,

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<sup>73</sup> Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, [Online Safety and Media Regulation Bill Q&A](#), December 2020.

<sup>74</sup> Head 52B provides for a “systemic complaints scheme”. The General Scheme states that the Media Commission shall have the power to devise and operate so-called “super complaints”. It states that this is where nominated bodies, for example NGOs or members of European Regulators Group for Audio-visual Media Service would have a channel to bring issues they have identified with a relevant or designate online service to the Commission’s attention. The General Scheme states that the Commission would have the power to devise the nomination process and the functioning of the scheme.

- direct online services to make changes to their systems, processes, policies and design, and,
- seek to apply sanctions, including financial sanctions, against online services which aren't complying.

While the role and duties of the Online Safety Commissioner have been reported in documents accompanying the General Scheme, there is no specific or detailed provision in the General Scheme establishing the role of the Online Safety Commissioner or, specifying the functions of the Commissioner. This is a concerning omission, as the powers of the Online Safety Commissioner will have a substantial impact on the rights of users and operators of online services and will have a significant role in overseeing the regulatory framework under the General Scheme.

**The Commission recommends that the General Scheme be revised to make specific provision for the role and functions of the Online Safety Commissioner, and to specifically include a provision ensuring that the Online Safety Commissioner has regard to human rights and equality issues in the exercise of their functions.**

#### Definition of Harmful Online Content (Head 49A)

Head 49A provides that the definition of harmful online content includes:

- “material which it is an criminal offence to disseminate under Irish [or Union law],
- 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,
- material which is likely to encourage or promote eating disorders and which a reasonable person would conclude was the intention of its dissemination, and,
- 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 goes on to specify that “harmful online content” does not include:

- (a) “material [containing or comprising] a defamatory statement,
- (b) material that violates [data protection or privacy law],
- (c) material that violates [consumer protection law], and
- (d) material that violates [copyright law].”

The explanatory notes accompanying this Head state that:

“[i]t is not proposed to define harmful content as a singular concept” rather “[i]t is proposed to enumerate definitions of categories of material that are considered to be harmful online content.”

Head 49B does provide that the Media Commission may propose to include or exclude further categories of material from the definition harmful online content, which can be adopted by Ministerial regulation.

The adoption of regulations to address harmful online content is welcome, as such content can act as a barrier to full and meaningful participation in public and political life. However, the current approach to defining harmful online content is vague and open-ended, and lacks legal certainty<sup>75</sup>. Legal certainty is important in this context for a number of reasons:

- to ensure that the legislation is proportionate and compatible with rights including freedom of expression;
- to ensure that the definitions will be effective in practice; and
- to ensure that those definitions are not open to misuse or abuse to target content or users unfairly.

In particular, category (a) which refers to “material which it is a criminal offence to disseminate under Irish [or Union law]” does not specify the exact offences or legislation that fall within its scope. It would seem that the intention is to capture any material which it is an offence to disseminate under Irish or EU law and to:

“incorporate any future changes to criminal law in this area, making it adaptable and futureproof”.

Thus, the section, in principle, encompasses material which it is an offence to disseminate under the *Prohibition on Incitement of Hatred Act 1989* (the ‘1989 Act’)

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<sup>75</sup> *King v. Attorney General*[1981] IR 233.

and such legislation as may replace the 1989 Act in the wake of the Department of Justice's Review of that Act.<sup>76</sup> However, even this is unclear as there is no specific reference to hate speech, whether on specific grounds such as those protected under the 1989 Act or otherwise. This is notwithstanding the fact that the Directive makes express reference to hate speech and incitement to hatred on protected grounds. Similarly, although not stated, the definition would presumably extend to other legislation criminalising the dissemination of content, such as that proscribed under the *Harassment, Harmful Communications and Related Offences Act 2020*. While such a broad provision may be well-intentioned, it illustrates the potential breadth and open-endedness of this category of harmful online content. This is problematic, not only at the level of principle, but also will likely to give rise to significant difficulty in practice, as neither the Media Commission, media companies or their users will have a clear sense of the scope and limits of this provision.

Similar concerns regarding vagueness of definitions arise in relation to category (b) which refers to:

“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”.

While the explanatory note clarifies that this category intends to encapsulate the notion of cyberbullying, the scope and limits of this provision, in practice, may cause difficulties. Finally, while categories (c) and (d) which refer to eating disorders, self-harm and suicide are more specifically framed, lack of adequate clarity will likely impact on how effective they are at addressing the intended harmful content. In this respect, further specificity is required in the context of what is meant by “eating disorders”, “self-harm” and “suicide” and what should or, should not fall within the meaning of “philosophical, medical and political discourse”.

