ICCL submission on the Online Safety and Media Regulation Bill

To: Oireachtas Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht

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Executive summary

The purpose of this submission is to consider the Online Safety and Media Regulation Bill which seeks to, among other things, transpose the amended Audiovisual Media Services Directive [Directive (EU) 2018/1808] into Irish law; to dissolve the Broadcasting Authority of Ireland and to establish a Media Commission which will regulate audiovisual media services, sound media services, and designated online services.

By providing for the Media Commission's regulatory oversight of these services, the Bill provides for the commission to create online safety codes and to issue guidance materials and advisory notices in relation to harmful online content and age-inappropriate online content.

It provides for the commission to audit user complaint mechanisms operated by designated online services; to direct a designated online service to take specified actions, including to remove or restore individual pieces of content; to conduct investigations and inquiries; to issue compliance notices; to issue warning notices if a

service does not provide a satisfactory justification in relation to any alleged non-compliance; and, where the Commission deems necessary, to apply to seek sanctions.

The Bill provides that the Commission may seek: (a) to apply an administrative financial sanction (b) leave of the High Court to compel a designated online service, subject to a warning notice, to take steps that the Commission deems warranted or, (c) leave of the High Court to compel internet service providers to block access to the designated online service in the State.

The wide range of services which the Commission will potentially be able to designate as a "designated online service" will emanate from a pool of online services which facilitate the dissemination of or access to user-generated content. These services include, but are not limited to, social media services; public boards and forums; online gaming services; e-commerce services, where they facilitate the dissemination of or access to user-generated content; private communication services; private online (cloud) storage services; press publications, where they facilitate the dissemination of or access to user-generated content; online search engines; and internet service providers. In respect of private communication services and private online (cloud) storage services, the Bill states that the Commission's powers will "be explicitly limited to matters relating to content which it is a criminal offence to disseminate"[1].

ICCL acknowledges and supports the Government's intention to reduce the painful harm that children and adults suffer on account of material online. However, it's not clear to the ICCL that a significant part of this legislation, by creating vague new online-only offences in respect of very broadly defined services meets the standards of legality, necessity and proportionality. In particular, the proposed law in regards to regulating non-illegal material for cyberbullying, in respect of services that allow users to share, spread or access content that other users have made available, is overly vague and poorly defined to the point that it is not clear who specifically could be subject to and/or regulated under this Bill and/or when.

In addition, passing legislation to allow for the issuing of notices for the removal of content which, for example, is deemed to *likely* cause someone to feel humiliated, is a threshold so low that it could seriously damage individuals' constitutional rights to freedom of expression, to communicate and to privacy. ICCL believes the need to protect individuals' right to freedom of expression and to uphold media freedom is paramount as such freedoms are vital for a healthy, functioning democratic society. Our four main concerns with the general scheme are:

[1] Online Safety and Media Regulation Bill General Scheme, p.109

1) Unconstitutional vagueness in respect of the definition of harmful content
2) Question of ultra vires in respect of commissioner/s role/roles
3) Deployment of codes in a quasi-criminal way
4) Regulation of private communications and private online cloud storage services

This legislation is being passed as part of the State's transposing of the amended Audiovisual Media Services Directive [Directive (EU) 2018/1808] into Irish law. However, while using this as an opportunity to address cyberbullying, this Bill appears to be an overreach.

It is ICCL's position that the State should only regulate online speech that is already criminalised and tightly circumscribed. In addition, we believe an alternative worthy of exploration before resorting to the proposed model would be the establishment of a system on a statutory basis that would allow social media platforms and other online service providers to opt-in to an online harms code, with specific attention given to children. This could see said platforms earn a level of accreditation for their child safety standards with a regulator assessing and monitoring this accordingly.

ICCL submission:

1. The Irish Council for Civil Liberties (ICCL) would like to thank the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media for the opportunity to provide a submission on the General Scheme of the Online Safety and Media Regulation Bill. This submission provides: (Part 1) a brief overview of the relevant human rights framework and the State's obligations in this area, specifically the right to freedom of expression, right to send and receive information, and the right to privacy; (Part 2) the main problems with this Bill; and (Part 3) ICCL's recommendations.

Part 1: Human rights framework

Right to freedom of expression

Irish Constitution

2. Article 40.6.1.i of the Irish Constitution safeguards, "The right of the citizens to express freely their convictions and opinions". The right to freedom of expression is based on the concept that it promotes a free trade of ideas at a marketplace of ideas[2]. The free exchange of ideas is the lifeblood of a democratic and free society. Mature democracies require that a critique of ideas and institutions is tolerated and encouraged.

3. The right to freedom of expression is not an absolute right as it is subject to "public order and morality" and the "authority of the State". However, it should be noted that the Constitution Review Group in 1996 stated that the use of the qualifying phrase "public order and morality" is too general and all-embracing, and it made a similar criticism of the reference to the "authority of the State"[3]. The Irish judiciary has since adopted the proportionality doctrine[4], from the Canadian courts[5] and the European Court of Human Rights, which guides courts when they measure the validity of a rights restriction or limitation. This three-part test obliges courts to determine (1) if the measure has a legitimate aim, (2) if the restriction is rationally connected to its objective, is a sensible way to achieve its aim, and is not arbitrary of unfair and based on irrational considerations and (3) if the restriction is the least intrusive option.

