

Committee on Justice and Equality
Opening Statement by Ronan Lupton*

16 October 2019

1. Introduction and background

- 1.1 Chairperson and members of the Committee on Justice and Equality (the “Committee”), I would like to thank you for the invitation to appear before you and to contribute to your current deliberations and discussions on Internet Safety in Ireland.
- 1.2 I am a practising barrister. I practise in the areas of commercial, competition, chancery, media, and regulatory law. I have taught criminal and constitutional law at professional level. I currently lecturer at UCD on the Data Protection and Privacy Diploma course on a part time basis, in complement to my practice at the Bar.
- 1.3 I chair the Association of Licensed Telecommunications Operators – ALTO, CLG. I am an independent advisor to the ISPCC advising on Internet content and harm related issues. I have also recently been elected an independent non-executive director of the Internet Neutral Exchange Association – INEX, an organisation concerned with Internet peering for the island of Ireland.
- 1.4 Prior to commencing practice at the bar. I was Head of Regulatory Affairs at Verizon in Dublin and I also held a pan-European interconnect policy role.
- 1.5 I commenced my career in telecommunications in 1998, and I have been involved in policy formulation and matters related to the Internet and telecommunications markets since around 2002.

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- 1.6 I have served on the Department of Justice Internet Advisory Board – IAB, the Internet Safety Advisory Council and later the Internet Safety Advisory Committee – ISAC, from 2006 until 2014. Those committees are reformed under the remit of the Minister for Communications and the group are now called the National Advisory Council for Online Safety – NACOS.
- 1.7 I have also served as a non-executive director of the Internet Service Providers Association of Ireland – ISPAI, which operates and supervises the hotline.ie service.
- 1.8 I was appointed as a member of the Internet Content Governance Advisory Group – ICGAG,¹ in 2014 and I have also contributed to the work of the Law Reform Commission and the Report on Harmful Communications and Digital Safety.²

2. Positioning

- 2.1 My evidence and remarks to the Committee are made as an independent legal expert.
- 2.2 My evidence should not be attributed to ALTO or to any other organisation that I work with. I have not been asked to present any position in evidence for or on behalf of any organisation or body.
- 2.3 I intend to address three areas:
- (i) Hosts as publishers – eCommerce Directive reforms;
 - (ii) State structural reforms – Accountability; and
 - (iii) Legislation – Making laws relevant.

¹ ICGAG Report: <https://www.dccae.gov.ie/en-ie/communications/publications/Pages/Internet-Content-Governance-Advisory-Group-Report.aspx>

² LRC Report: <https://www.lawreform.ie/news/report-on-harmful-communications-and-digital-safety.683.html>

3. Hosts as publishers – eCommerce Directive Reforms

3.1 The Committee is likely to have heard from a number of parties, and perhaps formed its own views that simply declaring Internet Hosts as defined in law as publishers,³ might appear to be a “*quick win*” mechanism to solve many of societies issues, or go some way to addressing the harms with which this Committee is concerned.

3.2 A move to legislate in that manner, so as to declare Internet Hosts as publishers is simply not advisable. At very minimum a coordinated and clear approach must be taken by the State in this area at EU level,⁴ to ensure adherence to European Law and legal norms.

3.3 Recently, Ursula von der Leyen the president-elect of the European Commission, proposed a Digital Services Act which proposes to:

"upgrade the Union's liability and safety rules for digital platforms, services and products and complete our Digital Single Market.

Digitalisation and cyber are two sides of the same coin. This starts with a different mindset: We need to move from “need to know” to “need to share”.

We should do this through a joint Cyber Unit to speed up information sharing and better protect ourselves. The public sector has an important role in stimulating digital transformation. I want the European Commission to lead by example.”⁵

3.4 It is becoming increasingly clear that the European Commission will reform the eCommerce Directive 2000/31/EC⁶ to include some form of Good Samaritan clause to reassure intermediaries that they will not be held liable for hosting

³ Article 14, Directive 2000/31/EC or S.I. 68 of 2003 – Regulation 18.

⁴ Previously, the Department of Enterprise, Trade and Employment would have had this area under its remit. That would now logically be DBEI under Minister Humphreys.

⁵ <https://ec.europa.eu/digital-single-market/en/new-eu-rules-e-commerce>

⁶ S.I. 68 of 2003 – Regulation 18, will change in consequence.

illegal material of which they only became recently fixed with knowledge of, either through monitoring or reporting by users.

- 3.5 Regrettably, from an economic perspective, there is no one-size-fits-all liability rule for various types of platforms and various forms of harm. This committee should exercise caution signalling that national law reform could follow that would be out of synchronisation with, or incompatible with European Union law.
- 3.6 Ideally, a duty of care for online hosting platforms will vary depending on several general factors, e.g., costs, notification systems, harm prevention reporting, and the extent of the harms.
- 3.7 I note that platforms rely upon virtual Community Rules that are deployed in a manner that is inconsistent with laws in the jurisdictions in which they operate. For example, defamation law can be assessed by online intermediaries in differing ways, and by reference to their own Community Rules, rather than properly and consistent with what the law might say on its face. They may also not apply legal tests relevant to the jurisdiction from which a complaint has been raised.
- 3.8 Applications for disclosure order or *Norwich Pharamacal* Orders are becoming more regular features before the courts, and proposed reforms to this area were addressed in the ICGAG Report in 2014 and later LRC Report (effectively adopting the ICGAG reform proposals). Such reforms may need to feature in the forthcoming review of Civil Justice, but it is unknown whether they will feature at this time.
- 3.9 Lately, experience before the Irish Courts involving Hosts and interlocutory applications for the removal and restraint concerning harmful and defamatory content hosted and covered by intermediary liability defences has resulted in some decisions that are inconsistent with the law⁷ and the latest jurisprudence of the Court of Justice of the European Union – CJEU.⁸

⁷ Article 14 2000/31/EC

⁸ *Muwema v Facebook Ireland Ltd.* (High Court and Court of Appeal)

3.10 Some passages of the recent *Eva Glawischnig-Piesczek* case,⁹ case C-18/18 are worth reflecting on here and underpin my comments in relation to the inappropriateness of Ireland simply legislating that Hosts be declared publishers without first considering European Union law (with emphasis added):

“(45) *The limitations of the liability of intermediary service providers established in this directive do not affect the possibility of **injunctions of different kinds**; such injunctions can in particular consist of orders by **courts or administrative authorities** requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.*

(46) *In order to benefit **from a limitation of liability**, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken **in the observance of the principle of freedom of expression and of procedures established for this purpose at national level**; this Directive does **not affect Member States’ possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information**.¹⁰*

(47) *Member States **are prevented from imposing a monitoring obligation on service providers**¹¹ only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, **in particular, does not affect orders by national authorities in accordance with national legislation**.*

(48) *This Directive does not affect the possibility for Member States of requiring service providers, **who host information provided by***

⁹ Judgment C-18/18 handed down on 3 October 2019

¹⁰ Such as a Digital Safety Commission or Online Safety Regulator function for civil matters.

¹¹ Note: BAI submission <https://www.bai.ie/en/bai-publishes-submission-on-regulation-of-harmful-online-content-implementation-of-new-audiovisual-media-services-directive/> pages 58, 59 and 60 – which are inconsistent with EU law as matters stand. Albeit that they attempt to pay lip service to the eCommerce packages at p. 78 and 79.

recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.”

- 3.11 Article 14 appears to me to logically act as a disincentive to hosts or intermediaries to proactively monitor the legality of the material they host because doing so would undoubtedly result in the loss of the host defence or liability exemption.¹² It is entirely understandable that a business is unlikely to spend money or deploy resources on items that are not required.
- 3.12 It is my submission, that at best, the Committee should only be recommending some form of a duty of care consistent with a Digital Safety Commissioner or Online Safety function for civil matters only.
- 3.13 The Committee should not, in my opinion, be recommending making Hosts publishers in national law at this time.
- 3.14 Furthermore, having watched the Committee’s work in recent weeks, I do not believe that the principles and phenomenon of “*counter speech*” is consistent with Irish law as it presently stands and by reference to Article 40. 3. 2° of the Constitution:

“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

- 3.15 While it might be alright for those who have a voice or an equivalent platform to begin with in terms of equality of arms, to respond or inoculate using Counter Speech, it doesn’t disincentivise recidivist and bad behaviour.¹³
- 3.16 Balance is required in law. Any laws should balance the protection of the good name of citizens in law Article 40. 3. 2°, while also protecting the right to freedom of expression Article 40. 6. 1°. i. Legislative incentives to behave, and disincentives in terms of law existing and repeat offending.

¹² *Mulvaney & Ors v The Sporting Exchange Ltd t/a Betfair* [2009] IEHC 133
<http://www.courts.ie/Judgments.nsf/0/669D0A8DA2D31AE2802575A6004E5E63>

¹³ See for example: Ryan family incident over an advert for Lidl.

3.17 For completeness, and in the interests of time on this subject, I propose to associate myself with the remarks and evidence that will be given by Dr TJ McIntyre for Digital Rights Ireland.

4. **State structural reforms – Accountability**

4.1 The only State structures that deal with online harms and misbehaviour sit within the criminal justice area. I have had the pleasure of working with and being exposed to the significantly underfunded and under-resourced departments and functions existing within the State during my time in Verizon and while serving on the group now known as NACOS.

4.2 Such significant under funding and under-resourcing means that the Gardai are ill-equipped to deal with the most serious criminality and online harms, it can also be said that scale dictates that crimes that are of a limited nature can go unpunished.

4.3 One organisation called *hotline.ie* that operates under the auspices of the ISPAI deals with consumer reported content. That is not to take away from the good advocacy work of the ISPCC, CyberSafeIreland, Rape Crisis Network, Barnardos, SpunOut, ABC National Bullying and Resource Centre, and some other NGOs.

4.4 It remains the case that the following eight Government Departments have significant interests in the issue of online safety, rights, harms and structural funding:

- (i) Justice (Criminal Justice and Policy);
- (ii) Communications (Central EU Coordination AVMSD, etc.);
- (iii) Business, Enterprise and Innovation (Copyright, Competition, Enterprise);
- (iv) Education (National Curriculum);
- (v) Children and Youth Affairs (Tusla, Child Protection);
- (vi) Social Welfare (Access in some instances);

- (vii) Public Expenditure and Reform (Budget allocation and regulation); and
- (viii) Taoiseach (Information Society, Data Protection).

- 4.5 It is very disappointing that no reform action has been taken by the State in relation to the 31 Recommendations made by ICGAG in 2014 and the various recommendations made by Law Reform Commission – LRC, Report on Harmful Communications and Digital Safety mentioned previously.
- 4.6 The ICGAG and LRC reports were based upon serious online activity that gave rise to public scandal and various calls to action on the part of legislators.¹⁴
- 4.7 It is also important to note, that both the ICGAG and LRC reports are now quite old, or simply out of date when considering the pace of technological change.
- 4.8 The reports predate certain serious online scandals which to my mind must shift certain findings set out in the reports and recommendations. However, the core work and recommendations remain good and must be viewed as a decent starting point for legislators of all political persuasions.
- 4.9 In an unprecedented Committee hearing in February 2018, wherein four cabinet ministers (Bruton, Flanagan, Naughten, and Zappone) attended the Committee on Children and Youth Affairs, the Minister for Justice has previously made the position clear with regard to criminal justice matters.¹⁵ Such matters will never fall within the ambit of any supervisory regulatory body contemplated.
- 4.10 It may well be the case that a future Online Safety Office or Digital Safety Commissioner becomes a reporting unit for civil matters only, and with powers only for Notice and Takedown functions for online content.
- 4.11 Such entities will have to operate within the strictures of European Law concerning intermediary liability and freedoms and will more than likely be

¹⁴ Shane McEntee T.D. (RIP); Viral video at Slane Castle; and various cases of misidentification online.

¹⁵ Committee on Children and Youth Affairs – 21 February 2018:
https://www.oireachtas.ie/en/debates/debate/joint_committee_on_children_and_youth_affairs/2018-02-21/3/

faced with companies who are well able to meet and defeat them before arbitrators, courts or tribunals established to deal with appeals.

4.12 I note with some disappointment that the General Data Protection Regulation – GDPR,¹⁶ has been pitched in Ireland as being an all-encompassing online child or other form of societal protection instrument. Making such a case is incorrect.

4.13 While GDPR contains some limited protections in relation to conditions applicable to a child’s consent online,¹⁷ it is fundamentally not an online abuse or protection instrument in the way that has been assumed by some. It is quite clear that the provisions of Article 8 are dependent on the lawfulness of processing and legitimate interests arising under Article 6.

4.14 GDPR is about using data responsibly and appreciating that its protection is a fundamental right.¹⁸ This is not at all in conflict with the digital economy or digital agenda.

4.15 The issue of age verification is certainly a matter that this Committee should be analysing in terms of a few themes:

- (i) forward looking legislation;
- (ii) vested interests;
- (iii) workable solutions that are compliant with law and regulation;
and
- (iv) not legislating in a manner that is inconsistent with European Law norms.

4.16 It is my submission in terms of accountability, that the silo-type positioning of the State in relation to the Internet, online content and abuse issues which fall

¹⁶ Regulation (EU) 2016/679

¹⁷ GDPR Article 8 and Recitals 38, 58, 65, 71, and 75.

¹⁸ Treaty for the Functioning of the European Union – TFEU, Article 16; Charter of Fundamental Rights of the European Union – CFREU, Article 8.

within both the civil and criminal spheres remain in a position that is best described as not being fit for purpose.

4.17 A recent example of this arises in the context of the work of the Office of the Data Protection Commissioner. A regulator who since the implementation of GDPR is effectively regulating more than three quarters of the world's tech companies in Dublin and who can't obtain resource or budget adequate to proceed in an efficient manner, while gearing up to deal with the State under the Public Services Card – PSC, debacle. This is a most unsatisfactory state of affairs when the Ireland Inc. reputation and inward investment is at stake. It is also most unsatisfactory that the State appears presently to be awaiting, or even calling for enforcement action. This is not messaging that indicates that the State is taking compliance with laws, in the defence of the rights of citizens, as seriously as it should.

4.18 Separately, as a nation we have operated under and permitted an era of self-regulation for almost twenty years. Self-regulation only works if incentives exist to promote compliance with laws and societal norms.

4.19 It is my submission that self-regulation has not worked in a manner consistent with the law and general requirements that the public and wider society believe are necessary in modern Ireland. It may be that with enhanced legislation (hate speech, privacy, defamation, and criminal laws) then we may be able promote better forms of and adherence to self-regulation, however it might be the case that the time has elapsed for such an approach to be maintained.

5. **Legislation – Making laws relevant**

5.1 It is my view that the Committee should consider and report upon the following pieces of legislation, which are to my mind no longer fit for purpose, that is, when considering the issue of online abuse, harms, and content control in both the civil and criminal law fields:

- (i) Prohibition of Incitement to Hatred Act, 1989;
- (ii) Criminal Justice (Public Order) Act, 1994;

- (iii) Non-Fatal Offences Against the Person Act, 1997;
- (iv) Child Trafficking and Pornography Act, 1998;
- (v) Criminal Justice (Theft and Fraud) Offences Act, 2001; and
- (vi) Defamation Act, 2009.

- 5.2 (i) The *Prohibition of Incitement to Hatred Act, 1989* is notoriously difficult to decipher, let alone to prosecute. Reforming (or repealing) this piece of legislation to cater for various forms of hate speech offline, and the equivalent online misbehaviour, which has been clear recently and which is currently being experienced, would act as an incentive and disincentive in terms of the behaviour of citizens.
- 5.3 (ii) The *Criminal Justice (Public Order) Act, 1994* requires a general overhaul. In particular, offences in relation to the online organisation of activities in public places that are offensive and obstructive. That is over and above the already codified offences within the 1994 Act.
- 5.4 (iii) The *Non-Fatal Offences Against the Person Act, 1997* has been widely discussed in the ICGAG, LRC and Bill presented by Brendan Howlin T.D. It is quite clear that section 10, dealing with the issue of Harassment, is no longer fit for purpose when dealing with online harms and crimes. I should also point out that some of the proposals in the Howlin Bill are useful. However, any future Bill will require significant re-drafting in terms of the appearance of strict liability offences. There are also some other areas in the Bill which will require significant revision.
- 5.5 (iv) The *Child Trafficking and Pornography Act, 1998* the Committee should note that the language deployed in this Act, which is designed to deal with some of the most serious offences on the Statute Book, is seriously outdated. Another issue arising is the lack of a Good Samaritan clause of good actors, or certain groups, permitted to hold content blocking lists without fear of prosecution for doing so. Updating this legislation might also provide a logical legislative home for revenge porn offences.

- 5.6 (v) The *Criminal Justice (Theft and Fraud Offences) Act*, 2001 requires general attention. While it may be argued that it sits comfortably with the *Criminal Justice (Offences Relating to Information Systems) Act* 2017, the 2001 Act and an updated version of it (*Theft, Fraud and Online Offences*), might provide a suitable place to codify offences that are more common place now, e.g., up skirting, revenge porn, honey potting, etc.
- 5.7 (vi) The *Defamation Act, 2009* now requires revision. In fact, the provisions of the 2009 Act, at section 5 stipulate and say that review is required “*not later than 5 years after the passing of this Act*”. The said required review does not appear to have been adhered to so far by the State. A number of important issues now arise in terms of the Internet,¹⁹ the defence of Innocent Publication per section 27,²⁰ and its interworking with the eCommerce Directive and recent jurisprudence of the CJEU.
- 5.8 I note also, that the Courts have been prosecuting up-skirting offences utilising a provision that is somewhat buried in the *Criminal Law (Sexual Offences) Act* 2017 at Part 8, Miscellaneous section 45, dealing with *Exposure, offensive conduct of a sexual nature*. If this is the only place where offences such as this can be prosecuted, then a very serious and urgent review and revision is now required.
- 5.9 I believe that there may be scope for a Privacy Act for Ireland in the near future. However, I have serious concerns over Bills previously drafted seeking to deal with the issue of Privacy legislation. Those draft Bills may have had a chilling effect on the media and would require significant redrafting to make them fit for purpose.
- 5.10 I also think that we should now be considering some form of malicious communications legislation, not dissimilar to approaches taken in the UK.²¹

¹⁹ See *McAlpine v Bercow* <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/mcalpine-bercow-judgment-24052013.pdf>

²⁰ See *Monroe v Hopkins* <https://www.judiciary.uk/judgments/judgment-monroe-v-hopkins/>

²¹ Communications Act 2003 – UK legislation for reference.

While Ireland has certain provisions on the Statute Book,²² those provisions are quite outdated at this time and do not properly deal with Internet enabled devices.

5.11 It is clear to me, that regardless of what good work this Committee may do in its deliberations, the various Bills pending before the Oireachtas:

- (i) *Harmful and Malicious Electronic Communications Bill*, 2015;
- (ii) *Harmful Communications and Digital Safety Bill*, 2017;
- (iii) *Children's Digital Protection Bill*, 2018;
- (iv) *Digital Safety Commissioner Bill*, 2018.

will not be dealt with by the time of the next election, and consequently they are all very likely to be abandoned.

5.12 This is also likely to be the case of the Online Safety Act work that has been undertaken by Minister Bruton in recent times. Though as that work is with the civil service in the Department of Communications, there is a stronger chance that a change in Government will not in fact be so detrimental to it.

5.13 I submit that there is a serious body of legislative reform work and structural work required to make our laws relevant. Should the Committee report on this issue, one of the most important features arises at 4.9 above. Criminal Justice matters are not going to be simply handed over to some sort of online Tsar to deal with in isolation, despite what this Committee may have heard recently.

5.14 I submit that we now must enable the various law enforcement authorities, through appropriate legislation, to deal with hate speech.²³ I am disappointed to make this submission, but recent examples already noted in this witness

²² *Postal and Telecommunications Services Act*, 1983; *Interception of Postal Packets and Telecommunications Messages (Regulation) Act*, 1993; and *Communications Regulation (Amendment) Act* 2007

²³ CNN "Ireland has a hate crime problem and its legislation is not fit to deal with it" - <https://edition.cnn.com/2019/10/13/europe/ireland-hate-crimes-intl/index.html>

statement,²⁴ given rise to a pressing need to make our laws more relevant, while seeking to balance the rights of the citizen carefully.

6. Conclusion

6.1 Taking account of the three areas that I have made submissions on. I call on the Committee to take utmost account of current and emergent European Law and policy trends concerning online commerce and safety prior to making any recommendations.

(i) Nationally moving to make Internet Hosts publishers, is not a correct future move and will mean a very undesirable incompatibility with European Union Law;

(ii) Accountability and State structural reforms, may provide for some “*quick wins*” in order to protect the citizen from clear harms that exist; and

(iii) The Statute Book is not up to date when endeavouring to deal with matters arising online in both the civil and criminal spheres of law and the administration of justice in Ireland. This hamstrings the courts, lawyers, and citizens and may result in future judgments that could be costly for the State.

6.2 The Committee must report as widely as it can on the area of legislative reform and in particular concerning criminal justice matters.

6.3 It is quite clear to me that robust laws will act as a disincentive to bad faith actors, particularly in the area of hate speech and criminal justice matters of a sexual and explicit nature.

²⁴ Ryan family example, and ICCL Report “*Lifecycle of a Hate Crime*” by Haynes and Schweppe (2017) <https://www.iccl.ie/wp-content/uploads/2018/04/Life-Cycle-of-a-Hate-Crime-Country-Report-for-Ireland.pdf>

- 6.4 That does not mean that Ireland should be an outlier in the area of online legislation thrusting us into incompatibility with European Union Law and endeavouring to declare Internet Hosts as publishers.
- 6.5 I make myself available to the Committee to clarify anything arising in this Statement.

Ronan Lupton