

# DÁIL ÉIREANN

## AN COMHCHOISTE UM NA MEÁIN, TURASÓIREACHT, EALAÍONA, CULTÚR, SPÓRT AGUS GAELTACHT

### JOINT COMMITTEE ON MEDIA, TOURISM, ARTS, CULTURE, SPORT AND THE GAELTACHT

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*Dé Céadaoin, 5 Bealtaine 2021*

*Wednesday, 5 May 2021*

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Tháinig an Comhchoiste le chéile ag 12.30 p.m.

The Joint Committee met at 12.30 p.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Peter Fitzpatrick,	Malcolm Byrne,
Brendan Griffin,	Micheál Carrigy,
Mattie McGrath,	Shane Cassells,
Imelda Munster,	Annie Hoey,
Johnny Mythen,	Fintan Warfield.
Christopher O'Sullivan.	

Teachta / Deputy Alan Dillon sa Chathaoir / in the Chair.

## **Business of Joint Committee**

**Vice Chairman:** We have one item of business to address before I call our witnesses to present. Is it agreed that the draft minutes of our public and private meetings on Tuesday, 27 April are formally agreed and that there are no matters arising? Agreed.

### **General Scheme of the Online Safety and Media Regulation Bill 2020: Discussion (Resumed)**

**Vice Chairman:** We are conducting pre-legislative scrutiny of the general scheme of the online safety and media regulation Bill 2020. This meeting has been convened to hear from representatives from the Broadcasting Authority of Ireland, BAI, and the Data Protection Commission, DPC. This is the second of our public hearings to discuss the general scheme of the Bill.

I welcome the witnesses. They will all be joining the meeting remotely via Microsoft Teams. From the BAI, I welcome Mr. Michael O’Keeffe, chief executive, and Ms Celene Craig, deputy chief executive. From the DPC, I welcome Ms Anne Morgan, deputy commissioner and head of legal, and her colleague, Ms Jennifer Dolan, assistant commissioner for children’s policy. The format of the meeting is that I will invite the witnesses to make opening statements which will be followed by questions from members of the committee. As they are probably aware, the committee may publish the opening statements on the website following the meeting. I will call on each organisation to deliver their opening statements in the following order. We will first hear from the BAI and then the DPC. Opening statements are limited to five minutes per organisation.

I advise our guests of the following in the context of parliamentary privilege. Witnesses are reminded of the long-standing parliamentary practice that they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable, or otherwise engage in speech that might be regarded as damaging to the good name of the person or entity. Therefore, if witnesses’ statements are potentially defamatory with regard to an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative that they comply with any such direction. As our witnesses today are attending remotely from outside the Leinster House campus, they should note that there are some limitations to parliamentary privilege and, as such, they may not benefit from the same level of immunity from legal proceedings as a witness who is physically present does.

Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the Houses or an official either by name or in such a way as to make him or her identifiable. I remind members of the constitutional requirement whereby members must be physically present within the confines of the place where Parliament has chosen to sit, namely, Leinster House or the Convention Centre Dublin, in order to participate in public meetings. I will not permit a member to attend where he or she is not adhering to the constitutional requirements. Any member who attempts to attend from outside the precinct will be asked to leave the meeting.

I ask members to identify themselves when contributing for the benefit of the Debates Office staff preparing the Official Report and also to please mute their microphones when not contrib-

uting in order to reduce background noise or feedback. I also ask that they use the raise hand function when they wish to contribute. I remind those joining today's meeting to ensure that their mobile phones are silent or switched off.

I invite Mr. O'Keeffe to make an opening statement on behalf of the BAI.

**Mr. Michael O'Keeffe:** On behalf of the BAI, I thank the Chair and members of the committee for inviting us to present and answer questions today. This is important legislation and we hope that our contribution will be of assistance to the committee in the important pre-legislative scrutiny work that they are doing currently and will continue to do over the next number of months. I am joined by my colleague and deputy CEO of the BAI, Ms Craig. We will both answer questions about the various topics that are raised in our submission.

I am sure that members are familiar with the BAI, which was established in 2009. Our current responsibilities including licensing of commercial and community radio stations and television, regulation and the provision of support to independent and public service broadcast media. We also provide funding for programming and archiving related to Irish culture, heritage and experience, through our sound and vision and archiving schemes. Many people will be familiar with the sound and vision fund.

The BAI welcomes the Bill's provision for the functions and the staff of the organisation to be transferred to the new media commission when the legislation is enacted. We believe that this approach will result in the BAI bringing its considerable knowledge and regulatory expertise gained to date, and also the planning work that we have done for the future regulation of on-demand and video-sharing platform services, to make a meaningful and early contribution to the work of the new media commission.

In the document containing our opening statement, of which, I know, members will all have received copies, I have outlined the current BAI activities which we believe are especially relevant to these new regulatory areas. I am not going to go in to these in detail but we would be happy to answer questions on them. The first area is the regulation of harmful content. The second is the preparatory work undertaken by the BAI to support the transformation of the audiovisual media services directive, or the AVMSD, as people know it. I have highlighted our work in the important areas of media literacy and also disinformation. Members will be familiar with the term "fake news", as it is sometimes referred to. We have done significant work on disinformation. We have also been involved in the future funding and sectoral sustainability of public service, commercial and community broadcasters, and the independent productions sector. We have engaged extensively with the Future of Media Commission, which is operating in parallel with this process. We would be happy to take any questions that members may have on those aspects of our work.

The final part of the opening statement specifically addresses certain heads of the Bill. I emphasise that the BAI welcomes and strongly supports the aims of the general scheme of the Bill. It provides for the future regulation of traditional media and also online services. We would commend our colleagues in the Department on the work they have put in to this over the past couple of years. We especially value the establishment of a single content regulator. That should ensure consistency in the approach to regulation. We also welcome the emphasis on regulatory principles and policies which will serve and protect audiences and online users and which will also uphold and promote freedom of expression, cultural diversity and human dignity. The high-level macro approach to regulation in managing the issue of scale is also welcomed.

Our submission refers to a small number of heads which we believe would benefit from further committee consideration. We would be happy to take any questions that members have on these. They include, in no particular order other than that in which we presented them in the document: the independence and resources and resources that will be available to the media commission; some of the categories and indeed definitions of harmful online content; the concept of compliance and warning notices, which we would be familiar with from our work; the proposed content levy and associated schemes that may emerge from that; and some elements of advertising limits. We would be happy to elaborate on these positions regarding the heads, or any other matter that members may wish to question us on, during the question-and-answer session.

I thank the committee for the opportunity to discuss the general scheme and I look forward to answering whatever questions they may have about our submission.

**Vice Chairman:** I thank Mr. O’Keeffe. I call Ms Morgan to address the committee on behalf of the Data Protection Commission, DPC.

**Ms Anna Morgan:** The DPC thanks the committee for the invitation to discuss our written submission on the general scheme of the online safety and media regulation Bill. While the Bill covers a number of areas, including broadcast media and on-demand audiovisual media services, the DPC’s submission focuses primarily on Part 4, online safety, and the specific areas in which there may be potential synergies with the work of the DPC.

While the DPC is primarily concerned with its own area of regulation, namely, data protection, it recognises that the regulation of online safety issues, including harmful content, and data protection will naturally complement and be mutually supportive of each other. The issue of children’s data protection rights is a key priority for the DPC and an area in which we are working to raise standards of protection substantially. As such, we are pleased to have this opportunity to bring a data protection perspective to this broader discussion on harmful content and online safety. Although harmful content and online safety issues are outside the remit of data protection law, the DPC considers that these objectives are two sides of the same coin.

Digital technology is an intrinsic part of everyday life for each and every one of us and provides significant opportunities, but the online world also presents new risk scenarios for children and adults alike, many of which areas are not yet subject to oversight or regulation by an appropriate body. Therefore, the DPC strongly welcomes the Government’s decision to introduce separate legislation to regulate the area of harmful content, among other issues, and establish a dedicated, independent media commission, including a constituent member who will act as the online safety commissioner, to enforce the law.

As stated in our submission, the DPC notes that the Bill in its current form expressly excludes material that violates data protection or privacy law from falling within the scope of harmful content. However, the DPC believes it is important that the media commission have the power to regulate all types of harmful online content irrespective of whether they involve personal data. This is because there are clear limitations to the reach of data protection regulation, meaning it does not and cannot provide a comprehensive regime for tackling harmful content posted or shared in an online context.