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[2] *Abrams v United States*, 250 US 616 (1916), Judge Oliver Wendell Holmes
[3] Constitution Review Group, *Report of the Constitution Review Group*, May 1996, page http://archive.constitution.ie/reports/crg.pdf
[4] *Heaney v Ireland* [1994] 3 IR 593; *Murphy v IRTC* [1999] 1 IR 12; *Mahon v Post Publications Ltd* [2007] 2 ILRM 1
[5] *R v Oakes* [1986] 1 SCR 103

4. The publication of seditious or indecent matter is also an offence which shall be punishable by law[6]. However, as a member of the Dail recently commented, "there is no clear or comprehensive definition" of sedition[7]. A Law Reform Commission consultation paper previously defined sedition as "the uttering of seditious words, the publication of seditious libels, and conspiracies to do an act for the furtherance of a seditious intention". But it noted there had been no reported cases of seditious libel since the foundation of the State[8] and warned the common law offence of sedition "is dangerously close to incompatibility with Article 40.6.1.i, which specifically refers to 'rightful liberty of expression, including criticism of Government policy'". It also added, "As an offence it has an unsavoury history of suppression of government criticism and has been used as a political muzzle."[9]

European Court of Human Rights

5. Article 10 of the European Convention of Human Rights states:

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

   (2) "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[10]

6. The Irish Supreme Court has previously held that, "Section 2 of the European Convention on Human Rights Act 2003 now requires the Court in interpreting

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[6] Article 40.6.1.i
[7] Labour TD Sean Sherlock speaking in the Dail on 6 November, 2019. Accessed here: <https://www.kildarestreet.com/debates/?id=2019-11-06a.578&s=sedition#g582>
[8] The Law Reform Commission, *Consultation Paper on the Crime of Libel* [LRC 1991], at 214
[9] Ibid, at 217
[10] European Convention on Human Rights. Accessible here: <https://www.echr.coe.int/documents/convention_eng.pdf>

'any statutory provision or rule of law, ……in so far as is possible, subject to the rules of law relating to such interpretation and application, [to] do so in a manner compatible with the State's obligations under the Convention provisions'."[11] As such, it has also held a restriction on freedom of expression, if it is to be permitted pursuant to Article 10(2) of the Convention, must be prescribed by law and necessary in a democratic society. It must also serve a pressing social need and serve one of the listed interests in Article 10 (2)[12].

7. The European Court of Human Rights has previously held that Article 10 not only safeguards "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", adding, "Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."[13]

8. It should be noted that the ECtHR has also held that the phrase "prescribed by law" or "in accordance with the law" does not merely require an identifiable legal basis in domestic law but also relates to the "quality of the law". The domestic law must be accessible and the person concerned should be able to foresee the consequences of the law for themselves[14].

Charter of Fundamental Rights of the European Union

9. Article 11 of the Charter of Fundamental Rights of the European Union enshrines that everyone has the right to freedom of expression and information, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers[15]. Article 11.2 states that the freedom and pluralism of the media shall be respected[16]. Article 12 enshrines that everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters[17]. Article 13 provides that the arts and scientific research shall be free of constraint, and that academic freedom shall be respected[18].

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[11] *Mahon v Post Publications* [2007] 3 IR 338, at 59, Mr Justice Fennelly.
[12] Ibid, at 60
[13] *Handyside v The United Kingdom*, Application no. 5493/72
[14] *Malone v The United Kingdom*, Application no. 8691/79
[15] Charter of Fundamental Rights of the European Union. Accessible here: <https://www.europarl.europa.eu/charter/pdf/text_en.pdf>
[16] Ibid
[17] Ibid
[18] Ibid

International Covenant on Civil and Political Rights

10. Article 19.1 of the International Covenant on Civil and Political Rights provides that, "Everyone shall have the right to hold opinions without interference."[19] The fundamental right to freedom of expression is also recognised in many other international human rights charters[20].

Right to send and receive information

Irish Constitution

11. Somewhat intertwined with the right to freedom of expression is the unenumerated right to communicate, under Article 40.3.1. The Irish courts have recognised the right to communicate as a right which can "take many forms"[21]; as "one of the most basic rights of man"[22]; and that "the right of a free press to communicate information without let or restraint is intrinsic to a free and democratic society"[23].

European Court of Human Rights

12. As previously mentioned, Article 10 of the European Convention on Human Rights includes the right "to receive and impart information and ideas without interference by public authority and regardless of frontiers", pursuant to Article 10(2). In respect of this right, the ECtHR has strongly upheld the role of the press as a "watchdog" in a democratic society and affixed its job to impart information and ideas on all matters of public interest to the public's right to receive said information and ideas[24]. The ECtHR has also recognised that NGOs play a

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[19] International Covenant on Civil and Political Rights. Accessible here: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

[20] The right to freedom of expression is asserted in Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights (ICCPR); Article 9 (2) of the African Charter on Human and People's Rights; Article 13.1 of the American Convention on Human Rights19; and principle 23 of the Human Rights Declaration adopted by the Association of Southeast Asian Nations (ASEAN).

[21] *Attorney General v Paperlink Ltd* [1984] ILRM 373, at 31 [1983] IEHC 1, Mr Justice Costelloe.

[22] *Murphy v IRTC* [1999] 1 IR 12, at 24, Mr Justice Barrington held: "It appears to the Court that the right to communicate must be one of the most basic rights of man. Next to the right to nurture it is hard to imagine any right more important to man's survival."

[23] *Mahon v Post Publications* [2007] 3 IR 338, at 377.

