Joint Committee on Justice and Equality
Hearing on Online Harassment and Harmful Communications
Opening Statement by Dr. TJ McIntyre, Digital Rights Ireland
16 October 2019

1. Introduction

1.1 I am very grateful to the Committee for the opportunity to make submissions on the issue of online harassment and harmful communications. I am an Associate Professor in the UCD Sutherland School of Law, practising solicitor, and chair of Digital Rights Ireland (DRI). DRI is a civil liberties group focusing on fundamental rights in the context of modern technology. DRI is a member of European Digital Rights, an international non-profit association of non-profit, non-governmental organisations. At the domestic level we work with other civil rights groups such as the Irish Council for Civil Liberties. DRI has appeared as a plaintiff before the European Court of Justice in the landmark case of *Digital Rights Ireland and Seitlinger*[1] and as *amicus curiae* before the European Court of Justice in *Schrems v. Data Protection Commissioner*[2] and the US Federal Court of Appeals in *Microsoft v. United States*.[3]

1.2 Ronan Lupton BL has shared his submissions with me and I agree with his conclusions and recommendations. In this statement I would like to complement the points he makes by expanding on two areas: how An Garda Síochána investigates online harassment,[4] and the human rights framework which must be taken into account in considering proposals for a Digital Safety Commissioner or similar body.

2. Garda training, resources and investigative powers

[1] Joined Cases C-293/12 & C-594/12, judgment of 8 April 2014.
[2] Case C-362/14, judgment of 6 October 2015.
[3] 829 F.3d 197 (2d Cir. 2016).
[4] Meant here as a catch-all term to include other harmful communications such as racial abuse and non-consensual intimate images.

2.1 The work of the Internet Content Advisory Group[5] and the Law Reform Commission[6] has given an overview of the substantive law in this area. Unfortunately we have nothing similar in relation to the practical and procedural issues of enforcing that law. In particular, there does not appear to be any detailed empirical research into how the Garda handles complaints regarding online harassment.[7]

2.2 It is, to put it mildly, difficult to make policy or new law without knowing how the existing law is being enforced. The Garda Inspectorate has indicated that it plans to examine the investigation of cybercrime in general and it would be extremely desirable if it were to look at the area of online harassment in particular. However the evidence we do have suggests that there are a number of systemic issues which need to be addressed.

Online crimes treated as civil matters

2.3 The first is an unwillingness to commence investigations into cases of online harassment, with victims who approach the Garda being told that the conduct is not a crime or that there is nothing that can be done.

2.4 This is a longstanding problem. In 2013 DRI appeared before the Oireachtas Joint Committee on Transport and Communications as part of a series of hearings on Social Media Ethics and Communications, following the suicide of Donegal teenager Erin Gallagher. In his written submissions for that hearing Fergal Crehan BL pointed out that "It was reported after the death of Erin Gallagher that her mother was told by

[5] Internet Content Governance Advisory Group, 'Report of the Internet Content Governance Advisory Group' (Dublin: Department of Communications, Energy and Natural Resources, 2014), http://www.dcenr.gov.ie/NR/rdonlyres/0BCE1511-508E-4E97-B1A9-23A6BE9124AA/0/InternetContentGovernanceAdvisoryGroup.pdf.

[6] Law Reform Commission, 'Report on Harmful Communications and Digital Safety' (Dublin, 2016), http://www.lawreform.ie/_fileupload/Final%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety%2021%20Sept%20PM.pdf.

[7] T.J. McIntyre, 'Cybercrime in Ireland: Towards a Research Agenda', in *Routledge Handbook of Irish Criminology*, ed. Deirdre Healy et al. (Abingdon, Oxon: Routledge, 2015); there is a body of research regarding hate crimes online, but that generally focuses on the substantive law and not the procedural mechanisms and resources needed to enforce it. See e.g. Jennifer Schweppe and Dermot Walsh, 'Combating Racism and Xenophobia through the Criminal Law', *A Report Commissioned by the National Action Plan Against Racism, Centre for Criminal Justice, University of Limerick*, 2008, chap. 8, http://reportracism.ie/website/omi/omiwebv6.nsf/page/AXBN-7UPE6D1121207-en/$File/Combating%20Racism%20with%20the%20Criminal%20Law.pdf.

