

Submission to the Joint Oireachtas Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht on the General Scheme of the Online Safety and Media Regulation Bill

8 March 2021



Founded in 1995, the Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

Ag Eisteacht
Alcohol Action Ireland
Amnesty International Ireland
An Cosán
AsIAM
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown Camp
Bedford Row Family Project
BeLonG To Youth Services
Care Leavers' Network
Catholic Guides of Ireland
Childrens Books Ireland
Child Care Law Reporting Project
Childhood Development Initiative
Childminding Ireland
Children in Hospital Ireland
COPE Galway
Cork Life Centre
Crosscare
CyberSafeKids
Dalkey School Project National School
Daughters of Charity Child and Family Service
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Doras
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dyslexia Association of Ireland
Dyspraxia/DCD Ireland
Early Childhood Ireland
Educate Together
EPIC
Extern Ireland
Focus Ireland
Foróige
Gaelscoileanna Teo
Good Shepherd Cork
Immigrant Council of Ireland
Inclusion Ireland
Institute of Guidance Counsellors
Irish Aftercare Network
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)

Jack & Jill Children's Foundation
Jigsaw
Katharine Howard Foundation
Kids' Own Publishing Partnership
Mecpaths
Mental Health Reform
Mercy Law Resource Centre
Migrant Rights Centre Ireland
Mothers' Union
My Project Minding You
Museum of Childhood Project
Music Generation
National Childhood Network
National Forum of Family Resource Centres
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
Novas
One Family
One in Four
Pavee Point
Peter McVerry Trust
Private Hospitals Association
Psychological Society Ireland
Rainbow Club Cork
Rainbows Ireland
Rape Crisis Network Ireland (RCNI)
Realt Beag/Ballyfermot Star
Respond Housing
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
School of Education UCD
Sexual Violence Centre Cork
SIPTU
Simon Communities of Ireland
Social Care Ireland
Society of St. Vincent de Paul
Sonas Domestic Violence Charity
SPHE Network
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
Teachers' Union of Ireland
Transgender Equality Network Ireland
The Ark, A Cultural Centre for Children
The Prevention and Early Intervention Network
The UNESCO Child and Family Research Centre, NUI Galway
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
Young Ballymun
Young Knocknaheeny
Young Social Innovators
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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1. Introduction

The Children’s Rights Alliance unites over 100 organisations working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services. We identify problems for children. We develop solutions. We educate and provide information and legal advice on children’s rights.

The Children’s Rights Alliance welcomes the opportunity to make a written submission to the Joint Oireachtas Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht on the General Scheme of the Online Safety and Media Regulation Bill. This submission has been developed following a consultation with our members who work with children, young people and families across Ireland.

Children make up one third of global online users.¹ While the online world brings unparalleled opportunity to children and young people to learn, create, connect and socialise it also brings unparalleled risk, including the loss of personal data, exposure to harmful content, cyberbullying, negative impacts on health and well-being, online grooming and extortion. Research commissioned by the Irish Society for the Prevention of Cruelty to Children (ISPCC) found that 73 per cent of parents did not think the Government was doing enough to keep children safe online and 78 per cent felt that the industry was not doing enough.² Self-regulation of the industry can result in inconsistent standards being applied and data from CyberSafeKids reveals that there are high numbers of children under the age of 13 on social media platforms despite current age restrictions.³ While undoubtedly, the internet has significant positive impacts both for children and wider society, for too long legislation and policy have not kept pace with the evolution of the online world. This has left children and young people at risk and unprepared to appropriately navigate online platforms.

All children have the right to be protected from abuse, neglect and sexual exploitation.⁴ In the UN Committee on the Rights of the Child’s *Report of the 2014 General Day of Discussion, Digital Media and Children’s Rights*, it recommended that a holistic approach be taken to address the risks posed by digital media and Information and Communication Technologies (ICT) to children’s safety, including online harassment, sexual exploitation of children, access to violent and sexual content, grooming and self-generated sexual content.⁵ The Committee has also highlighted States’ obligation to ‘develop effective safeguards against abuse without unduly restricting the full enjoyment of their rights’.⁶

The UN Committee on the Rights of the Child has noted that ‘the opportunities and the risks of harm for children are likely to increase, even where children do not actively access the internet, as societies progressively rely upon digital technologies for their functioning’.⁷ The Committee also in

1 Unicef ‘Children in the Digital World’ (2017) <https://www.unicef.org/publications/files/SOWC_2017_ENG_WEB.pdf> accessed 27 November 2020.