[24] *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland*, Case no. 931/13; *Bédat v Switzerland,* Case no. 56925/08; *Axel Springer AG v Germany*, Case no. 39954/08; *The Sunday Times v the United Kingdom (no. 2)*, Application no. 13166/87; *Bladet Tromsø and Stensaas v Norway*, Application no. 21980/93 (1999); *Pedersen and Baadsgaard v Denmark*, Case no. 49017/99; *News Verlags GmbH & Co.KG v Austria*, Application no. 31457/96; D*upuis and Others v France*, Application no. 1914/02; Cam*pos Dâmaso v Portugal*, Application No. 17107/05.

similar role to that of the press in terms of being a "public watchdog"[25]. In addition, it has also held that academic researchers[26] and authors of literature on matters of public concern[27] also enjoy a high level of Article 10 protection. Finally, considering the role played by the internet in the public's access to news and information, the ECtHR has also held that the function of bloggers and popular users of social media may be also assimilated to that of "public watchdogs" in respect of Article 10.[28]

International Covenant on Civil and Political Rights

13. Article 19.2 of the International Covenant on Civil and Political Rights provides that, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[29]

Right to privacy

Irish Constitution

14. The right to privacy is protected by the Constitution with the Irish courts holding that the right to privacy is one of the unenumerated rights which flow from Article 40.3.1 which states, "The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." The right to privacy was first recognised in the marital context[30] before it was extended to communications[31].

European Court of Human Rights

15. Article 8 of the European Convention on Human Rights enshrines the right to respect for private and family life, providing that:

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[25] A*nimal Defenders International v the United Kingdom,* Application no. 48876/08; *Medžlis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina*, Case no. 17224/11; *Cangi v. Turkey,* Application no. 24973/15.
[26] *Başkaya and Okçuoğlu v Turkey,* Application nos. 23536/94 and 24408/94; *Kenedi v Hungary,* Application no. 31475/05; *Gillberg v Sweden,* Application no. 41723/06
[27] *Chauvy and Others v France*, Application no. 64915/01; *Lindon, Otchakovsky-Laurens and July v France,* Application nos. 21279/02 and 36448/02
[28] *Magyar Helsinki Bizottság v. Hungary*, Application no. 18030/11
[29] International Covenant on Civil and Political Rights. Accessible here: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
[30] *McGee v Attorney General* (1974) IR 284
[31] *Kennedy v Ireland* (1987) IR 587.

(1) “Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.”[32]

16. The European Court of Human Rights has previously recognised that “…the mere existence of legislation which allows a system for the secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied. This threat necessarily strikes at freedom of communication between users of the communications services and thereby amounts in itself to an interference with the exercise of the applicants’ rights under Article 8, irrespective of any measures actually taken against them.”[33]

17. It is also noted that the courts must scrutinise whether the growing sophistication of surveillance monitoring operations has been “accompanied by a simultaneous development of legal safeguards securing respect for citizens’ Convention rights… it would defy the purpose of government efforts to keep terrorism at bay, thus restoring citizens’ trust in their abilities to maintain public security, if the terrorist threat were paradoxically substituted for by a perceived threat of unfettered executive power intruding into citizens’ private spheres by virtue of uncontrolled yet far-reaching surveillance techniques and prerogatives.”[34] The ECtHR has also said that member states do *not* “enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance”, adding that the ECtHR “being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the contracting states may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate”[35].

Charter of Fundamental Rights of the European Union

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[32] European Convention on Human Rights. Accessible here: <https://www.echr.coe.int/documents/convention_eng.pdf>
[33] *Weber and Saravia v. Germany*, Application No. 54934/00
[34] *Szabó and Vissy v Hungary.* Application no.: 37138/14. The monitoring techniques at the heart of this case included secret house search and surveillance with recording, opening of letters and parcels, as well as checking and recording the contents of electronic or computerised communications, all without the consent of the persons concerned.
[35] *Klass and Others v Germany*, (1979) 2 EHRR 214 § 36

18. Article 7 of the Charter of Fundamental Rights of the European Union enshrines that everyone has the right to respect for his or her private and family life, home and communications[36]. Article 8 of the Charter states that everyone has the right to the protection of personal data concerning him or her[37]. Article 10 of the Charter provides that everyone has the right to freedom of thought, conscience and religion[38]. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

International Covenant on Civil and Political Rights

19. Article 17.1 of the International Covenant on Civil and Political Rights provides that, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Article 17.2 provides that, "Everyone has the right to the protection of the law against such interference or attacks."[39] The right to privacy is also recognised in many other international human rights charters[40].

United Nations General Assembly

20. On December 16, 2020, the UN General Assembly adopted a draft resolution, "The right to privacy in the digital age"[41], in which it called on States to end violations of the right to privacy and to create conditions to prevent such violations, including ensuring that national legislation complies with their international human rights law obligations. It also called on states not to interfere with technical solutions which secure and protect the confidentiality of digital communications, including encryption. In June 2020, the UN High Commissioner for Human Rights recommended that states promote and protect strong encryption and anonymity options online, and ensure that laws provide for judicial supervision for any lifting of anonymity[42].

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[36] Charter of Fundamental Rights of the European Union. Accessible here: <https://www.europarl.europa.eu/charter/pdf/text_en.pdf>
[37] Ibid
[38] Ibid
[39] International Covenant on Civil and Political Rights. Accessible here: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
[40] The right to privacy is also protected by the Universal Declaration of Human Rights (Article 12); and regional treaties and standards including the African Charter on the Rights and Welfare of the Child (Article 10), the American Convention on Human Rights (Article 11), the African Union Principles on Freedom of Expression (Article 4), the American Declaration of the Rights and Duties of Man (Article 5), and the Arab Charter on Human Rights (Article 21).
[41] General Assembly Adopts 48 Third Committee Resolutions, Proclaims International Day for People of African Descent, Covering Broad Themes of Human Rights (United Nations), December 18, 2020. Accessible here: <https://www.un.org/press/en/2020/ga12304.doc.htm>
[42] Report of the United Nations High Commissioner for Human Rights. Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests, June 25, 2020. Accessible here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25996&LangID=E>

Part 2: Problems with the Online Safety and Media Regulation Bill

Unconstitutional vagueness

Vague definition of harmful content

21. This Bill states that the content it seeks to have either removed or, in certain circumstances, blocked, includes material which is already subject to criminal law and cannot be legally disseminated. This includes child sexual abuse material; content containing or comprising incitement to violence or hatred; and/or public provocation to commit a terrorist offence (Head 49 A (a)). It also refers to content which encourages and/or promotes eating disorders (Head 49 A (c)), and content which encourages and/or promotes self-harm and/or suicide (Head 49 A (d)).

