For The Committee on Communications, Climate Action and Environment
Regarding *The Digital Safety Commissioner Bill 2017* - Detailed Scrutiny
23 October, 2018

Joint submissions from the Irish Council for Civil Liberties and CIVICUS
Primary Drafter: Marianna Belalba-Barreto, Civic Space Research Officer, CIVICUS

The Irish Council for Civil Liberties (ICCL) and CIVICUS are pleased to present submissions on the *The Digital Safety Commissioner Bill 2017.* We share the concerns of the Committee on Communications, Climate Action and Environment about the ability of online social media platforms to adequately self-regulate. We applaud the efforts of the Committee in responding to these issues of public concern, and to Deputy Ó Laoghaire in bringing forward the draft bill.

The ICCL and CIVICUS also stress that it is important to ensure that the digital privacy and data protection of people in Ireland can be secured without using overly broad legislative language that might have unintended consequences including restrictions on free speech and expression.

To assist detailed scrutiny of the bill, we therefore offer this review. Our review reveals problems in the bill related to 1. its incompatibility with international human rights standards on the freedom of expression and 2. the practical implementation of the bill. The following sections explore each of these in turn.

I. Incompatibility with International Human Rights Standards on Freedom of Expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR), Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the European Convention on Human Rights (ECHR), and Article 11 of the Charter of Fundamental Rights of the European Union (EU Charter). These instruments have been ratified by Ireland and therefore the country must comply with the obligations derived from their provisions.

The right to freedom of expression applies to all forms of electronic and Internet-based modes of expression.[1] As this bill concerns the removal of harmful communications, it is subject to this international legal framework on freedom of expression.

According to international human rights standards, states may limit the right to freedom of expression in exceptional circumstances and provided that such limitations conform to the strict requirements of the three-part test.[2] The restriction must be prescribed by law, pursue a legitimate aim, and be necessary in pursuit of that aim.

This justification standard is well-recognised around the world. Article 10, section 2 of the European Convention on Human Rights includes part of the three-part test,[3] and the European

---

1 UN Human Rights Committee, General Comment No.34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, (2011), available at: https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf; Joint Declaration on Freedom of Expression and the Internet adopted by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE), the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, (2011), available at: https://www.oas.org/en/iachr/expression/showarticle.asp?artID=849&lID=1

2 The same principles apply to electronic forms of communication or expression disseminated over the Internet: UN Human Rights Committee, General Comment No.34 t states that "any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government."

3 Article 10 § 2 states: 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.

Court of Human Rights has repeatedly recognised this standard,[4] as has the Inter-American Court on Human Rights.[5]

1) Prescribed by law. Any restriction on freedom of expression must be provided for by law. Any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly.

"Harmful digital communications", the main concept on which content can be removed, is not defined in the bill. The absence of a definition of "harmful digital communications" does not enable an individual user to understand the prohibited conduct and therefore adapt their behaviour accordingly.

Article 5(b) of the bill states that "digital service undertakings" are required to include "a provision that prohibits end-users from posting harmful digital communications" or "a provision that may reasonably be regarded as the equivalent" of such a prohibition.

If, as the bill suggests, harmful material is for the "undertakings" to define, this could conceivably result in varying standards regarding what is "harmful",[6] and therefore it would be unrealistic for an individual user to know what constitutes harmful communication for every platform.

In addition, delegating the definition to the "undertakings" will amount to the privatisation of speech regulation (i.e. the regulation of speech by contract), which, according to the freedom of expression organisation Article 19, "raises serious concerns for the protection of freedom of

---

4 Müller v. Switzerland, Eur. Ct. H.R. App. No. 10737/84, paragraph 29-31 (1988); Aleksey Ovchinnikov v. Russia, Eur. Ct. H.R. App. No. 24061/04, paragraph 44 (2010)

5 Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, paragraph 120-23 (July 2, 2004); Canese v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, paragraph 96 (Aug. 31, 2004); Kimel v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, , paragraph 58 (May 2, 2008); Usón Ramírez v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 207, paragraph 88 (Nov. 20, 2009)

6 See for example Article 19's analysis of the terms of services of social media companies regarding content regulation, specifically the "varying degrees of precision" in which they described hate speech: Article 19, Side-stepping rights: Regulating speech by contract, available at: https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB-v2.pdf

expression… as the Terms of Service usually include lower standards for restrictions on freedom of expression than those permitted under international human rights law."[7]

2) Legitimacy. This requires that any restriction on freedom of expression must be in pursuit of a legitimate aim. These aims are stated in Article 19(3) of the ICCPR, Article 10(2) of the ECHR, and Article 52 of the EU Charter. While some variation between the aims listed can be found in the instruments—especially regarding the provision in the ECHR—it has been interpreted as being functionally the same.[8] The list includes respect of the rights or reputations of others, the protection of national security or of public order (ordre public), or the protection of public health or morals. This bill does not describe which of above-mentioned aims it is seeking to achieve.

3) Necessity and proportionality. Necessity means that there must be a pressing social need for the restriction, and proportionality requires an analysis as to whether the interference is strictly proportionate in relation to the legitimate aim that is pursued.

It is not clear from the bill what pressing social need the bill aims to address. While the takedown of harmful communications might be the social need, because it is not defined it doesn't meet the above standard.

The examination of a complaint using the "take down procedure" will be performed presumably by the "digital service undertaking". First, take-down procedures to remove online harmful content, when the latter is not precisely defined, could lead to abuse and therefore could be deemed disproportionate. Second, it is especially worrisome that the adjudicator will be a private company. In that regard, in 2011 the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated that notice-and-takedown regimes were subject to abuse by both States and private actors; and that the "lack of transparency in relation to decision-making by intermediaries often obscured discriminatory practices or political pressure affecting the companies' decisions."[9]

---

7 Article 19, Side-stepping rights: Regulating speech by contract, available at: https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB-v2.pdf

8 Jan Oster, Media Freedom as a Fundamental Right, page 115

9 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, (2011) paragraph 42, available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

Further, in a 2016 Report the UN Special Rapporteur recognised that "private intermediaries are typically ill-equipped to make determinations of content illegality." At the European level, the Council of Europe Commissioner for Human Rights recommended that "States should stop relying on private companies that control the Internet to impose restrictions that violate States' human rights obligations."[10]

As the bill suggests that it is the responsibility of the digital service undertakings to enforce the takedown procedure, a few considerations arise:

Lack of due process safeguards: The 2018 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression says that "complex questions of fact and law should generally be adjudicated by public institutions, not private actors whose current processes may be inconsistent with due process standards and whose motives are principally economic".[11] Indeed, an analysis by Article 19 notes that mechanisms put in place for content removal by social media platforms do not contain "all the appropriate safeguards" and that "they all fall short of international standards on free expression and due process in some way".[12]

The appeal process included in article 7 of the bill seems to only apply to when the digital service undertaking "did not take down the specified communication or did not comply with a take-down timeline". Therefore, there are no obvious appeal mechanisms for a user (owner of the content) to challenge a content removal decision. In addition, the bill does not include provisions for the companies to notify users when their content has been removed or flagged. Further, there is no explicit remedy for the wrongful removal of content.

---

10 The Rule of law on the Internet and in the wider digital world (2014), available at: https://rm.coe.int/16806da51c

11 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35 (2018), available: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/096/72/PDF/G1809672.pdf?OpenElement

12 Article 19, Side-stepping rights: Regulating speech by contract, available at: https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB-v2.pdf

II. Other considerations/Impracticality of Certain Measures

1. The bill applies to "any form of communication… (including SMS text message)"[13] this would require mobile network providers to remove SMS text messages, something that is impossible once the message has been delivered.

2. "Digital service undertaking" and "undertaking" are so broadly defined,[14] that they also include an individual who for example operates an online forum, message board, or a blog by her or himself. While larger companies would be able to "appoint a suitably qualified individual… as its digital safety officer" (art. 5(f)), smaller companies or individuals that fall under the definition of an "undertaking" in the bill may not have the capacity to hire someone specifically for this role. They would also have to provide for the "take down procedure… free of charge" (art. 3(d)). This could impede competition and infringe on a company's freedom to conduct business under Art. 16 of the EU Charter.[15]

3. The bill's provision regarding jurisdiction, reads as to apply to any "digital service undertaking" where "such harmful communications affect" an "Irish citizen" and where "the means of communication used… are within the control to any extent of an undertaking established under the law of another State and where a court established in the State would have jurisdiction to give notice of service outside the State in respect of civil proceedings to which such harmful communications refer." This provision could potentially have a global impact. The 2018 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression addresses this issue of extraterritorial jurisdiction as raising a "serious concern that States may

---

13 Article 1 (Interpretation), available at: https://data.oireachtas.ie/ie/oireachtas/bill/2017/144/eng/initiated/b14417d.pdf

14 Article 1: "digital service undertaking" means an undertaking that provides a digital or online service whether by the internet, a telecommunications system, the world wide web or otherwise, and includes an undertaking that is described, whether in an enactment or otherwise, as an intermediary service provider, an internet service provider, an internet intermediary, an online intermediary, an online service provider, a search engine, a social media platform, a social media site, or a telecommunications undertaking

15 Case C-70/10 Scarlet Extended SA v. SABAM, paras. 46-53, and Case C-360/10 SABAM v. Netlog NV, paras. 44-51, where the CJEU found that an obligation to install a filtering mechanism to protect copyright would unduly infringe an ISP's and social network provider's freedom to conduct to do business, respectively.

interfere with the right to freedom of expression "regardless of frontiers". That report also says that "the logic of these demands would allow censorship across borders, to the benefit of the most restrictive censors. Those seeking removals should be required to make such requests in every jurisdiction where relevant, through regular legal and judicial processes".[16]

4. According to the Law Reform Commission report, the bill mirrors New Zealand's and Australia's legislation on the topic. It is important to highlight that the Australian law limited its scope to "harmful material directed at children",[17] which implies a narrower scope than the Digital Safety Bill, and the legislation in New Zealand has been heavily criticised by civil society organisations as having negative implications for the exercise of freedom of expression.[18]

5. The Digital Safety Commissioner will be appointed by the Minister of Justice and Equality, with the consent of the Minister for Children and Youth Affairs and the Minister for Communications, Climate Action and Environment. No explicit provision is found in the bill regarding the independence of the Commissioner, or any other provision that could guarantee that independence. For example, the bill does not make explicit what the qualifications and eligibility criteria of the Commissioner should be, the duration of the mandate, guarantees of financial independence and specific causes for dismissal.[19]

6. Article 6 of the bill states that a digital service undertaking may apply for a certificate that it complies with the code of practice and the National Digital Safety Standards. The provision further states that the certification could be revoked under certain circumstances. However, the bill does not describe what the implications may be for the digital service undertaking when a revocation takes place.

---

16 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35 (2018), available: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/096/72/PDF/G1809672.pdf?OpenElement

17 Enhancing Online Safety for Children Act 2015, available at: https://www.legislation.gov.au/Details/C2015A00024

18 Electronic Frontier Foundation, New Zealand's Harmful Digital Communications Act: Harmful to Everyone Except Online Harassers, (2015) available at: https://www.eff.org/deeplinks/2015/07/nz-digital-communications-act-considered-very-harmful; Tech Liberty NZ, available at: http://techliberty.org.nz/tag/hdc/

19 See for example Chapter 6 of the General Data Protection Regulation, available at: https://gdpr-info.eu/art-52-gdpr/

7. The bill mentions that "only affected person can start a process".[20] However, a clear definition of what constitutes an affected person, especially in the absence of the definition for "harmful content" is problematic as it could potentially imply a broad definition of a complainant. This has been seen as "an ideal tool for a coordinated harassing mob—or simply a large crowd that disapproves of a particular piece of unpopular, but perfectly legitimate speech".[21]

About us

Irish Council for Civil Liberties

The Irish Council for Civil Liberties is Ireland's leading independent human rights organisation. We monitor, educate and campaign in order to secure full enjoyment of rights for everyone. Founded in 1976 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland. We have previously given submissions to Oireachtas Committees on digital rights and privacy questions, including the *Communications (Retention of Data) Bill* and *The Public Services Card.* We have also raised human rights questions guiding legislative responses to recent 2018 social media scandals including data protection breaches and degrading content.

CIVICUS

CIVICUS is a global alliance of civil society organisations and activists dedicated to strengthening citizen action and civil society throughout the world. We were established in 1993 and since 2002 have been proudly headquartered in Johannesburg, South Africa, with additional hubs across the globe. We are a membership alliance with more than 4,000 members in more than 175 countries. We work to strengthen citizen action and civil society toward a more just, inclusive and sustainable. Our work reflects our belief that people-powered and collective action is at the centre of transformative change.

Contact

Elizabeth Farries
Information Rights Project Manager
Irish Council for Civil Liberties | International Network of Civil Liberties Organization
Unit 11, First Floor, 34, Usher's Quay, Dublin 8
elizabeth.farries@iccl.ie

---

20 For example, Article 3(d); 4(b) and 5(c) of the Bill

21 Electronic Frontier Foundation, New Zealand's Harmful Digital Communications Act: Harmful to Everyone Except Online Harassers, (2015) available at: https://www.eff.org/deeplinks/2015/07/nz-digital-communications-act-considered-very-harmful