Seirbhís Leabharlainne 7 Taighde
Library & Research Service

L&RS Note

Insights into the OSMR Bill

Part 3: Introduction to the Current Legal and Regulatory Framework

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21 February 2022

The *Online Safety and Media Regulation Bill* provides for the dissolution of the Broadcasting Authority of Ireland (BAI) and the establishment of **Coimisiún na Meán**, or the Media Commission, in its place. This Commission will have a wider remit, covering on-demand audiovisual media, visual sharing platforms and online safety.

This *L&RS Note* series forms the backdrop to the L&RS's policy and legislative analysis work in respect of this piece of legislation. **Part 1** of this series provides an introduction to the Bill and the policy context underpinning its development, as well as an overview of the legislative provisions in this area, whilst **Part 2** sets out detailed empirical data (both national and international) on various aspects of online usage.

Introduction

This L&RS Note introduces the current legal and regulatory position prior to the *Online Safety and Media Regulation Bill 2022* (OSMR Bill). It outlines the existing position regarding online safety and social media platforms, the main elements of the law on defamation, as well as the current provisions under the *Broadcasting Act 2009* for broadcasting codes and rules, and financial sanctions. This existing framework includes offences that may be applicable to online harassment and cyberbullying, as well as specific offences introduced during the current Dáil. It is intended to aid Members of the Oireachtas as an overview of key elements surrounding the current law on broadcasting and online safety and is not intended to be a comprehensive or exhaustive consideration of this framework.

Tithe an Oireachtais
Houses of the Oireachtas

The areas covered by this *L&RS Note* are summarised as follows.

Online Harms and Social Media

The first part of this paper considers the current law applicable to online harms and social media. The provisions outlined include relevant provisions under the *Non-Fatal Offences Against the Person Act 1997*, specific offences created by the *Harassment, Harmful Communications and Related Offences Act 2020*, as well as other criminal offences that may be applicable in an online context. It also outlines civil avenues that are available in the context of online harms, including the *Norwich Pharmacal Order*, which has been used by plaintiffs in recent times to access information held by third-party online platforms for the purposes of litigation, and an overview of the current law on defamation.

This Note also briefly considers user-generated content and current arrangements for the liability of online service providers themselves. The liability of ISPs is based on Directive 2000/31/EC[1] (the e-Commerce Directive) will be outlined in more detail in a future *L&RS Note* focusing on online safety in the context of the upcoming Digital Services Act, as will the self-regulatory elements for social media platforms.

Broadcasting Regulation

This paper also considers the main provisions of the Act that the OSMR Bill seeks to amend, the *Broadcasting Act 2009*. This sets out the current provisions on the regulation of broadcasters in Ireland, including through the use of broadcasting codes and rules. The Act also provides for a complaints procedure, the investigation of complaints and breaches of certain provisions of the Act, and the application of financial sanctions in certain circumstances. There are also further provisions on the awarding of broadcast licences and contracts which are not covered in significant detail in this *L&RS Note* due to the breadth of issues covered by the Bill.

1. Current Legal Framework for Social Media Users

This part of the paper considers the current law in relation to online harms and safety. It is noteworthy from the outset that current legal regulation is focused on individual users rather than the social media platforms themselves. As referenced in Part 1 of this *L&RS Note* series, there is already a range of offences applicable to cyberbullying and harassment, although these offences may be reserved for the most severe of cases.[2]

The main changes proposed by the Bill allow for the formulation of online safety codes by the Media Commission, which are applicable to designated online services or categories of designated online services. These codes are envisaged to be binding and further provision is made in relation to the audit of complaints mechanisms of such services and for what is a termed a “super-complaints mechanism”.

Criminal Law

While the OSMR Bill is focused on addressing harmful content rather than sanctions for individual users, it does provide for some offences regarding providers including offences involving the management of what are termed designated online services in the Bill. However, the provisions of the Bill itself do not appear to contain any further offences for individual users. Irish law already provides for several criminal offences which may be applicable in an online context, which are discussed below.

Harassment and Harmful Communications

The offence of harassment, as provided for under the *Non-Fatal Offences Against the Person Act 1997* (1997 Act), would appear to be the most applicable criminal offence to cyberbullying. As noted in Part 1 of this series and the previous *L&RS Note* on online harms, these offences are applicable to the serious instances of cyberbullying. However, in recent times Irish law has provided for specific online offences, such as those contained in the *Harassment, Harmful Communications and Related Offences Act 2020* (2020 Act). This section considers the offences under the 1997 and 2020 Acts, while also briefly discussing the offences of threat under section 5 of the 1997 Act, criminal damage under the *Criminal Damage Act 1991*, and the provisions under section 13 of the *Post Office (Amendment) Act 1951* (as amended by Part 2 of Schedule 1 to the *Communications Regulation (Amendment) Act 2007*).

Non-Fatal Offences Against the Person Act 1997

As noted above, the offence of harassment under section 10 of the 1997 Act was considered the central mechanism in addressing cyberbullying in recent years.[3] The offence occurs when a person, "without lawful authority or reasonable excuse, by any means including a telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her". The offence itself has two elements:

1) the acts are carried out intentionally or recklessly, and
2) the acts are such that a reasonable person would realise that those acts would seriously interfere with an individual's peace and privacy or cause alarm, distress or harm to another.