**The Commission recommends that Head 49A be revised to ensure that the definition of harmful online content is clear and sufficiently precise. Any such limitations on**

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<sup>76</sup> Department of Justice and Equality, *Legislating for Hate Speech and Hate Crime in Ireland Report*, available online at [http://www.justice.ie/en/JELR/Pages/Legislating\\_for\\_Hate\\_Speech\\_and\\_Hate\\_Crime\\_in\\_Ireland\\_Report](http://www.justice.ie/en/JELR/Pages/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Report)

**freedom of expression should be clearly prescribed by law, pursue a legitimate aim, be suitable for attaining that aim, and limited to what is necessary to achieve the public interest objective pursued.**

Article 6(1)(a) of the revised Directive provides that Member States shall ensure, by appropriate means, that audio-visual media services provided by media service providers under their jurisdiction do not contain any 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. EU law is clear that in transposing the Directive, the State must interpret and apply the Directive in a manner that is consistent with the Charter.<sup>77</sup>

It is relevant to note that the 1989 Act is the subject of a separate review by the Department of Justice and this may be the reason why there is no specific reference to hate speech or incitement to violence and hatred in this context in the definition itself. Notwithstanding, this is clearly a category of speech which requires specific attention and focus, in light of the State's obligations, both under the Directive and international human rights law. Lack of clarity in this area will have a significant impact on the effectiveness of any proposed legislation. In this respect, it is noted with concern that Head 49A does not make any reference to incitement to hatred in the definition of harmful online content.

**The Commission recommends that the categories of harmful online content in Head 49A be amended to include online hate speech and content inciting violence or hatred against groups protected under Article 21 of the Charter, including for example – gender, nationality, race and ethnic background and disability.**

**The Commission further recommends that terms relating to hate speech, such as for example racism, sexism, and ableism should also be clearly defined under proposed legislation.**

The definition of online harm does not include material which violates other legal regimes, such as defamation law, data protection or privacy law, consumer protection law or copyright law. The rationale behind these exclusions appears to be that material

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<sup>77</sup> Case C-391/16, C-77/17 and C-78/17, *M & Others*, paragraph 77.

in violation of these distinct legal regimes is adequately regulated under those regimes. However, the mere fact that a statement is defamatory, in breach of data protection or copyright law or so on does not necessarily mean that it may not also be a form of harmful online content. In many cases, such material may be both harmful online content and, separately and distinctly, in breach of other regimes. If the definition is curtailed in this way, it could significantly undermine the effectiveness of the regime for tackling harmful online content.

**The Commission recommends that the stated exclusions under Head 49A in relation to defamation, data protection, privacy or consumer law, etc. should be removed, where they will likely undermine the effectiveness of tackling online harmful content.**

Category (d) contains a form of exception for material which may *prima facie* be likely to encourage or promote self-harm or suicide but which forms part of “philosophical, medical and political discourse”. Aside from the exclusions referred to in the preceding paragraph, there are no exceptions or carve-outs envisaged for online content which may *prima facie* be harmful online content, falling within the scope of these categories but may serve important purposes such as journalistic, educational or research purposes. This may be important in ensuring the proportionality of any definition of harmful online content. Where such exceptions are included, they should be clearly defined under legislation to ensure that they are applied in a proportionate and appropriate manner.

**The Commission recommends that Head 49A be revised to explicitly recognise that there may be exceptions to all categories for harmful online content, including for example, where the material serves educational, journalistic, medical, philosophical, political or research purposes.**

**The Commission further recommends that any such exceptions be clearly defined under legislation.**

Further consideration is required in respect of how the Media Commission will regulate disinformation or, fake news.<sup>78</sup> Also, it may be necessary to examine whether “content” will sufficiently regulate all forms of online harm. For example, information technology is developing in such a way that it can be the conduct of certain parties rather than simply the material, or content displayed online. For example the use of algorithm’s and the targeting of certain information to people for the purpose of grooming or, radicalisation can have a serious impact on democratic values and further may indirectly facilitate and encourage harmful content, including hate speech.<sup>79</sup> Regulating harmful conduct is therefore of equal importance in the context of regulating online service providers and should be examined, defined and addressed within the proposed legislation.

**The Commission recommends that the General Scheme be revised to ensure that disinformation is captured within the meaning of harmful content.**

**The Commission further recommends that the definition be revised to include all forms of online harm, including conduct, such as grooming and radicalisation.**

### Definition of Age Inappropriate Online Content (Head 49C)

Head 49C defines “age inappropriate online content” as:

“age inappropriate online content” means material which may be unsuitable for exposure to minors and that they should not normally see or hear and which may impair their development, taking into account the best interests of minors, their evolving capacities and their full array of rights, and includes:

- (a) material containing or comprising gross or gratuitous violence,

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<sup>78</sup> Disinformation is defined by the European Commission as “verifiably false or misleading information created, presented or disseminated for economic gain or to intentionally deceive the public.” The European Commission further states that it “may cause public harm, be a threat to democratic political and policy making processes, and may even put the protection of EU citizens’ health, security and their environment at risk. See European Commission, JRC Technical Reports JRC Digital Economy Working Paper 2018-02 – The digital transformation of news media and the rise of disinformation and fakes news. <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc111529.pdf> Also see European Commission, European Code of Practice on Disinformation <https://ec.europa.eu/digital-single-market/en/code-practice-disinformation>

<sup>79</sup> European Commission, High Representative of Union for Foreign Affairs and Security Policy, Brussels, 10 June 2020, (Join (2020) 8 final – Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions – Tackling Covid-1 disinformation – Getting the facts right.

- (b) material containing or comprising cruelty, including mutilation and torture, towards humans or animals, and,
- (c) material containing or comprising pornography.”

This Head makes welcome reference to some of the concepts derived from the CRC, including the best interests of the child and their evolving capacity. However, it does not clearly make provision for the evolving capacity of a child in practice or, the spectrum of harmful content in this context. In this regard, Article 6(a) of the Directive suggests that there may be some form of spectrum of harmful or inappropriate content in this context, with the most harmful content, such as gratuitous violence and pornography “subject to the strictest measures”.

The Council of Europe *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* provide that:

“individual children may reach different levels of maturity at different ages”

And

“States and other relevant stakeholders should recognise the evolving capacities of children, including those of children with disabilities or in vulnerable situations, and ensure that policies and practices are adopted to respond to their respective needs in relation to the digital environment.”

The Guidelines also set out that that States should ensure that their legal frameworks encompass the full range of unlawful acts which can be committed in the digital environment, while at the same time providing for suitable preventive and restorative approaches to peer-to-peer online violence and abuse amongst children, with a view to preventing the criminalisation of children.<sup>80</sup>

It is noted that some of these issues may be more appropriately addressed in codes or guidance developed by the Commission. However, these issues nonetheless raise questions as to the appropriateness and effectiveness of the definition in its current form. Similarly, to the issues raised regarding harmful content; the appropriateness of

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<sup>80</sup> Council of Europe, [Guidelines to respect, protect and fulfil the rights of the child in the digital environment](#), Recommendation CM/Rec (2018)7 of the Committee of Ministers, at paras.74-75.

certain exemptions may require further consideration (such as, for journalistic, educational or research purposes).

Furthermore, in circumstances where the proposed legislation will have a fundamental impact on the rights of the child, the active involvement of all stakeholders, including children in particular, should be facilitated prior to the adoption of any such legislation and in any subsequent reviews to evaluate the impact of the law on children's rights, wellbeing and development.<sup>81</sup>

**The Commission recommends that Head 49C be revised to appropriately address the rights of the child within the meaning of "age appropriate online content" to include explicit reference and consideration to the evolving capacities of the child and the spectrum of harmful content in this context.**

**The Commission recommends that the appropriateness of certain exemptions under Head 49C require further consideration (such as, for journalistic, educational or research purposes).**

**The Commission further recommends that the development and implementation of this legislation should be informed by consultation with children to ensure a child rights perspective to the legislation.**

### Regulatory framework (Head 50-56)

Heads 50-56 provide the Commission with a range of regulatory powers to address online harmful content, including preparing codes governing standards and practice, user complaints and issues handling (Head 50A), compliance measures (Head 50b and 53-56), developing guidance (Head 51), complaints handling (Head 52A and B) and sanctions (Head 54).

In general terms this is a welcome approach. However, it would be important to ensure specific regard is had to the State's human rights obligations in the design and implementation of these regulatory tools, including online safety codes and guidance.

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<sup>81</sup> Committee on the Rights of the Child, [General comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration \(art. 3, para. 1\)\\*](#), CRC/C/GC/14, at para.35; UN Committee on the Rights of the Child, [Report of the 2014 Day of General Discussion: "Digital media and children's rights"](#), para.87; Council of Europe, [Guidelines to respect, protect and fulfil the rights of the child in the digital environment](#), Recommendation CM/Rec(2018)7 of the Committee of Ministers, at para.72.