2 Karen Hand (ISPCC 2018) unpublished.

3 Cybersafelreland, *Annual Report 2019, (2020)* 23.

4 UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) Arts 19 and 34.

5 UNCRC ‘*Report of the 2014 General Day of Discussion, Digital Media and Children’s Rights*’ (OHCHR, 2014) at para 105.

6 *Ibid* at para 102

7 UN Committee on the Rights of the Child, Draft General comment No. 25 (2020) on Children’s rights in relation to the digital environment CRC/C/GC/25, para 4.

its draft General Comment has recommended that States should regularly update legal frameworks to protect children from ‘emerging risks of violence, including psychological harm, in the digital environment’.⁸ The Committee noted that some of the risks in the digital environment come from children themselves such as ‘cyberbullying, harassment, violence, and sharing of sexualized images of children (“sexting”)’ and that in responding to this, recommended States take ‘preventive, safeguarding and restorative justice approaches whenever possible’.⁹ The UN Committee adopted the General Comment in February 2021 and it is due to be published shortly.

Another aspect of online safety for children and young people is in relation to their privacy rights and how these are best protected. The UN Convention on the Rights of the Child (UNCRC) also protects a child’s right to privacy.¹⁰ An individual’s right to privacy is protected under the International Covenant on Civil and Political Rights as well as the European Convention on Human Rights. End-to-end encryption can protect a person’s privacy as a service provider cannot read messages sent between two parties. This is important in the context of children’s privacy and safety as it ensures their personal details including home address, locations they’ve visited and contact information of people they know remains private and will not fall into the hands of potential abusers.¹¹ However, as noted in a 2020 working paper, written to inform UNICEF’s work, on *Encryption, Privacy and Children’s Right to Protection from Harm*, ‘[d]isagreements around platform end-to-end encryption has inadvertently created a perceived conflict between a child’s right to privacy and the right to protection from sexual abuse and exploitation’.¹¹ Online safety legislation should ensure children and young people’s rights to both privacy and protection. While the right to privacy is not absolute, States should seek to achieve a proportionate balance between these rights.

In 2018, the Council of Europe published its Recommendation, *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment* which recommends that States require businesses to meet their responsibilities by requiring them to implement measures and ‘encourage them to co-operate’ with the State and other stakeholders, including children.¹² It further recommends that Member States should ensure that a child’s right to an effective remedy under the European Convention of Human Rights¹³ is respected and protected when their rights have been infringed online.¹⁴ Guidance is given on what constitutes an effective remedy and it includes inquiry, explanation, reply, correction, proceedings, immediate removal of unlawful content, apology, reinstatement, reconnection and compensation.¹⁵ Importantly it provides that process should be speedy, child-friendly and provide the appropriate redress.¹⁶

There are a number of welcome provisions in the General Scheme including:

- Head 49A provides a comprehensive definition of what constitutes harmful online content as including material that is a criminal offence to disseminate,¹⁷ material that is likely to

8 *ibid* para 82.

9 *ibid* para 85.

10 UN Convention on the Rights of the Child A/RES/44/25 (20 November 1989) Art 16.

11 Kardefelt-Winther, D., Day, E., Berman, G., Witting, S.K., and Bose, A., on behalf of UNICEF’s crossdivisional task force on child online protection (2020). *Encryption, Privacy and Children’s Right to Protection from Harm*. Innocenti Working Paper 2020-14. Florence: UNICEF Office of Research – Innocenti, 6-7.

12 Council of Europe, ‘*Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment*’ (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 8 January 2021, 11.

13 European Convention of Human Rights Art 6 and 19.

14 Council of Europe, ‘*Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment*’ (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 8 January 2021, 24.

15 *ibid*.

16 *ibid*.