22. Head 49 A (b) seeks to regulate content to help prevent and/or stop cyberbullying. This includes, "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". An explanatory note states that this category of content is legally clear and that its constituent elements can be legally attributed to Article 28b(1)(a) and (b) [of the revised Directive][43] as appropriate, i.e. content which may "impair the physical, mental or moral development of minors" and material open to the general public which would be deemed to concern the "incitement to violence or hatred… based on any grounds referred to in Article 21 of the Charter"[44].

23. However, notwithstanding the explanatory note above, ICCL believes the quoted section above of Head 49 A [b] lacks precision, clarity and certainty, and is too vague, arbitrary and unspecific about the specific content, the publication or dissemination of which could lead to sanction. ICCL's concerns are based on the fact that this could lead to a restriction of speech online which is legal offline, or indeed online when communicated privately. It's also not clear to ICCL how a lawyer or legal practitioner could advise a client about whether the publication of certain content could lead to sanction, based on Head 49 A.

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[43] Directive (EU) 2018/1808 of the European Parliament and of the Council. Accessible here: <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>

[44] Article 21 of the Charter of Fundamental Rights of the European Union relates to non-discrimination, stating: "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."

24. Such vagueness also raises concerns about clarity and foreseeability regarding the effects of this Bill. Any regulation of "harmful online content" interferes with the right to freedom of expression. This may be justifiable if it is prescribed by law, necessary in a democratic society and proportionate to a legitimate aim. In relation to the first limb of that test, the law in question must be both accessible and "foreseeable as to its effects"[45]. The European Court of Human Rights (ECtHR) has made it clear that the right to freedom of expression[46] protects information or ideas that offend, shock and/or disturb the State or any sector of the population[47]. It has also made clear that the criminal law must be clear enough to allow individuals to regulate their behaviour and foresee the consequences of their actions[48]. While this Bill is not a criminal Bill, it is ICCL's position that the principle remains the same. As previously stated by the late Mr Justice Hardiman, "From a legal and constitutional point of view, it is a fundamental value a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful."[49]

25. Head 49A's list of categories of harmful online content is a non-exhaustive list, while Head 49B provides that the commission can propose to the Minister that additional categories of harmful content be added to this list. Given the fundamental human rights involved, any increase of the types of content that could be subjected to restrictions, as per Head 49B, should be subjected to full legislative scrutiny.

26. Under Head 49A (c), the Bill states that it seeks to prevent or reduce the dissemination of material that is *likely* to have a particular effect on the person to which it pertains, and which a reasonable person would conclude was the intention of its dissemination. Although this may be well-intentioned, particularly in terms of protecting children's feelings, this means the Bill will seek to reduce or prevent a *feeling* that does not need to have actually been felt by anyone, including adults, for action to be taken. Given the opinion of an appointed commissioner will decide whether or not material will fit this category, and therefore potentially be subjected to sanction, this means that any sanction will turn on something that will be very difficult to verify evidentially. Material which may lead one person feeling intimidated, threatened, humiliated or persecuted may not lead another, or even the person to whom it pertains, to feel the same.

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[45] *Akçam v Turkey* (2011) 62 EHRR 12 (App No 27520/07) at [91]; similarly, *Grigoriades v Greece* (1999) 27 EHRR 464 (App No 24348/94) at [37].
[46] As per Article 10 of the European Convention on Human Rights; and protected in Ireland by Article 40.6.1 of Bunreacht na hEireann.
[47] *Handyside V UK* (1976) 1 EHRR 737, [1976] ECHR 5, 1 EHRR 737, (1979) 1 EHRR 737, [1976] ECHR 5493/72
[48] *Akçam v Turkey* and *Grigoriades v Greece*
[49] *The People (Director of Public Prosecutions) v Cagney* [2008] 2 IR 111, 121-122

When offences are vaguely defined, there is potential for such definitions to give rise to arbitrary application of the law. They can also be struck down for vagueness[50].

27. ICCL accepts that the intention of this Bill is to reduce harm. However, it believes this subjective opinion-based approach about feelings that *could* be had, in regards to already vaguely defined "harmful" content, could lead to a serious chilling effect on the rights to freedom of speech, opinion, and to the right to send and receive information. It is ICCL's position that if there is to be legal consequences for the publication and/or dissemination of some forms of speech and/or expression, it should be very clearly circumscribed. Any chilling of non-illegal and non-tortious speech and expression by way of vague legal parameters within laws cannot be acceptable, especially given this will see the distribution of material or behaviour online becoming unlawful when such distribution or behaviour is not illegal or unlawful offline.

28. The vagueness of Head 49A leads ICCL to believe that it could be ultimately deemed unconstitutional and/or constitute disproportionate restrictions upon the freedom of expression protected by Article 40.6.1 of the Constitution and freedom of communication protected by Article 40.3.1[51]. There is related precedent in Irish case law for this. In *Dillon v DPP*, Mr Justice De Valera in the High Court held that the definition of a begging offence, under Section 3 of the Vagrancy (Ireland) Act 1847, was too vague and, therefore, interfered with the right to freedom of expression and the right to communicate.[52] Notably, Mr Justice De Valera noted in his judgment that had a 1985 Law Reform Commission report on vagrancy been heeded, Mr Dillon's application would not have been necessary[53].