In recent years, the DPC has experienced an increase in the number of complaints received relating to user-generated content that is considered offensive, harmful, defamatory or detrimental to the health, safety or well-being of one or more individuals. In the absence of an

existing statutory framework to regulate such issues and handle complaints in this area, the DPC finds itself having to deal with complaints relating to requests for the takedown of user-generated content despite the fact that the data protection regime is not intended to tackle such matters and does not provide an appropriate range of tools for dealing with them. Issues around user-generated content also commonly overlap with the areas of content moderation and online safety, but the general data protection regulation, GDPR, and the Data Protection Act 2018, which gives further effect to the GDPR, do not aim to regulate content. Therefore, that legislation does not provide the tools nor the powers required to tackle such issues, including the power to issue immediate takedown notices on the basis of content alone.

Subject to limited exceptions, data protection law is generally not intended to regulate on-line interactions between individuals on a personal one-to-one basis, in other words, where there is no relationship between a data subject and a data controller. As set out in further detail in the DPC's submission to the committee, there are a number of criteria that need to be met before data protection law is engaged in the context of a complaint. For example, the content in question must contain personal data and the complaint must be raised by or on behalf of the data subject whose personal data are concerned. However, even in cases where the content in question contains personal data and a complaint is submitted by or on behalf of the data subject, it is not always immediately apparent at the outset whether there has been an infringement of the GDPR. The DPC must therefore embark on a course of action to handle and examine the complaint against the various obligations of data controllers under the GDPR.

It is important to highlight that the DPC cannot simply order the erasure or removal of personal data based on a unilateral assessment of online content. This is because data protection law is not so much concerned with the nature of the content as it is with examining whether the rules in the GDPR and the 2018 Act have been complied with in the use of those personal data. As such, the establishment of a dedicated body with the power to order, among other things, the swift takedown of all types of harmful content is imperative in this regard.

It is for these reasons that data protection regulation, which performs a substantially different policy function, is not the appropriate prism through which to tackle situations where the primary objective of a complainant is to ensure the immediate takedown of content due to its potential to cause real harm, whether physical, psychological or otherwise. On the other hand, the Bill clearly and unequivocally aims to establish the jurisdiction of a new media commission for the purpose of regulating such matters, among others.

It is against this backdrop that the DPC respectfully suggests that the committee give consideration to the potential risks to the public interest of a regulatory lacuna arising following the Bill's enactment. This potentially arises in circumstances where, as contemplated by the Bill, complaints about harmful content may be excluded from the remit of the media commission simply because the harmful online content in question also involves, at some level, the use of an individual's personal data.

We would be happy to discuss the finer points of the DPC's submission in detail and we welcome whatever questions the committee may have.

**Vice Chairman:** I thank our witnesses for their opening statements. We will proceed to questions and answers.

**Senator Fintan Warfield:** I thank the contributors. I will use the short time I have to discuss the BAI and the establishment of the media commission, which I welcome. A single

content regulator is something that we can all get behind. As I discussed with the departmental officials previously, it is widely accepted that the BAI will have to grow quickly and urgently into a media commission. I have met a number of tech companies, some of which are concerned about the BAI's understanding of their industry. There was some hope that the BAI would hire industry experts. My primary interest is in online audiences and users being protected and served well by the new media commission. That needs to happen as quickly as possible. The Department has stated that it is preparing a business case and is engaging with the Department of Public Expenditure and Reform. Is the BAI optimistic about the recruitment process, which needs to happen before this legislation is passed? What is the BAI's view on the need for urgency in establishing the commission? Other than introducing this legislation, what can the Government and the BAI do to move this issue forward?

I will ask my remaining two questions while I have the floor. One is about Irish women in terms of radio play. Imelda May topped the album charts last month. The last Irish woman to do so was Lisa Hannigan in 2016. I commend the Why Not Her? campaign and Linda Coogan Byrne for their report and work on this issue. The BAI mentioned the importance of the media commission in upholding cultural diversity. Surely there should be more work done on tackling the disparity in air time. Could we consider enforcing licensing conditions where women are disadvantaged compared to their male counterparts in terms of air time?

I will make my final point briefly. It strikes me that the State has never realised or recognised the status and importance of community media. I am not using that term interchangeably with "local media". I am talking about community media as distinct from public service media and private commercial media. How can the Future of Media Commission strengthen community media in Ireland in a new digital age?

**Mr. Michael O'Keeffe:** I will take those questions. I thank Senator Warfield. The first question was on recruitment and urgency. I am glad the Senator mentioned urgency because we absolutely agree with him on it. I welcome the fact that this pre-legislative scrutiny is being done now. There is a target to have it completed by the summer. The target is also to have the legislation enacted by the end of the year. That is very positive. I urge the committee members, as legislators, to ensure this happens. There is an imperative. The audiovisual media services directive is in place since 2019 so I believe the end of 2021 is a target. I agree strongly with the Senator on the urgency.

On the business case and recruitment, we have engaged with the Department. I saw the proceedings of this committee's meeting with Mr. Ciarán Shanley and Ms Triona Quill a couple of weeks ago. We met them yesterday. We have had preliminary discussions on the business case and what is involved in it. Ms Quill, when she was here a couple of weeks ago, talked about a fairly exponential rise in the number of staff members. We have about 40 people in the BAI. Clearly, many more will be needed in the media commission. The Department of Public Expenditure and Reform has a role and will be involved. The Department will engage with the commission. We have agreed, with the Department, to set up regular meetings. We are talking about meeting every three to four weeks to update and plan. There will be a need to start a recruitment process as early as is practicable. How it will work out in practice will have to be negotiated through the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media and the Department of Public Expenditure and Reform. There is a commitment on the Department's side and ours to work with those concerned.

The Senator made a point on the tech companies. If the tech companies were happy with this, he might be more concerned. In our submission, we set out all the activities in this area



in which we have been engaged, including through the European Commission and the European regulatory group that we chaired. We have chaired several groups involved in this so our knowledge in this area is very strong. We have engaged with the tech companies and look forward to continuing to do so. We agree with the Senator on the concept of urgency and its importance in making progress.

Let me address the Senator's other two questions. On the question on women, we are meeting Ms Coogan Byrne. The gender team, which involves my colleagues Ms Stephanie Comey and Ms Deborah Molloy Bergin, has set up a meeting with Ms Coogan Byrne, to be held next week on 14 May. The team has had positive engagement with her in the recent past. There is certainly an issue that needs to be addressed. We have a good track record on this. We had a similar situation regarding women in creative roles in the independent production sector. We introduced criteria for the sound and vision fund. That has seen a fairly significant rise in writers and directors, although maybe less so with respect to directors of photography. This is another of the areas we have examined. The rise is a result of policies we introduced with the scheme. There is no question but that there is an issue that needs to be addressed. It has not been raised with us in the past. It was raised by Ms Coogan Byrne last autumn for the first time. We have been engaging. There is a need to engage with the commercial radio sector and, indeed, the public broadcaster, including its radio section. We intend to come up with some proposals and move on this. We did this over a couple of years with the independent production sector and it worked very well.

I want to make a final point, on community media, because it is important. We have launched a consultation on a new community media policy and have done a lot of work in this area. We can send some of the material on to Senator Warfield in that regard.

**Deputy Mattie McGrath:** I welcome our guests. I thank them for their outline and for the information they sent us in advance. I look forward to the roll-out. I hear the calls concerning the Department of Public Expenditure and Reform and the need for more staff. I have not been happy with the BAI in many instances, especially in the recent past. I hope there will be a more engaging body that will be more combative with RTE and other groups if they make outlandish productions and insult sections of the people. There will be some robust engagement, including on accountability. We need that. It is important across all sectors. Given the effects of cyberbullying and everything else, there is an important role to be played regarding media content, including fake and distasteful media content. I look forward to engaging more with those concerned. That is all I have to say for today.

**Senator Shane Cassells:** I thank the witnesses for their work and presentations. Mr. O'Keeffe spoke extensively in his opening statement about tackling disinformation and fake news. This is very apt given the day that is in it. The Facebook oversight board is set to rule today on whether Mr. Donald Trump's ban for using the Facebook platform to incite an insurrection should stand. My point applies to all social media platforms. The world will watch with interest. This development follows on from a weekend over which major sports organisations across the United Kingdom effected a total online media blackout to combat online hate speech and online racism. It is an interesting time to be discussing all these issues.

In his opening statement, Mr. O'Keeffe, whom I praise for his work in this area, said it may not be appropriate, given the scale of the regulations and the fact that the general scheme is already very significant, to include broader societal harm at this juncture. Could he elaborate on that point? Furthermore, could he elaborate on the definitions related to harmful online content? He said he is concerned with the element of the definition concerning what a reasonable

person would conclude is the intention of the dissemination. Could he expand on that?

On the issue of the content levy, Mr. O’Keeffe, in keeping with considerations on resources and so forth, noted that consideration should be given to the removal or prohibition of funding for news and current affairs content, given emerging concerns in respect of disinformation. That is welcome. There is a lot of interest in the content levy among independent producers, Screen Ireland and so forth. On the content levy, does Mr. O’Keeffe agree that the fund should only be open to applications from independent Irish producers working with broadcasters and online media services? At what percentage should the levy be set?

I thank Ms Morgan for her presentation. She spoke extensively of the work that may not fall within the remit of the Data Protection Commission but is landing on her desk because it has nowhere else to go. Of these complaints, what is the age profile of complainants? Are they under 18 years? How difficult is this? Given the lacuna that exists, how co-operative are the social medial giants in dealing with the Data Protection Commission? How swiftly do they respond when the DPC makes infringement complaints to them?

**Mr. Michael O’Keeffe:** I will ask my colleague Ms Craig to deal with harmful online content. The BAI and the European Commission have been doing a huge amount of work on disinformation with the voluntary code of practice. We released two pieces of research in the last couple of years, ElectCheck and CodeCheck, on how the platforms were fulfilling the requirements of the code. The results were not great to be honest, and it raises the question of whether there is a need for greater intervention from a regulatory perspective. We continue to do more work in that area.

The reason we suggested waiting is that we believe there will be further legislative developments at European level that will need to be taken into account. To go back to my earlier point about urgency, our feeling was that while it would be premature on one level, on another level, because it is so complex, this legislation needs to go through. It would make more sense to await the current legislative developments. We are not dismissing the concerns and issues around that.

On the content levy, we have been clear on our rationale. The original exclusion of new and current affairs was for a particular reason. For media plurality, and returning to the Senator’s point on disinformation, we believe there should not be a restriction on news and current affairs in schemes.

The European Regulators Group for Audiovisual Media Services, ERGA, has done significant work on the preparation of schemes of this nature as they are being introduced in a range of jurisdictions. We are involved in a group that is involved in that process and will continue to support that work.

If one is taking a percentage of a levy from broadcasters and, indeed, new media, I am not sure one can restrict a scheme to applications from organisations that are supported by the sector. In the history of schemes of this nature, for example, the Sound and Vision scheme on the television side, 95% of funding goes to independent producers who have the support of broadcasters. It is inevitable that a scheme of this nature will provide great support to the independent production sector when it is introduced.

**Ms Celene Craig:** The BAI supports the categories of online harm that have been included within the general scheme. We consider that these constitute some of the most egregious harms.



We support the idea that online users should be protected from such harms while they are using online services. We have a small concern. In general, we believe the definitions need to be readily usable in practice. In the first instance, that will involve definitions that can be readily applied by the online platforms, which can decide if material is in breach of the statute. It is very important that they are usable, including at scale given the number of complaints and concerns that may be expressed and brought to any one platform.

We have concerns around the requirement to conclude intent. We see there may be some practical difficulties with this, particularly where all of the context may not be known. We are also keen to state that the real intention is not necessarily to assign blame to the person who may have caused the harm but, rather, to insure that a user is protected from harm, particularly a child. In a case where a child is being cyberbullied by another child or other children, it may be difficult to conclude there was intention. Nevertheless, the definitions as they are applied should be capable of determining that this has the potential to cause harm and, therefore, merits consideration or removal in that context.

**Ms Anna Morgan:** The Senator raised the issue of user-generated content and complaints about it that land on our desk. He also asked about the types of complaints, the age profile of complainants and the volume of complaints of this nature. We currently have around 80 user-generated complaints. I understand none of these relates to minors or those under 18 years. In general, the nature of the complaints is that a person has had a post placed on a platform that relates to him or her and the complainant is unhappy about it, finds it offensive or threatening or may consider it defamatory. The difficulty for complainants is that because they are objecting to the nature of the content in question rather than asserting that there has been some sort of infringement insofar as the rules around data protection are concerned, when we go about evaluating that complaint, we must do so within the framework of the data protection regime. That means, first, trying to establish whether there is a control, process or relationship in being, because that is the cornerstone of the application of GDPR and the 2018 Act. We must also look at whether there is a lawful basis for the processing of those data.

Complications will generally arise when we put the complain to the platform. It will often tell us that it does not believe there has been an infringement of personal data. Platforms are generally only prepared to remove that sort of content when there has been an infringement of their community standards or terms of use. That process of going back and forth between the complainant and platform must necessarily be an iterative one. As we said in our written submissions to the committee and opening statement, we do not have the power to order the immediate takedown of content on the basis of the content alone. Instead, we must embark on a process of tracing through the various rules in the GDPR.

It is a complicated process that frequently does not yield an outcome with which the complainant is satisfied. It very much depends on the attitude of the platform in question, particularly when we intervene, as to whether it is prepared to take down that content.

**Deputy Brendan Griffin:** Further to the point regarding the power the Data Protection Commissioner does or does not have, is Ms Morgan saying the provisions in the Bill should be stronger in that regard?

**Ms Anna Morgan:** The core point we have made in our written submission is a concern that a regulatory lacuna will arise in circumstances where the current definition of harmful online content set out in head 49A specifically excludes material which is said to violate, among other things, data protection law. The concern that arises for us on that front is that there may

be a dilution of the effectiveness of the online safety commissioner and the media commission in tackling these sorts of issues in circumstances in which there may potentially be a tangential or ancillary technical infringement of the general data protection regulation, GDPR, rules but in which the primary complaint of the complainant relates to an objection to a video or other material posted about that complainant online. The reason for that concern is the harmful effect that content is said to have. We are concerned that, in specifically excluding any material which may even potentially involve ancillary infringement of the GDPR, we will not get to the nub of the issue and that an important opportunity for dealing with complaints that are really based on the nature of the content posted rather than concerns about data processing rules will be excluded from the remit of the media commission.

**Deputy Brendan Griffin:** I thank Ms Morgan for her point, which is well made.

**Deputy Johnny Mythen:** I thank Ms Craig, Ms Dolan, Mr. O’Keeffe and Ms Morgan. Most of the questions I had wanted to ask have been asked but I have one more. Mr. O’Keeffe mentioned that he would like to see gender-based harm included in the scope of the Bill. Will he expand on what he means by this? In his opening statement, he said that he is of the view that the media commission should have greater discretion in the setting and implementation of advertising limits. Will he describe in more detail the rationale for wanting discretion in this regard? What steps should the new media commission take to ensure and to support its full independence? Do the witnesses feel there is enough independent diversity in the media? Do they see this diversity being allowed more of a voice in the future?

**Ms Celene Craig:** I do not see my colleague online so I will take the Deputy’s questions, if I may. I will deal first with the issue of gender-based violence. The point we would like to make in this regard is again in reference to the categories of online harm specified in the general scheme, categories which we support. Under head 49A, category (b), “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” is specified as a category of harmful online content. While one might consider that gender-based violence or harm caused online to be included within that definition, the Broadcasting Authority of Ireland, BAI, is very concerned about the specific targeting of women online, in particular, although not solely, those in public office, women politicians and women journalists. There has been significant targeting of such people, which we believe has the potential to cause real harm. The BAI believes that there might be some benefit in giving a level of specificity in this regard within the Bill. An alternative might be to require the media commission to specify within an online code that gender-based violence, or any kind of sexuality-based violence such as homophobic content, is to be considered as forming part of that particular category of online harm. That is where we are coming from on that issue.

With regard to advertising limits, the BAI’s position on advertising limits has for some time been that there is a value in the media regulator having oversight of all of the advertising limits rather than having a broken-up system in which there is some role for different parties such as the Minister and the media commission. It allows for differentiation in the allocation of minutage and a singular policy approach across different forms of media, having regard to different factors that impact different media. That is our main purpose in making that recommendation.

The Deputy also talked about the steps the media commission would take. Will he repeat that question?

**Deputy Johnny Mythen:** I asked about the steps it would take to ensure and support its independence.

**Ms Celene Craig:** The independence of public bodies is always highly valued but it is particularly pertinent in respect of the media in order to ensure that people can be confident that regard is had to matters such as freedom of expression and support for democratic discourse. We believe the main place in which that independence can be strengthened is through the very clear direction within the legislation with regard to the powers of the media commission, the separation of those powers and being very distinct and clear as to the role of the Oireachtas in certain situations. This role may be in the expansion of the categories of online harm or in the oversight or acknowledgement of any online codes that might apply. We believe that independence can be cemented within the general scheme but can also be supported through clarity and the ability of the media commission to act independently and to have its own code of conduct that would support its independence in that regard.

I believe the Deputy's last question related to diversity. I was a little bit unclear on this question. Was the Deputy referring to diversity in the content broadcast by independent broadcasters?

**Deputy Johnny Mythen:** Yes.

**Ms Celene Craig:** The BAI engages in a wide range of activities to support diversity of content on broadcasting services. This relates to the range of services and the different types of services it licenses. It also stretches across the different categories of services. We recognise that public service broadcasting, commercial broadcasting and community broadcasting, on both radio and television, all have roles in increasing diversity. Our licence agreements or contracts with broadcasters spell out the manner in which they will deliver on diversity objectives but there are many other ways in which the BAI supports diversity. For example, we do so very extensively through the sound and vision scheme. This scheme encourages and supports a very wide range of content that it might not otherwise be possible to provide in a commercial context. It also supports the supply and broadcasting of that content right across the different categories of broadcaster in both radio and television. That is central to our functions and we remain very committed to continuing to do this. We also believe it should form part of the core functions of the new media commission.

**Senator Malcolm Byrne:** I thank the representatives of the BAI and the Data Protection Commission, DPC, for their presentations. I will begin with questions to the DPC. I welcome the fact that, in its recommendations, it mentions the new media commission dealing with all forms of online harm and states that these need to be covered. This has the potential to be one of the most powerful regulators in the State. I received assurances from Department officials that there would be codes around algorithmic decision-making and guarding against bias and potential harm in this regard. It was suggested that this would be managed by the media commission. Will biometric authentication and the use of biometrics now fall within the remit of the DPC or that of the media commission? When we are looking at various new forms of artificial intelligence, AI, and how they are going to be rolled out, particularly by some of the tech companies, I would like to know where these matters will fall between the organisations. The BAI may wish to comment on this as well. When we spoke with officials from the Department, they envisaged the BAI being folded into the new media commission. This commission will, however, cover a far broader range of issues. The Department envisaged that the commission would be at least the size of the DPC. As the witnesses probably know, I have argued that there are questions as to whether the DPC is adequately resourced to even deal with its current range

of obligations. What level of experience and staffing do the BAI and DPC anticipate will be required to deal with regulating the media while also addressing many of the online harms about which we have spoken?

**Ms Anna Morgan:** I thank Senator Byrne for his questions. He raised two issues in particular, namely, biometric authentication and the increasing roll-out of artificial intelligence by tech companies and tech platforms. Separately, he referred to algorithmic-based decision-making. Both are matters which, insofar as they concern general data, would fall within the scope of the GDPR and the general data protection regime.

On biometric authentication, the use of any biometric personal data would be captured by the rules around processing within the GDPR and the rules on processing for special category personal data. Equally, insofar as decision-making is concerned, as members of the committee will be aware, Article 22 of the GDPR expresses a prohibition on automated decision-making insofar as it may create legal or other similarly significant effects. That prohibition operates other than where there are a range of circumstances where the-----

**Senator Malcolm Byrne:** I apologise for interrupting Ms Morgan, but my question is around guarding against algorithmic bias where a social media company or others are setting up that process. I got the impression from my engagement with the officials that the media commission will be addressing this issue. It is key that it does. I want to know this issue is being addressed and that we have the necessary strength of legislation to ensure that we can guard against bias, particularly bias especially based on gender, ethnicity or sexual orientation.

**Ms Anna Morgan:** I thank the Senator. Insofar as the regime created by the GDPR is concerned, if, for example, a complaint is made around the processing of personal data and an allegation is made that the rules of the GDPR have not been complied with and this has some form of effect for a data subject or an individual, it is within contemplation that that would fall within the rules of the GDPR. This will be determined by the specific facts of any given situation and the nature of the processing that is carried on and what we mean by algorithmic bias and the affects referenced by the Senator. Returning to Article 22 of the GDPR, insofar as there is some form of automated decision-making that is carried out that is not in compliance with the rules set out in that part of the GDPR, that would certainly fall within the remit of the DPC.

**Senator Malcolm Byrne:** I ask Ms Morgan to comment on the broader issue of the level and expertise of staffing required given the range functions the new regulator will have.

**Ms Celene Craig:** If I may, I will respond to the Senator's question on the role that the media commission might have in this regard. Insofar as the matters that are within scope of the media commission are concerned, there is potential for it to have oversight of the way in which machine learning informs decisions in regard to the taking down of content online. A compliance and enforcement regime is to be introduced by the media commission for services falling within the scope of legislation. An important part of that is not just looking at content that is on the platform that should have been taken down but also ensuring, in the interests of freedom of expression, that regulation is not having an over-chilling effect. It will also be important for the media commission to have auditing powers to examine that type of content. Subject to the GDPR requirements, the media commission should have access to content that has been removed by algorithmic processes to ensure that it is in compliance and that the right types of decisions have been made. The BAI would envisage that this would form part of the compliance and enforcement regime that would be introduced by the media commission. It is important to clarify that.

On the range and experience of staffing, my colleague, Michael O’Keeffe, has already referred fairly extensively to the work of the BAI in this area, both in preparing for the new regime and for implementation of the audiovisual media services, AVMS, directive. I believe there is a core of staff in the BAI that is well positioned to assist the media commission in that start-up situation. In terms of the efforts of the Department in securing the right numbers, our departmental colleagues have said that a staff of, at least, the size of the Data Protection Commission would be envisaged. Given the scale of the tasks before the new media commission, we would not disagree with that. We believe that a staff of, at least, a similar scale is required. There will be a requirement to build incrementally and a wide range of skills will be required. Given that regulation, for example, of the AVMS directive will be on a Europe-wide basis, a range of people with extensive legal and regulatory expertise and others with linguistic knowledge and knowledge of the online environment will be required.

**Senator Malcolm Byrne:** We are talking about big numbers already and we have not yet got to the online safety commissioner role and the support staff it may need.

**Ms Celene Craig:** I was referring to all staff, including for the online safety role. It is important to say from a BAI perspective that one of the things we have argued for is the macro high-level approach that is appropriate for the role of the media commission. Where a lot of the work is done by the platforms, the role of the commission would be in oversight of the way they implement the requirements of the online safety code and their accountability for the decisions they take and the way they take them. It is about a high level of oversight of the policies, procedures and practices of online platforms and then being able to provide transparency through appropriate auditing procedures and appropriate reporting accountabilities.

**Vice Chairman:** We have lost audio for Ms Craig.

**Ms Celene Craig:** My apologies, my microphone was muted. We believe that that is the right approach and that it will allow the commission some time to scale up. We also believe that in terms of getting the right skills - there is a huge amount of interest across Europe for involvement in that regulatory area - we believe that potentially there is an ability for the commission to be able to draw from a wide pool of talent.

**Senator Malcolm Byrne:** I ask Ms Craig to comment on enforcement because it will be key that the commission has teeth.

**Ms Celene Craig:** I agree. We are satisfied that the provisions of the online safety and media regulation, OSMR, Bill provide for a wide range of enforcement and sanction options for the media commission. It will be important that the commission can take whatever action is appropriate to the particular circumstances in question. A wide range of sanctions and provisions in this regard are provided for in the Bill. We would strongly support that approach.

**Vice Chairman:** The next speaker is Senator Carrigy.

**Senator Micheál Carrigy:** I welcome the witnesses. Many of my questions have been already answered, but I would like to make a small number of points and ask a few questions. The report references a waiver of the broadcasting levy for the independent sector. Are there plans for a further waiver to help the sector?

The issues of disinformation and gender-based harm were mentioned earlier and it was recommended that it would be appropriate to await legislation with regard to disinformation. What is the reason for that recommendation? I would consider it important to have it addressed



in this legislation because disinformation can be extremely harmful content. On the levy, I support its introduction but I believe it should be applicable not only to the broadcasting sector, but the print media as well, particularly news and current affairs. It is important that sector would be able to benefit too.

On data protection, I sometimes find it hard to get my head around this area. What stands out to me are two particular comments from the DPC opening statement, in particular that the Bill expressly excludes material that violates data protection or privacy law from falling within the scope of harmful content. I ask the witnesses to expand on that and the opinion that it does not regulate all types of harm.

It is stated in the submission, at No. 9, that complaints about harmful content may be excluded from the remit of the commission simply because the online content in question also involves, at some level, the use of an individual's personal data. Are we facing barriers to deal with certain types of harmful content because of data protection? Are there ways to address that so that we can deal with all forms?

**Ms Celene Craig:** I will answer the Senator's first two questions. The BAI waived the industry levy for commercial and community radio stations during the first half of 2020 in view of the extremely adverse financial circumstances in which the sector found itself arising from the Covid pandemic. The Minister had asked us to consider that request, which we did. There are no immediate plans to waive the levy further. However, the BAI has been busy, both last year and continuing into the current year, in disbursing funds that the Minister has made available in addition to the normal funds that would accrue to the sound and vision scheme. The sound and vision rounds of programme funding are being made available across the various sectors of the broadcasting industry. That additional financial benefit is accruing in recognition of their contributions to the provision of content as it links to the pandemic both last year and as it is unfolding, and the issues that are arising in the current year.

We have flagged disinformation as an area of major concern for the BAI, as a regulator, and also for our European colleagues. We felt it was important to raise this with the committee. We also suggested that some time might be taken before this would be considered for inclusion in legislation. The scope of obligations and functions that will fall to the new media commission is very wide. It might be best to let the commission get on with regulating in the space of personal harms as they are articulated in the Bill. Nonetheless, we believe this is an ongoing issue.

The second possible reason to defer consideration of inclusion in the legislation at this point is that there is potential at European level for the introduction of new legislation to address disinformation. This would allow Ireland then to co-ordinate with the European legislation in addressing it. The BAI is certainly satisfied to continue with its work in this space. We also believe that the media commission should stay actively involved in tracking developments in this area, particularly as they may have implications within Ireland. The commission should also have a wider sense of what is happening at the European level and beyond. The new regulator should certainly stay in that space, albeit there might be some value in postponing the inclusion of it within the legislation pending clarification of potential developments at the European level. It is very actively under discussion and we would expect it to become clear later this year or at the very latest early next year.

I know the Senator addressed this question to the DPC. However, I might just address the concern that certain categories of online harm might be excluded. This area might benefit from clarification with the departmental officials. Our reading of the general scheme was not

that categories of online harm would be excluded by virtue of the fact that they might contain some personal data, but rather that it was more to protect the functions of the Data Protection Commissioner and make those clear and distinct from the functions of the media commission. Therefore, determinations in respect of data protection would not be made by the media commission but rather they would be made by the Data Protection Commissioner and the powers of the media commission would be confined to issues as they concern online harm.

We realise that this is complex and that complaints may be made that will have a data protection element as well as involving an online harm element. The BAI very much supports this - indeed we proposed the approach within the Bill. We very much endorse the idea that the media commission could enter into structured co-operation agreements with other regulators. We would certainly foresee, particularly in the area of protection of minors, that there will be a need for very structured engagement between the media commission and the office of the Data Protection Commissioner. The BAI would certainly welcome early engagement with the Data Protection Commissioner in this regard. We believe that because of some of these complexities, a co-operation agreement that would allow us to clarify some of these issues would be very desirable and in the interests of both organisations.

**Ms Anna Morgan:** I thank the Senator for his questions and I also thank Ms Craig for her comments on these issues. If someone has posted content online about another individual, issues may arise concerning both harmful online content concerns and data protection concerns. It can be hard for individuals to differentiate between the two different areas of regulation. While we appreciate that it may not have been the intention to have an outright exclusion of material which conflicts with or violates data protection law from the remit of the media commission, because of the very explicit way in which head 49(A) has been drafted, we are concerned that the impact could be to exclude complaints which are primarily about the nature of the content and the potential for harmful effects on one or more individuals. Those sorts of complaints might fall entirely outside the remit.

Ms Craig has referred to the possibility of co-operation agreements and I note that that is dealt with in head 29 of the general scheme. I wish to comment on that part of the general scheme. It is not entirely clear that there would necessarily be a handoff of complaints between the media commission and the DPC or any other regulator. If that was to be the case, the DPC has made the point in its written submission that insofar as there might be a transmission of complaints between regulators, there would need to be a clear legal basis for the transfer of those complaints given that they would involve personal data. We consider that Article 6.1(a) of the GDPR and the legal basis for how performance of a task in the public interest is engaged it would require a basis in Irish law in order for those complaints to be transferred.

Equally, we note Ms Craig's comments and the intention to have general co-operation agreements. We think it is a good idea to have arrangements in place between regulators outlining the processes by which they would interact with each other. If there was an intention to transfer individual complaints containing personal data, that would require specific legislation and the creation of a legal basis.

**Vice Chairman:** I call Deputy Munster. She will be followed by Deputy Christopher O'Sullivan, after which we will have a second round. I ask members to indicate if they want to come back in. We have plenty of time.

**Deputy Imelda Munster:** I apologise for having just joined the meeting, as I was speaking at the convention centre. I apologise if I ask questions that have already been asked. I will go

ahead and ask my questions in the time allotted.

Do the representatives from the BAI know what the changes will mean for the authority? Has there been much in the way of consultation with the BAI in that regard? The BAI opening statement said that it is important that sufficient resources are in place from the outset of the media commission. What kinds of additional resources and staff numbers does the BAI think it will need? Fórsa's submission indicated that the BAI has had resourcing issues over the years. Will the witnesses comment on this in the context of additional resources needed for the new commission?

Reference was also made to the need for a system to facilitate the swift removal of content, which is under head 53. It was said that such a system was proposed but not provided for in the general scheme of the Bill. Will the witnesses expand on what the BAI would like to see there? Does the BAI believe the general scheme provides adequate freedom for the press? Is the BAI happy with the new levy, proposed under head 40 of the Bill, that would fund the media commission?

My next questions are for the Data Protection Commission. Will the representatives expand on the potential issues that could arise if the Bill to emerge from this general scheme persists in excluding, from the scope of harmful online content, material that violates data protection or privacy law? If this type of content was to be included, would it then be a matter for the new media commission, or would the witnesses envisage a dual role for the Data Protection Commission and the new media commission?

In its submission, the Data Protection Commission raised the need for a legal basis in compliance with Article 6.1 to allow for the transfer of personal data between the Data Protection Commission and the media commission. Does the general scheme contain adequate provision for this?

**Mr. Michael O'Keeffe:** I am back in the call and I will take some of the Deputy's questions. I will ask my colleague Ms Craig to deal with the question on head 53.

On resources, yes absolutely. We addressed this earlier. It is important and essential that there will be sufficient resources in the new media commission. We have engaged with the Department. We held preliminary discussions with the Department, which is making a business case to the Department of Public Expenditure and Reform. We will work with the Department over the next months on that particular issue. The Deputy is right with regard to Fórsa, which has also been in touch with us. We have engaged with Fórsa and will continue to engage. As I said earlier, the BAI is just 40 people and there is no question that there will be a greater number of people required for the media commission. It is absolutely a priority and something on which we will work very closely.

On the new levy, we are working with our colleagues in the European regulators group on preparing the type of levy scheme that is envisaged under heads 76 and 77. Obviously, it is a new area. We are part of that working group and it is envisaged the new media commission will set the scheme. It is a different scheme but similar in concept to the broadcasting funding scheme, which we established in 2005. The principles are the same but the media commission will need to decide on certain aspects such as the percentage of the levy, what is involved, who is liable to pay the levy and who is eligible, and how the funding will be allocated with regard to types of programming and content. There is a range of questions we will need to address in preparing the new scheme. I will now ask Ms Craig to deal with the question on head 53.

**Ms Celene Craig:** I thank the Deputy for the question. The BAI envisages a very high-level scheme where, primarily, the platforms themselves will be required, through the commission's codes, to take responsibility for the matters and content that link to areas specified in the legislation. We expect the online platforms would have in place the necessary arrangements to deal speedily with issues that are raised and with content that might be prohibited by the codes.

There is one area we do not envisage the media commission should be involved, namely, the large-scale removal of content on online platforms. We do believe, however, that ultimately the media commission should have the ability to make a determination in respect of a piece of content that is particularly egregious, where the commission is of the view that the matter has not been resolved to satisfaction. It is important to say that the general scheme envisages that the platforms will take responsibility, that there will be independent appeals mechanisms and that there will be potential for mediation. We do not envisage a vast number of such requests landing on the media commission's desk, but there would be some situations. We are quite persuaded around this, having spoken with many of the organisations who are involved in dealing with harmful online content, and especially harmful online content as it impacts young children and where the need is to protect the individual or a vulnerable adult from the harm being caused. We believe that ultimately this should be an option open to the new media commission. The BAI does not envisage - I must strongly say - that there will be a large or wholesale taking down of content in a way that may not be desirable. Ultimately, we are hoping that platforms are encouraged to adhere to the code, to make the right decisions and to have in place the proper processes for the removal of harmful content. We recognise that there is a big concern that not all complaints of this nature can be successfully resolved. There is a particular concern as it impacts young children who are active on platforms. That is the BAI's thinking in that regard. We suggest that it be given some further consideration.

**Deputy Imelda Munster:** I thank the witnesses.

**Deputy Christopher O'Sullivan:** I apologise for the technical issues earlier. The sooner we can return to the committee rooms the better. I thank the witnesses for attending the meeting today and speaking on the heads of the Bill. I have read the statements. I missed out of many of the contributions and questions due to technical issues but I can certainly watch the meeting back later on.

My questions are for any witness to answer that he or she feels relevant. The first question is to the BAI and concerns the impact on local commercial radio of the setting up of the new media commission. I apologise if this question has been asked already. Do the witnesses have an opinion on what this will mean for local commercial radio? It is a really tough world out there for them to compete. Advertising revenue has gone online to a great extent. Without a shadow of a doubt the local stations provide an important media service and this does not get enough recognition. What are the witnesses' opinions on what the setting up of the new media commission will mean for local commercial radio?

On the harmful content issue and the scope within the heads of the Bill, do the representatives feel that the scope goes far enough? This may have been covered already. Will there be enough emphasis on fake news for example? I believe this area has really been exacerbated and highlighted during the pandemic and even in recent months with the roll-out of the vaccine. Some people who have quite an influential social media presence with a large reach and a big following have been purporting and extolling incorrect information. This is damaging to public health. Do the witnesses believe that, as presented, the scope of the Bill's heads is wide enough to cover this issue?

Much of what I am about to raise next has been addressed, but I have to speak about a young woman who bravely told her story recently about a fake Instagram account that had been set up in her name and using her face and that showed sexually explicit images of other young women. She received horrific abuse. It was a shocking experience that only occurred in the past couple of weeks. It highlighted that this has happened to many young women throughout Ireland. It is horrific. The act is illegal under Coco's Law, but it is still happening. How can this Bill put in place measures that will protect young women and ensure that it does not happen again or, if it does, there are strong measures to deliver retribution?

**Mr. Michael O'Keeffe:** I might take the first question and then hand over to my colleague, Ms Craig, for the questions on harmful online content.

The local radio sector is important to us. It is our bread and butter. We started off as the Independent Radio and Television Commission, IRTC, way back when. I am unsure whether the Deputy is aware of it, but we have run a number of schemes in the past 12 months reflecting the difficulties that the sector has encountered. There was a levy waiver from the BAI during the first half of last year. We have run two special sound and vision schemes with the support of the Minister, who has given us additional funding to allow that. The schemes have been appreciated by the sector. We have a good relationship with the sector on a number of fronts through the Independent Broadcasters of Ireland, IBI, which I believe will appear before the committee soon, and Learning Waves Skillnet, which is the training and development group. The latter's AGM was last Friday. It is a successful and strong group and we provide funding supports to it. We have a range of engagements with the local and regional radio sectors as well as the community radio sector, which someone asked me about earlier.

The licensing and regulatory role that I talked about in my introductory remarks is part of the core of what we do, and that will not change. We are passionate about the sector, and that passion will continue.

**Ms Celene Craig:** I thank the Deputy for his question. The first comment to make about the scope of the online safety and media regulation, OSMR, Bill is that there is considerable breadth in the matters it covers. There are all of the matters covered by the audiovisual media services directive as well as the individual harms envisaged within the national scheme.

Disinformation, or fake news as it is often called, is a major concern and an important area of activity for the BAI currently. However, it is not envisaged by the OSMR Bill's provisions as drafted. We raised this matter for the Oireachtas's consideration. We are aware of the potential for damage that can arise in respect of some of the public health matters to which the Deputy referred. However, we have suggested in our submission that this is something that the Oireachtas might put a pause to. While there is good reason for including it within the scope of the Bill, it is fair to say that what the Bill covers is already extensive and it is important that the media commission address those issues and get measures up and running quickly.

Another reason for deferring this matter for the present time, albeit keeping it in consideration for down the line, is the potential for legislation at European level in this regard. The matter is being actively considered by regulators and legislators at European level. We believe that there may be some developments there. As such, there could be some value in waiting to see what those developments are, thereby allowing Ireland to co-ordinate on the issue. While the media commission should support activities at European level, particularly in terms of identifying issues concerning Covid vaccines and so forth, a media regulator can try to determine what impact such issues will have at an Irish level, which is what the BAI is currently trying to do.



We intend to continue our work in this vein. We also suggest that the media commission maintain an informational and research role in this regard. In terms of bringing it within the scope of the legislation, there may be some value in waiting to see what happens at European level.

The Deputy spoke about the case of a young woman whose personal data were used in a shocking experience. As he rightly stated, it was considered illegal under Coco's Law. A breach or potential breach would be a matter for other arms of the State in terms of progressing any prosecution that might be appropriate and would not necessarily be a matter for the media commission. There could be personal data considerations on which the DPC might wish to comment.

**Ms Anna Morgan:** I thank Deputy O'Sullivan for his comments and questions. The negative experience of the lady to whom he referred reinforces the need outlined in our written submissions for an adequate regulatory regime, which is missing currently, to tackle these types of situation where what is essentially user-generated content is at issue. As we noted in our submissions, the data protection regime has not been set up with the policy objective of dealing with such content moderation issues. Consequently, there is a gap in the law.

The lady's experience also reinforces the need for measures that are responsive and contain some form of immediacy, given the nature of the serious harms to which the Deputy referred in that case. All of this goes back to the point that the DPC made in our written submissions: the data protection regime is not set up to tackle those sorts of issue and does not aim to, and therefore does not have the power to issue immediate takedown notices. That is why we welcome the new regime heralded by the general scheme of this Bill, which we hope will have the potential to tackle the types of issue that have been referred to in the Deputy's recounting of that experience.

**Vice Chairman:** Two members have indicated they wish to speak. If anyone else wishes to contribute, he or she should indicate now.

**Senator Malcolm Byrne:** I wish to tease out some of the last points that were made. I am also familiar with the story of the young woman - many of us may be - about whom Deputy Christopher O'Sullivan spoke. When we set up an online safety commissioner, we want to be able to assure that woman that this State regulator will be able to deal with the situation she faced and address such concerns. It is key that the office of the online safety commissioner have teeth.

Mr. O'Keeffe made a point about the speed of setting up this legislation. I agree that we need to get the media commission established. The BAI has extensive experience of regulating broadcasting, but regulating tech companies and social media and dealing with online abuse and harm is a new and growing area. We were talking earlier about biometrics and algorithms, and I am conscious of what the witnesses said earlier about this. I think a flood of queries will arrive in to the new online safety commissioner. Ms Morgan might be able to comment on this. Every year the Data Protection Commission gets something like 6,000 individual queries around data protection breaches. If we look at the scale and level of online abuse that is out there, I have no doubt that if we have an online safety commissioner, that will attract thousands upon thousands of queries and complaints.

Ms Craig spoke earlier about the abuse that female journalists have been experiencing online. Journalists and politicians have experienced a lot of online abuse, and we heard this talked about on radio recently. There is going to be a role for this new commission and the online

safety commissioner in reassuring those in journalism and politics that while people can engage in robust debate, when it crosses the line into abuse and harassment, the online safety commissioner will be able to deal with that. For example, it will need to be strong enough to be able to deal with the story of that young woman Deputy Christopher O’Sullivan spoke about and of many others. We have to ensure that role is strong enough.

This comes back to the crucial question of the extent to which we allow the social media companies to self-regulate, and this is where I would be grateful for the views of the witnesses. At the moment, if anyone makes a complaint about online abuse to Twitter or Facebook, it can take a long time to be addressed and it is often addressed *ex post facto*. While some of this is around education and so on, we need to look at ways to address this beforehand. Whether that is done by stopping anonymous accounts through people having to register with an intermediary or by having to identify themselves in the same way as if they were setting up a bank account, those issues have to be addressed.

I am concerned. I would like to hear the witnesses’ views on whether the current system, where the tech companies are essentially self-regulating, should be allowed to continue. It comes back to the question from Senator Cassells around the Donald Trump question. Regardless of anyone’s views on Donald Trump, this is a social media company making a critical decision around the future of democracy. It could be me or anyone else tomorrow. Yes, there is a point about getting the media commission set up and running, and dealing with the audiovisual media services directive and the regulation of that sector. However, from listening to all of the questions, the debate has been around the online safety commissioner. The Data Protection Commission is right that it has to try to cover all forms of online harm, and this is why I was asking about the level of staffing required. If we look at the number of content moderators, even somewhere like Facebook, that gives an idea of the scale of the challenge.

I am unloading a lot there. This regulator will be very important and I would like to hear the witnesses’ perspectives on how we can give assurances to Alicia, the young woman Deputy O’Sullivan spoke about, who told her story publicly, and to others who are impacted.

**Mr. Michael O’Keeffe:** I will start on that and I will then bring in Ms Craig. I apologise to Senator Byrne for the technical issues but I was not dodging his questions. This has never happened to me before in the time we have been using Microsoft Teams.

Online safety is a new area. The reason the Broadcasting Authority of Ireland is involved is that we are a body that has been involved in regulating harmful content for many years. We are a principles-based regulator and it is around principles. The principles are very similar as they are around hate speech, protection of minors and advertising, although that is slightly different. Those principles form the basis of our regulation. This is starting something from scratch. There has never been an online safety commission in this jurisdiction and the question is who we get involved in it. I think we should get people or a body that has experience, perhaps not absolutely in this area, but in areas that are similar. Other jurisdictions are looking at this. The UK is giving responsibility to OFCOM in this area. Australia, which is the first example I am aware of, appointed a separate online safety commissioner, but associated or attached to the Australian media regulator. The same kind of principles are involved.

That does not mean it is not complicated or complex, and it absolutely is. Some of the other elements will be more straightforward for us, as a regulatory body.

**Senator Malcolm Byrne:** Sorry to interrupt. I appreciate the principles are the same but it

is different when regulating established broadcasters. What social media has done is that it has democratised this, and anyone can post anything. If a broadcaster like RTÉ broadcasts something that is way out of line, we can take action. It is a lot more difficult online. This comes back to the issue of publisher or platform, although I know that is an entirely different debate.

**Mr. Michael O’Keeffe:** I might bring in Ms Craig because she has done some deeper analysis on this particular point.

**Ms Celene Craig:** The Senator is making a very important point. The scale of what is envisaged by the general scheme cannot be underestimated but, at the same time, it is breaking important new ground. A lot of concern has been expressed, understandably and justifiably, about the fact platforms are regulating themselves at the moment. The first point to make is that what this scheme envisages is that this era of self-regulation, insofar as the matters within the scope of the scheme are concerned, is over. The Minister would previously have made those comments when the scheme was introduced back in 2019, and that is important. What we are seeing now is a requirement for platforms to be accountable to an independent regulator for their activities as they are spelled out in the legislation. That is the first point.

The issue that has to be addressed, and this is the real challenge in moving from a broadcasting model of regulation to one which is overseeing online platforms, is that the scale of content we are dealing with is altogether of a different nature. This was central to the Broadcasting Authority of Ireland’s thinking when it came to making its own proposals to Government in regard to the form that the regulation should take. What we want is an independent regulator that can ultimately take a view in regard to compliance or otherwise by a platform with the requirements of the legislation. However, it does not mean that a new regulator will be able to manage all of the complaints, and that is not what is envisaged by the scheme.

The real difference between the current regulatory regime and the future regulatory regime will be a reliance, to a large extent, on the platforms to actually take on board the requirements of the legislation and to ensure they implement those as fully and as carefully as they can. However, where another level of oversight comes in is in regard to the role of the media commission, which will take a view and set the basis upon which the online platforms are expected to behave, and through its online codes will be very clear about the matters with which the online platforms are obliged to comply. That might be not just in regard to the content but it might concern their policies, procedures and practices.

One of the procedures we would expect an online platform to make very clear is what are its own internal procedures for ensuring that such content is not present on its platform. That might include some element of machine learning, and we referred earlier to algorithmic activity. It will no doubt involve a certain level of internal human content moderation that might potentially have a number of stages and, indeed, even an appeal stage within the platform itself.

There is also potential, we believe, for independent bodies to perhaps participate in an independent dispute resolution mechanism. That is required, for example, under the audiovisual media services directive and we would certainly recommend that the regulator has a role in either overseeing or ensuring that those independent dispute resolution mechanisms are established and operate and function well. There is also provision in the statute for potential mediation. We see that where the most egregious complaints are concerned or there are systemic problems with certain forms of content on the platform. Those can be taken directly to the media commission and the commission would be in a position to make determinations in respect of some of those matters. However, we have to be realistic. It is not envisaged that a media

commission would deal with what could - on a Europe-wide basis in relation to, for example, the hate speech provisions of the directive - amount to thousands of complaints daily. That will not be practical or workable.

It will be important for the media commission to get the messaging right around what its role and function is. An important part of that is that, for the first time, video-sharing platforms and online platforms generally will be accountable to an independent regulator, who will be able to shine a light on their practices and performance in complying with the legislation. The day-to-day management of complaints will be a matter for the platforms, albeit the regulator will be able to take a view as to the adequacy of the systems and procedures they put in place and could make a determination where they need to move and the actions they are required to take to comply with the legislation.

**Senator Malcolm Byrne:** I ask for the DPC's experience because part of it will be around these independent complaints. People will come to us with a complaint, such as a problem they have with something on Twitter. They say that Twitter is not taking action and ask what they can do. That is part of the challenge. I made the point about the DPC. Ms Morgan might clarify the number of individual complaints the DPC gets every year. I understand it is in the thousands. I expect this will arise with social media companies as well.

**Ms Anna Morgan:** I thank the Senator. He is correct that the volume of complaints the DPC experiences annually is in the region of thousands. For example, in 2020 it received more than 4,500 complaints. We understand the challenges Ms Craig has talked about in terms of the scale and volume of complaints and contacts that might be received by the media commission. This goes to the important debate already taking place among members of the public on the question of whether there is a systemic or an individualised complaint-handling mechanism. In our written submissions, we noted the explanations the Department has provided in setting out the basis for seeking to adopt a systemic complaints-handling mechanism. We have also noted the views of academics, NGOs and other organisations in online rights, including children's organisations. We note they have called for individual complaint-handling mechanisms. We respectfully suggest the committee consider seeking further expert input on this area. There is a delicate balance and we understand the unique challenges that can arise from a large volume of complaints and the obligation to handle same. At the same time, we are mindful of the comments from those sorts of expert organisations which have raised concerns about the current structure for handling concerns raised where a platform does not respond, for example, to a request to take down material.

**Ms Celene Craig:** To add to Ms Morgan's comments, another issue that will need to be addressed and might merit further consideration is cases where a complaint is not in respect of any one platform. This is a real concern of some children's organisations with which we have spoken. It is where there is a multiplatform complaint. That will merit further consideration in terms of the complaint-handling mechanism. The committee will see these are new and complex areas, but they will all require mechanisms to try to address the concerns that underpin them.

**Senator Micheál Carrigy:** Unfortunately, being in politics, and particularly being a Government representative, I have received a lot of online abuse and threats, particularly from social media activists. It depends on what one puts up on social media. A concern in recent times has been the targeting of journalists for abuse. Recently, one national journalist has been writing stories that involve the Data Protection Commissioner and a political party. The amount of threats and abuse that journalist has received on social media is quite noticeable. We pride

ourselves in this country on the quality and independence of the journalists we have. This issue concerns me. Ms Craig mentioned targeting of female journalists. Is she concerned by the amount of online abuse targeted at journalists, particularly in recent times, in print and in the broadcasting sector?

**Ms Celene Craig:** The BAI is clear on this. All forms of online abuse are of concern to the BAI. We flagged in our submission and my colleague, Mr. O’Keeffe, flagged in his opening statement that gender-based violence, targeting or online abuse is of particular concern. We understand it is not limited to the women in the public sphere but we take note of the targeting of women journalists and politicians, in particular. While we believe this falls under head 49A, it could be considered to be within scope under category B, harmful online content, as set out in the scheme. We believe there might be some value in giving more specific visibility around this concern. That could be done on the face of the legislation but we also expect that, if the media commission is required to enumerate the different forms of harmful content that might fall for consideration under that category, visibility would be given to gender-based violence or other forms of online abuse that might be considered under the category of sexuality more generally, such as homophobic abuse, etc., which is also quite widespread on platforms. There are two potential ways of addressing this, either to be specific in the legislation or to require that the media commission enumerate the forms of harm that it sees within scope under this category. We have a particular concern about gender-based abuse online.

**Deputy Imelda Munster:** Witnesses spoke about platforms being accountable to the independent regulator. On the individual complaints mechanism, are the witnesses saying they do not think it is feasible from a resources and workload point of view to provide an individual complaints mechanism, in practical terms?

**Ms Celene Craig:** In practical terms, we do not believe that is workable when one considers the number of complaints received on a daily basis by an online platform. Insofar as the matters in the scope of the audiovisual media services directive are concerned, where complaints could originate from all over Europe in relation to lots of different pieces of content across multiple platforms, we believe the scale of the problem is not something which any regulator, no matter how well resourced, would be able to deal with. We strongly believe the role of a new regulator will be to ensure that the platforms have in place adequate systems to deal speedily and urgently with complaints that fall on their lap. Beyond the platforms, there is potentially a requirement for independent dispute resolution mechanisms, mediation and other means of resolution. However, we do not believe a media regulator could cope with the scale of complaints that would be likely to arise. As I stated, it is not workable when one considers the level of complaint activity on any one day and any one platform. However, that does not mean the platforms are being left to regulate themselves. The committee should not underestimate the significance of the legislation in terms of providing for the first time, and certainly almost for the first time on a Europe-wide basis, such a significant holding to account of the online platforms in respect of their activities.

**Vice Chairman:** I thank Ms Craig. To pick up on the point made by Deputy Munster, do the representatives of the DPC and the BAI believe there are sufficient sanctions, deterrents or penalties for not adhering to the regulation? That is an important point. Reference was made to self-regulation, but how will that be policed? How can we implement deterrents or penalties? Ms Morgan referred to 4,000 complaints being made in 2020. How many of those complaints involved apparent enforcement breaches of the GDPR and the Data Protection Act? How many of those could be issues for the online regulator?



On the BAI being subsumed within the media commission, what challenges do the witnesses see coming down the road with the Bill being enacted? What is the BAI working group undertaking with regard to the forthcoming EU legislation? What enhancement will that present to the general scheme of the Bill?

The commission will be funded by an industry levy, with online services required to pay for the first time. What will be the benefits of that? I ask the representatives of the BAI to contribute first.

**Mr. Michael O’Keeffe:** I thank the Vice Chairman. Obviously, the BAI is a small organisation with 40 staff that is being subsumed into a much larger organisation. We have been planning internally in addition to our engagement with the Department. We will continue that engagement and increase it in the coming months. We have a transition team in place in the BAI to prepare us. We have transitioned in the past, albeit on a much smaller scale. I refer in particular to the transition from the Broadcasting Commission of Ireland to the BAI, which involved the allocation to us of additional resources. We have experience in this area, but acknowledge that this will be a much greater change and transformation. The planning is essential. We have been doing that internally within the BAI for the past couple of years and we are now engaging with the Department as we get to this stage of the legislation with a view to enactment later in the year. In that regard, we are in a good position but there are many challenges ahead.

On the issue of the levy, we devised a levy system for the traditional broadcasting sector which was a principles-based levy model. Obviously, the scale will be a lot greater in terms of size and our funding requirement, but the principles will remain the same. How we will structure the levy will be based on key regulatory principles, the ability of the sector to pay and various elements of that nature. That will be done once the legislation is enacted, but we will begin to plan for it because it is clearly envisaged that the media commission will be funded by the sector.

Does Ms Craig have any thoughts on the question regarding sanctions?

**Ms Celene Craig:** Yes. The range of sanctions envisaged by the legislation is fairly wide-ranging and we certainly support that. It will be very important for the media commission to introduce at a very early stage a reporting regime for the online platforms in scope and that it is in a position to take a view with regard to their performance under various elements of the legislation. It is really around the good design of a proper performance, compliance and enforcement regime for all of the platforms that are designated for regulation under the general scheme. I expect that a key priority for the media commission will be to ensure there is a good design in that scheme for assessing performance and ensuring compliance and, if there is not compliance, then ensuring there is enforcement. The range of provisions and the powers required to support the media commission in that regard are very well set out within the scheme.

With regard to sanctions, and financial sanctions in particular, there is very high expectation from our European counterparts in the regulatory area that those ultimate sanctions, particularly around financial sanctions, should be available to any regulator in this area. There is also a strong expectation that not only will those powers be available to the commission, but they will actually be utilised and enforced where necessary. That may have been the experience also of the Data Protection Commissioner.

**Vice Chairman:** I ask the DPC to address the issue around sanctions, enforcement and penalties.

**Ms Anna Morgan:** I thank the Vice Chairman. As regards the general enforcement structure contemplated by the general scheme of the Bill, a very different regulatory framework applies to the DPC. Obviously, the tasks and powers of the DPC emanate from EU law and the GDPR. There is an obligation on supervisory authorities under Article 77 of the GDPR to handle every complaint and to investigate each complaint to the extent appropriate. There is an obligation on the DPC under section 109 of the 2018 Act, which gives further effect in Ireland to those regulatory obligations, to seek to amicably resolve complaints in the first instance. The committee will note that approximately 60% of all the complaints the DPC received last year were concluded within that year. Of course, those issues do not seem to be in contemplation in terms of the structure which is currently foreseen within the general scheme.

In terms of the larger scale enforcement and the system of deterrence measures, it is quite different to the structure that is contemplated under the 2018 Act and the GDPR insofar as the general scheme seems to provide for a system of compliance notices and warning notices. The latter would follow where compliance notices are not complied with by an online platform. Flowing from non-compliance with a warning notice, there is the possibility for criminal sanctions as well as various applications that can be made to the court. The maximum level of fine, set at 10% of turnover, is even higher than that provided for under the GDPR, which allows a maximum fine of 4% of the annual global turnover of an organisation.

**Vice Chairman:** That brings us to a conclusion. I thank the witnesses. It has been a very informative session and it will certainly assist the committee as it continues pre-legislative scrutiny of the Bill. That concludes our business for today. The committee stands adjourned until 12.30 p.m. on Thursday, 6 May, when we will continue our scrutiny of the Bill. We will first be joined by students from Tallaght Community School and Kinsale Community School to discuss issues relating to online safety and cyberbullying, to be followed by a meeting with representatives of Craol - Community Radio Ireland and the Independent Broadcasters of Ireland.

The joint committee adjourned at 2.30 p.m. until 12.30 p.m. on Thursday, 6 May 2021.