17 General Scheme of the Online Safety & Media Regulation Bill, Head 49A(a).

encourage or promote eating disorders¹⁸ and material that would encourage or promote self-harm or suicide.¹⁹ Consideration could be given to widening this definition to include the exposure of children to internet alcohol marketing. We note that the Annex to the Regulatory Impact Analysis this Bill does not consider that alcohol marketing falls into the ‘harmful content’ category but rather that it may be classified as ‘inappropriate content’.²⁰ Over three quarters of young people aged between 13 and 17 have previously reported exposure to online marketing.²¹ Young people can be exposed to alcohol marketing which encourages, normalises and glamorises alcohol consumption.²²

- Head 49C provides a definition of age-inappropriate online content which takes into account ‘the best interest of minors, their evolving capacities and their full array of rights’, and includes:
 - material containing or comprising gross or gratuitous violence,
 - material containing or comprising cruelty, including mutilation and torture, towards humans or animals, and,
 - material containing or comprising pornography’.
- Head 50A provides that the Media Commission shall prepare and from time to time revise online safety codes, governing standards and practices. In particular, it is welcome that Head 50A(3)(h) specifically provides that in doing so the Media Commission will have regard specifically to the protection of children and young people. Designated or categories of online services will have to observe these codes, governing standards and practices. Special consideration should be given to how children can be effectively protected from all forms of digital marketing and commercial digital advertising in online safety codes and this work should be prioritised upon the establishment of the Commission. Head 50A(4) outlines that the Media Commission, when preparing the codes may consult with any persons or bodies it sees fit. Consideration should be given to placing a statutory obligation on the Media Commission through an explicit provision in the legislation to consult with children and young people as part of the development of the online safety codes.²³
- Head 51A provides that the Commission will develop online safety guidance materials and as part of this will have regard to, among other issues, the protection of children and young people.

Summary of Recommendations

- Consider how best to ensure that a child is protected from the distribution of harmful content through end-to-end encrypted messaging platforms while at the same time protecting the right to privacy.
- The Bill should provide that end-to-end encryption must allow for the detection and disruption of CSAM.
- Refer the regulation of end-to-end encryption to the Irish Human Rights and Equality Commission to see advance on how to balance the children’s right to protection and

18 *ibid* 49A(c).

19 *ibid*, Head 49A(d).

20 Online Safety and Media Regulation Bill, *Annex to the Regulatory Impact Analysis* (Government of Ireland 2020) 13-14.

21 Alcohol Action Ireland and the Health Promotion Research Centre NUI Galway, *Alcohol marketing and young people’s drinking behaviour in Ireland* (Alcohol Action Ireland 2015) 4.

22 *ibid* 2.

23 A similar provision to consult with children is contained in the Child and Family Agency Act 2013 s9(3) which provides that ‘the Agency shall, when planning and reviewing the provision of services in connection with the performance of functions under section 8 (1)(a), (b) or (c), ensure that consideration is given to the views of children.’

other critical rights such as the right to freedom of expression, the right to association and the right to protest.

- Retain and expand the objective to protect the interests of children and young people to include that in all actions concerning children that the best interests of the child shall be the primary consideration.
- Amend the General Scheme to provide that the Online Safety Commissioner is given the power to evaluate and regulate educational and community awareness programmes on online safety.
- Amend the General Scheme of the Bill to specifically provide for the establishment of an Online Safety Commissioner as part of the Media Commission. The Online Safety Commissioner must be adequately resourced, with appropriate ring-fenced funding and staffing, and granted robust statutory powers to sanction companies who do not comply with timebound codes for the protection of children and young people online that are in line with fair procedures.
- Amend the General Scheme of the Bill to specifically provide for an individual complaints mechanism to ensure that children and young people whose rights are not respected by the online providers and who have exhausted all appropriate channels with the relevant platform, have access to an effective remedy.

Interpretation (Head 2)

Head 2 of the General Scheme provides a definition of what constitutes media for the purposes of the Bill. It is welcome that this definition includes on-demand audio-visual media services (for example Apple TV), video sharing platform services (for example YouTube) and online services. However, private end-to-end encrypted communications services, such as Whatsapp, will not currently fall under the remit of this Bill. This means that unless the material shared is illegal (rather than defined as harmful content in Head 49 (A)) it will not be regulated. While an individual's right to privacy in using encrypted messaging platforms should be respected, it should also be recognised that '[e]nd-to-end encryption impedes efforts to monitor and remove child sexual abuse materials and identify offenders attempting to exploit children online'.²⁴ There is also a risk that a child or young person will be 're-victimized as materials depicting their abuse continue to be shared online'. While there are a number of ways to prevent and interrupt the sharing of child sexual abuse material,²⁵ the 5Rights Foundation²⁶ has emphasised that technology like PhotoDNA which can identify this material when it is uploaded, means that it can be instantaneously removed and reported.²⁷ They are not opposed to end-to-end encryption but are calling on tech companies to 'implement end-to-end encryption in a way that allows PhotoDNA and similar tools to operate'. In

24 Kardefelt-Winther, D., Day, E., Berman, G., Witting, S.K., and Bose, A., on behalf of UNICEF's crossdivisional task force on child online protection (2020). Encryption, Privacy and Children's Right to Protection from Harm. Innocenti Working Paper 2020-14. Florence: UNICEF Office of Research – Innocenti, 3.