Self-censorship and prior restraint

29. Such vagueness in law could not just lead to potentially unjustified removal of material, but it could also lead to massively liberty-inhibiting self-censorship and prior restraint. Under the threat of sanction, vague legal definitions could lead to anyone subjected to this Bill, to self-censor when it comes to publishing or broadcasting certain material. It should be noted that the Supreme Court has

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[50] *King v Attorney General* [1981] IR 233; *Dokie v DPP* [2011] 1IR 805; *Douglas v DPP* [2013] IEHC 343

[51] Dr Eoin O'Dell, *A little Parthenon no longer: the proportionality of tobacco packaging restrictions on autonomous communication, political expression and commercial speech*, Northern Ireland Legal Quarterly, 2018. Accessible here: <https://nilq.qub.ac.uk/index.php/nilq/article/view/91>

[52] *Dillon v DPP*, [2007] IEHC 480. Accessible here: <https://www.courts.ie/acc/alfresco/190ef4ec-48ca-47c3-abdd-a63ee331c4c1/2007_IEHC_480_1.pdf/pdf>

[53] Ibid, par.19

previously held, in a case concerning a Tribunal of Inquiry attempting to identify the source of a leak of information to the newspaper *The Irish Times*, which both destroyed the relevant material and refused to answer questions concerning the source, that prior restraint in respect of publishing material requires the strictest scrutiny[54]. Mr Justice Fennelly held, "The right of a free press to communicate information without let or restraint is intrinsic to a free and democratic society"[55]. He also quoted Lord Hoffman, who said:

> "Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."[56]

Danger of greater use of filters

30. Such vagueness could also lead to larger companies adopting more strenuous filtering measures or greater use of automated decision-making and algorithms in respect of removing online content. This risks even greater speech restrictions in a world where machines may unjustifiably remove material due to the non-detection of art, parody, satire, irony or sarcasm, all of which are critical for healthy democratic debate. Over use of restrictive filters can restrict genuine reporting, and have a discriminatory effect[57].

Previous concerns

31. ICCL's concerns about vague definitions of "harmful online content", as outlined in Head 49 A (b) in this Bill, echoes previous concerns raised by ICCL pertaining to Section 4.1(a)(i) and (ii) of the *Harassment, Harmful Communications and Related Offences Act 2017* which includes making it an offence to distribute or publish any "grossly offensive" communication about or to a person. Earlier this year, we wrote to both the Department of Justice and the Director of Public Prosecutions to raise concerns about that section not including a definition of

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[54] *Mahon v Post Publications* [2007] IESC 338
[55] Ibid, at 377
[56] *R v Central Independent Television PLC* [1994] Fam. 192; [1994] 3 WLR 20
[57] Elizabeth Farries, ICCL submission to the public consultation on regulation of online content to the Department of Communications, Climate Action and Environment (March 2019) Accessible here: <https://www.iccl.ie/wp-content/uploads/2019/07/190415-Online-content-regulation-ICCL-submission-FINAL.pdf>

"grossly offensive"[58]. We urged the DPP to issue guidelines on how this offence will be interpreted by prosecutors and what threshold the DPP will use to distinguish between permitted "offensive" communication and illegal "grossly offensive" communication. We took this action because we believe such a definition, or guidelines, could assist individuals in regulating their own behaviour and/or at least understanding the consequences of their behaviour; victims in understanding how the criminal law protects them; and prosecutors and gardaí in interpreting and applying the new law.

32. It's critically important to note that the Law Reform Commission, in its Harmful Communications and Digital Safety report, previously warned that the use of the term "grossly offensive" could be vulnerable to constitutional challenge on grounds of vagueness[59]. To illustrate their concerns, the LRC cited a Supreme Court case in India in which an offence of "sending offensive messages through communication services etc" was struck down on a number of grounds including on the grounds of vagueness[60]. The LRC specifically noted that this case outlined the difficulty with offences which use imprecise terms such as "grossly offensive", particularly given how different courts could interpret such offences differently, giving rise to different and inconsistent results[61]. The LRC further highlighted the problem with legislation for harmful digital communications falling foul of the vagueness doctrine by recalling a case in which the Nova Scotian Supreme Court in Canada struck down the Cyber-safety Act 2013 on the grounds that the Act's definition of cyberbullying amounted to a "colossal failure" because of the extent to which it unjustifiably interfered with the rights to freedom of expression and liberty under the Canadian Charter[62].

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[58] Letter from ICCL to the DIrector of Public Prosecutions Claire Loftus, 13 January 2021. Accessible here: <https://www.iccl.ie/wp-content/uploads/2021/01/ICCL-letter-to-DPP-re-Harmful-Comms-Act.pdf>

[59] Law Reform Commission, *Harmful Communications and Digital Strategy*, (LRC 116 - 2016), p.101. Accessible here: <https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf>.

[60] *Shreya Singhal v Union of India* (2015) Writ Petition (Criminal) No. 167 of 2012. Section 66A of the Information Technology Act 2000 provided that, "Any person who sends, by means of a computer resource or a communication device: (a) any information that is **grossly offensive** or has menacing character, or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device, or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine." In this case, two women, who had been arrested under this section of law for comments posted on Facebook but who were later released and whose prosecutions were dismissed, challenged the constitutionality of the section, arguing that it violated their right to freedom of expression under Article 19(1)(a) of the Constitution of India. The Supreme Court held that the expressions used in section 66A were "completely open-ended and undefined"; that they were "nebulous in meaning" and subjective, as "what may be offensive to one may not be offensive to another" and what may cause "annoyance and inconvenience to one may not cause annoyance and inconvenience to another". The court concluded that, as there was "no demarcating line" conveyed in any of the expressions used, the section was "unconstitutionally vague". Judgment accessible here: <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/06/Shreya_Singhal_vs_U.O.I_on_24_March_2015.pdf>

