LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

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

FROM: Law Reform Commission

DATE: 8th March 2021

SUBJECT: **Submission on the General Scheme of the Online Safety and Media Regulation Bill**

A. Introduction

1. The Law Reform Commission thanks the Joint Committee for the invitation to make a written submission on the General Scheme of the Online Safety and Media Regulation Bill.
2. We are very happy to assist the Committee's examination of the General Scheme, which addresses the important matter of online safety for all members of society, and protection from harmful material and abuse.
3. The Commission examined this area in a project that formed part of our **Fourth Programme of Law Reform**, and which culminated in our 2016 **Report on Harmful Communications and Digital Safety**.
4. Our Report acknowledged the enormous positive benefits that the digital media revolution has brought: being able to communicate from our smartphones with family and friends no matter where they are on the planet, and participating on a national and international level in civic society and in public discourse generally. This has greatly expanded the capacity to enjoy freedom of expression in Ireland, and in other like-minded countries.
5. But we also acknowledged that this freedom has brought some negative aspects, including a tendency for some online and digital users to engage in communications that cause significant harm to others, such as by posting online intimate images without consent and which involve gross breaches of the right to privacy, and other harmful communications involving threats and intimidation. The Report therefore dealt with a wide range of behaviour.
6. As is our usual practice when we make recommendations for reform, our Report included a *Draft Harmful Communications and Digital Safety Bill* intended to implement those recommendations. That Draft Bill covered both the criminal law and regulatory aspects of harmful communications.
7. We intend our draft Bills to be helpful guides to policy makers, and law makers such as the Committee members, when deciding whether to implement the recommendations we make in our Reports.

8. Our recommendations on reform of criminal law were reflected in the enactment of the **Harassment, Harmful Communications and Related Offences Act 2020** (which can also be referred to as Coco's Law).

9. The recommendations in our 2016 Report on the need for a new regulatory and supervisory system are reflected in the General Scheme, especially Part 4, comprising Head 49A to Head 56.

B. Our role as a statutory legal research body, and the scope of this submission

10. The Law Reform Commission is a statutory research and advisory body. Our purpose is to review the law independently and objectively, and to make proposals for reform.

11. While our title includes "law reform", we cannot actually do law reform because that is, of course, a matter for the Committee members as legislators, and the Oireachtas as a whole. But we undertake research, and we consult widely, and we make recommendations that aim to make the law modern, accessible and fit for purpose.

12. In the context of the General Scheme being examined by this Committee, the **Report on Harmful Communications and Digital Safety** recommended the enactment of a regulatory regime to address online harmful communications, including the establishment of a Digital Safety Commissioner. This is addressed in Part 4 of the General Scheme in particular, and our submission is limited primarily to Part 4.

13. Since the Commission has not examined other aspects of the General Scheme, such as the proposals to establish a Media Commission to absorb and expand the functions of the Broadcasting Authority of Ireland, or the proposals to implement the amended Audiovisual Media Services Directive, Directive (EU) 2018/1808, the Commission is not in a position to assist the Committee on those aspects of the General Scheme.

14. We hope, however, that our submission will be of assistance to the Committee in connection with Part 4 of the General Scheme.

C. Our consultation process included a public seminar and workshops

15. We consult as widely as possible when we carry out our work. This consultative process is a vital part of our research work: the assistance we get from a wide range of organisations and individuals, public sector, private sector, Government Departments and Offices, professional bodies and NGOs greatly assists our analysis and proposals for reform in our Reports.

16. In connection with the harmful communications project, we first published a **consultative paper**, as a result of which we received a wide range of extremely helpful submissions. This was followed by a **public seminar** on the project, attended by over 100 delegates. We also recognised that the views of young people on the issues covered by our project needed to be considered, because they are one of the groups most affected by harmful online communications. We therefore organised two consultative workshops with young people aged between 13 and 17, facilitated by the then Department of Children and Youth Affairs. An independent report of the consultations, prepared by Sandra Roe, was included as an Appendix to the Commission's 2016 Report. We really appreciated the enthusiastic and reflective approach of the participants at these workshops and also the highly professional manner in which the Department's representatives organised these workshops, and

for the high quality of the report prepared by Sandra Roe. Our reform proposals were significantly influenced by our consultative process.

D. Guiding principles used to address harmful communications

17. Our consultations with interested parties led us to conclude in our Report that proposals to reform the law should bear in mind the following guiding principles:
    - the ***wider context*** within which law reform proposals should be considered, in particular the need to have in place solutions that involve education and empowerment concerning harmful digital and online communications;
    - the need to take account of ***relevant rights and interests***, including to ensure that the law contains an appropriate balance between the right to freedom of expression on the one hand and the right to privacy on the other hand; and
    - the requirement for a ***proportionate legal response*** that recognises the respective roles of criminal law and of civil law and regulatory oversight: namely, that criminal law is used only where activity causes significant harm, and that civil law and regulatory oversight includes an efficient and effective take-down procedure and a suitable statutory framework.
18. Our Report therefore recommended that we should approach this area on three different levels:
    - First, through education (in its widest sense): to create user empowerment and foster safe and positive digital citizenship.
    - Secondly, through statutory oversight by a Digital Safety Commissioner: where education and related responses are ineffective and the law needs to be employed, a system of statutory oversight should be used because it can be a more suitable and proportionate response than using the criminal law.
    - Thirdly, the criminal law can play a part, but only in respect of the most serious harmful communications.