It is noted that Head 50A section 3(m) and Head 51 section 3(n) require the Media Commission to have regard to fundamental rights of users and operators of designated online services in preparing online safety codes and guidance materials respectively. However, this should be set out as a primary consideration rather than a final consideration in a long list of other considerations. It may be of benefit to spell out such considerations in clear and distinct terms, such as for example, taking care to distinguish between the position of users and operators, as appropriate. It may further benefit from express reference to equality and non-discrimination, as appropriate.

**The Commission recommends that Heads 50A and 51A be revised to emphasise that the primary consideration of the Media Commission in the design and implementation of its regulatory tools should be the fundamental rights of users and operators. This should be set out in clear and distinct terms, taking care to distinguish between the position of users and operators as appropriate.**

### [Accessibility of services for persons with disabilities](#)

Article 7 of the Directive makes special provision for accessibility of services for persons with disabilities.

Article 7(1) provides that:

“Member States shall ensure, without undue delay, that services provided by media service providers under their jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures.”

Article 7(3) sets out that:

“Member States should encourage media service providers to develop accessibility action plans in respect of continuously and progressively making their services more accessible to persons with disabilities.”

Article 7(4) provides that:

“[e]ach Member State shall designate a single, easily accessible, including by persons with disabilities, and publicly available online point of contact for providing information and receiving complaints regarding any accessibility issues referred to in this Article.”



Finally, Article 7(5) states that

“Member States shall ensure that emergency information, including public communications and announcements in natural disaster situations, which is made available to the public through audio-visual media services, is provided in a manner which is accessible to persons with disabilities.”

It is noted that the State has flexibility in its approach to transposition.<sup>82</sup> In this regard, it would appear, although not explicitly stated in the General Scheme itself that the State seeks to implement Article 7 through media codes<sup>83</sup> and media rules<sup>84</sup>. It is of some concern that beyond explicit reference in the Commission’s objective under Head 9, and its annual reporting obligations under Head 35, there is limited reference to accessibility of services for persons with disabilities in the General Scheme.

Ensuring access to the media and online services, in an accessible manner, is critical for fulfilling the fundamental rights of person with disabilities and ensuring the full and meaningful participation within public and political life. In relation to access to the internet, the Committee on the Rights of Persons with Disabilities sets out that States should promote access:

“through the application of mandatory accessibility standards. Information and communication should be available in easy-to-read formats and augmentative and alternative modes and methods to persons with disabilities who use such formats, modes and methods.”<sup>85</sup>

The Committee on the Rights of Children states that children with disabilities, should be:

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<sup>82</sup> Article 288 TFEU, that States have freedom in respect of the forms and methods of transposition. This is important to bear in mind in this context as it appears from a review of the Directive and the outline provisions of the General Scheme that many specific obligations are not expressly reflected in the proposed Bill. It is unclear why this is so: whether the State considers that certain elements are transposed already or through other measures; or whether it is intended to give effect to certain measures through secondary legislation adopted under and in accordance with the primary legislation when enacted. Secondly, at least in certain respects, the Directive provides for minimum harmonisation and permits measures to adopt stricter measures: see e.g. Article 4 and the specific rules in relation to minors (recital 20) and the possibility of voluntary arrangements with video-sharing platform providers (Article 28b).

<sup>83</sup> Article 62(2)(J) of the General Scheme. See -

<sup>84</sup> Article 70 of the General Scheme. See

<sup>85</sup> Committee on the Rights of Persons with Disabilities, [General comment No. 2 \(2014\) Article 9: Accessibility](#), CRPD/C/GC/2, 22 May 2014, para 21.

“provided with the appropriate technology and other services and/or languages, e.g. Braille and sign language, which would enable them to have access to all forms of media, including television, radio and printed material as well as new information and communication technologies and systems, such as the Internet.”<sup>86</sup>

**The Commission recommends that the General Scheme be revised to explicitly reflect Article 7 of the Directive, to ensure that people with disabilities have meaningful access and can engage with media and online services.**

**The Commission recommends that the development and implementation of this legislation be guided by the State’s obligations under the CRPD and in consultation with persons with disabilities and representative groups of persons with disabilities, to ensure any proposed measures meet the requirements of persons with disabilities.**

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<sup>86</sup> Committee on the Rights of the Child, [General comment No. 9 \(2006\) The rights of children with disabilities](#), CRC/C/GC/9, 27 February 2007, para 37-38.



**16 – 22 Sráid na Faiche,  
Baile Átha Cliath, D07 CR20**  
16 – 22 Green Street,  
Dublin, D07 CR20

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