[61] *DPP v Collins* (2006) 1 WLR 2223; *Chambers v DPP* [2012] EWHC 2157

[62] *Crouch v Snell*, 2015 NSSC 340. The Cyber-safety Act, which had been passed in Nova Scotia in 2013, three weeks after the suicide of 17-year-old Rahtaeh Parsons who had been cyberbullied, had defined cyber-bullying as "any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional

Potential overlap with separate legislative process under way

33. ICCL is also concerned that the vague language pertaining to Head 49 A [b] appears to create an overlap between this Bill and a separate legislative process already underway by the Department of Justice to reform the 1989 Prohibition of Incitement to Hatred Act and legislate against hate crimes.[63] While intending "to encapsulate the notion of cyberbullying"[64], Head 49 A [b] also includes what could be termed online hate speech by seemingly leaning on Article 28b (1)(a) and (b) of the revised Directive[65].

34. ICCL believes a more sensible approach would be to first pass promised criminal legislation in relation to incitement to hatred, after rigorous pre-legislative scrutiny and open, robust, democratic debate, before passing any civil legislation which would restrict similar, if not identical, content. This would, on the face of it, appear to be of huge importance given the Department has signalled that the pending legislation regarding crimes motivated by hate and prejudice will include "robust safeguards" for freedom of expression, including protections for reasonable and genuine contributions to literary, artistic, political, scientific or academic discourse, and fair and accurate reporting. These are safeguards which are notably *not* present in the heads of the OSMR Bill, with the exception of material pertaining to 49A(d)[66].

35. ICCL wishes to note in this context that it does not support criminalising against hate speech, except in the most extreme circumstances such as incitement to genocide or hateful violence or propaganda for war. ICCL endorses what is known as the hate speech pyramid, developed by ARTICLE 19. This sets out how there is a distinction between extreme hate speech which must be prohibited; hate speech which may be prohibited; and deeply offensive speech which is problematic but should not be prohibited[67].

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well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way." The Supreme Court held that this definition amounted to a "colossal failure" because of the extent to which it interfered with freedom of expression. It concluded that the Act violated Section 2 (b) of the Canadian Charter of Rights and Freedoms which provides that everyone has a fundamental freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. Judgment accessible here: <https://canadianmedialawyers.com/wp-content/uploads/2019/05/Crouch_v_Snell_2015_NSSC_340_1.pdf>

[63] *Legislating for Hate Speech and Hate Crime in Ireland, Report on the Public Consultation 2020*, Department of Justice, accessible here: <http://www.justice.ie/en/JELR/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf/Files/Legislating_for_Hate_Speech_and_Hate_Crime_in_Ireland_Web.pdf>

[64] Online Safety and Media Regulation Bill General Scheme, p.84.

[65] Ibid.

[66] In respect of material pertaining to 49A(d), an explanatory note states: "The fourth and final category of material included under harmful online content is intended to encapsulate the encouragement, promotion of self-harm or suicide or the provision of instructions on how to engage in self-harm or suicide. However, this definition contains derogation for material that is dissemination as part of philosophical, medical or political debate."

[67] See Article 19, Toolkit on Hate Speech, 2015, at p. 19. Accessible here: <https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf>

Question of vires

36. ICCL is also concerned about the overly broad and vague language used in Head 10 concerning the specific functions of appointed Commissioners and, most significantly, a separate failure to seemingly provide for the role of the Online Safety Commissioner. An explanatory note, under Head 10, states: ". . . it should be noted that it is intended that the Commission will formally delegate functions to Commissioners and staff as appropriate. While the delegation of functions is ultimately a matter for the Commission itself, this provision is desired from a policy perspective as the Minister wishes that individual Commissioners can take responsibility for clearly delegated functions. This is particularly relevant in the case of the Online Safety Commissioner."[68] This is the only express reference to the Online Safety Commissioner in the general scheme of the Bill, in contrast to the Bill's now defunct predecessor, the Digital Safety Commissioner Bill 2017, which specifically detailed the Digital Safety Commissioner's roles[69].

37. ICCL is concerned that such a lack of precision in detailing the specific roles and responsibilities of the Commissioners and/or the Online Safety Commissioner could lead to questions or findings of ultra vires, i.e. where Commissioners and/or the Online Safety Commissioner could be found to be acting beyond their legal power or authority. This is a significant concern given the very wide-ranging powers that this Bill is affording the Commission and the fact that the Commission will be making its own rules and enforcing them, in contrast to, by way of example, the Data Protection Commission who is tasked with applying the EU General Data Protection Regulation (GDPR). It should be made very clear how individual Commissioners, and in particular the Online Safety Commissioner, will operate within the Commission in terms of decision making and the delegation of powers.

38. The powers of the Commission, under Head 11, are listed as, but not limited to: the power to issue notices and warnings; to devise, implement, monitor and review codes, including codes of practice; to conduct investigations and inquiries, and for the necessary powers to be conferred on the Commission to conduct such investigations and inquiries; to appoint authorised officers to carry out investigations and to confer such authorised officers such powers as are necessary to fulfil their duties; to impose administrative financial sanctions, subject to court confirmation, and to enter into settlement arrangements; to prosecute summary offences; to convey licenses to television broadcasting

[68] Online Safety and Media Regulation Bill General Scheme, p.27
[69] Digital Safety Commissioner Bill 2017, Section 3. Accessible here: <https://data.oireachtas.ie/ie/oireachtas/bill/2017/144/eng/initiated/b14417d.pdf>

services; and to operate a registration system for on demand audio-visual media services.

39. Head 15C also provides for the Commission to appoint authorised officers who will be empowered to seek and obtain a warrant from a District Court judge if "there are reasonable grounds for suspecting that information required by an authorised officer for the purpose of performing his or her functions"; and who could be accompanied by a garda if the officer thinks it's necessary. Under Head 15B, they will have the power to search and inspect a premises if the officer "has reasonable grounds for believing documents, records, statements or other information relating to [a relevant regulated activity] is being kept"; inspect any such "documents, records, statements or other information found" in the location and "require any person at the place, to produce to him or her any [relevant materials] which are in that person's power or control and, in the case of information in a non-legible form, to reproduce it in a legible form, and to give to the authorised officer such information as he or she may reasonably require"; and secure documents or any data equipment, including any computer in which records may be held.

40. These are extraordinary powers. ICCL strongly recommends that the roles of both the Commissioners and the Online Safety Commissioner, and the details and thresholds to be met before each action can be taken, be vastly more precise.

Deployment of codes in a quasi-criminal way

41. The Broadcasting Authority of Ireland (BAI), which the Media Commission will replace, regulates all content which is broadcast on all Irish licensed broadcasters. It receives and investigates complaints from viewers and listeners, but also monitors the broadcast content to ensure that the content complies with broadcasting codes and rules[70]. In taking over from the BAI, this Bill provides that the commission will prepare, implement, monitor and review "codes and rules" to be observed by audiovisual media services, sound media services, and designated online services. The services which fall under this scope, determined by the Commission, will face sanction if they fail to observe these codes.

42. Under Head 2, a designated online service is defined as "a relevant online service designated by the Media Commission in accordance with Head 56".

[70] Broadcasting Authority of Ireland, Regulation. Accessible here: <https://www.bai.ie/en/broadcasting/regulation/>

Under Head 56, the Bill states that the commission will "from time to time, designate relevant online services or categories thereof", before listing matters which the Media Commission will have regard for when deciding on this designation[71]. An explanatory note under Head 56 states that the Media Commission will have "the power to designate individual and categories of online services from a wider pool of relevant online services to abide by any online safety codes the commission deems necessary"[72] including "an information society service established in the State that [facilitates the dissemination of or access to] user-generated content via an electronic communications network"[73].

43. The same note defines "user-generated content" as "content constituting an individual item, irrespective of its length, that is created by a user and uploaded to relevant online service by that user or any other user and does not include content uploaded to relevant online service by the provider of that service". The same explanatory note states that the types of services which could come under the scope of "designated online services" include, but are not limited to: social media services; public boards and forums; online gaming services; e-commerce services, where they facilitate the dissemination of or access to user-generated content; press publications, where they facilitate the dissemination of or access to user-generated content; online search engines; and Internet service providers. Private communication services and private online (cloud) storage services could also fall under this remit but only in respect of material which is "explicitly limited to matters relating to content which it is a criminal offence to disseminate"[74]. [More on this latter point below].

44. This vastly wide-ranging list of services which could potentially be subjected to regulation will, on the face of it, potentially see members of the public subjected to codes in a quasi-criminal manner even though members of the public, as individuals, do not themselves make up a licenced body such as the State broadcaster RTE. ICCL has significant concerns about this. Given the significant potential for rights limitations, by virtue of the enforcement of these codes, it is ICCL's position that the State, and corporations alike, must comply with constitutional and international standards. While our enshrined rights may be limited in exceptional circumstances, they must still conform with the principles of legality, necessity, and proportionality. Notwithstanding previous decisions where the courts upheld radio broadcasting restrictions against the right to expression

[71]Online Safety and Media Regulation Bill General Scheme, p.106 and 107.
[72]Online Safety and Media Regulation Bill General Scheme, p.108.
[73]Online Safety and Media Regulation Bill General Scheme, p.110.
[74]Online Safety and Media Regulation Bill General Scheme, p.108 and 109.

and communication as proportional[75], these were in respect of licensed services. The enforcement of State codes of conduct against members of the public, who are not licensed, for non-illegal behaviour creates serious problems with respect to fundamental rights.

Regulation of private communications and private online cloud storage services

45. Head 56 (13) provides that, "the Media Commission may not oblige a designated online service or category thereof to abide by an online safety code that relates to material which it is not a criminal offence to disseminate if said service or services are: (a) an interpersonal communications service, or, (b) a private online storage service." An explanatory note states that Head 56, "Provides that the Media Commission's code making powers in relation to interpersonal communications services and private online (cloud) storage services be explicitly limited to matters relating to content which it is a criminal offence to disseminate. This reflects the different balance of fundamental rights that arise in relation to these services than other relevant online services." It further explains: "The reason for this is that these services raise particular rights balancing issues, especially regarding the right to privacy, which make it difficult to justify giving the Commission to power to require them to take measures in relation to non-criminal harmful online content."

46. While ICCL appreciates that Head 56 acknowledges the fact that serious rights issues obviously arise when it comes to regulating private communications, it's utterly unclear to ICCL how the Commission intends to regulate *private* communications for criminal content in a manner that respects the principles of legality, necessity, and proportionality. It's also unclear to ICCL how such regulation will work without breaching the presumption of innocence[76].