D. The different forms of harmful communications

19. The first type of harmful communications we identified in the Report is the intentional victim-shaming of individuals (overwhelmingly women), which is sometimes referred to as “revenge porn”. We prefer not to use that phrase because it appears to imply that such activity is “just porn” rather than what it is: posting of intimate material, without consent, that is intended to cause harm to and to take away the right of privacy of the individual who is being targeted.
20. A second type of harmful communication we addressed involves posting intimidating and threatening online messages directed at private persons and public figures.
21. The third type we addressed is a new type of voyeurism, sometimes referred to as “upskirting” and “down blousing” in which intimate images are taken without consent and then posted online.
22. We recognise that online and digital harassment and stalking also mirror to some extent the pre-digital versions of these harmful behaviours, such as stalking by persistently following someone, the “poison pen” letter, the abusive phone call and taking intimate pictures without consent on a non-digital camera.

23. That is why we proposed in the Report that our existing pre-digital laws in this area should be consolidated into a single piece of legislation that covers both digital and non-digital harmful communications. Those criminal law elements were addressed in the **Harassment, Harmful Communications and Related Offences Act 2020**.

24. Harmful communications can also include other, arguably less harmful but nonetheless hurtful, types of bullying behaviour, such as sending unpleasant personal messages, "unfriending" or "freezing out" from groups. These also need to be addressed through the other two levels identified: education and regulatory oversight, which should of course also address the behaviour captured by the criminal law.

25. Part 4 of the General Scheme addresses the regulatory and oversight aspect of harmful communications that the Commission had identified in the Report.

E. Education, Oversight and Codes: Digital Safety Commissioner

26. In terms of education and oversight, our Report recommended that we should establish a statutory Digital Safety Commissioner, based on similar successful offices that had already (by 2016) been put on a statutory basis in Australia and New Zealand.

27. We recommended that the Digital Safety Commissioner's general function would be to promote digital safety, including an important educational role to promote positive digital citizenship among children and young people.

28. We proposed that the Commissioner, and the Ombudsman for Children, would liaise with all the education partners (including the Department of Education, the National Council for Curriculum and Assessment, the National Parents Council and student representative bodies) to develop guidance material for young people and schools on what it means to be a safe and responsible digital citizen. This would include guidance on encouraging mediation and restorative processes, especially to deal with issues for which a criminal law response would not be suitable.

29. We also recommended that the Digital Safety Commissioner would publish a statutory Code of Practice on Digital Safety. This would build on the current non-statutory take down procedures and standards already developed by the online and digital sector, including social media sites, to respond to take-down requests concerning harmful communications. The Code would set out nationally agreed standards on the details of an efficient take-down procedure.

30. Under the Commission's proposed statutory system, individuals would initially apply directly to a social media site to have harmful material removed in accordance with agreed time-lines: this is similar to the statutory system in place in Australia. If a social media site did not comply with the standards in the Code of Practice, the individual could then appeal to the Digital Safety Commissioner, who could direct a social media site to comply with the standards in the Code. If a social media site did not comply with the Digital Safety Commissioner's direction, the Commissioner could apply to the Circuit Court for a court order requiring compliance.

E. Template of core effective regulatory powers

31. Our 2016 Report addressed some elements of a regulatory system. In 2018, the Commission examined the whole question of effective regulatory powers in our **Report on Regulatory Powers and Corporate Offences**, which made detailed recommendations concerning the core powers that economic regulators should have

in order to be effective. The Commission recommended that economic regulators should have the following six core powers:

(1) the power to issue a range of warning directions or notices, including to obtain information by written request and "cease and desist" notices;

(2) the power to enter and search premises and take documents and other material, for example where relevant for product testing purposes;

(3) the power to require persons to attend in person before the regulator, or an authorised officer, to give evidence or to produce documents (including provision for determining issues of privilege);

(4) the power to impose administrative financial sanctions (sometimes inaccurately referred to as "administrative fines"), subject to court oversight, to ensure compliance with constitutional requirements;

(5) the power to enter into wide-ranging regulatory compliance agreements or settlements, including consumer redress schemes; and

(6) the power to bring summary criminal prosecutions (prosecutions on indictment are the responsibility of the Director of Public Prosecutions).