25 *ibid.*

26 5Rights Foundation exists to make systemic changes to the digital world to ensure it caters for children and young people, by design and default.

27 5Rights Foundation, 'Briefing: end-to-end encryption and child sexual abuse material' <5rights-briefing-on-e2e-encryption--csam.pdf (5rightsfoundation.com)> accessed 5 March 2021.

particular they call on national governments to ‘mandate that end-to-end encryption must allow for the detection and disruption of CSAM’.²⁸

Research conducted by CyberSafeKids and published in 2020 found that 32 per cent of 8-12 year olds are using Whatsapp (despite age restrictions).²¹ Content on these platforms can be shared rapidly amongst multiple users in a single group (up to 250+ users in a WhatsApp group for example). This type of communication could be used to distribute harmful online content. In a 2020 report by the Anti-Bullying Centre in Dublin City University, 28 per cent of children and young people reported that they had been a victim of cyberbullying during the Covid-19 lockdown while 50 per cent reported seeing it happen to others. Younger children were more likely to have been victims of cyberbullying. Two thirds of young people aged 14-16 reported that they ‘experienced significantly more cyberbullying in instant/private messaging services such as WhatsApp, Viber or Telegram’.²⁹ While it is welcome that the General Scheme provides that harmful content including cyberbullying (as defined under Head 49(A) distributed in public fora will fall under the scope of the legislation, there is a concern that not including private communications services specifically could result in the sharing of this content to persist underground to the unregulated services, where it can still be shared with a large number of users.

Content on these platforms can be shared rapidly amongst multiple users in a single group (up to 250+ users in a WhatsApp group for example). This type of communication could be used to distribute harmful online content. While the General Scheme provides that harmful content including cyberbullying (as defined under Head 49(A) distributed in public fora will fall under the scope of the legislation, there is a concern that not including private communications services specifically could result in the sharing of this content to persist underground to the unregulated services, where it can still be shared with a large number of users. At the same time, the Alliance recognises the challenges in this area and the potential of over-regulation to impede the right to freedom of expression, the right to freedom of association and the right to protest. This is especially important in countries where political rights are under threat.

The real question for legislators is how best to achieve the appropriate balance between the child’s right to privacy which is also necessary to keep them safe and their right to protection from sexual exploitation and harm, including online bullying. We believe that a proper balance needs to be found and recommend that Government refer the matter to the Irish Human Rights and Equality Commission to advise.

Recommendation:

- Consider how best to ensure that a child is protected from the distribution of harmful content through end-to-end encrypted messaging platforms while at the same time protecting the right to privacy.
- The Bill should provide that end-to-end encryption must allow for the detection and disruption of CSAM.
- Refer the regulation of end-to-end encryption to the Irish Human Rights and Equality Commission to see advance on how to balance the children’s right to protection and other critical rights such as the right to freedom of expression, the right to association and the right to protest.

28 5Rights Foundation, ‘Briefing: end-to-end encryption and child sexual abuse material’ <5rights-briefing-on-e2e-encryption--csam.pdf (5rightsfoundation.com)> accessed 5 March 2021.

29 Dr Tijana Milosevic, Derek Laffan and Prof James O’Higgins Norman Kids’ Digital Lives in Covid-19 Times: Key Findings from Ireland. Dublin: National Anti-Bullying Research and Resource Centre,

Objectives of the Media Commission (Head 9)

Head 9(4) provides that one of the objectives of the commission is to ‘protect the interests of children taking into account the vulnerability of children to harmful content and undue commercial exploitation’. It is welcome that protecting the interests of children is one of the five objectives of the Media Commission.