A recent Irish case has been noted by the media as demonstrating that the law prior to the 2020 Act was sufficient in prosecuting harassment that takes place online.[4] This is because the Act refers to harassment "by any means", which may be applied to digital platforms.[5]

However, while it must be persistent, the LRC Report has noted that in the digital age:

> "even a single communication has the capacity to interfere seriously with a person's peace and privacy or cause alarm, distress or harm, particularly as internet communications are also difficult to erase completely."[6]

Harassment, Harmful Communications and Related Offences Act 2020

In more recent times, specified legislation has either been enacted by the Oireachtas, or continues to be explored by Government. In December 2020, the *Harassment, Harmful Communications and Related Offences Act 2020* introduced specific offences which aimed to address the non-consensual sharing of intimate images, particularly on online and social media platforms. The elements of the main offences introduced by the 2020 Act are as follows:

- Section 2(1) makes it an offence to distribute, publish, or threaten to distribute or publish, an intimate image of another person without their consent and with either the intent to cause harm, or being reckless as to whether harm is caused, to the other person. For the purposes of this offence there are two elements; 1) the accused's acts, either intentionally or recklessly, seriously interfere with the person's peace or privacy, or cause alarm and distress to that person, and 2) the acts are such that the reasonable person would realise this.
- Section 3(1) makes it an offence to record, distribute or publish an intimate image of another person without that person's consent, where that recording, distribution or publication seriously interferes with the other person's peace and privacy, or causes alarm, distress or harm to that other person. Section 3(2) allows for an exception to this offence for

a person who distributes or publishes an intimate image for the purpose of prevention, investigation or prosecution of an offence under Section 3.

- Section 4(1) makes it an offence to either send threatening or grossly offensive communication to another person, or to distribute or publish such communication about another person, with the intent of causing harm. Section 4 defines intending to cause harm for the purposes of that section as "intentionally seriously interferes with the other person's peace and privacy or causes alarm or distress to the other person".

The 2020 Act also makes amendments to the 1997 Act and the *Domestic Violence Act 2018*:

- Section 10 of the 1997 Act is amended to include communication about a person, as well as with a person.
- Section 40(5) of the *Domestic Violence Act 2018* is amended to include the offences set out in sections 2 and 3 of the 2020 Act as 'relevant offences' for the purposes of that Act.

Outside of the legal framework, in 2021 the Department of Justice announced the expansion of the hotline.ie reporting service to include the reporting of intimate images shared without consent. In announcing this expansion, the Department also highlighted that 1 in 20 adults claim to have had an intimate image shared to an online or social media site without consent.[7] The process involved in the hotline.ie service was also outlined to the Committee during hearings:

> "On receipt of reports, hotline.ie content analysts examine the content and if the material is considered illegal will issue notice and take down request orders to the appropriate service provider and notify the Garda Síochána with the relevant information."[8]

The penalties for the offences set out under the 1997 Act (as amended) and the 2020 Act are set out in the below table. Fines and / or terms of imprisonment may be imposed.

Table 1: Penalties for offences under 1997 and 2020 Acts

Offence	Summary	Indictment
s.10, 1997 Act: Harassment	Class A Fine (up to €5,000) Up to 12 months imprisonment	Fine Up to 10 years imprisonment
s.2, 2020 Act: Distributing / publishing / threatening to distribute or publish an intimate image with intent / recklessness to cause harm	Class A Fine (up to €5,000) Up to 12 months imprisonment	Fine Up to 7 years imprisonment
s.3, 2020 Act: Recording, distributing or publishing an intimate image without consent	Class A Fine (up to €5,000) Up to 12 months imprisonment	N/A
s.4, 2020 Act: Distributing, publishing or sending threatening or grossly offensive communication	Class A Fine (up to €5,000) Up to 6 months imprisonment	Fine Up to 2 years imprisonment

Threat

Section 5 of the 1997 Act makes it an offence to, without lawful authority, threaten to kill or cause serious harm to another person with the intention that the other person believes that threat. Such a threat can be made by any means.

Phone and text

Section 13 of the *Post Office (Amendment) Act 1951* makes it an offence to send by phone any message that is grossly offensive or of an indecent, obscene or menacing character. Part 2 of Schedule 1 to the *Communications Regulation (Amendment) Act 2007* extended this provision to text messages sent by short message service (SMS). The difficulty with this provision is that it

appears limited to telephone and SMS communication, meaning that online communications may be outside its scope. Some academics have posited that although there is an instance involving social media where a defendant pleaded guilty to charges under the provision, it may not stand up to judicial scrutiny.[9]

The widespread use of smartphones to access applications and social media platforms has nonetheless led to calls for the definition in the 1951 Act to be extended to encompass social media and other online communications. In 2014, the Report of the Internet Content Governance Advisory Group recommended such an extension for this offence.[10] The Law Reform Commission, in its 2016 Report, noted that section 13 of the 1951 Act is outdated and that "modernised version of section 13 should extend to digital communications but also use clearer terms than those currently found in the section, some of which are potentially vague".[11] It recommended that the provision be repealed and replaced with an offence of distributing a threatening, false, indecent or obscene message by any means with the intent to cause alarm, distress or harm or being reckless to this.[12]

Section 15 of the Harassment, Harmful Communications and Related Offences Bill 2017 (the 2020 Act as initiated) proposed the repeal of section 13 of the 1951 Act (as well as section 10 of the 1997 Act), but ultimately, this provision was not included in the 2020 Act. Therefore, this offence currently remains in force, but its application to the online environment remains unlikely.

