Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **Digital Safety Commissioner Bill 2017** (Bill) and its potential implications for the right to freedom of expression in Ireland.

According to information received:

On 30 November 2017, the Digital Safety Commissioner Bill 2017 ("the Bill") was introduced before the Oireachtas. Currently, the Bill is in in the third stage before the Dáil Éireann.

The Bill is based on recommendations of the Law Reform Commission in its September 2016 report on Harmful Digital Communications and seeks to address concerns over cyber-bullying and children's online safety.

The Bill would establish a Digital Safety Commissioner that formulates and oversees a code of practice for the takedown procedures for the removal of "harmful digital communications." It also imposes duties on social media platforms, search engines and other "digital service undertakings" in connection with the removal of harmful communications.

Relevant provisions of the Bill I would like to highlight for your attention are:

Definition of Harmful Digital Communications

Section 1 of the Bill defines a "communication" as "any form of communication, including by speech, by letter, by camera, by telephone (including SMS text message), by smart phone, by any digital or online communication (including the internet, a search engine, a social media platform, a social media site or the world wide web), or by any other telecommunications system." In addition to private communications exchanged via telephone, e-mail, or social media, this would include blogs, websites, social media posts and search engine results.

However, the Bill does not provide guidance on what forms of digital communications would be considered "harmful." The Law Reform Commission's report, Harmful Communications and Digital Safety, upon which the legislation is based, defines harmful content as: "[p]osting images or videos (especially those of an intimate nature) without consent where this involves gross breaches of privacy, setting up fake or offensive websites or social media profile, sending intimidating or threatening messages, as well as harassment and stalking."[1]

Code of Practice on Take Down Procedure for Harmful Communications

Under Section 4 of the Bill, a Digital Safety Commissioner appointed by the Minister of Justice and Equality will "prepare and publish" a code of practice that provides digital service undertakings with detailed and "practical guidance" on their take down procedures for harmful digital communications.

At a minimum, the Code of Practice will stipulate "timelines" for digital service undertakings to respond to complaints regarding "different categories of harmful digital communications" and the takedown of content pursuant to valid complaints.

The Code of Practice will also require digital service undertakings to provide information about their takedown procedures to all affected individuals "free of charge."

Duties of Digital Service Undertaking

Under Section 1 of the Bill, "digital service undertaking" includes any entity that "provides a digital or online service whether by the internet, a telecommunications system, the world wide web or otherwise." This definition would encompass internet service providers, search engines, social media platforms and other online intermediaries.

Under Section 5, digital service undertakings are required to comply with National Digital Safety Standards, including the following:

- Prohibiting end-users from posting "harmful digital communications";
- Establishing a "complaints scheme" enabling end users to request the takedown of "harmful digital communications;" and
- Publishing timelines for responding to users' complaints and for takedowns pursuant to valid complaints that are "no less stringent" than those indicated in the Code of Practice.

[1] Coimisiún um Atchóirú an DLÍ, Report – Harmful Communications and Digital Safety, p. 3, ¶13 http://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf.

In addition, digital services undertakings are required to ensure that their takedown procedures comply with the Code of Practice described above.

Users' Appeals

Under Section 7 of the Bill, users may appeal the decision of digital service undertakings to turn down their complaints regarding harmful digital communications. Users may also appeal failures to comply with the timelines for responding to complaints and taking down content pursuant to complaints that were upheld.

The Commissioner will hear and investigate the appeals described above.

If the Commissioner deems the appeal to be valid, it shall revoke the Certificate of Compliance issued to the digital service undertaking. It is unclear whether this revocation will require the digital service undertaking to suspend its operations in the Republic of Ireland or take any other action.

Under Section 8, if the digital service undertaking refuses to comply with an order issued by the Commissioner, the Commissioner may apply to the Circuit Court requiring compliance.