Under the UNCRC, all children have the right to be protected from abuse, neglect and sexual exploitation.³⁰ The UN Committee on the Rights of the Child has highlighted States’ obligation to ‘develop effective safeguards against abuse without unduly restricting the full enjoyment of their rights’.³¹ While it is important to protect children and young people online, other rights such as their right to freedom of expression³² and right to information³³ as well as their participation rights³⁴ play a key role in children’s enjoyment and participation in the online world. The Council of Europe (COE) *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment* provide that ‘in all actions concerning children in the digital environment, the best interests of the child shall be a primary consideration’ and further recommend that States should strike a balance between the child’s right to protection and their other rights to freedom of expression, participation and access to information.³⁵ The COE also acknowledges the differing levels of maturity and understanding of children at different ages and recommends that States recognise the evolving capacities of children which can mean that the ‘policies adopted to fulfil the rights of adolescents may differ significantly from those adopted for younger children’.³⁶

The Committee on the Rights of the Child has issued a general comment³⁷ to clarify the meaning of this principle in 2013 and stated that it has a three-fold meaning. The best interests principle is:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or

30 UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) Arts 19 and 34.

31 UN Committee on the Rights of the Child, Draft General comment No. 25 (2020) on Children’s rights in relation to the digital environment CRC/C/GC/25 para 102.

32 UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) Art 13.

33 UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) Art 17.

34 UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) Art 12.

35 Council of Europe, ‘Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment’ (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 26 February 2021, 12.

36 Council of Europe, ‘Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment’ (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 26 February 2021, 12.

37 UN Committee on the Rights of the Child (2013) *General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14

negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

The Alliance believes that the Bill could be strengthened by adopting the UN Convention standard namely that the best interests should be a primary consideration in all matters affecting children. Adopting this standard would offer greater clarity on how the principle should be interpreted in practice and would lead to better outcomes for all children.

Recommendation:

- Retain and expand the objective to protect the interests of children and young people to include that in all actions concerning children that the best interests of the child shall be the primary consideration.

Functions of the Media Commission (Head 10)

Head 10 of the General Scheme of the Bill provides that the Commission will conduct public information campaigns for the purpose of educating and providing information to the public in relation to online safety and media literacy.³⁸ This is a welcome provision alongside the function to promote 'educational initiatives and activities relating to online safety' and to advise any educational or training institution, Ministers, Departments of State or any public body.³⁹ However, the General Scheme does not give the Commission the power to evaluate and regulate the educational and community awareness programmes on online safety. Currently there is no single body in the State tasked with doing this work and providers of educational programmes are unregulated.

The Council of Europe (COE) *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment* recommend that States ensure the educational resources are of a high quality and should be evaluated by States and other stakeholders in order to maintain high standards of education about the digital world.⁴⁰

In Australia the eSafety Commissioner has the power, alongside providing educational resources and training, to evaluate a range of educational and community awareness programs relevant to online safety.⁴¹ As part of this work they publish a list of trusted providers of online safety education on their website called the Trusted eSafety Provider Program. This is designed to give schools confidence that the external online safety provider they engage meets the eSafety Commissioner's online safety education standards.⁴²

Recommendation:

- Amend the General Scheme to provide that the Online Safety Commissioner is given the power to evaluate and regulate educational and community awareness programmes on online safety.

38 General Scheme of the Online Safety & Media Regulation Bill, Head 10 (xiii)

39 General Scheme of the Online Safety & Media Regulation Bill, Head 10 (xiv)

40 Council of Europe, 'Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment' (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 26 February 2021, 19.

41 Australian Government, Australian E- Safety Commissioner, What we do, <<https://www.esafety.gov.au/about-us/what-we-do>> accessed 25 February 2021.

42 Australian Government, Australian E- Safety Commissioner, What we do, < <https://www.esafety.gov.au/educators/trusted-providers>> accessed 25 February 2021.

Membership of the Commission (Head 19)

While one of the objectives of the Commission is to ‘protect the interests of children taking into account the vulnerability of children to harmful content and undue commercial exploitation’⁴³ the Scheme of the Bill does not specify that one member of the proposed Commission will be an Online Safety Commissioner. The Media Commission will be empowered to delegate functions to individual commissioners, and it is intended that one of the three initial commissioners will be delegated the functions relating to online safety.⁴⁴

While we note the Government’s intention that one of the commissioners appointed to the Commission will be delegated to oversee the online safety functions,⁴⁵ the legislation should explicitly provide for and establish a dedicated Online Safety Commissioner.

Recommendation:

- Amend the General Scheme of the Bill to specifically provide for the establishment of an Online Safety Commissioner as part of the Media Commission. The Online Safety Commissioner must be adequately resourced, with appropriate ring-fenced funding and staffing, and granted robust statutory powers to sanction companies who do not comply with timebound codes for the protection of children and young people online that are in line with fair procedures.

⁴³ General Scheme of the Online Safety & Media Regulation Bill, Head 9(4).

⁴⁴ Communication received by the Children’s Rights Alliance from the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, 12 January 2021.

⁴⁵ *ibid.*

Core Powers of the Media Commission, Auditing complaints handling and Systemic complaints scheme (Head 10, Head 52A and Head 52B)

The powers of the Media Commission as set out in Head 11 include ‘the power to conduct investigations and inquiries’.⁴⁶ However, the Scheme does not provide a mechanism for individuals to appeal to the Commission when a social media site fails to comply with the standards of the Code of Practice on Digital Safety. Instead, the Bill provides for a ‘systematic complaints scheme’⁴⁷ or ‘super complaints’⁴⁸ designed for nominated bodies, such as expert Non-Governmental Organisations (NGO), to bring systematic issues to the attention of the Commission, an example of which could be that a vast number of complaints about a particular issue are made against a particular provider. This Bill provides for the Commission to have the power to audit the complaints handling system of a service provider⁴⁹ and direct them to take specified actions which can include changes to their systems or the take-down or restoration of content.

The Council of Europe recommends Member States should ensure that a child’s right to an effective remedy under the European Convention of Human Rights⁵⁰ is respected and protected when their rights have been infringed online.⁵¹ This means that States are required to make provision for ‘known, accessible, affordable, and child-friendly avenues through which children, as well as their parents or legal representatives, may submit complaints and seek remedies’.⁵² Guidance is given on what constitutes an effective remedy and it includes inquiry, explanation, reply, correction, proceedings, immediate removal of unlawful content, apology, reinstatement, reconnection and compensation.⁵³ Importantly, it provides that the process should be speedy, child-friendly and provide the appropriate redress.⁵⁴

The Law Reform Commission (LRC) has recommended establishing a statutory Digital Safety Commissioner, modelled on comparable offices in Australia and New Zealand.⁵⁵ The LRC also envisioned that this office would have responsibility for publishing a Code of Practice on Digital Safety which would include an efficient take-down procedure.⁵⁶ Under the LRC proposals, if a social media site did not comply with the standards in the Code of Practice, an individual could then appeal to the Digital Safety Commissioner, who could direct a social media site to comply with the standards in the Code.⁵⁷ The LRC further recommended that if a social media site did not comply with the Digital Safety Commissioner’s direction, the Commissioner could apply to the Circuit Court for a court order requiring compliance.⁵⁸

46 General Scheme of the Online Safety & Media Regulation Bill, Head 11(3)

47 *ibid* Head 52B.

48 *ibid* explanatory note at Head 52.

49 *ibid* Head 52A.

50 European Convention of Human Rights Art 6 and 19.

51 Council of Europe, ‘*Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment*’ (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 8 January 2021, 24.

52 Council of Europe, ‘*Recommendation CM/Rec(2018)7 of the Committee of Ministers to Member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment*’ (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 8 January 2021, 24.

53 *ibid*.

54 *ibid*.

55 Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116 - 2016) 144.

56 *ibid*.

57 *ibid*.

58 *ibid*.

The current General Scheme does not follow the recommended approach of the LRC, or the existing models in Australia (E-Safety Commissioner) or New Zealand (Netsafe) in providing a mechanism for individuals to appeal to the Commissioner when a social media site fails to comply with the standards of the Code of Practice on Digital Safety. The proposed powers of the Commission should be amended to include an individual complaints mechanism to ensure that when online providers do not respect the rights of children and young people, and they have exhausted all appropriate channels with the relevant platform, they will have access to an effective remedy in line with their rights under the European Convention of Human Rights.⁵⁹ This should also align with the Council of Europe *Guidelines* which state that in the digital environment an effective remedy includes inquiry, explanation, reply, correction, proceedings, immediate removal of unlawful content, apology, reinstatement, reconnection and compensation.⁶⁰

Recommendations:

- Amend the General Scheme of the Bill to specifically provide for an individual complaints mechanism to ensure that children and young people whose rights are not respected by the online providers and who have exhausted all appropriate channels with the relevant platform, have access to an effective remedy.

⁵⁹ European Convention of Human Rights Arts 6 and 19.

⁶⁰ Council of Europe, *Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment* (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 8 January 2021, 24.