Criminal Damage

Section 1 of the *Criminal Damage Act 1991* contained a broad definition of what constitutes criminal damage, which extended the definition of property to data. Section 2 of the 1991 Act criminalises the damaging of personal property. The 1991 Act has been successfully used to prosecute for damage to a person's social media profile without their consent.[13] However, it should be noted that section 1 was subsequently amended by section 13 of the *Criminal Justice (Offences Relating to Information Systems) Act 2017*, to delete the definition of data. The latter Act includes offences relating to the accessing of information systems, the interference with information systems, the interference with data and the interception of data without lawful authority.[14]

Public Order

Section 6 of the *Criminal Justice (Public Order) Act 1994* makes it an offence to ""use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned". However, the Law Reform Commission notes that the definition of public place in Ireland does not appear to extend to the internet as it is limited to physical places. It draws the comparison with the *Public Order Act 1986* (UK), which it states is not confined in this way.[15] The Report also cites one example of where the UK Act was used to prosecute the sender of an offensive tweet.[16]

Further to the above, section 17 of the *Criminal Justice (Public Order) Act 1994* makes it an offence, with a view to making a gain for oneself or others, to make any unwarranted demand with menaces. This offence relates to blackmail and extortion and unlike section 6, contains no limitation on where an offence must take place.

Incitement to Hatred

Sections 2 and 3 of the *Prohibition of Incitement to Hatred Act 1989* outline offences in relation to actions and broadcasts respectively, that are likely to stir up hatred. However, the Department of

Justice noted in 2020 that there is no specific legislation to address hate crime in Ireland and very few prosecutions have resulted from the 1989 Act.

In its 2019 Review of the Prohibition of Incitement to Hatred Act 1989, the Irish Human Rights and Equality Commission considered the application of the Act to online hate speech. The review noted that EU Law requires that Member States ensure that laws prohibiting incitement to hatred extend to cases involving an information system where either the offender is within the Member State and / or the content is hosted in the Member State.[17] The review also noted that the majority of cases of hate speech internationally occur online.[18]

Proposals for reform

The upcoming Criminal Justice (Hate Crime) Bill is expected to include provisions relating to hate crime in an online context. The General Scheme for the Bill is already published and envisages a range of offences involving prejudice and incitement of hatred. The Bill proposes to create an offence of incitement to hatred that occurs when a person communicates hatred against another person / group, due to a real or perceived association with a protected characteristic. Furthermore, the General Scheme outlines that the Bill would provide for content inciting hatred to be prosecutable in the Irish courts if one of the following is present in the State:

- The person sending / posting the content;
- The person receiving the content; or
- The information system hosting the content.

Finally, the Bill provides for a new section 10A of the 1997 Act, which would provide for a crime of harassment aggravated by prejudice. This is harassment within the present definition, but with the added element of a hate crime such as race, nationality, ethnicity, sexual orientation, gender or disability.

Civil Law

Access to Information – Norwich Pharmacal Orders

There is a civil legal remedy currently available to injured parties known as the **Norwich Pharmacal Order** (NPO), named for the UK case in which it was originally formulated.[19] An NPO is a remedy that may be granted by the courts to an injured party, requiring an innocent third party to provide information it holds as to the identity of a wrongdoer. The information that may be provided includes, but is not limited to, a name or names, email address(es), telephone number(s) and IP address(es).[20] To receive NPO relief, a plaintiff must demonstrate a *prima facie* case of wrongdoing by the intended defendant and that the third-party respondent is in a position to identify the wrongdoer. According to Doherty, the test set out in *Norwich Pharmacal* is that an order may be granted if the applicant can demonstrate:

- A reasonable basis to allege that a wrong has been committed;
- The disclosure of documents or information from the third party is needed to enable action against the wrongdoer;
- The respondent is sufficiently involved in the wrongdoing so as to have facilitated it, even if innocently, and is in a position to provide the information;
- The order is necessary in the interests of justice on the facts of the case.[21]

The remedy itself is recognised in Irish law through the case of *Megaleasing UK Ltd v Barrett (No 2)*,[22] although practitioners identify it as a rare form of relief.[23] In that case, the Supreme Court held that the order must be used sparingly and requires a balancing of justice and privacy. In the 21st

century, NPOs have been used in an online context to identify users on peer-to-peer (PSP) networks where there is alleged copyright infringement.[24]

The use of the NPO may be subject to certain limitations, particularly limitations prompted by other rights. In the case of *Muwema v Facebook*, the High Court considered whether an NPO should be granted to the applicant in the circumstances.[25] The High Court ruled that the service provider was not obliged to take down the post and initially granted an NPO. However, before the NPO could be perfected, the court accepted new evidence that the poster was in danger of suffering human rights abuses if his identity was revealed to the plaintiff, ultimately holding that the order could not be granted, as the right to life and bodily integrity of the user in question took precedence over the applicant's wish to defend his reputation.[26] This position was upheld by the Court of Appeal.[27]

In addition to the need to balance the granting of an NPO with competing rights, the measure may also have technical limitations. For example, such an order to establish an IP address may be rendered ineffective through the use of a proxy IP address, and even if the IP address is established, further proceedings against an internet service provider may be required to ultimately establish a name and address against which proceedings may be initiated.[28]

Some legal concerns have also been identified, including

- The requirement to prove that a legal wrong has occurred;
- The availability of the NPO in the High Court only;
- The lack of clarity on who bears the cost for such an application;
- The necessity of applying for an NPO in the first place, which is facilitated by platforms allowing users to operate anonymously; and
- Constraints involving the statute of limitations, particularly for defamation actions.[29]

It has been suggested that some clarifications to the law may be required:

- Clarification around the test / threshold to be applied (*prima facie* case of wrongdoing);
- Clarification on whether or not the applicant is indeed expected to pay costs;
- Extending the availability of NPOs to the Circuit Court;
- Providing a mechanism for ensuring that platforms take greater responsibility, such as the Online Safety Codes proposed by the OSMR Bill; and
- Disregarding the period for the application for an NPO and the response from the online platform for the purposes of the statute of limitations.[30]

Some have further argued that the Circuit Court already can already grant a range of injunctive remedies, and there is no evidence that this caused any administrative or "floodgates" issues, also highlighting that costs are not often recoverable from the defendant.[31] Similarly, the Law Reform Commission has recommended a similar extension of the granting of NPO relief from the superior courts to the Circuit Court, as well as allowing the alleged defendant to appear before the court before an NPO is granted.[32]

Section 14(2) of the Harassment, Harmful Communications and Related Offences Bill 2017, as initiated, sought to formalise an NPO-like procedure in Irish law and extend its availability to the Circuit Court, but this was not included in the final 2020 Act. The remedy has nonetheless been used in the context of 'trolling' to identify persons behind anonymous social media accounts.[33] The Law Reform Commission has also noted that NPOs can be granted by the UK courts in relation to online abuse.[34]

Defamation

In Irish law, cases of cyberbullying and inaccurate content shared in relation to an individual may also give rise to a civil action for defamation.[35] However, such a claim carries several considerations, including the legal costs associated with litigation for both for the plaintiff and defendant, and whether the defendant would be in a position to pay damages if there is a successful claim.

The tort of defamation itself is provided for by section 6 of the *Defamation Act 2009*. Section 6(1) replaces the previous torts of slander and libel with a single tort of defamation. Under section 6(2), this tort consists of the publication, by any means, of a defamatory statement concerning a person to one or more other persons. Section 6(3) provides that a defamatory statement concerns a person if it can be reasonably understood as referring to them. Section 6(4) provides for circumstances where a statement is published to the person it concerns and another person where it is not intended and not reasonably foreseeable for the other person to see the statement. Section 6(5) states that the tort of defamation does not require proof of special damage.

One of the key issues in relation to the treatment of social media companies, and internet service providers generally, relates to their liability, and whether social media companies are responsible for the content posted on their platforms. The case law appears to suggest that such liability may arise if a platform fails to remove a defamatory post.[36] However, like existing criminal and civil law provisions on harmful content generally, Irish law takes a user-focused approach. In relation to the publication status of posts on social media, Doherty notes that:

> "Users of social media can be mistaken in the belief that exchanges via that medium, ostensibly directed to someone's online 'friends', cannot constitute publication for the purposes of defamation proceedings. This is not the case, as the 2009 Act makes it clear that any communications via the internet are publications for the purposes of the Act" [37]

Under section 2 of the *Defamation Act 2009*, a statement includes the following:

a) a statement made orally or in writing,
b) visual images, sounds, gestures and any other method of signifying meaning,
c) a statement—
    i. broadcast on the radio or television, or
    ii. published on the internet, and
d) an electronic communication …[38]

Although Irish law does not require proof of special damage, the UK courts have given greater consideration to the impact of such posts / tweets, rather than the transient nature of some of them, e.g. the post or tweet is deleted, holding that a tweet available for a period of time is analogous to a newspaper not being read more than once.[39] The court also addressed the point that the reaction of other social media users may reflect serious harm for the purposes of defamation law in the UK, although this may not be as relevant in an Irish context as Irish law does not require proof of special damage.[40] The repeating of posts or tweets on social media may also constitute republication. For example, in *McAlpine v Bercow*, the plaintiff has initiated proceedings against individuals who had retweeted a defamatory tweet.[41]

The wider context of *McAlpine* also highlighted the issue of proportionality. At the time, the UK media reported that the plaintiff discontinued actions against Twitter users with less than 500 followers in exchange for a charitable donation.[42] In Ireland, section 31(2) of the *Defamation Act 2009* requires that, where a case is brought in the High Court, the judge gives directions to the jury

on assessing the appropriate level of damages. The human rights considerations on the issue of damages and proportionality were considered by the European Court of Human Rights in *Independent Newspapers (Ireland) Limited v Ireland,* which held that Irish defamation law pursues the legitimate aim of protecting an individual's reputation and right to private and family life. [43] However, it also held that the level of damages may represent a chilling effect on the right to freedom of expression.[44]

It is noteworthy that the case at issue in *Independent Newspapers (Ireland) Limited v Ireland* was taken before the 2009 reforms. In responding to the judgment, the then Minister for Justice, Charles Flanagan TD, stated the following:

> "The judgment expressly notes and welcomes the fact that Irish law was subsequently changed, by section 31 of the Defamation Act 2009, which introduced a new provision for the High Court judge to give directions to the jury to guide it in assessing an appropriate amount of damages."[45]

As noted above, the law on defamation appears more focused on individual users rather than online platforms, although the OSMR Bill proposes placing greater responsibilities on social media companies. During the pre-legislative scrutiny of the Bill, the possibility of some overlap between defamation and harmful content was raised. For example, it was suggested in submissions during the PLS of the OSMR Bill that a proposed exclusion of defamation as harmful content is removed from the Bill, as a statement or post on social media can be both defamatory and harmful.[46] Further, as noted above, the position of the UK courts has also focused on the harmful nature of content. The OSMR Bill ultimately followed the recommendation of the Joint Committee by removing the exclusion of defamation as a form of harmful online content.

Position of Online Platforms

Directive 2000/31/EC, also known as the e-Commerce Directive, provides for rules regarding the position of intermediary service providers (ISPs) regarding content and communications through their services.[47] The Directive was transposed into Irish law by the European Communities (Directive 2000/31/EC) Regulations 2003 (the 2003 Regulations).[48] This legislation makes provision regarding the liability of ISPs in certain circumstances, including:

- The "mere conduit" defence (provided for by Article 12 of the 2000 Directive and Regulation 16 of the 2003 Regulations);
- Caching (provided for by Article 13 of the 2000 Directive and Regulation 17 of the 2003 Regulations); and
- Hosting(provided for by Article 14 of the 2000 Directive and Regulation 18 of the 2003 Regulations).

Article 15 of the Directive makes further provision that ISPs have no general obligation to monitor communications on their services.

Innocent publication

Under section 27 of the *Defamation Act 2009*, there is a defence of innocent publication, which provides that it is a defence to a defamation action if the defendant can prove that:

a) he or she was not the author, editor or publisher of the statement to which the action relates,
b) he or she took reasonable care in relation to its publication, and

c) he or she did not know, and had no reason to believe, that what he or she did caused or contributed to the publication of a statement that would give rise to a cause of action in defamation.

Furthermore, section 27(2)(b) appears to provide an element of protection to electronic media. It provides that a person shall not, for the purposes of section 27, be considered the author, editor or publisher if:

> "in relation to any electronic medium on which the statement is recorded or stored, he or she was responsible for the processing, copying, distribution or selling only of the electronic medium or was responsible for the operation or provision only of any equipment, system or service by means of which the statement would be capable of being retrieved, copied, distributed or made available."

In addition to the defence of innocent publication, under section 33 of the *Defamation Act 2009*, the court may make an interim, interlocutory or permanent order requiring that no further publication of the defamatory statement takes place.

The UK courts have held in *Tamiz v Google* that in the case of innocent publication, the defence is only available to a service provider that acts to remove content.[49] This decision applied the previous position in *Byrne v Deane*[50], where a club secretary was held liable for the publication for a defamatory notice that had been left on the club noticeboard for a number of days. In arriving at this decision, Richards LJ stated the following:

> "…if Google Inc allows defamatory material to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material."[51]

Data hosting

EU law also contains protections in relation to data hosts. Under Directive 2000/31/EC, transposed into Irish law by the European Communities (Directive 2000/31/EC) Regulations 2003, protection is afforded to a data host, under Article 14 of the Directive. This provides that where "an information society service" consists of the storage of information provided by a recipient, Member States must ensure that the service provider is not liable for the information stored, subject to two conditions:

- the provider does not have actual knowledge of the illegal activity or information and, regarding claims for damages, is not aware of the facts or circumstances from which the illegal activity of information is apparent, and
- the provider must act expeditiously to remove or disable access to the information upon obtaining such knowledge.

The Directive does account for the possibility that Member States may apply a duty of care to service providers in order to detect and prevent certain types of illegal activities.[52] Article 14(3) further provides that Member States courts or administrative authorities may require a service provider to terminate or prevent an infringement, and Member States may also establish procedures governing the removal or disabling of access to information.[53]

In order to impose liability on a data host, the 2003 Regulations require "actual knowledge" on the part of the data host that an online defamatory publication is unlawful.[54] This may mean that not only must a complainant bring material that is *prima facie* defamatory to a data host's attention, but the complainant must also provide sufficient evidence that it is unlawful.[55] Further issues that have

arisen in recent years include the issue of fake social media endorsements[56], as well as the creation fake social media profiles and "cat-fishing".[57]

Research carried out by the EPRS has highlighted that elements around the application of the e-Commerce Directive remain unclear, including the definition of an 'information society service', and the prohibition of the general obligation to monitor.[58] It cites the examples of *SABAM v Netlog*[59], where the CJEU held that the installation of a filtering system was contrary to EU law, and *Glawischnig-Piesczek v Facebook Ireland*[60], where the CJEU held that a social networking platform could be ordered to find and delete content identical to illegal defamatory content.[61] However, the Irish courts have accepted that social media is an ISP for the purposes of the Directive, as found in *Muwema*. In the case, the court recalled the decision of *Mulvaney v Sporting Exchange*, which found that a chatroom was an ISP for the purposes of the Directive.[62]

Finally, the proposed Digital Services Act (DSA), contains proposals to update the provisions of the e-Commerce Directive.[63] While it appears that the DSA will retain the present provisions in relation to "mere conduit", caching and hosting defences, as well as provisions on ensuring no general obligation to monitor, it does contain provisions on orders to act against illegal content and to provide information on one or more specific recipients of the service (Articles 8 and 9). It includes further provisions requiring online platforms to provide an internal complaints-handling system (Article 17) and allows them to select out-of-court dispute settlement (Article 18). Additional obligations are also set down for online platforms (Articles 16 to 24), with further requirements for what are termed 'very large online platforms', which are platforms where the number of recipients is at least 10% of the EU population (Articles 25 to 33). A further consideration is that the DSA is proposed to be a Regulation (as opposed to a Directive), so will have direct effect across all Member States once it enters into force.

Constitutional and Human Rights Issues

The Irish courts have recognised that the constitutional provisions regarding regulation of the media (organs of public opinion) may also extend to television and the internet. Similarly, the European Court of Human Rights has found that limitations to the right to freedom of expression under Article 10 of the Convention also extend to the internet.

As noted by Carolan and O'Neill, broadcasters do not enjoy an unfettered right to freedom of expression.[64] Article 40.6.1 of the Constitution affirms the right of the State to regulate broadcasting with the following provision:

> "The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
>
> i) The right of citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law."

Carolan and O'Neill also note that this provision clearly recognises media freedom of expression, noting in particular the reference to criticising government policy.[65] They also note that the

language used in this provision does not preclude television as a "protected organ of public opinion", and it seems that the list is capable of further addition as technology advances.[66]

Hogan and Whyte also maintain the view that this list can be extended to television and the internet, noting that the wording "is not an exhaustive listing and it is possible to construe the phrase 'organs of public opinion' in this subsection as applying to means of communication not in existence in 1937".[67] They also note that television has been recognised as an 'organ of public opinion' by the Irish courts in *State (Lynch) v Cooney*[68], as has internet blogging in *Cornec v Morrice*.[69] In the latter decision, the High Court expressly held that the references to radio, the press and the cinema in the Constitution are only examples.[70]

Similarly, the European Convention on Human Rights makes the following provision in relation to freedom of expression in Article 10:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

While Article 10 does not make explicit reference to the internet, the jurisprudence of the European Court of Human Rights has affirmed that Article 10 is applicable to the internet. The European Court of Human Rights has published a factsheet outlining the main case law relating to new technologies.[71] In its 2016 Report on Harmful Communications and Digital Safety, the Law Reform Commission (LRC) considered the balancing of the right to privacy and the right to freedom of expression, noting two significant cases before the European Court of Human Rights that relate to online freedom of expression and user-generated content.[72]

- In the first case, *Delfi AS v Estonia*, the Court held that the Estonian courts were correct to hold Delfi liable for user-generated comments.[73] The LRC notes that the Court attached significant weight to the nature of the *Delfi* site, which was commercially run and sought to attract a large number of comments, with the number of comments generating further visits and advertising revenue.[74] It also noted the restrictive approach of the court in this case, where it stressed that its decision does not apply to internet forums, e.g. social media platforms, bulletin boards and blogs, but rather to large, professionally managed news portals that are run on a commercial basis.[75] The LRC, citing McCarthy, has also noted the "considerable tension" with the provisions of the e-Commerce Directive, particularly Article 15 (no general obligation to monitor).[76]
- In the subsequent case of *MTE and Index v Hungary*[77], the court held that there was a violation of Article 10, where the Court distinguished *Delfi* on two grounds; 1) while the user-generated comments in *MTE* were offensive they did not amount to hate speech, and 2) on the basis of the economic interests of the intermediaries in both cases. In *MTE*, one of the applicants operated on a non-profit basis as it is the Hungarian self-regulatory body of internet content providers.[78]

2. Broadcasting Regulation

In relation to broadcasting regulation, the main piece of legislation is the *Broadcasting Act 2009* (referred to as the 2009 Act in this section). As noted in Part 1 of this series, the OSMR Bill is amending this Act so they will be collectively cited as the Broadcasting and Other Media Regulation Acts 2009 to 2022, once the OSMR is passed. One of the effects of the OSMR Bill is to expand the provisions on broadcasting duties, codes and rules to wider media service providers. The current 2009 Act is organised into 14 Parts and 2 Schedules.

While most of the above Parts are amended by the Bill, this *L&RS Note* does not propose to consider every section in detail, particularly Parts of the Bill that are consequentially amended due to the creation of the Media Commission in place of the BAI. However, the Bill does propose changes to the provisions on duties, codes and rules, redress and enforcement. The purpose of this section is to outline the current regulatory framework for broadcasters in these areas and note proposed changes in the Bill.

Duties of Broadcasters

Section 39 of the *Broadcasting Act 2009* provides for a series of duties on broadcasters which are summarised in the following table.

Table 2: Summary of Broadcasters' Duties under the 2009 Act

Duty	Requirements
News	All news is reported and presented objectively and impartially and without any expression of the broadcaster's own views
Current Affairs	This includes matters which are of public controversy or the subject of public debate. The broadcast of current affairs must be fair to all interests concerned and presented objectively and impartially without any expression of views. Where it is impracticable to apply this duty to a single broadcast, two or more broadcasts may be regarded as a whole broadcast if they are transmitted within a reasonable period of each other.
Sound Broadcasts	A minimum period for the broadcast of news and current affairs is applied as: • A minimum of 20% of broadcasting time; and • Where the broadcasting time exceeds 12 hours in any one day, at least 2 hours of broadcasting time between 7am and 7pm. The BAI may, however, authorise a derogation from this requirement.
Content	Broadcasters may not broadcast content that is reasonably regarded as: • Causing harm and offence; • Likely to promote or incite to crime; or • Tending to undermine the authority of the State.
Privacy	Broadcasters may not unreasonably encroach upon the privacy of any individual in programmes it makes, or in the means employed to make such programmes.
Party Political Broadcasts	Broadcasters are permitted to transmit party political broadcasts provided that unfair preference is not given any political party in the allocation of time for such broadcasts.

Source: Section 39 of the *Broadcasting Act 2009*

Recording of Broadcasts

Under section 40 of the 2009 Act, broadcasters are required to record every broadcast and every item of programme material they supply under a broadcasting contract or content provision contract. Provision is also made for the retention of such recordings for a period determined by the Compliance Committee.[79] The section further provides that recordings are to be supplied to the Compliance Committee where it investigates a complaint made to it in relation to a broadcast. The

provision further exempts such recordings as contraventions of the *Copyright and Related Rights Act 2000*.

Advertising

Section 41 of the 2009 Act permits broadcasters to include advertisements in programme broadcasts. However, it places limitations on the level of advertising and also provides for the prohibition of certain types of advertisement:

- Advertisements directed towards a political end or that relate an industrial dispute;
- Advertisements that address the issue of the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation.

However, the section is clear in that party political broadcasts are permitted provided that no unfair preference is given to any political party in the time allocated for such broadcasts. Broadcasts by the Referendum Commission in relation to matters referred in section 3 of the *Referendum Act 1998* are also permitted. The provision also construes advertising as including references to advertising matter contained in sponsored programmes.

It is worth noting that the *Consumer Protection Act 2007* also provides for a range of prohibited commercial practices, including unfair commercial practices, misleading commercial practices and aggressive commercial practices. In particular, this includes protections for consumers from false or misleading advertising under section 43 of the Act and from competitor or product confusion under section 44 of the Act. Under section 47 of the Act, it is an offence to provide false information (section 43(1)), or to deceive or mislead a consumer (section 43(2)), on any of the matters set out in section 43(3) of the Act.

Furthermore, the Advertising Standards Authority of Ireland operates a self-regulatory complaints mechanism, which includes the ASAI Code and a complaints procedure.

Broadcasting Codes and Rules

At present, sections 42 and 43 of the 2009 Act respectively empower the BAI to prepare broadcasting codes and broadcasting rules.

Section 42(2) sets out the matters that must be included in broadcasting codes, which include the duties provided for in relation to news, current affairs, privacy, content that is likely to incite crime or undermine the authority of the State, and party political broadcasts. Broadcasting codes must also, among other things, provide for certain protections from harmful or offensive material, as well as protect the interests of children in respect of advertising, teleshopping, sponsorship and other forms of commercial promotion (with particular regard to the public health interests of children). The BAI is further required to have regard to certain matters set out in the section, including the likely degree of harm caused by the inclusion of a particular sort of material in programmes, the likely size and composition of the potential audience for programmes, and the likely expectation of the audience on the content of a programme. The section also permits the BAI to prohibit the advertising of foods and beverages containing fat, trans-fatty acids, salts or sugars aimed at children when preparing a code aimed at protecting the interests of children under section 42(2)(g).

Section 43 sets out the matters on which the BAI may make broadcasting rules. These include rules on the maximum times permitted for the transmissions of advertisements and teleshopping material. Rules may also be made on steps to promote the understanding and enjoyment of programmes by certain persons with disabilities, which must be reviewed every two years (section 43(6)).

Section 45 requires the BAI to present a copy of a broadcasting code or rule to the Minister as soon as possible after it is made, and the Minister is required to lay copies of such codes or rules before the Houses of the Oireachtas. With the exception of rules made under section 43(6), the BAI is required to review the effect of a broadcasting code or rule once every 4 years.

Finally, section 46 provides for the cooperation of the BAI with other parties on standards and self-regulation.

The Codes and Standards that are currently in place are publicly accessible on the website of the BAI. These include:

- Access Rules*;
- General Commercial Communications Code*;
- Code of Fairness, Objectivity and Impartiality*;
- Code of Programme Standards*;
- Children's Commercial Communications Code*;
- Right of Reply Scheme;
- Rules on Adverts and Teleshopping*;
- Guidelines on the Code for Fair Trading Practice; and
- Code of Practice for the Placement of TV Services on Saorview.

*Codes and Rules marked with asterisk, which are affected by the repeal of Part 3 of the *Broadcasting Act 2009*, are proposed to be retained by the Bill.[80]

Furthermore, following the transposition of the original 2010 Directive, the BAI has formulated a Code of Conduct for ODAS Media Service Providers and a Short News Code. The BAI also has an obligation in relation to media guidelines pursuant to the Connecting for Life Strategy.[81]

Financial Sanctions

Chapter 2 of Part 5 of the 2009 Act (sections 52 to 56) sets out the current procedures for investigations and financial sanctions applicable to broadcasters. Part 12 and section 71 of the OSMR Bill propose to establish a new statutory regime for investigations and sanctions and repeal Chapter 2 respectively.

Section 53 of the 2009 Act provides that the BAI may investigate the affairs of a broadcaster for an apparent breach of requirements set out in the section:

- Duties set out in section 39(1) of the 2009 Act;
- Provisions regarding the recording of broadcasts under sections 40(1), 40(2) and 40(3);
- Provisions under sections 41(2), 41(3) and 41(4) regarding the maximum time for advertising on a sound broadcasting service, political advertising and advertisements on the merits of a religious faith or belief;
- Provisions under section 106(3) regarding the maximum time for advertising on a public service broadcasting service;
- Provisions under section 127(6) regarding the maximum time for advertising on the Irish Film Channel; and
- Requirements under any broadcasting code or rule.

The power to apply a financial sanction is already an existing power held by the BAI. Under section 54(5) of the 2009 Act, the BAI may apply to the High Court for an administrative financial sanction of up to €250,000 on a broadcaster for breach of certain provisions of the Act. Under section 55(1), the Court may make a determination that there has been a breach, direct that a broadcaster pay

the BAI a financial sanction and make an order to that effect. The Court is also empowered to dismiss an application under section 54(5).

Section 55(2) makes provision for a broadcaster to consent to a determination on whether or not there is a breach by the BAI. Section 56 of the 2009 Act sets out the matters to be considered in determining a financial sanction.

Proposed Changes

Sections 52 to 56 of the 2009 Act, which govern the application of financial sanctions, are to be repealed by section 71 of the OSMR Bill. A new Part 8B of the 2009 Act, which would govern investigations and sanctions, is to be inserted by Part 12 of the OSMR Bill. It provides that the Commission may appoint authorised officers to conduct investigations and for the powers of authorised officers, including the entry and search of a premises, requiring the production of relevant material and to conduct oral hearings. The authorised officer prepares a report of the investigation which is submitted to the Commission for a decision on whether a contravention has occurred on "the balance of probabilities" and the sanction to be applied. Provision is made for a provider to make submissions on a draft report and the final report.

The Bill proposes to set the limit for administrative financial sanctions for individuals at €20,000,000 and for non-individuals, the higher of €20,000,000 or 10% of turnover in the previous financial year. It also provides that the payments received by the Commission are to be paid into the Exchequer as directed by the Minister for Finance. According to the General Scheme, the criteria to be considered in determining whether to impose a sanction and the amount of that sanction are derived from section 56 of the 2009 Act. In the Regulatory Impact Analysis, administrative financial sanctions are considered as an appropriate tool for all areas envisaged to be regulated under the Bill, including video-sharing platforms and on-demand audiovisual media, as well as broadcasting.[82]

The Administration of Justice

The ability to impose administrative financial sanctions is a feature of civil law jurisdictions and has been required of EU Member States pursuant to certain Directives in other areas of law, including Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the food supply chain, and Directive (EU) 2019/1, also known as the ECN+ Directive, which provided for greater enforcement powers for European competition authorities. However, the application of a sanction by a body other than a court may also raise some constitutional questions in relation to the administration of justice. This is a particular issue when applying administrative financial sanctions in an Irish context.

Article 34.1 of the Constitution provides that:

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

However, Article 29.4.6 also provides that:

> "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union …"

It would thus follow that in the application of administrative financial sanctions pursuant to EU law, the administration of justice issues could not be used to question the imposition of such sanctions. The problem arises in their application to measures that are not necessitated by EU membership, i.e. domestic law. Article 37 does allow for the exercise of "limited judicial functions" by bodies other than courts, although this raises the question of what constitutes a 'limited judicial function'.

In determining whether a civil process is an administration of justice, Kenny J listed five characteristic features of the administration of justice in *McDonald v Bord na gCon*:

1. A dispute or controversy as to the existence of legal rights or a violation of the law;
2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;
5. The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country.[83]

The courts have repeatedly endorsed these criteria in subsequent cases and it is now the established position that all five criteria must be met in order for a process to be considered an administration of justice. In *O'Connell v Turf Club*, the Supreme Court confirmed that a procedure that does not follow the *McDonald* criteria is definitively not an administration of justice.[84] In a regulatory context, *O'Connell* was relied upon by the Central Bank of Ireland in *Purcell v Central Bank of Ireland*, where Hedigan J considered these criteria. In considering the issue of administration of justice, he stated the following:

> "… if the process fails *even one of the criteria*, it is not an administration of justice. In this case, in my judgment, the inquiry process does not fit into any of the five criteria. The constitutional challenge on this ground fails."[85] <emphasis added>

Despite the above determinations regarding what is and is not an administration of justice, the Supreme Court held in 2021 that the adjudication process of the Workplace Relations Commission was an administration of justice, also holding that the *McDonald* criteria should be applied with some flexibility.[86] The *Zalewski* decision has had repercussions in that legislation was passed by the Oireachtas to address the matters raised by the Court, including the independence of the body administering justice and the holding of proceedings in public. Additionally, the judgment was a consideration of the development of adjudication and sanctions structures in other areas of legislation, e.g. competition law reform.[87]

A further issue is related to Article 38.1 of the Constitution, which provides that no person shall be tried for a criminal charge save in due course of law. This issue concerns whether an offence to which a sanction is applied may be construed as a criminal charge. The provisions of the OSMR Bill, however, are clear in that the Commission arrives at its decision "on the balance of probabilities", which is a lower standard of proof than that used in criminal proceedings. Thus, this paper does not propose to discuss Article 38.1 in any detail, although the Library & Research Service does consider the impact on Article 38.1 and further issues pertaining to administrative financial sanctions in its 2019 Spotlight.[88]

Conclusion

As stated above, this paper is not a full and comprehensive review of current Irish legal provisions. Rather, it seeks to signpost key provisions and considerations on the existing legal and regulatory framework.

At present, Irish law provides for a user-focused framework on online safety, including the application of criminal offences for the most serious instances of cyberbullying and cyber-harassment, and courses of action in response to defamatory content. Furthermore, the Irish courts have recognised the use of NPOs allowing plaintiffs to access information from third parties (such as social media platforms) and has also recognised social media platforms as ISPs for the purposes of EU provisions on the liability of ISPs. Constitutionally, the internet is recognised as an organ of public opinion, while the application of administrative financial sanctions raises some considerations in relation to the administration of justice, including the independence of the proposed Media Commission. Finally, this paper provides a high-level overview of the current provisions on broadcasting codes and rules, most of which are retained in the proposed Part 3B provided for in the OSMR Bill.

It is envisaged that a future **L&RS Note** in this series will focus on online safety. This will include national and international data in respect of online safety (including experiences of various online harms such as cyberbullying, potentially harmful user-generated content, and online harassment). In a regulatory context, it will also consider the self-regulation mechanisms of individual social media platforms, developments at EU level and related issues such as the verification of age and identification.

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