



**Safe Ireland Submission on the  
General Scheme of the Online Safety  
and Media Regulation Bill 2020**

**June 2021**

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### Safe Ireland

Safe Ireland is the National Social Change Agency working to end gender based violence with a specific focus on male violence against women in intimate/domestic relationships. We believe that at the root of all violence is what happens in the home and that the single biggest barrier to achieving gender equality and human rights for women is the high prevalence of gender based violence and its wider personal, family, social and economic impacts. We are working to make Ireland the safest country in the world for women and children. We collaborate closely with 39 frontline domestic violence services across communities in Ireland, state agencies, civic society organisations, business, community, and cultural organisations throughout the country. We work directly with women to bring their experiences and voices into research, policy, service development and violence prevention programmes. Our core strategic focus is to change culture and transform the response to gender based violence in Ireland and to progress towards realising our vision for a safe Ireland.

### The General Scheme of the Online Safety and Media Regulation Bill – version published December 2020

Safe Ireland has given a broad welcome to this forthcoming Bill whose General Scheme<sup>1</sup> sets out a detailed framework for the establishment of a Media Commission to regulate the activities of designated online services as well as audio-visual media services, including traditional broadcast media services. Our services do their best to support increasing numbers of women coping with myriad forms of online abuse by their partners and former partners. Sadly, they are also confronted with some instances of online abuse of children, sometimes at the hands of an existing or former intimate partner who is also under-age.

While many more forms of online harassment have become criminal offences since the new Harassment, Harmful Communications and Related Offences Act 2020 came into force earlier this year<sup>2</sup>, there are still many forms of cyber-bullying which do not fall under the remit of the criminal

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<sup>1</sup> The text of the Final Version of the General Scheme is available via this web-link:  
<https://www.gov.ie/pdf/?file=https://assets.gov.ie/126000/b174bdcd-e017-47d9-bb48-07b29671330c.pdf#page=null>

<sup>2</sup> The Act came into effect fully on 10<sup>th</sup> February 2021. The text may be accessed online via this web-link:  
<http://www.irishstatutebook.ie/eli/2020/act/32/enacted/en/html>

justice system. In any event, the arsenal of available criminal justice offences to combat online abuse is not aimed at internet service providers (ISPs) but at individual perpetrators, and the criminal justice system itself reacts too slowly to prevent these perpetrators from continuing to disseminate harmful online content.

The ISPs have been regulating their own online safety procedures up to this point and they continue to work (in our experience, mostly very diligently and effectively) with An Garda Síochána to ensure that identified child sexual abuse material (CSAM) is removed as soon as possible, through [www.hotline.ie](http://www.hotline.ie). It is relatively simple to identify and remove CSAM, but much more challenging to identify and remove other material which is disseminated as part of a pattern of cyber-bullying but which is not illegal per se. The practice is that the ISPs will remove this kind of material on foot of a complaint if it is found to contravene their own community standards. However, the experience of our services is that even when the victim of the cyber-bullying is under-age, it may take a very considerable time for the material to be removed – and it may not be removed at all, if it is not found to have contravened the particular ISP's community standards.

As intimate partner and transgenerational abuse spreads further online, Safe Ireland's view is that ISPs need to be regulated much more tightly to ensure that harmful online content which constitutes intimate partner abuse, or the abuse of a child by a parent, can be taken down swiftly and further access to it restricted equally swiftly through processes which are simple and quick to access and use, even in cases where the harmful online content in question does not constitute material which it is a criminal offence to disseminate.

This General Scheme recognises the need for

- further regulation and for effective sanctions for non-compliance as appropriate,
- further education at every level,
- ongoing research and
- a new mechanism through systemic online safety issues may be addressed,

which will all come under the remit of the proposed new Media Commission.

All these aspects of the proposed Bill are necessary components of a strategy to prevent and confront online abuse and are most welcome. The remainder of this Submission is concerned with making workable recommendations to improve the Bill itself so that the new regulating body is as effective as it can be in its role as the guardian of online safety in the interests of women and children who have to live with the reality of online abuse from partners, ex partners, and sometimes, parents.

## Structure of this Submission

This submission will focus mostly on two related areas of the General Scheme:

- Part 2 of the General Scheme – Media Commission

- **Part 4 of the General Scheme – Online Safety.**

It should be read alongside the Safe Ireland Submission on Online Harassment, Harmful Communications and Related Offences, made in 2019 to the Joint Oireachtas Committee on Justice and Equality<sup>3</sup>. While that submission concentrates to a large extent on online criminal offences, it is relevant to the definition of harmful online content in the General Scheme of the Online Safety and Media Regulation Bill (Head 49A), which includes a category of such content consisting of material which it is already a criminal offence to disseminate. The positive effect of the newly commenced Harassment, Harmful Communications and Related Offences Act 2020 is to increase the number of online offences of an abusive nature, and as a result, to increase the amount of harmful online content which is relatively easy for ISPs to identify, remove and restrict from further viewing online.

