



**RCNI Submission on the
General Scheme of the Online Safety & Media
Regulation Bill**

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Introduction – Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

Introduction – This Submission

RCNI would like to contribute its views on the General Scheme of the forthcoming Online Safety and Media Regulation Bill 2020, which is the responsibility of the Department for Media, Tourism, Arts, Culture, Sports and the Gaeltacht. These views will focus on the online service aspects of the General Scheme (especially Part 4 on Online Safety) rather than on the audio-visual broadcasting and on-demand audio-visual services aspects of it.

Online sexual harassment and abuse is a prevalent and ever-increasing form of sexual violence which is no less serious in its effects than any contact sexual violence. Until the Harassment, Harmful Communications and Related Offences Act 2020¹ came into force in February 2021, we had few tools with which to sanction online sexual violence against adult victims in particular, or to ensure that online service providers are regulated in such a way as to minimise the risks of such violence for all potential victims. While it is possible to charge many perpetrators of online sexual violence against children with an offence under Part 2 of the Criminal Law (Sexual Offences) Act 2017, there were very few offences which could be charged in relation to adult victims of similar abuses until the new Act was passed.

However, more is needed by way of a legislative framework to help ensure online safety from many forms of online sexual violence and harassment is properly regulated. The General Scheme represents significant progress towards a safer online world, but it will work best if it is underpinned by a greater range of criminal offences which capture as many forms of online sexual violence as possible. This theme is developed further in this Submission.

Our understanding is that the provisions of this proposed new Bill are being examined currently by the Office of the Attorney-General. As indicated, the new version² of the General Scheme itself has been referred for pre-legislative scrutiny by the relevant Joint Oireachtas Committee, and these hearings are now being considered.

¹ Available online through this web-link: [Harassment, Harmful Communications and Related Offences Act 2020 \(irishstatutebook.ie\)](https://www.irishstatutebook.ie/eli/2020/act/1/section/1)

² Available online via this web-link: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/126000/b174bdcd-e017-47d9-bb48-07b29671330c.pdf#page=null>

Structure of this Submission

This Submission will consider the Heads of the General Scheme which it considers most relevant to the regulation of online safety from the point of view of both victims and potential victims of online sexual violence. These Heads will be considered in the order in which they appear in the General Scheme, and any recommendations for change will be listed under the relevant Head.

Part 2: Media Commission

Head 9 Objectives – starting at page 22 of the print version of the General Scheme

Subheads 3, 4 and 5 are the most relevant here. Subhead 3 is the objective of ensuring that the right systems are in place to detect and remove harmful online (and broadcasting) content, Subhead 4 is the objective of protecting the interests of children from harmful online content (as well as undue commercial exploitation), while Subhead 5 is the objective of providing a flexible, responsive regulatory framework to be applied in a proportionate, consistent and fair manner.

RCNI does not take issue with of these necessary and important objectives. However, they are all secondary in one sense, that is, they are aimed at dealing with harmful material **after** it has appeared online. In our view, safety should be built into new platforms, programs, and applications as far as possible from the beginning – by design, and this should be named as a distinct, equal and important objective. From the point of view of reducing the risks of online harm, primary prevention is better than the best possible secondary measures taken after the fact.

RCNI Recommendation: As far as possible, safety should be built into new programs, online services, applications and platforms and the promotion of online safety by design should be listed as a distinct objective of the Media Commission.

RCNI Recommendation: The new Media Commission should consider including safety by design provisions into every designated online service Code of Practice to minimise the risks to internet users from online harms generated by new products. Our understanding is that the professional body representing online service providers in Ireland, Hotline.ie, is very much in favour of this approach.

Head 10 Functions

RCNI notes that the Media Commission is given wide powers under this Head to initiate investigations itself, including in response to any complaint from an individual, into any suspected breach of the “relevant statutory provisions” (subhead vii), and is obliged to devise codes and roles to be obeyed by designated online services (subhead x), and to establish or facilitate complaints mechanisms covering designated online services (subhead

xi). There is also a wide-ranging provision giving the Commission all such powers as are “necessary or expedient for the performance of its functions.....” (subhead vi).