Gardaí that there was nothing they could do in respect of the bullying. This was simply not so".

2.5 Six years later, the current case of the Ryan family from County Meath (who were subject to racial abuse after appearing in advertising for Lidl) illustrates the same problem. Ms. Ryan reported abuse she received on Twitter to the Garda but "was told it was a civil matter".[8] However that abuse should have prompted an investigation into whether individual users were guilty of harassment,[9] and later posts against the Ryan family should also have been investigated as threats to kill or cause serious harm.[10] This case highlights the continued need for greater training for gardaí throughout the country in how to handle cases of online harassment.

Cyber Crime Bureau and local resources inadequate

2.6 The second area of concern is in relation to Garda resources for policing online harassment. The Committee has already heard from Chief Superintendent Michael Gubbins and Detective Superintendent Pat Ryan to the effect that the Garda Cyber Crime Bureau has 32 staff members with an identified requirement of 120. This has resulted in investigations of a range of serious crimes, including possession and distribution of child abuse images, being delayed for up to six years and there are ongoing delays in forensic examination.[11]

---

[8] Kitty Holland, 'Couple in Ad Campaign Left "Shaking and Fearful" after Online Abuse', The Irish Times, 27 September 2019, https://www.irishtimes.com/news/social-affairs/couple-in-ad-campaign-left-shaking-and-fearful-after-online-abuse-1.4031549.

[9] Contrary to s.10 of the Non-Fatal Offences Against the Person Act 1997.

[10] Contrary to s.5 of the 1997 Act. A Garda investigation is now underway, following the publicity given to the case. Shauna Bowers, 'Gardaí "Identifying Individuals" behind Abuse of Lidl Advert Couple', The Irish Times, 9 October 2019, https://www.irishtimes.com/news/crime-and-law/garda%C3%AD-identifying-individuals-behind-abuse-of-lidl-advert-couple-1.4045369.

[11] Garda Síochána Inspectorate, 'Responding to Child Sexual Abuse - A Follow up Review' (Dublin, December 2017), chap. 4, http://www.gsinsp.ie/en/GSINSP/Responding%20to%20Child%20Sexual%20Abuse%20-%20A%20follow%20up%20review%20-%20Full%20Report.pdf/Files/Responding%20to%20Child%20Sexual%20Abuse%20-%20A%20follow%20up%20review%20-%20Full%20Report.pdf; Tom Brady, 'Computer Crime Cases Facing Six-Year Delay Due to Garda Backlog', Irish Independent, 1 November 2016, https://www.independent.ie/business/computer-crime-cases-facing-sixyear-delay-due-to-garda-backlog-35177764.html; Tom Brady, 'Backlog in Cybercrime Including Child Abuse Dates Back Two Years', *Irish Independent*, 3 February 2018, https://www.independent.ie/irish-news/backlog-in-cybercrime-including-child-abuse-dates-back-two-years-36562483.html; Conor Gallagher, 'Couple to Take Garda to Court over Delay in Child Pornography Case', The Irish Times, 10 April 2019,

2.7 The Commission on the Future of Policing in Ireland has recently stated that: "Even in the absence of comprehensive data about cybercrime in Ireland, it is already clear to us that the capacity and expertise of the existing Garda National Cyber Crime Bureau should be substantially expanded as a matter of urgency, and personnel appointments in that field should be fast tracked".[12] Similarly, at the level of individual Garda stations there have been complaints that social media sites cannot be viewed using station computers, leaving gardaí to investigate using their personal devices.[13]

2.8 As long as this level of under-resourcing continues it is hard to see how any significant number of cases of online harassment can be pursued, creating the risk that any expansion of the criminal law in this area will go unenforced.

Failure to replace data retention law with rights compliant access regime

2.9 A third point relates to access to data held by internet connectivity providers such as eir or Virgin Media. As members of the Committee will recall from previous hearings on the Heads of the Communications (Retention of Data) Bill 2017, this data has been accessed using the Communications (Retention of Data) Act 2011. However the High Court in *Dwyer v. Commissioner of An Garda Síochána*[14] found the core elements of that Act to be incompatible with European Union law, particularly by allowing access to internet data without prior authorisation by a judge or equivalent independent authority.

https://www.irishtimes.com/news/crime-and-law/couple-to-take-garda-to-court-over-delay-in-child-pornography-case-1.3855051.

[12] Commission on the Future of Policing in Ireland, 'The Future of Policing in Ireland' (Dublin, December 2018), 27, http://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland(web).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland(web).pdf.

[13] Cathal McMahon, 'Gardaí Dealing with Avalanche of Social Media Complaints Claim "unnecessary Obstacles" Put in the Way by Management and Web Firms', Independent.ie, 29 April 2017, http://www.independent.ie/irish-news/news/garda-dealing-with-avalanche-of-social-media-complaints-claim-unnecessary-obstacles-put-in-the-way-by-management-and-web-firms-35664310.html.

[14] [2018] IEHC 685.

2.10 Those provisions remain in force while the judgment is appealed,[15] but the 2011 Act is now a zombie lurching towards its inevitable dispatch by the Supreme Court. This is already undermining investigations[16] by making it likely that data obtained after the High Court judgment will be inadmissible in any subsequent prosecution.[17]

2.11 Despite this, the Department of Justice and Equality has failed to progress legislation to reform the law on access to internet data and there has been no public movement on this point since this Committee held its hearings on the Heads of the Communications (Retention of Data) Bill 2017.

3. Human rights framework

3.1 DRI is concerned that some proposals in this area, in particular the Law Reform Commission's model for a Digital Safety Commissioner, fail to take into account key elements of the right to freedom of expression under the Constitution and the European Convention on Human Rights (ECHR).

Failure to define speech which may be removed

3.2 The starting point is the need for clear definition of what speech is prohibited or subject to removal. Article 10 ECHR provides that restrictions on freedom of expression must be "prescribed by law". The leading judgment on this point is *Sunday Times v. United Kingdom*[18] where the European Court of Human Rights (ECtHR) held that it requires precision and predictability. First, "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case". Secondly, "a norm cannot

[15] Aodhan O'Faolain, 'State to Appeal Graham Dwyer Data-Retention Ruling', The Irish Times, 11 January 2019, https://www.irishtimes.com/news/crime-and-law/courts/supreme-court/state-to-appeal-graham-dwyer-data-retention-ruling-1.3754773.
[16] Maeve Sheehan and Ralph Riegel, 'Gardai Trawl through Cases in Aftermath of Graham Dwyer's Court Victory', Irish Independent, 9 December 2018, https://www.independent.ie/irish-news/gardai-trawl-through-cases-in-aftermath-of-graham-dwyers-court-victory-37608121.html.
[17] The High Court judgment in effect puts down a marker after which use of the legislation will probably constitute a 'deliberate and conscious' violation of constitutional rights. For details on the applicable test see Yvonne Marie Daly, 'Overruling the Protectionist Exclusionary Rule: DPP v JC', *The International Journal of Evidence & Proof* 19, no. 4 (1 October 2015): 270–80, https://doi.org/10.1177/1365712715601764.
[18] Series A No 30, (1979-80) 2 EHRR 245.

be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[19]

3.3 Unfortunately, the Harmful Communications and Digital Safety Bill proposed by the Law Reform Commission does not meet this standard. Part 3 of the Bill provides for the establishment of a Digital Safety Commissioner and a takedown procedure in relation to "harmful digital communications" but does not define what is meant by that term other than to say it "includes the harmful communications referred to in sections 4 to 8 [*the provisions relating to offences regarding intimate images, harassment and stalking*]".[20] By leaving the term open-ended, the Bill would require service providers to prohibit and remove content on a subjective basis without any legal standard. For these powers to comply with the ECHR it is clear that the term "harmful digital communications" would have to be defined in a way which makes it clear what speech is and is not covered.