## **Part 2 of the General Scheme – Media Commission**

### **Head 9 Objectives – from page 22 of the print version of the General Scheme**

Subhead 3 is the objective of ensuring that the right systems are in place to detect and remove harmful online (also traditional broadcast) content, Subhead 4 is the objective of protecting the interests of children from harmful online content, while Subhead 5 is the objective of providing a flexible, responsive regulatory framework to be applied in a proportionate, consistent and fair manner.

Safe Ireland has no quarrel with these objectives. However, they are all secondary in one sense: they are not aimed at preventing the appearance of harmful material online in the first place. In our view, safety should be built into new platforms, programs, and applications to the greatest extent possible from the start (so-called “safety by design”). We think this should be named as a separate but equally important objective. Primary prevention is better than even than the very best secondary procedures, such as takedown requests, which can only come into play once the harmful online content has already appeared online.

**Safe Ireland Recommendation:** Safety should be built into new programs, online services, applications and platforms to the full extent possible and online safety by design should be listed as a separate and equal objective of the Media Commission.

**Safe Ireland Recommendation:** The new Media Commission should consider including safety by design provisions into every designated online service Code of Practice to reduce the risks to internet users from online harms from new products/programmes/services. We understand that

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<sup>3</sup> Accessible online via this web-page – scroll down to 2019 Publications: <https://www.safeireland.ie/policy-publications/>

the professional body representing internet service providers in Ireland, Hotline.ie, itself favours this approach.

## Head 10 Functions

Safe Ireland notes that the Media Commission is given wide powers under this Head to initiate investigations itself, including in response to any complaint from an individual, into any suspected breach of the “relevant statutory provisions” (subhead vii), and is obliged to devise codes and roles to be obeyed by designated online services (subhead x), and to establish or facilitate complaints mechanisms covering designated online services (subhead xi). There is also a wide-ranging provision giving the Commission all such powers as are “necessary or expedient for the performance of its functions.....” (subhead vi).

Safe Ireland is inclined to the view that these four subheads give the Commission the necessary standing and powers to investigate an individual complaint made in relation to an online service provider, where this is necessary and appropriate. The Commission will also be able, according to the list of its functions, to ensure that codes, rules, and complaints mechanisms relevant to designated online services are themselves designed to ensure that individuals get a timely and appropriate response to their requests for takedown of harmful online content, and to enforce compliance with the relevant statutory provisions, so that its own direct intervention should only come into play as a second-tier, fall-back individual complaints mechanism whenever the first-tier individual complaints and takedown procedures run by the internet service providers themselves, fail to provide a timely and appropriate response.

Our view is that it would be even better to go further in Head 10 and state explicitly that one of the functions of the Media Commission is to provide an individual complaints mechanism which will have the powers to remedy tardy or otherwise unsatisfactory responses by an ISP to complaints or takedown requests from individuals affected by the continuing presence of harmful online content on its platform. We develop this theme further under Head 11 below (“Core Powers” and also under Part 4 below (Online Safety).

Further, Safe Ireland welcomes the wide-ranging functions of the Media Commission under this Head in relation to education, public awareness and research in relation to online safety and media literacy (subheads xiii through xv), its duty to co-operate with law enforcement agencies here and elsewhere on matters related to harmful online content and the protection of children (subhead xix), and its statutory role in relation to the review of proposed legislation on online safety (subhead xx).

Finally, we note that all existing functions of the Broadcasting Authority of Ireland under current legislation will become vested in the Media Commission (subhead xxiv) once the Bill is enacted.

**Safe Ireland Recommendation:** The Media Commission should not be slow to use its powers under this Head in a proper case to intervene to investigate in response to an individual complaint, or any suspected breach of the relevant statutory provisions, at least insofar as any such complaint is in relation to harmful online content;

**Safe Ireland Recommendation:** The Media Commission should ensure that any code, rule, or complaints mechanism which it devises, establishes, or facilitates, is adequate to address any issue relating to harmful online content in such a way that any complaint or takedown request is dealt with quickly, simply, sympathetically, and effectively.

**Safe Ireland Recommendation:** These codes, rules and complaints mechanism should all focus on ensuring that time limits for relevant actions to be taken are as short as possible, are clear, and are enforced, as timeliness is of the essence if online safety is taken seriously by the regulating body and by the online services under its remit.

## **Head 11      Core Powers**

**Safe Ireland Recommendation:** The Media Commission should have an additional express power and obligation to examine and respond to individual complaints from users of online service, by giving timely directions to any entity which it regulates, in any situation in which, in its view, there are reasonable grounds to suspect that there has been an unjustified failure by an online service provider to comply with a request from an affected person or body to take down, or restrict access to, material which is, or has been, the subject of a complaint by that person or body on the basis that it is “harmful online content” as defined in Heads 49A, B, C of this Scheme. We suggest that Head 61 (Complaints in relation to Media Service Providers) might provide at least a rough blueprint for the procedure involved in implementing an effective second-tier individual complaints mechanism.

## **Head 12      Compliance Notices and Warnings [nb: Heads 53 and 59 refer]**

Head 12 gives the Commission wide powers to issue compliance notices to regulated entities “where it appears to the Commission that there is or has been regulatory non-compliance”. Head 53 gives the Commission powers to issue a compliance notice in narrower circumstances: following either an assessment of compliance or an audit which has found that a designated online service was not in compliance with either an online safety code or a direction of the Commission. Under Head 53, the compliance notice may also specify steps to be taken to remove (or restore) material, while under the former, the compliance notice will merely “outline the Commission’s views on alleged regulatory non-compliance and the basis for these views”.

As far as harmful online content is concerned, Safe Ireland's view is that the Commission should have the explicit power to spell out to the relevant designated online service the steps to be taken to remove harmful online content under Head 12 as well as under Head 53, at the very least if it is content which it is a criminal offence to disseminate. We also think that if the service's view is that such identified content is not harmful, it should have to remove it until a final decision is made on whether it is harmful online content or not.

Safe Ireland recognizes that such restraint of publication should not contravene the right to freedom of expression in Article 10 of the European Convention on Human Rights (ECHR)<sup>4</sup>, which Ireland must follow. We respectfully submit that it is in fact possible to frame such powers of "prior restraint" so that they do not contravene this right. Article 10(2) lists the circumstances in which it is possible to restrict freedom of expression, and they include: "for the protection of the reputation or rights of others", and "preventing the disclosure of information received in confidence". The relevant case-law summarised<sup>5</sup> in essence says that: any such restriction or "prior restraint" should be "prescribed by law", which means not only compatible with national law but with ECHR itself, should be made in pursuit of one of the legitimate aims in Article 10(2), and must be necessary to achieve that aim. It also makes clear that prior restraint is justified only in exceptional circumstances, and there must be a legal framework to ensure both tight control over the scope of the ban and an effective Convention-compliant judicial review process.

In our view, it should be straightforward for our law to justify the urgency of the immediate enforcement of "prior restraint" take down provisions, where the specific piece of content at issue is illegal per se (in the sense that it is a criminal offence to disseminate it already), or otherwise fits a clear definition of harmful online content. We think that it is beyond argument that such a measure is necessary in order to achieve the legitimate aim of protecting the reputation or the rights of the subjects of such content: if harmful content which is illegal (at least) is not blocked without delay, the damage to the rights of the victim(s) to freedom from humiliating and degrading treatment and to respect for their private and family life as a result of the harm done to the victim(s) by the unauthorised (and possibly illegal) dissemination, may well be, and in our experience very likely will be, extremely difficult to remedy.

Safe Ireland understands that it must be possible for the internet user who uploaded or distributed the offending content to appeal against the decision to take it down to an independent judicial authority. If ultimately it turns out that an error was made and the content is not such that it can be removed for a reason sanctioned in Article 10(2), it can be restored online at that point. Any such process of determination should itself be swift, fair and transparent.

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<sup>4</sup> European Convention on Human Rights full text is available online at this web-link:

[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>5</sup>See footnote 3 below which contains reference including web-link to the latest ECHR Judgment on "prior restraint" (June 2020). It sets out standards for use in future cases.

**Safe Ireland Recommendation:** Head 12 should be amended to give the Commission explicit power to specify the steps which should be taken to remove any form of harmful online content in any circumstance in which it appears to the Commission that there has been, or is, regulatory non-compliance at initial compliance notice stage, ie without waiting for a response and the second warning notice stage. We repeat that timeliness is of the essence whenever there is good reason to believe that harmful online content has already been made accessible on the internet.

**Safe Ireland Recommendation:** The language of these and other takedown provisions in the Bill should reflect the language of Article 10 (2) and these provisions should be framed so that they comply both with the Article and with the standards laid down in the most recent relevant case-law<sup>6</sup>.