RCNI’s view is that these four subheads provide the Commission with the necessary standing and powers to investigate an individual complaint made in relation to an online service provider, where this is necessary and appropriate. The Commission will also be able as part of its functions listed under this Head to ensure that codes, rules, and complaints mechanisms in relation to designated online services are themselves designed to provide individuals with a swift and appropriate response to their requests for takedown of harmful online content, and to enforce compliance with the relevant statutory provisions, so that its own direct intervention should not become necessary as a matter of routine in most cases.

Further, RCNI welcomes the wide-ranging functions of the Media Commission under this Head in relation to education, public awareness and research in relation to online safety and media literacy (subheads xiii through xv), its duty to co-operate with law enforcement agencies here and elsewhere on matters related to harmful online content and the protection of children (subhead xix), and its statutory role in relation to the review of proposed legislation on online safety (subhead xx). We also note that all existing functions of the Broadcasting Authority of Ireland under current legislation will become vested in the Media Commission (subhead xxiv).

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

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

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

Head 11 Core Powers

RCNI Recommendation: The Media Commission should have an additional express power and obligation to examine and respond to individual complaints from users of online service, by giving timely directions to any entity which it regulates, in any situation in which, in its view, there are reasonable grounds to suspect that there has been an unjustified failure by an online service provider to comply with a request from an affected person or body to take down, or restrict access to, material which is, or has been, the subject of a complaint by that

person or body on the basis that it is “harmful online content” as defined in Heads 49A, B, C of this Scheme. We would suggest that Head 61 (Complaints in relation to Media Service Providers) could provide at least a rough guide as to how such an express power to investigate and respond to individual complaints could be framed in relation to Designated Online Services.

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

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

With regard to harmful online content, RCNI’s view is that the Commission should have the explicit power to specify to the relevant designated online service the steps which should be taken to remove harmful online content under Head 12 as well as under Head 53, at the very least if it is content which it is a criminal offence to disseminate. We also think that if the service’s view is that such identified content does not need to be taken down, it should still be obliged to remove it pending a final determination as to whether it is harmful online content or not.

We acknowledge that such restraint of publication should not contravene the right to freedom of expression in Article 10 of the European Convention on Human Rights (ECHR)³, which Ireland is bound to follow. In our respectful submission, it is perfectly possible to frame such powers of “prior restraint” so that they do not contravene this right. Article 10(2) lists the circumstances in which it is possible to restrict freedom of expression, and they include: “for the protection of the reputation or rights of others”, and “preventing the disclosure of information received in confidence”. The relevant case-law summarised⁴ in essence says that: any such restriction or “prior restraint” should be “prescribed by law”, which means not only compatible with national law but with ECHR itself, should be made in pursuit of one of the legitimate aims in Article 10(2), and must be necessary to achieve that aim. It also makes clear that prior restraint is justified only in exceptional circumstances, and

³ European Convention on Human Rights full text is available online at this web-link: https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁴See footnote 3 below which contains reference including web-link to the latest ECHR Judgment on “prior restraint” (June 2020). It sets out standards for use in future cases.

there must be a legal framework to ensure both tight control over the scope of the ban and an effective Convention-compliant judicial review process.

In our view, it should be straightforward for our law to justify the urgency of the immediate enforcement of “prior restraint” take down provisions, where the specific piece of content at issue is clearly illegal (in the sense that it is a criminal offence to disseminate it already), or otherwise fits a clear definition of what constitutes harmful online content. There is no question about the necessity of such a measure in order to achieve the legitimate aim of protecting the reputation or the rights of the subjects of such content: if harmful content which is illegal (at least) is not blocked without delay, the damage to the rights of the victim(s) to freedom from humiliating and degrading treatment and to respect for their private and family life as a result of the harm done to the victim(s) by the unauthorised (and possibly illegal) dissemination, will be extremely difficult to remedy.

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

RCNI Recommendation: Head 12 should be amended to give the Commission explicit power to specify the steps which should be taken to remove any form of harmful online content in any circumstance in which it appears to the Commission that there has been, or is, regulatory non-compliance.

RCNI Recommendation: The language of these and other takedown provisions in the Bill should reflect the language of Article 10 (2) and should be drafted in such a way that it complies both with the Article and with the standards laid down in the most recent relevant case-law⁵.

Head 13 Codes of Practice

RCNI’s view is that it is appropriate that an independent authority such as the Commission should have the power to devise, implement and review codes to govern standards and practice by regulated entities (which include designed online services). In our view, it is also appropriate that the Commission should be obliged to consult with relevant stakeholders in devising and revising these codes.

RCNI Recommendation: These new Codes of Practice should state clearly and unequivocally that

⁵ OOO Flavius & ors vs Russia (ECHR) Judgement 23rd June 2020, available online via this web-link: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-203178%22%5D%7D>

- it is the duty of all designated online service providers to respond to, and where possible, comply with, individual requests for takedown of harmful online content and any other protective measures related to online safety **within strict time limits**, and that failure to do this will be a breach of the Code which among other things, will allow the Commission to direct the online service provider to take down identified harmful online content and/or take other remedial steps on behalf of the individual complainant;
- Where it is not possible to comply with a takedown request or other request for a remedial measure, strict time limits should also be included within the Codes of Practice within which the online service provider must provide a full explanation to the individual complainant of the reasons why this is not possible, and
- The Codes of Practice should also explain that in any situation where the individual complainant is not satisfied with the response from the relevant online service provider, s/he can address their complaint directly to the Commissioner who will examine it and make such directions to the online service provider as it sees fit;
- The Codes of Practice should set out the circumstances in which it is appropriate to take down or restrict access to material which may be harmful pending a full determination of the nature of the material. This is the concept of “prior restraint” referred to above under Head 12.

RCNI Recommendation: Whether in primary legislation or in regulations governing its internal standard operating procedures, the relevant stakeholders to be consulted on the design, implementation and review of any code to govern standards and practice in relation to online safety, complaints and takedown procedures for designated online services, should always include non-State agencies advocating on behalf of and providing services to individuals and groups who have suffered, or at risk of suffering, the negative effects of harmful online content.

Part 4: Online Safety

Head 49A Categories of Harmful Online Content

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

(a) “material which it is a criminal offence to disseminate”; and

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

(a) “material which it is a criminal offence to disseminate”

RCNI's understanding is that material within this category is generally simple to identify from the point of view of any online service provider, through whatever technical or humanly moderated means is most appropriate to the particular type of material. This means that where necessary, it is relatively swiftly removed on foot of a complaint.

Any material the subject of a criminal offence must be defined as clearly and unambiguously as possible to remove as far as possible any doubt about its illegality. From the point of view of the victim of behaviour involving the dissemination of harmful online material, it makes sense for as many forms of this behaviour as possible to be criminal offences. For example, the online service providers were very quick to act when names and photos of the boys accused of Ana Kriegel were published and very successful in ensuring names and photos stayed off the internet⁶.

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

In RCNI's view, this new Act has the potential to make the remedy of takedown, to be set out in online safety codes, much more readily accessible and useful to victims of online sexual (and indeed other) harassment and abuse – especially adult victims. In this way it is likely to make a very significant contribution to online safety generally.

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

We note that it is not intended that this Head should contain a single definition of harmful online material, and that this category (b) which relates to cyber-bullying, is of its nature a wide one which is hard to pin down in a statutory definition. There is no doubt that cyber-bullying can take many different forms. However, while such a formulation has the merit of

⁶ However, there were still limitations: in that case the court heard that both Facebook and Twitter could only remove material that was brought to their attention, ie after it had already been published.

being wide enough to capture a very wide range of online harassment and abusive behaviours, it seems to us it would be quite difficult for any online service provider working to a prescribed online safety code – to work out which material “is likely to have the effect of intimidating, threatening, humiliating or persecuting a person to whom it pertains and which a reasonable person would conclude was the intention of its dissemination”, and therefore should be taken down/prevented from being uploaded in the first place.

Our understanding from contacts with online service providers and regulators, and from researching the relevant ECHR provisions and case-law, is that it is vital that “harmful online content” is defined clearly and unambiguously so that not only a legal professional but also an internet user or service provider can understand easily which content is illegal and therefore should not be accessible on the internet at all because it is a criminal offence to disseminate it, and which content though not (yet) illegal nevertheless may be defined clearly and unambiguously as harmful online content – and therefore, should be taken down.

In our respectful submission, there are some types of sexual harmful online material pertaining to adults which are easy to define and therefore, to identify and have taken down/prevented from being circulated further, regardless of whether at the time of the request to takedown, these types of material could also be defined as criminal in nature. In addition to those included in the Harassment, Harmful Communications Act 2020 referred to above, these include:

- Any audio or audio visual recording of a sexual assault upon an adult to which anyone other than the subject has access online and which has been notified as having been put up on line without consent.

With regard to the various forms of harm listed: “intimidating, threatening, humiliating or persecuting”, RCNI’s view is that this list is too short to cover many very common forms of online abuse. Our own view is that it should be stated clearly that online content is to be regarded as “harmful” if a reasonable person would consider it likely to have the effect of intimidating [etc] the person to whom it pertains.

With regard to the types of harm which are caused by online sexual harassment and abuse through the dissemination of harmful online content, we suggest that these should also include additional elements beside the four already listed, and we propose the following list: “intimidating, threatening, humiliating, persecuting, distressing, alarming, or exploiting financially or otherwise the person to whom it pertains, coercing the person to whom it pertains to do something or refrain from doing something which she is entitled to refrain from doing or from doing respectively, causing or contributing to a deterioration in [that person’s] mental or physical health and well-being without reasonable excuse, or damaging [that person’s] reputation, employment and/or career prospects without lawful justification”.

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

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

Our principal concern in relation to both exclusions is that they will allow both authors of defamatory statements and anyone who violates the data protection rights or privacy rights of another person – to continue to do either with impunity on the internet. In our respectful submission, these exclusions will amount to effective counter-arguments for anyone who wishes to continue to issue defamatory statements against another person, and/or to violate their data protection and privacy rights. These are unjustifiable incursions upon the rights of others, and it is little help to the victims of these incursions to hear that the Media Commission is precluded expressly from insisting that any online service provider should take down such material.

In practical terms, few victims have the resources to go about suing for defamation which in any event may take quite a long time. A few more would consider making a complaint to the Data Protection Commissioner. However, that is not a swift process either, as it is necessary first to exhaust any other complaint mechanisms. Lastly and most relevantly in this regard, the Data Protection Commissioner representative has explained in both written and oral submissions to the Joint Oireachtas Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht in May 2021⁷ that their office does not have the powers to intervene directly to prevent the spread of harmful online content online but is instead confined to the regulation of compliance by data controllers with the relevant data protection legislation.

The situation is further complicated by the fact that some data protection violations are also criminal offences. This means that some data protection violations would come under category (a) and so result in a swift takedown, whereas others would result in no redress under this legislation at all. With great respect, this cannot be regarded as just and equitable.

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

⁷ The relevant Committee debate may be read online through this web-link: [Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht debate - Wednesday, 5 May 2021 \(oireachtas.ie\)](https://www.oireachtas.ie/en/jointcommittees/media_tourism_arts_culture_sport_gaeltacht/debate/wednesday_5_may_2021/)

RCNI Recommendations on (b):

- Expand the listed effects of online abuse to take account of many more forms of abuse likely to occur in an intimate or formerly intimate relationship, for instance alarm, distress, financial loss, damage to their victim's psychological or physical health or career or employment prospects;
- Make it clear that the threshold for identifying material as harmful under (b) is low so that the damage caused by the cumulative effect of repeated low-level acts of abuse may be captured;
- Remove the exclusions from the categories of harmful online content of content which is defamatory and/or in breach of data protection or other privacy legislation; and
- Consider expanding category (a) of harmful online material, to include not only material which it is a criminal offence to disseminate, but also material whose dissemination is tortious and/or in contravention of express statutory provisions prohibiting its dissemination.

Finally, RCNI respectfully submits that both the expansion of these two categories (a) and (b) and the calls for increased speed and efficiency in identifying and taking down harmful online content, will have an impact on work practices in companies dealing with this content. The need to increase productivity in this area to identify harmful online content and to meet compliance deadlines must be met by a corresponding increase in numbers of well-trained and well-supported staff to do this work. This is necessary in order to avoid the risks of vicarious trauma to individual staff members as they deal with an increased volume of complaints about harmful online content. Taking steps to avoid these risks will help to ensure that identification and takedown systems are sustainable and effective.

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

In our view, this is a very welcome provision. RCNI is aware that new forms of online sexual harassment and abuse appear all the time, and it is likely that this applies also to non-sexual forms of online abuse.

RCNI Recommendation: Victim support NGOs and other agencies and individuals who support victims of online abuse and harassment should be consulted regularly by the Media Commission on any new forms of abuse as they appear, and should be encouraged to feed in information and views about them continually, to help ensure that the Commission's decision making in this regard is as well informed as it can be.

Head 49C Definition of Age-Inappropriate Content

RCNI observes that there is nothing under this Head about the need for robust age identification and exclusion of under-age people from viewing certain forms of violent or

sexual content. In our view, this Head should set out the obligations of designated online services to take all possible measures to ensure that these forms of content are not viewed by under-age persons, either by accident or design. If these procedures are not deemed suitable for inclusion under this Head, they **must** be included in all online safety codes. Finally, we wonder why/whether any of these kinds of material should be legal at all? It seems to us beyond doubt that they are likely to cause harm to viewers of any age and indirectly, to others in the community.

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

Head 50A Online Safety Codes

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

In our view, it would be best if this General Scheme did contain an express proposal that the Commission should be responsible for a second-tier, independent, over-arching online complaints and takedown process binding on all designated online services to be invoked in any case in which the failure of the individual DOS complaints and takedown process had been brought to its attention. If ultimately no such second-tier role for the Media Commission is included in the Bill, it becomes all the more important that the procedures on takedown and dealing with complaints generally are laid out in the online safety codes in some detail. The Commission should also ensure that these codes have a clear commitment to respect and as far as possible, fulfil the need which all victims of this kind of abuse have for a speedy, efficient, well-informed and compassionate response to a takedown request.

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

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

RCNI Recommendation: All online safety codes devised by the Commission should contain **time limits** by which material must be identified, taken down, or otherwise addressed.

These will have to provide for exceptions, but both the time limits themselves and the exceptions should be accessible to all internet users easily and simply, once the relevant codes have each been finalised and put into effect.

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

Head 50B Compliance Assessments

Subhead (1): While RCNI's view is that the power given to the Commission to request information and reports from designated online services "on the periodic basis" is fundamental, nevertheless it seems to us that this subhead ought to be phrased more strictly – for instance, there should be an obligation on the designated online service to respond to a request for information and/or provide a compliance report, within a reasonable time, and while it is always a good idea to have the power to look for information or compliance reports on an ad-hoc basis – should there not be a fixed minimum term after which a compliance report will have to be produced and forwarded by each designated online service, to the Commission?

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

Subhead (4): RCNI's opinion is that it is necessary that the Commission should have power to examine the compliance of any designated online service with the online safety codes on foot of information received from any person or body.

RCNI Recommendation: It should be made clear under this subhead that the expression "other interested parties" includes any individual affected by online abuse and any NGO whose role includes supporting victims of online abuse.

Subhead (6): RCNI welcomes the inclusion here of powers to issue a compliance notice to a designated online service specifying steps which the service must take in order to comply with any online safety code, including the removal or restoration of material. However, the power to issue directions is contingent on a compliance notice being issued. This may take a long time. From the point of view of victims of online sexual (and other) abuse, this is not satisfactory because it is too slow to restrict the additional harm caused by wider dissemination of the harmful online content which can happen very fast.

It would be much better if the Commission were given express powers to issue directions specifying steps to take down harmful online content which is clearly identified as such, or which there are reasonable grounds for believing is likely to fall within one of the categories of harmful online content – without waiting to issue a compliance notice, which must follow

a request for information or the delivery of a compliance report. In our respectful submission, the reported failure of any designated online service to take down harmful online content which is identified as such, or which there are reasonable grounds for believing is likely to fall within one of the categories of harmful online content – within a reasonable time, should be enough to allow the Commission to act immediately to direct that the relevant material be taken down within the shortest possible time, and should not be restored again unless and until the person who put it up satisfies the Commission that the material does not come within any of the categories of harmful online content.

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

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

We note that this pre-emptive approach has a venerable civil law precedent, that of the injunction remedy, where directions to do something or refrain from doing something pending a final hearing at which both sides may argue their case – are routine. It is possible to frame the quasi injunctive power to direct the removal of material from the internet pending a final determination as to whether its nature is harmful or not in such a way that the authors of frivolous and/or vexatious requests to remove material are not able to take advantage of it.

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

RCNI Recommendation: The Media Commission, as an officially constituted body operating independently of the State, should be empowered to give directions to designated online

services on foot of requests from or on behalf of affected individuals to take down harmful online content which are not granted or otherwise addressed, within a reasonable time by the relevant designated online service. This means issuing directions to take down such material pending any final determination as to whether or not it is in fact harmful online content in any case where it is clear that the material constitutes harmful online content, or there are reasonable grounds for believing that this is indeed the case.

RCNI Recommendation: The Commission should be given the power to direct the removal of material pending any final determination on whether it constitutes harmful online content or not - whenever it is satisfied that the material in question either unambiguously constitutes harmful online content, or that there are reasonable grounds for believing that it does indeed fall within one or more of the categories of harmful online content, - and it is also satisfied that the relevant designated online service has unreasonably failed to take down that material within a reasonable time after receiving a request to do so from the aggrieved person or from someone acting on their behalf.

Head 51 Online Safety Guidance Materials

A wide range of relevant NGOs whose role includes supporting victims of online abuse, should have to be consulted in preparing these guidance materials. This is especially important in relation to the identification of harmful online content under (b) which is not illegal per se. The topics which should be covered in this part of the Guidance should include:

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

- Victims' need to be treated with compassion and respect in circumstances in which they often have to relate intimate, embarrassing and frightening experiences to strangers.

RCNI Recommendation: Those who understand the nature and extent of the various forms of online sexual (and other) harassment and abuse, and those whose work includes supporting victims of these phenomena, should be consulted at every stage of the preparation of these Guidance documents. Without both perspectives, it is hard to see how such Guidance could be truly effective as a means of furthering online safety.

Head 52B Systemic Complaints Scheme

RCNI regards the process laid out under this Head as very progressive and positive from the point of view of furthering online safety. Expert NGOs whose role including the support of victims of online sexual (and other) abuse are well placed to become nominated bodies. They are often among the first to notice a systemic issue which is being reported by numbers of its clients and their supporters. It is good to know that there will be a straightforward mechanism through which such issues may be brought to the attention of the Commission without the need for numbers of often very vulnerable individuals to make separate complaints all on the same issue.

Head 53 Compliance and Warning Notices

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

Head 56 Designation of relevant online services

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

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

Conclusion

In summary, RCNI welcomes very much the holistic approach taken in this General Scheme to tackle online safety: it is by no means confined to the creation, implementation, revision and supervision of online safety codes but extends to primary prevention through safety by design, education, and policy developments. We remain concerned that there is no second-tier express individual complaints or take-down mechanism envisaged which will be run directly by the Commission and which would operate as a safety net to catch all individual complaints to designated online service providers which had not been satisfactorily resolved. However, the disadvantages of the indirect mechanisms proposed to ensure that the online safety codes are effective for those affected by, or at risk of, online abuse in all its forms – could be mitigated to some extent by:

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

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

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