32. Of these six core powers, our Report noted that the international evidence on effective regulation is that the ability to impose administrative financial sanctions, not just on corporate bodies but also on senior managers, and the ability to impose regulatory compliance agreements, are key parts of an effective "regulatory toolkit". The Commission's Report noted that, in 2018, Ireland was an outlier among EU and OECD countries in that very few of our economic regulators had these two important powers, the Central Bank being one of the few that did.

33. Criminal law enforcement is, of course, also an important and vital part of any "regulatory toolkit" but the ability of a regulator to call on administrative financial sanctions and regulatory compliance agreements is also key.

F. Comments on the General Scheme

34. The Commission reiterates here that we are a statutory research and advisory body. We recognise that decisions about whether to implement some or all of our recommendations are for others, notably this Committee and the Oireachtas as a whole.

35. It is therefore outside our statutory remit to compare and contrast the detailed content of any proposed legislation, including the General Scheme, against the recommendations in our Report.

36. We hope, nonetheless, that the above summary of the approach we took in our 2016 Report will be of assistance to the Committee.

37. In addition, we draw the Committee's attention to the following elements of the General Scheme:

- Head 11 (general functions) and Heads 16A to 16D (administrative financial sanctions) of the General Scheme reflect the approach in the Regulatory Impact Assessment (RIA) published by the Department, which concluded that the proposed Media Commission, which envisages the delegation of functions to an Online Safety Commissioner (the Commission recommended that this be

expressly provided for), should have the core regulatory powers identified in the Commission's 2018 **Report on Regulatory Powers and Corporate Offences**;

- Head 49A (categories of harmful online content) incorporates the Commission's analysis in the 2016 Report that harmful communications includes material that is regulated by the criminal law of the State. This has the benefit of certainty of scope and would avoid possible challenges based on vagueness. Since the enactment, and commencement, of the **Harassment, Harmful Communications and Related Offences Act 2020**, this now includes the reforms of the criminal law identified in the Commission's 2016 Report.
- Head 49B (provision for further categories of harmful online content) reflects the Commission's view in the 2016 Report that further categories of harmful communication, including those communications that have not been made criminal offences, should come within the regulatory and educational functions of the Online Safety Commissioner, subject again to the requirement of certainty in order to avoid a challenge for vagueness.
- Heads 50A and 50B (online safety codes and compliance) would implement the Commission's recommendation in the 2016 Report that the Online Safety Commissioner should be empowered to issue statutory national online codes and to have the power to ensure oversight by online service providers of compliance with those national codes.
- Head 51A (online safety guidance materials) also reflects the Commission's view in the 2016 Report that the Online Safety Commissioner should have an educational function in issuing safety guidance materials. The Commission's Report recommended that, in connection with guidance material for children and young persons, the Online Safety Commissioner, with the Ombudsman for Children, would liaise with all the education partners (including the Department of Education, the National Council for Curriculum and Assessment, the National Parents Council and student representative bodies) to develop guidance material.
- Head 52A (auditing complaints handling) and Head 52B (systemic complaints scheme) echo the Commission's view in the 2016 Report as to the Online Safety Commissioner's oversight role of the online safety codes. As noted above, the Commission's 2016 Report also recommended that individuals would initially apply directly to a social media site to have harmful material removed in accordance with agreed time-lines. If a social media site did not comply with the standards in the code of practice, the individual could then appeal to the Digital Safety Commissioner, who could direct a social media site to comply with the standards in the code. This is similar to the statutory system in place in Australia.
- Head 53 (compliance and warning notices) and Head 54A (sanctions for non-compliance) reflect the Commission's recommendations in the 2018 Report on core regulatory powers, including financial administrative sanctions, the details on which are set out in Head 11 (general functions) and Heads 16A to 16D (administrative financial sanctions), already noted above. As noted above, certainty in the scope of such powers would avoid challenges for vagueness.
- Head 55 (voluntary arrangements) would also implement the Commission's recommendations in the 2016 Report that the Online Safety Commissioner may enter into voluntary arrangements with online service providers, which are also a feature of the Australian legislation in this area.

G. Concluding comments

38. The Commission's 2016 Report addressed harmful online and digital communications, conscious of the need to ensure that it adopted a proportionate approach. We think that there is a strong case to develop national statutory standards that can educate and empower everyone – not just young people, but all of us – to become safe digital and online citizens. The proposed establishment, under the General Scheme, of an Online Safety Commissioner would provide an important regulatory framework for this purpose, including a proactive and protective system that would work in cooperation with all parties involved to achieve this.

39. In addition, our 2016 Report also concluded that the criminal law can play a suitable deterrent role in labelling as completely unacceptable the most serious kinds of harmful communications, which the enactment, and recent commencement, of the **Harassment, Harmful Communications and Related Offences Act 2020**, has reinforced.

40. In conclusion, we thank the Committee again for its invitation to make this submission on the General Scheme.