### Head 13 Codes of Practice

Safe Ireland's view is that it is entirely right that an independent authority such as the Commission should have the power to devise, implement and review codes to govern standards and practice by regulated entities (which include designed online services). In our view, it is also right (and indeed essential) that the Commission should be obliged to consult with relevant stakeholders, such as specialist Domestic Violence support services, in devising and revising these codes.

**Safe Ireland Recommendation:** These new Codes of Practice should state clearly and unambiguously that

- it is the duty of all designated online service providers to respond to, and where possible, comply with, individual requests for takedown of harmful online content and any other protective measures related to online safety **within strict time limits**, and that failure to do this will be a breach of the Code which among other things, will allow the Commission to direct the online service provider to take down identified harmful online content and/or take other remedial steps on behalf of the individual complainant;
- Where it is not possible to comply with a takedown request or other request for a remedial measure, strict time limits should also be included within the Codes of Practice within which the online service provider must provide a full explanation to the individual complainant of the reasons why this is not possible, and
- The Codes of Practice should also explain that in any situation where the individual complainant is not satisfied with the response from the relevant online service provider,

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<sup>6</sup> OOO Flavus & ors vs Russia (ECHR) Judgement 23<sup>rd</sup> June 2020, available online via this web-link: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-203178%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203178%22]})



s/he has the right address their complaint directly to the Commissioner who will examine it in a timely fashion and make such directions to the online service provider as it sees fit;

- The Codes of Practice should specify clearly the circumstances in which it is appropriate to take down or restrict access to material which may be harmful pending a full determination of the nature of the material. This is the concept of “prior restraint” referred to above under Head 12.

**Safe Ireland Recommendation:** Whether in primary legislation or in regulations governing its internal standard operating procedures, the relevant stakeholders to be consulted on the design, implementation and review of any code to govern standards and practice in relation to online safety, complaints and takedown procedures for designated online services, should always include non-State agencies advocating on behalf of and providing services to individuals and groups who have suffered, or at risk of suffering, the negative effects of harmful online content. Domestic Violence specialist support services should also be included in this group because of the prevalence and severity of the effects on women and children of the distribution of harmful online content in the context of an intimate or other close family relationship.

## Part 4 of the General Scheme – Online Safety

### Part 4: Online Safety

#### Head 49A Categories of Harmful Online Content

Safe Ireland will focus on the first two categories of the four categories of harmful online content listed under this Head, namely:

- (a) “material which it is a criminal offence to disseminate”; and
  - (b) “material which is likely to have effect of intimidating, threatening, humiliating or persecuting a person to whom it pertains and which a reasonable person would conclude was the intention of its dissemination”
- (a) “material which it is a criminal offence to disseminate”**

Safe Ireland understands from its contacts with ISPs that material within this category is generally simple to identify from the point of view of any online service provider, through whatever technical or humanly moderated means is most appropriate to the particular type of material. This means that where necessary, it is possible to have it removed or otherwise disabled swiftly on foot of a complaint.

Any material which it is a criminal offence to disseminate must be defined as clearly and unambiguously as possible in our criminal law, so that any doubt about its illegal nature is removed

(as far as this is possible). From the point of view of the victim of behaviour involving the dissemination of harmful online material, it makes sense for as many forms of this behaviour as possible to be criminal offences.

In this context, Safe Ireland was glad to welcome the Harassment, Harmful Communications and Related Offences Act 2020, now commenced in full as of 10<sup>th</sup> February 2021. This Act does much to broaden the range of online sexual offences which can be committed against **adult** victims. It also broadens the reach of our current harassment legislation, to include certain forms of online harassment which are one-off incidents and/or which involve communication with others besides the target of the harassment. An example of this is the dissemination of intimate images without the consent of their adult subject which is a single incident, not a persistent campaign. This Act also covers “deep-faking”: this involves tampering with a person’s non-intimate images, sometimes shared with the perpetrator some time ago in good faith, to make these images look as if the subject of the images is also the owner of the stranger’s intimate body parts which have been grafted digitally into the non-intimate images – and circulating the altered images online.

In Safe Ireland’s view, this forthcoming Online Safety and Media Regulation Bill has the potential to make the remedy of takedown, to be set out in online safety codes, much more readily accessible and useful to victims of online sexual (and indeed other) harassment and abuse – especially adult victims. In this way it is likely to make a very significant contribution to online safety generally.

**Safe Ireland Recommendation on Head 49A (b) “material which is likely to have the effect of intimidating, threatening, humiliating or persecuting a person to whom it pertains and which a reasonable person would conclude was the intention of its dissemination”**

Safe Ireland understands that category (b) which relates to cyber-bullying, is of its nature a wide one which is hard to pin down in a statutory definition. Cyber-bullying can take many different forms. However, while this wording is wide enough to capture a very wide range of online harassment and abusive behaviours, we think it might be difficult in practice for any online service provider – to work out which material “is likely to have the effect of intimidating, threatening, humiliating or persecuting a person to whom it pertains and which a reasonable person would conclude was the intention of its dissemination”, and therefore should be taken down/prevented from being uploaded in the first place.

We understand both from contacts with online service providers and regulators and from researching the relevant ECHR provisions and case-law, is that it is vital that “harmful online content” is defined clearly and unambiguously so that not only a legal professional but also an internet user or service provider can understand easily which content is illegal and therefore should not be on the internet at all because it is a criminal offence to disseminate it, and which

content though not illegal nevertheless may be defined clearly and unambiguously as harmful online content – and therefore, should be taken down.

Our own view is that it should be stated clearly that online content is to be regarded as “harmful” if a reasonable person would consider it likely to have the effect of intimidating [etc] the person to whom it pertains, regardless of what was intended by the person uploading the material.

We also think that the importance of **context** in determining whether or not certain material falls into category (b) should be reflected clearly in the statutory provisions. A single message may look harmless on its face, but as part of a long series of similar messages uploaded close together and/or as part of a campaign of different forms of online abuse against the same person, it is far from innocuous. How to examine context belongs to the Code of Practice, but a duty to consider the context of a piece of online content which is the subject of an individual complaint should be put clearly on the ISPs in the statute itself.

With regard to the various forms of harm listed: “intimidating, threatening, humiliating or persecuting”, Safe Ireland’s view is that this list is too short to cover many very common forms of online abuse which are commonplace forms of domestic abuse by a partner or ex partner (and sometimes, also parent or child). We suggest that these should also include additional elements beside the four already listed, and we propose the following list: “intimidating, threatening, humiliating, persecuting, distressing, alarming, or exploiting financially or otherwise the person to whom it pertains, coercing the person to whom it pertains to do something or refrain from doing something which she is entitled to refrain from doing or from doing respectively, causing or contributing to a deterioration in [that person’s] mental or physical health and well-being without reasonable excuse, or damaging [that person’s] reputation, employment and/or career prospects without lawful justification”.

Incidentally, we think it is entirely right to include the formula “to whom it pertains” in the wording, as many forms of online abuse are indirect, ie constitute communications with others rather than the victim themselves.

Further, Safe Ireland would like to address the exclusions at (a) and (b) at the end of Head 49A: these refer to material containing or comprising a defamatory statement, and material that violates data protection or privacy law.

We have the same anxiety with regard to both exclusions, namely that they will allow both authors of defamatory statements and anyone who violates the data protection rights or privacy rights of another person – to continue to do either with impunity on the internet. We respectfully submit that there is a real risk that in practice, these exclusions will amount to effective counter-arguments, ie defences, for anyone who wishes to continue to issue defamatory statements against another person, and/or to violate their data protection and privacy rights. These are unjustifiable incursions upon the rights of others, and it is small consolation to the victims of these

often devastating abuses to hear that the Media Commission is precluded expressly from insisting that any online service provider should take down such material.

In practical terms, few victims have the resources to go about suing for defamation which in any event may take quite a long time. A few more would consider making a complaint to the Data Protection Commissioner. However, that is not a swift process either, as it is necessary first to exhaust any other complaint mechanisms. Lastly and most relevantly in this regard, the Data Protection Commissioner representative has explained in both written and oral submissions to the Joint Oireachtas Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht in May 2021<sup>7</sup> that their office does not have the powers to intervene directly to prevent the spread of harmful online content online but is instead confined to the regulation of compliance by data controllers with the relevant data protection legislation.

The situation is complicated even more by the fact that some data protection violations are also criminal offences. This means that some data protection violations would come under category (a) and so result in a swift takedown, whereas others would result in no redress under this legislation at all. We respectfully submit that this is neither just nor equitable.

Safe Ireland suggests that this difficulty might be overcome relatively simply by deleting these exclusions and by expanding category (a) of harmful online material, to include not only material which it is a criminal offence to disseminate, but also material whose dissemination is tortious and/or in contravention of express statutory provisions prohibiting its dissemination.

### **Safe Ireland Recommendations on (b):**

- Expand the listed effects of online abuse to take account of many more forms of abuse likely to occur in an intimate or formerly intimate relationship, for instance alarm, distress, financial loss, damage to their victim's psychological or physical health or career or employment prospects;
- Make it clear that the threshold for identifying material as harmful under (b) is low so that the damage caused by the cumulative effect of repeated low-level acts of abuse may be captured;
- Include an express duty on any ISP to consider the importance of context in any determination of whether a particular piece of online content may be regarded as harmful because it comes under (b) above [cyberbullying provision];
- Remove the exclusions from the categories of harmful online content of content which is defamatory and/or in breach of data protection or other privacy legislation; and

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<sup>7</sup> The relevant Committee debate may be read online through this web-link: [Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht debate - Wednesday, 5 May 2021 \(oireachtas.ie\)](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_media_tourism_arts_culture_sport_and_the_gaeltacht/2021/05/05/)

- Consider expanding category (a) of harmful online material, to include not only material which it is a criminal offence to disseminate, but also material whose dissemination is tortious and/or in contravention of express statutory provisions prohibiting its dissemination.

Finally, Safe Ireland's view is that both the expansion of these two categories (a) and (b) and the calls for increased speed and efficiency in identifying and taking down harmful online content, will have an impact on work practices in companies dealing with this content. The need to increase productivity in this area to identify harmful online content and to meet Code of Practice and compliance deadlines must be met by an adequate increase in numbers of well-trained and well-supported staff to do this work. Their numbers must increase in order to help avoid the risks of vicarious trauma to individual staff members as the company as a whole deals with more complaints about harmful online content. Taking steps to avoid these risks will help to ensure that identification and takedown systems are sustainable and effective.

### **Head 49B Provision to add further categories of Harmful Online Content**

Safe Ireland welcomes this provision, being aware that new forms of online abuse of partners, ex partners and family members continue to appear.

**Safe Ireland Recommendation:** Victim support NGOs and other agencies and individuals who support victims of online abuse and harassment should be consulted regularly by the Media Commission about new forms of online abuse, and should be encouraged to feed in information and their own experiences with their clients continually, to help ensure that the Commission's decision making in this regard continues to be well-informed.

### **Head 49C Definition of Age-Inappropriate Content**

Safe Ireland notes that this Head does not address the need for robust age identification and exclusion of under-age people from viewing certain forms of violent or sexual content. We think this Head should set out the obligations of designated online services to take all possible measures to ensure that these forms of content are not viewed by under-age persons, either by accident or design. If these procedures are not deemed suitable for inclusion under this Head, they **must** be included in all online safety codes.

**Safe Ireland Recommendation:** Consider making the exclusion of under-age users from access to these forms of content an absolute priority for designated online services, either by means of statutory provisions under this Head or others in this legislation, or by means of inclusion in all online safety codes, or both.

## Head 50A Online Safety Codes

Safe Ireland's view is that it is right in principle that the online safety codes should be devised by the Media Commission in consultation with others affected by them. Those consulted on the content of these codes should always include a wide range of NGOs whose remit includes providing support services to victims of online abuse, including domestic abuse.

We have already outlined our view that it would be best if this General Scheme did contain an express proposal that the Commission should be responsible for a second-tier, independent, overarching online complaints and takedown process binding on all designated online services to be invoked in any case in which the failure of the individual DOS complaints and takedown process had been brought to its attention.

However, if ultimately no such second-tier role for the Media Commission is included in the Bill, it becomes all the more important that the procedures on takedown and dealing with complaints generally are laid out in the online safety codes in some detail. The Commission should also ensure that these codes have a clear commitment to respect and as far as possible, fulfil the need which all victims of this kind of abuse have for a timely, efficient, well-informed and compassionate response to a takedown request.

Safe Ireland also considers that the matters to be taken into account in devising these codes (see subhead (3)) should include the extent to which safety has been built into the platform/program/application by design (i) and **the need for speed** in responding to a takedown request or other measures restricting access, relating to any form of harmful online content (ii).

**Safe Ireland Recommendation:** The list of matters at subhead (3) should also include the extent to which safety has been built into the platform/program/application by design, and the need for speed in responding to a takedown request in relation to any form of harmful online content.

**Safe Ireland Recommendation:** All online safety codes devised by the Commission should contain **time limits** by which material must be identified, taken down, or otherwise addressed. While there must be room for exceptions, both the time limits themselves and the exceptions should be accessible to all internet users easily and simply, once the relevant codes have each been finalised and put into effect.

**Safe Ireland recommendation:** That the online safety codes specify that speed and efficacy of takedown are complemented by a transparent and timely review and appeal process so that the take down mechanism itself does not become a source of harassment/bullying.

## Head 50B Compliance Assessments

**Subhead (1):** While Safe Ireland’s view is that the power given to the Commission to request information and reports from designated online services “on a periodic basis” is fundamental, this subhead could and should be phrased more strictly – for example, there should be a duty on the designated online service to respond to a request for information and/or provide a compliance report, within a reasonable (or even fixed) time, and while it is always a good idea to have the power to look for information or compliance reports on an ad-hoc basis – there should be a fixed minimum term after which a compliance report will have to be produced and forwarded by each designated online service, to the Commission.

**Safe Ireland Recommendation:** We suggests that this subhead is reworded to place clear obligations to respond within a reasonable (or even fixed) time to a request for information and/or any obligation to produce a compliance report, on designated online services.

**Subhead (4):** Safe Ireland’s view is that the Commission must have power to examine the compliance of any designated online service with the online safety codes on foot of information received from any person or body.

**Safe Ireland Recommendation:** It should be clarified under this subhead that the expression “other interested parties” includes any individual affected by online abuse and any NGO whose role includes supporting victims of online abuse.

**Subhead (6):** Safe Ireland welcomes the inclusion here of powers to issue a compliance notice to a designated online service specifying steps which the service must take in order to comply with any online safety code, including the removal or restoration of material. However, the power to issue directions depends on a compliance notice being issued. This may take a long time. From the standpoint of victims of online abuse in a domestic violence context, this is not satisfactory because it is not fast enough to restrict the additional harm caused by wider dissemination of the harmful online content which can happen very fast.

As outlined above, our view is that the Commission should be given express powers to issue directions specifying steps to take down harmful online content which is clearly identified as such, or which there are reasonable grounds for believing is likely to fall within one of the categories of harmful online content – without waiting to issue a compliance notice, which must follow a request for information or the delivery of a compliance report. In our respectful submission, the reported failure of any designated online service to take down harmful online content which is identified as such, or which there are reasonable grounds for believing is likely to fall within one of the categories of harmful online content – within a reasonable time, should be enough to allow the Commission to act immediately to direct that the relevant material be taken down within the shortest possible time, and should not be restored again unless and until the person who put it up

satisfies the Commission that the material does not come within any of the categories of harmful online content.

Safe Ireland favours the “default” take-down option ie the concept that material should be taken down without delay on foot of a complaint (whether in compliance with the online safety code, or in response to a direction from the Commission or otherwise) and not be restored until such time as a full examination of the nature of the material has taken place which takes account of the views of the person who put it up on the internet. This is how the rights of those suffering harm as a result of online abuse in the context of domestic violence and abuse will be most swiftly and effectively vindicated.

We have already expressed our view under the **Head 12** section above (pages 5-6) that it is perfectly possible to draft such “default” take-down provisions so that they comply with the standards set in Article 10 ECHR and the relevant case-law. Accordingly, these arguments will not be repeated here.

Finally, Safe Ireland submits with respect that if the publication of libellous material in traditional print media were threatened, and injunctive relief to prevent publication sought on the basis of the enormous harm that would be done to the person who was the target of the alleged libel, the Court would be unlikely to take the view that the other party’s right of free speech should prevail until trial (absent any compelling overriding public interest in immediate publication) – because the reputational and personal damage would by then be done, and an eventual order made at trial could not reverse that damage. Our view is that it is for the Commission and the designated online services to do all they can to mitigate similar (and often worse) damage to individuals in the online world, including by the use of swift take-down directions and procedures.

**Safe Ireland Recommendation:** The Media Commission, as an officially constituted body operating independently of the State, should have the express power to give directions to designated online services on foot of requests from or on behalf of affected individuals to take down harmful online content which are not granted or otherwise addressed, within a reasonable time by the relevant designated online service. This means issuing directions to take down such material pending any final determination as to whether or not it is in fact harmful online content in any case where it is clear that the material constitutes harmful online content, or there are reasonable grounds for believing that this is indeed the case.

**Safe Ireland Recommendation:** The Commission should be given the power to direct the removal of material pending any final determination on whether it constitutes harmful online content or not - whenever it is satisfied that the material in question either unambiguously constitutes harmful online content, or that there are reasonable grounds for believing that it does indeed fall within one or more of the categories of harmful online content, - and it is also satisfied that the relevant designated online service has unreasonably failed to take down that material



within a reasonable time after receiving a request to do so from the aggrieved person or from someone acting on their behalf.