Failure to provide procedural safeguards

3.4 Freedom of expression requires that fair procedures should be in place in relation to any decision by the state to take down material, which should generally include notice to the affected individual, an opportunity to be heard and a right of appeal to a judicial body against a decision to take down.

3.5 At a constitutional level the principle of *audi alteram partem* in relation to freedom of expression has been established in a number of cases, notably the decision of the Supreme Court in *Irish Family Planning Association v. Ryan*[21] which quashed a decision of the Censorship of Publications Board banning a family planning booklet where the plaintiff had not been given an opportunity to make representations before a decision was made.

[19] Paras. 47 and 49.
[20] Section 21.
[21] [1979] 1 IR 295

3.6 These procedural safeguards have also been developed under the ECHR. One of the most important cases here is *Ekin Association v. France*[22] which held that in relation to prior restraints on speech – i.e. those imposed prior to a full judicial hearing – "a legal framework is required, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power".[23] In that case a law which gave the Minister of the Interior power to ban foreign publications by administrative action was held to be contrary to Article 10 ECHR. Central to this finding were the facts that bans took place prior to any hearing while the only judicial review did not consider the merits and was not automatic but required the publisher to apply to the courts.[24] Consequently, the Court took the view that the procedures provided "insufficient guarantees against abuse".

3.7 The principles established in the ECtHR caselaw were recently summarised by the Committee of Ministers of the Council of Europe in the 2018 *Recommendation on the roles and responsibilities of internet intermediaries*:

> "1.3.2. State authorities should obtain an order by a judicial authority or other independent administrative authority, whose decisions are subject to judicial review, when demanding intermediaries to restrict access to content. This does not apply in cases concerning content that is illegal irrespective of context, such as content involving child sexual abuse material, or in cases where expedited measures are required in accordance with the conditions prescribed in Article 10 of the Convention.
>
> 1.3.3. When internet intermediaries restrict access to third-party content based on a State order, State authorities should ensure that effective redress mechanisms are made available and adhere to applicable procedural safeguards…
>
> 2.3.3. Any restriction of content should be limited in scope to the precise remit of the order or request and should be accompanied by information to the public, explaining which content has been restricted and on what legal basis. Notice should also be given to the user and other affected parties, unless this interferes with ongoing law-enforcement activities, including information on

[22] App. no. 39288/98, judgment of 17 July 2001.
[23] Para. 58.
[24] Paras. 58-65.

procedural safeguards, opportunities for adversarial procedures for both parties as appropriate and available redress mechanisms."[25]

3.8 The Law Reform Commission's proposals for a Digital Safety Commissioner do not, however, address these points. The Report does not consider the issue of fair procedures for individuals who are affected by decisions to remove content, and the draft Bill contains no provision for an individual to be given notice that their communications may be taken down, no opportunity to be heard, and no appeal against a decision that communications must be removed. As drafted, it would not meet the standards required by the ECHR.

4. Conclusion

4.1 The issue of online harassment has been in the public eye and on the legislative agenda, in one form or another, since 2012. It is disappointing, therefore, that during this period the government has failed to properly resource An Garda Síochána to deal with this area, failed to reform the law on access to internet data, and failed to implement any of the recommendations made by the Internet Content Advisory Group or the Law Reform Commission.[26] As Mr. Lupton points out in his submissions, there is an ongoing debate at European Union level about platform and social media regulation and it is likely we will see proposals for a new Digital Services Act from the new Commission in the next year or so.[27] However this does not do away with the need for action at a domestic level, and in legislating for this area we must ensure that the law complies with both the Constitution and the ECHR.

[25] Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2018)2 on the Roles and Responsibilities of Internet Intermediaries', 2018, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14, emphasis added.
[26] While aspects of the LRC's proposals in relation to a Digital Safety Commissioner are problematic, the majority of its recommendations are largely uncontroversial and should have been addressed a long time ago.
[27] 'EU Draws up Sweeping Rules to Curb Illegal Online Content', The Irish Times, 24 July 2019, https://www.irishtimes.com/business/technology/eu-draws-up-sweeping-rules-to-curb-illegal-online-content-1.3966273.