Before explaining my concerns with the proposed Bill, I wish to remind Your Excellency's Government of the Republic of Ireland's obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

Article 19(1) of the ICCPR establishes "the right to hold opinions without interference." The right to hold opinions is so fundamental that it is "a right to which the Covenant permits no exception or restriction."[2] Accordingly, this right is not simply "an abstract concept limited to what may be in one's mind," and may include activities such as research, online search queries, and drafting of papers and publications."[3]

Article 19(2) of the ICCPR establishes State Parties' obligations to respect and ensure the right "to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Under Article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be "provided by law," and necessary "for respect of the rights or reputations of others" or "for the protection of national security or of public order

[2] U.N. Human Rights Comm., General Comment No. 34, article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34, ¶ 9 (September 12, 2011) ("General Comment 34"), available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

[3] General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/29/32, ¶ 20 ("A/HRC/29/32"), available at https://freedex.org/wpcontent/blogs.dir/2015/files/2015/10/Dkaye_encryption_annual_report.pdf

(*ordre public*), or of public health and morals." The General Assembly, the Human Rights Council and the Human Rights Committee (the body charged with monitoring implementation of the Covenant) have concluded that permissible restrictions on the Internet are the same as those offline.[4]

Since Article 19(2) of the ICCPR "promotes so clearly a right to information of all kinds," this indicates that "States bear the burden of justifying any withholding of information as an exception to that right."[5] The Human Rights Committee has also emphasized that limitations should be applied so that they do "not put in jeopardy the right itself."[6]

Article 19(3) of the ICCPR establishes a three-part test for permissible restrictions on free speech. First, restrictions must be provided by law. According to the Human Rights Committee, any restriction "must be made accessible to the public" and "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."[7] Moreover, it "must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."[8]

Second, restrictions must only be imposed to protect legitimate aims, which are limited those specified under Article 19(3) of the ICCPR. The term "rights… of others" under Article 19(3)(a) includes "human rights as recognized in the Covenant and more generally in international human rights law."[9] The previous Special Rapporteur on the right to freedom of opinion and expression concluded that permissible restrictions on the internet are the same as those offline.[10]

Third, restrictions must be necessary to protect legitimate aims. The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions "target a specific objective and do not unduly intrude upon the rights of targeted persons."[11] The ensuing interference with third

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[4] See General Assembly resolution 68/167; Human Rights Council resolution 26/13; General Comment 34, supra n. 1, at ¶ 12.

[5] General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/70/361, ¶ 8 ("A/70/361"), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361.

[6] General Comment 34, supra n. 1, at ¶ 21

[7] *Id.* at ¶ 25.

[8] *Id.*

[9] *Id.* at ¶ 28.

[10] Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/HRC/17/27, ¶ 69, ("A/HRC/17/27"), available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

[11] Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/29/32, ¶ 35; see also U.N. Human Rights Comm., General Comment No. 27, Freedom of movement (Art. 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov 2, 1999) ("General Comment 27"), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en.

parties' rights must also be limited and justified in the interest supported by the intrusion. Finally, the restriction must be "the least intrusive instrument among those which might achieve the desired result."[12]

The Human Rights Committee has reiterated that any restriction on the "operation of websites, blogs or any other internet-based ... system" must be compatible with the criteria of legality, legitimacy and necessity. The former Special Rapporteur on freedom of expression has concluded that, as a general rule, "there should be as little restriction as possible to the flow of information on the Internet, except under a few, very exceptional and limited circumstances prescribed by international law for the protection of other human rights."[13] In their 2017 Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, independent monitors of freedom of expression and the media in the UN, the Americas, Europe and Africa, including the Special Rapporteur, concluded that content blocking decisions must meet "minimum due process guarantees."[14]

The Manila Principles on Intermediary Liability, a best practices framework with over 50 civil society and academic signatories worldwide, are instructive. Under the Principles, "intermediaries must not be required to restrict content unless an order has been issued by an independent and impartial judicial authority that has determined that the material at issue is unlawful."[15] In exceptional circumstances where expedited review is required, the Principles indicate that notice-and-notice regimes and expedited judicial process are available as the least invasive means for achieving legitimate government aims under Article 19(3). Notice-and-notice regimes would require intermediaries "to respond to content restriction requests pertaining to unlawful content by either forwarding lawful and compliant requests to the [content sharing] provider, or by notifying the complainant of the reason it is not possible to do so" (Manila Principle III.d). Furthermore, the Principles indicate that "[t]he burden of a full judicial hearing can be reduced by instituting an expedited judicial process, subject to due legal safeguards" (Manila Principle II.a).