## Head 51 Online Safety Guidance Materials

A consultation with all relevant NGOs who support victims of online abuse, including domestic violence support services, should be held before preparing these guidance materials. This is particularly important in relation to the identification of harmful online content under (b) which is not illegal per se. The topics to be covered in this part of the Guidance should include:

- The nature of online abuse including within intimate and other close relationships;
- The importance of context in deciding whether material falls into category (b) of harmful online content or not;
- The multi-faceted and serious impacts of online sexual harassment and abuse, and indeed non-sexual forms of harassment and abuse;
- The factors which make people vulnerable to various forms of sexual (and other) harassment and abuse;
- The factors which make it difficult for a victim to address such abuse;
- The victims' experience of online sexual and non-sexual harassment and abuse – their fears of continuing abuse, their loss of privacy, their damaged relationships - and their need for speed, simplicity, default takedowns, good communication, easy to understand information and advice, and for transparency in all processes;
- Victims' need to be treated with compassion and respect in circumstances in which they often have to relate intimate, embarrassing and frightening experiences to strangers.

**Safe Ireland Recommendation:** Those who understand the nature and extent of the various forms of online abuse in the context of domestic violence and abuse, should be consulted at every stage of the preparation of these Guidance documents. Without this perspective, such Guidance will not be as effective as it should be as a means of increasing online safety for women and children affected by online abuse in the context of domestic violence and abuse.

## Head 52B Systemic Complaints Scheme

Safe Ireland views this process as very positive from the point of view of furthering online safety for women and children at risk of further abuse in a domestic context. Expert NGOs whose role

includes supporting victims of online abuse in the context of domestic violence and abuse are well placed to become nominated bodies. They have enough contact with clients reporting online abuse to notice a systemic issue which is being reported by several clients. It is heartening to learn that there will be a straightforward mechanism through which such issues can be brought to the Commission's attention without the need for numbers of often very vulnerable individuals to make individual complaints all on the same issue.

### **Head 53 Compliance and Warning Notices**

Safe Ireland approves of the power under subhead (9) to publish details relating to any warning notice which it issues under this provision. It seems to us that the risk of adverse publicity, given trust is a valuable commodity in online service provision, is likely to be a more effective sanction than a financial one. The power under the next Head 54 (5) to seek leave of the High Court to compel internet service providers to block access to a designated service provider within the State, is also likely to be an effective one in our view.

### **Head 56 Designation of relevant online services**

**Subhead (13):** Two types of designated online service (or category of same) will not be obliged to abide by an online safety code unless the material in question comes under category (a): "material which it is a criminal offence to disseminate...." These are interpersonal communications services, and private online storage services. Safe Ireland's view is that privacy rights and safe places to communicate are important resources for women and children living with domestic violence and abuse. This is a principal consideration when devising the best approach in terms of the harms that may be present in these spaces. We must point out that much online harassment and abuse does indeed take place over email and through WhatsApp and similar applications. This is an issue which hopefully will be resolved in part at least by the new criminal offences which came into force in February 2021 (Harassment, Harmful Communications and Related Offences 2020) and which captures an extended list of forms of sexual and non-sexual harassment and abuse.

**Safe Ireland Recommendation:** We suggest that interpersonal communications services and private online storage services should each remain private as a general rule, but that the Garda should have at their disposal, and have the legal power to use, every possible technical tool in order to investigate any report of a criminal offence alleged to have been committed using either of these kinds of these services.

## Conclusion

Safe Ireland would like to summarise this submission by welcoming very much the holistic approach taken in this General Scheme to tackle online safety: it is by no means confined to the creation, implementation, revision and supervision of online safety codes but extends to primary prevention through safety by design, education, and policy developments.

However, Safe Ireland does remain concerned that there is no second-tier express individual complaints or take-down mechanism envisaged which will be run directly by the Commission and which would operate as a safety net to catch all individual complaints to designated online service providers which had not been satisfactorily resolved. If ultimately no such second-tier individual complaints mechanism is made available to service users by the Media Commission, the disadvantages of the indirect mechanisms proposed to ensure that the online safety codes are effective for those affected by, or at risk of, online abuse in all its forms – may be mitigated to some extent by:

- the devising of detailed online safety codes which set out clear and swift procedures for take-down of offensive material,
- the continuing work to achieve safety by design and the willingness of the industry to partner with the Commission in this;
- a new system which would not allow any new program/application/platform to go “live” unless all reasonable care had been taken to ensure that it was safe as possible in line with online safety codes approved and overseen by the Commission and
- a procedure which would allow the Commission to direct swift take-downs pending final determinations on the nature of the material objected to, in any case in which the designated online service had failed to take it down without reasonable excuse, alongside transparent and timely review and appeal processes.

**Safe Ireland’s Final Recommendation:** Our final recommendation is that online safety issues become the responsibility of a dedicated Online Safety Commissioner and that his/her office is resourced adequately to ensure that any individual in whose case the complaints and takedown procedures of a designated online service provider have failed to effect a timely takedown or other protective measure, can have their complaint taken up, investigated and resolved by the Commission with the minimum of further delay and attendant harm.

## SI/CC

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