47. Any State surveillance proposal in Ireland prompts the most serious of concerns about the right to privacy, and these concerns are not without substance. As previously highlighted by Digital Rights Ireland and Privacy International, in a submission to the Office of the United Nations High Commissioner for Human Rights, Irish law regulates four types of State surveillance in Ireland, with just *one* method, surveillance devices, requiring prior judicial authorisation[77]. The four

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[75] See *Murphy v Independent Radio and Television Commission (IRTC)* [1999] 1 IR 12, [1998] 2 ILRM 360 and *Colgan v IRTC* [2000] 2 IR 490

[76] Article 38.1 of the Constitution and Article 6(2) of the European Convention on Human Rights. See *O'Leary v The Attorney General* [1993] 1 IR 102 (High Court), [1995] 1 IR 254 (Supreme Court)

[77] Dr TJ McIntyre, Digital Rights Ireland, and Alexandrine de Corbion, Privacy International, *The Right to Privacy in Ireland, Stakeholder Report Universal Periodic Review 25th Session – Ireland*, September 2015. Accessible here: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757015>

types are:

(i) Interception of communications under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993[78]
(ii) Access to retained communications data (data retention) under the Communications (Retention of Data) Act 2011[79]
(iii) The use of "tracking devices" (such as GPS trackers placed on cars or other vehicles) under section 8 of the Criminal Justice Surveillance Act 2009[80]
(iv) The use of "surveillance devices" (such as audio bugs and covert video cameras) under section 7 of the 2009 Act.

48. While the introduction of the prior judicial authorisation requirement was deemed to be a positive development in the 2009 Act, such authorisation can be "entirely bypassed" under Section 7 of the 2009 Act, which provides that a superior officer within the Garda Síochána, Permanent Defence Force or Revenue Commissioners can give internal approval in urgent cases, thereby allowing such surveillance to take place for up to 72 hours without any judicial authorisation either before or after the fact. As Dr McIntyre and Privacy International have pointed out, serious questions about constitutionality arise given the legislation purports to permit a secret invasion of a home (to plant and remove bugs) without prior judicial approval – contrary to Irish law which generally requires a judicial warrant before searches of the home.[81]

49. In addition to that, in April 2014, in the *Digital Rights Ireland* case, the Court of Justice of the European Union declared the EU directive underpinning Ireland's data retention scheme as "invalid", saying it "entails a wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data." Despite this, and a scathing report by the former Chief Justice John Murray about the same and how it pertained to journalists[82], the scheme continues.

50. Any plans to intercept or monitor private communications strike at the heart of Article 8 of the European Convention on Human Rights which protects the right

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[78] Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993. Accessible here: <http://www.irishstatutebook.ie/eli/1993/act/10/enacted/en/print>
[79] Communications (Retention of Data) Act 2011. Accessible here: <http://www.irishstatutebook.ie/eli/2011/act/3/enacted/en/html>
[80] Criminal justice Surveillance Act 2009. Accessible here: <http://www.irishstatutebook.ie/eli/2009/act/19/enacted/en/html>
[81] Dr TJ McIntyre, Digital Rights Ireland, and Alexandrine de Corbion, Privacy International, *The Right to Privacy in Ireland, Stakeholder Report Universal Periodic Review 25th Session – Ireland*, September 2015. Accessible here: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757015>
[82] Mr Justice John L Murray, *Review of the Law on the Retention of and Access to Communications Data*, April 2017. Accessible here: <http://www.justice.ie/en/JELR/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf/Files/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf>

to respect for private life, the home and correspondence, including the privacy of messages, phone calls and emails, and Article 17 (1) of the International Covenant on Civil and Political Rights (ICCPR) which provide that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. Without knowing how, when or under what circumstances such regulation of private communications may take place, it's impossible to know how such a measure would be legal, human rights compliant, and safeguarded against abuse.

51. It's also difficult to consider the concept of surveilling private communications for potential criminal content without addressing encryption. End-to-end encryption is not only an essential tool for all who wish to communicate privately but it also protects and secures the processing of our data when it comes to sensitive activities such as personal banking transactions, online credit card use, online shopping, buying health insurance, accessing health data, making mobile payments and carrying out our employment. It's also vital for those who need to communicate securely and without concerns or fear about undue government or State interference, including journalists and those who work in civic society[83].

[83] Dr Maria Helen Murphy, *Surveillance and the Law: Language Power and Privacy*, Routledge Press, 2019; and also see a letter from the International Network of Civil Liberties Organisations calling for the protection of end-to-end encryption, accessible here: <https://www.inclo.net/pdf/statements/INCLO%20encryption%20statement.pdf>

Part 3: Summary of Recommendations

While ICCL believes there are fundamental difficulties with the approach of this Bill, we identify specific difficulties with certain provisions of the Bill, namely:

52. The troubling vagueness in respect of the definition of harmful online content, under Head 49 A (b), and what this vagueness means for foreseeability, the safeguarding of the right to freedom of expression and communication, and the potential chilling effect resulting from this vagueness due to self-censorship and prior restraint.

53. The need for full legislative scrutiny in respect of Head 49(b), under which the commission will be able to widen the types of content that could be deemed harmful and, therefore, subject to restriction.

54. The overly broad and vague language used in Head 10 concerning the specific functions of appointed commissioners and, most significantly, a separate failure to seemingly provide for the role of the Online Safety Commissioner.

55. The deployment of codes in a quasi-criminal way, under Head 56, in respect of unlicensed services and internet users, whom the commission will ultimately decide is under its remit.

56. The legality, necessity and proportionality of proposals for regulating private communications and private online cloud storage services under Head 56.

57. ICCL recognises the potentially valuable role an independent body could play in the regulation of online illegal speech. ICCL is particularly supportive of mechanisms that will provide supplementary routes of redress for victims of crimes perpetrated online. ICCL is concerned, however, about the human rights impact of a system designed to restrict non-illegal speech in the online context.

58. An alternative worthy of exploration before resorting to the proposed model would be the establishment of a system on a statutory basis that would allow social media platforms and other online service providers to opt-in to an online harms code. A crucial aspect of such a statutory system would be the supervisory role played by an independent regulator with sufficient powers. Platforms could receive accreditation for compliance with the code and individuals could accordingly make an informed choice about where they wish to maintain a presence online.