Given these criteria for imposing intermediary liability for user-generated content, the Special Rapporteur on the right to freedom of opinion and expression has urged States to adopt "[s]mart regulation, not heavy-handed viewpoint-based regulation ... focused on ensuring company transparency and remediation to

[12] General Comment 27, at ¶ 14.
[13] General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/66/290 , ¶ 12 ("A/66/290"), available at http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf
[14] The other experts are the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information.
[15] Manila Principles on Intermediary Liability, Version 1.0, March 24, 2015. *Available at* https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf

enable the public to make choices about how and whether to engage in online forums."[16] Furthermore, "States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy."[17] Additionally, "States should refrain from imposing disproportionate sanctions, whether heavy fines or imprisonment, on Internet intermediaries, given their significant chilling effect on freedom of expression."[18]

The Special Rapporteur has also emphasized that States should "States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression. They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users."[19]

***Concerns*:**

In light of the aforementioned standards, I would like to express support for measures requiring company transparency regarding their takedown procedures.

At the same time, I am also extremely concerned that major sections of the Bill are incompatible with the aforementioned standards of international human rights law. While I respect your Government's interest in ensuring the online safety of children and other users, I am concerned that the restrictions established by the Bill are inconsistent with the criteria of legality, necessity and proportionality under article 19(3) of the ICCPR. In the absence of even a basic definition of "harmful digital communications," I am particularly concerned that its prohibition will lead to undue censorship and incentivize social media platforms and other "digital service undertakings" to restrict content that is perfectly legitimate and lawful. The consequences of a digital service undertaking's failure to comply with the Code of Practice or the Commissioner's orders are also unclear, enhancing uncertainty about how the Bill would operate in practice.

Given that the Bill proposes a legal prohibition against "harmful digital communications", I am also concerned that the Bill delegates significant oversight and control over the interpretation and enforcement of this prohibition to digital service undertakings and the Digital Safety Commissioner, an extrajudicial mechanism that will be appointed by the executive branch.

While the Bill contemplates the involvement of the Circuit Court at the appeals stage, law-based removals of content may raise complex legal questions at the first instance that require adjudication by an independent and impartial judicial authority. Digital service undertakings are fundamentally ill-equipped to resolve these questions,

[16] A/HRC/38/35, para. 66.
[17] *Id.*
[18] *Id.*
[19] *Id.*, at para. 68.

given the pressures they face from commercial stakeholders and regulatory authorities. The Commissioner's mandate to prioritize digital safety may also distort its ability to address these questions on appeal in a manner that adequately considers countervailing interests in protecting freedom of expression and other fundamental values. It is also unclear how the Commissioner's independence will be guaranteed.

In exceptional circumstances where expedited action is required, I urge Your Excellency's Government to consider implementing notice-and-notice regimes and expedited judicial process, which are available as less invasive means for protecting online child safety.

Given the potential implications of the Code of Practice for the exercise of freedom of expression online, I am also concerned that the Bill does not establish a meaningful consultative process that involves a representative cross-section of civil society, human rights groups and company officials. I am also concerned that the timelines established for responding to complaints and taking down content may be extremely short and create undue pressure on companies to err on the side of removing content.

In light of these concerns, I would like to call on your Excellency's Government to take all steps necessary to conduct a comprehensive review of the bill to ensure its compliance with international human rights law.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for any additional information and comment on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned issues.

2. Please provide detailed information on measures taken by your Government to ensure that the abovementioned Bill is strictly compatible with Your Excellency's Government's obligations under international human rights law and standards, especially under Article 19 of the ICCPR.

3. Please explain how subsequent versions of the Bill will seek to define the scope of "harmful digital communications," or introduce meaningful limits on its definition in compliance with Article 19(3) of the ICCPR.

4. Please explain the legal and regulatory implications for a digital service undertaking that is not granted a certificate of compliance, or whose certificate is revoked.

I would appreciate receiving the response within 60 days.

Finally, I would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx.

Your Excellency's Government's response will be made available in the above-mentioned website as well as in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression