



**ombudsman
do leanáí
for children**

**Preliminary Observations of the Ombudsman for Children's Office
on the General Scheme of the Data Protection Bill 2017**

**Submission to the Oireachtas Joint Committee on Justice and Equality
29 June 2017**

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Recommendations of the Ombudsman for Children's Office regarding the General Scheme of the Data Protection Bill 2017

Children's rights in the digital age

- In giving further effect to the GDPR, the Data Protection Bill 2017, once finalised, should recognise the status of children as rights holders, take appropriate account of the rights of the child engaged in the context of information society services, and ensure that any restrictions on children's exercise of their rights in this context are necessary, reasonable and proportionate and accord with children's best interests and evolving capacities.

Internet use by children and young people in Ireland

- Children and young people should be afforded the opportunity to express their views on aspects of this legislation affecting them and their views should be taken into account in the context of further work to draft and finalise the Bill.

Definition of the 'child' and the visibility of children

- The Data Protection Bill 2017, once drafted, should include an explicit definition of the 'child' and this definition should be in keeping with the UNCRC's definition of the 'child' as every human being below the age of eighteen years.
- Ongoing work to prepare the Bill should include a focus on strengthening the visibility of children in the Bill and ensuring that explicit references to children in the GDPR are reflected explicitly and as appropriate in relevant provisions of the Bill.
- The Bill should include a provision, which recognises that children merit specific protection and further attention should be given to making provisions in the Bill that set out the specific protections that children will be entitled to as users of information society services.

The age of digital consent

- The Data Protection Bill 2017 should provide for the age of 13 years to be the age of digital consent.
- Further consideration and clarification should be given as to whether the obligations arising in relation to information society services offered directly to children will apply to information society services used by young people who are of the age of digital consent.

- The Bill should make explicit provision for the derogation set out in Recital 38 of the GDPR in relation to preventive or counselling services offered directly to a child who is under the age of digital consent. Consideration needs to be given to which services will constitute “preventive and counselling services offered directly to a child”. Consideration also needs to be given to the measures that will be required to enable such services to collect children’s personal data for the purposes of improving service provision to children while at the same time safeguarding against the commercial use of this data.
- The Bill should make explicit provision as regards data controllers’ positive obligations to ensure that the information they provide to young people who are of the age of digital consent and to holders of parental responsibility respectively is readily accessible and sufficiently clear. The provision of accessible, clear information is vital to ensuring that young people and holders of parental responsibility can make fully informed decisions about whether they wish to give, refuse or withdraw consent.
- Consideration should be given to providing in the Bill and/or through other measures, including codes of conduct, for appropriate safeguards to be put in place so that techniques used to verify age and consent do not infringe privacy rights and contradict the principle of data minimisation promoted through the GDPR.
- Appropriate measures need to be taken to develop and strengthen the digital literacy competencies and skills of children, young people and parents/guardians.

The right to erasure (‘right to be forgotten’)

- Provisions in the Bill concerning the right to rectification and erasure should make explicit reference to the rights of children and young people in this regard.

Communications addressed to children

- The Bill should place an explicit positive obligation on data controllers to provide information and communication to children and young people in language and formats that ensure children and young people can easily understand the information and communication.

Raising awareness among children and young people of their data protection rights

- Consideration should be given to how relevant public bodies in Ireland, including the proposed Data Protection Commission, can coordinate and, where appropriate, collaborate on measures aimed at equipping children and young people with the

knowledge and skills they need to navigate the online environment as confident, competent digital citizens.

1. Introduction

The General Scheme of the Data Protection Bill 2017 ('General Scheme') was published on 12 May 2017. The stated aims of this legislation are: to give further effect to the General Data Protection Regulation (GDPR), which will come into force on 25 May 2018;¹ to transpose Directive (EU) 2016/680 into national law;² and to replace the Data Protection Commissioner in Ireland with a Data Protection Commission.

The Ombudsman for Children's Office (OCO) has prepared this submission in response to an invitation from the Oireachtas Joint Committee on Justice and Equality and pursuant to Section 7(4) of the Ombudsman for Children Act 2002 (as amended), which provides for the Ombudsman for Children to advise on any matter relating to the rights and welfare of children, including proposals for legislation affecting children.

We welcome the publication of the General Scheme of the Data Protection Bill 2017 and the opportunity it presents to strengthen the protection and fulfilment of the rights of children and young people under the age of 18 in respect of information society services.

This submission offers our preliminary observations on the General Scheme in so far as it aims to give further effect to several key provisions of the GDPR that concern children. In making this submission, we are mindful that work by the Department of Justice and Equality to draft the current legislation is ongoing. Furthermore, we are aware that further clarification is needed as regards the interpretation, implications and application of several aspects of the GDPR, including aspects affecting children. In this regard, we understand that the Article 29 Working Party ('WP29'), an independent European advisory body on data protection and privacy, is planning to publish guidance on several additional provisions of the GDPR, including provisions relating to consent and profiling, which affect children.

In light of this evolving context, we plan to monitor developments and may prepare further advice on the draft legislation in due course. At this juncture, we hope that our current preliminary observations will inform and assist the Committee's pre-legislative scrutiny of the current General Scheme.

In accordance with the Ombudsman for Children's statutory function to promote the rights and welfare of children, the overall aim of this submission is to highlight a number of ways

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). This Regulation can be accessed at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>.

² Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. This Directive can be accessed at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0680&from=EN>.

in which the legislation could be strengthened to give further visibility to children and further effect to children's rights.

2. Children's rights in the digital age

Recommendation:

- In giving further effect to the GDPR, the Data Protection Bill 2017, once finalised, should recognise the status of children as rights holders, take appropriate account of the rights of the child engaged in the context of information society services, and ensure that any restrictions on children's exercise of their rights in this context are necessary, reasonable and proportionate and accord with children's best interests and evolving capacities.

It has been estimated that one in three internet users globally are under the age of 18.³ As indicated by the decision of the UN Committee on the Rights of the Child to hold a Day of General Discussion on digital media and children's rights in 2014 and, more recently, by the Council of Europe's decision to include the rights of the child in the digital environment as one of five key priorities in its Strategy for the Rights of the Child 2016-2021, the online environment is one where children's rights are engaged. Therefore, legislation that is concerned with this environment must recognise the status of children as subjects of rights and consider the rights of the child.

While the UN Convention on the Rights of the Child pre-dates the current digital era, its principles and provisions are highly relevant to and resonate in the online environment.⁴ Among the rights of the child engaged in this environment are:

- children's right to non-discrimination (Article 2)
- children's right to have their best interests treated as a primary consideration in all actions and decisions affecting them (Article 3)
- children's right to be heard and to have due weight given to their views in all matters affecting them (Article 12)
- children's right to freedom of expression, which includes the right to seek, receive and impart information and ideas (Article 13)
- children's right to freedom of thought, conscience and religion (Article 14)
- children's right to freedom of association and peaceful assembly (Article 15)
- children's right to protection from arbitrary or unlawful interference with privacy, family, home or correspondence (Article 16)
- children's right to access information and materials from a variety of sources and to be protected from harmful information (Article 17)

³ Livingstone, S, Carr, J and Byrne, J, 'One in Three: Internet Governance and Children's Rights' (2015), Innocenti Discussion Paper No.2016-01, UNICEF Office of Research, Florence, 2016.

⁴ UN Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on Digital Media and Children's Rights, para. 46.

- children’s right to be protected from all forms of violence, abuse and exploitation (Articles 19, 34 and 36)
- children’s right to the highest attainable standard of health (Article 24)
- children’s right to education (Articles 28 and 29)
- children’s right to engage in play and recreational activities and to participate freely in cultural life and the arts (Article 31).

As the UN Committee on the Rights of the Child and the Council of Europe, among others, have highlighted, the online environment presents significant opportunities for children and young people to enjoy and exercise many of their rights as well as risks to children’s rights to privacy and to protection from all forms of harm, abuse and exploitation.⁵ On the one hand, the internet is an important resource for children and young people’s education and learning; it facilitates them to access and share information; it supports them to maintain contact with family; it provides opportunities for play, recreation and engagement with cultural life and the arts; it affords access to health information and support services; and it is a means through which they express their views and participate in decisions affecting them. On the other hand, the internet can present challenges with regard to safeguarding children and young people’s privacy rights and expose them to risks such as online fraud, violence and hate speech, sexist speech against girls and lesbian, gay, bisexual, transgender and intersex adolescents, cyberbullying, grooming for sexual exploitation, trafficking and child pornography, over-sexualisation, and targeting by armed or extremist groups.⁶

In light of this, a key challenge as regards framing any legislation affecting children’s rights in the online environment is to balance the rights of the child that are engaged in this environment⁷ appropriately by ensuring that the legislative provisions made are necessary, reasonable and proportionate and take account of children’s best interests and evolving capacities.

3. Internet use by children and young people in Ireland

Recommendation:

- Children and young people should be afforded the opportunity to express their views on aspects of this legislation affecting them and their views should be taken into account in the context of further work to draft and finalise the Bill.

⁵ UN Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on Digital Media and Children’s Rights; UN Committee on the Rights of the Child, General Comment N. 9 (2006) on the rights of children with disabilities, CRC/C/GC/9, para. 37; UN Committee on the Rights of the Child, General Comment N. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20; Council of Europe, Strategy for the Rights of the Child 2016-2021, pp.20-21.

⁶ UN Committee on the Rights of the Child, General Comment N. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, para. 48.

⁷ See Livingstone, S, Lansdown, G and Third, A (2017), The Case for a UNCRC General Comment on Children’s Rights and Digital Media (Children’s Commissioner for England & LSE Consulting, April 2017).

Access to the internet among children and young people is increasing, greater numbers of children are going online earlier and the average age of first-time internet use is getting younger.⁸ While children and young people's use of the internet in Ireland continues to evolve and change, the findings of research conducted with 9 to 16 year olds in Ireland in 2013/2014 provide an indication of the extent and nature of children and young people's internet use. According to the 2015 report arising from this research, Net Children Go Mobile: Full findings from Ireland:⁹

Access and Use

- Home is the main location of internet use. 63% of children reported using the internet several times a day or at least once a day at home.
- Smartphones are the most used device for internet access on a daily basis by 9- 16 year olds in all contexts. Smartphones (35%) followed by laptops (29%) and tablets (27%) are the devices most used most to go online.
- Just under half or 46% of children access the internet from their own bedroom on a daily basis, with 22% saying they do so several times per day.
- Most online use is during the day. A minority go online after 9pm: 28% say a little and 14% say a lot.
- Over half (53%) of 9-16 year olds say they never or almost never use the internet in school. Just 7% of Irish 9-16 year olds children report using the internet in school on a daily basis.
- Internet access while on the move - such as on the way to school or when out and about - is still limited. 87% of children say they never or almost never do this. Three quarters of young people rely exclusively on free Wi-Fi access to go online using their smartphone.
- Home games consoles are the device that 9-16 year olds are most likely to own (44%), followed by smartphones (40%), a tablet (28%) or a mobile phone that is not a smartphone (27%).
- Compared with 2011, internet use in the child's own room increased in 2014, strikingly so among older teenagers (15-16 years), with over three quarters (77% vs. 43%) saying they go online in their own room.
- The age at which children start using the internet has fallen marginally. 8 years of age is now the average for the 7 countries compared to 9 years of age reported by EU Kids Online in 2011.

⁸ Report of the Secretary-General, *Protecting children from bullying*, UN Document A/71/213, 26 July 2016, para. 20.

⁹ For this research, 500 young people, aged 9-16, were interviewed face-to-face in their homes. Ipsos MRBI carried out the quantitative fieldwork in Ireland in November and December 2013, while the qualitative study was carried out from April to June 2014, with the involvement of 32 children and 10 parents of children from 9 to 16 year-olds. For the full findings, see O'Neill, B and Dinh T (2015), *Net Children Go Mobile: Full findings from Ireland* (Dublin: Dublin Institute of Technology). Available at: <http://arrow.dit.ie/cgi/viewcontent.cgi?article=1055&context=cserrep>.

Online activities

- Entertainment uses (listening to music and watching video clips online) continue to be the most popular online activities for all age groups.
- 9 in 10 of all 15-16 year olds in Ireland have a profile on a social networking site. Notably, just under 40% of 11-12 year olds also have a social networking profile despite age restrictions. There is a steep rise from age 11-12 to age 13- 14 where use of social networking more than doubles.
- 8 out of 10 children who use social networking use Facebook as their main profile.
- 10% of 15-16 year olds say they use Twitter as their primary social networking platform.
- Over one third of all 9-16 year olds (36%) have a profile on a media sharing platform.
- Instagram is the most popular media-sharing platform and is reported by 42% of 9-16 year olds as the media platform they use most often. This is followed by YouTube (34%).
- The notable change in what Irish children do online is they do more of everything compared to 2011. Smartphone users make considerably more use of the internet in almost every way. However, many informational, civic and creative uses are regularly undertaken only by a minority of children.
- By comparison with other European countries, Irish children (together with UK children) are more satisfied with the availability of online content.¹⁰

Such findings illustrate how the internet has become an integral part of children and young people's daily lives in Ireland. In light of these and other findings from this research (which highlight children and young people's perspectives on their digital literacy, risks presented by the internet and their dependence on the internet), it is vital to recognise that children and young people will have their own views and insights to offer on a range of issues affecting them under the GDPR and, accordingly, under the current draft legislation.

Following its Day of General Discussion on digital media and children's rights, the UN Committee on the Rights of the Child recommended that States "should ensure children are consulted in order to take into account their views and experiences in developing laws, policies, programmes, and in the setting up of services, and other measures relating to digital media and ICTs".¹¹

Taking into account Article 12 of the UNCRC, Goal 3 of the Better Outcomes, Brighter Futures national policy framework¹² and the commitment to mainstreaming children and young people's participation made in the National Strategy on Children and Young People's

¹⁰ See O'Neill and Dinh (2015), pp.4-5.

¹¹ UN Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on Digital Media and Children's Rights, para. 99.

¹² Department of Children and Youth Affairs (2014), Better Outcomes, Brighter Futures. The National Policy Framework for Children and Young People 2014-2020 (Dublin: Government Publications), p.32ff.

Participation in Decision Making (2015-2020),¹³ we believe that children and young people should be afforded the opportunity to express their views on aspects of the draft legislation affecting them and that due account should be given to their views in the context of further work to draft and finalise the Data Protection Bill 2017.

4. Definition of the ‘child’ and the visibility of children

Recommendations:

- The Data Protection Bill 2017 should include an explicit definition of the ‘child’ and this definition should be in keeping with the UNCRC’s definition of the ‘child’ as every human being below the age of eighteen years.
- Ongoing work to prepare the Bill should include a focus on strengthening the visibility of children in the Bill and ensuring that explicit references to children in the GDPR are reflected explicitly and as appropriate in relevant provisions of the Bill.
- The Bill should include a provision, which recognises that children merit specific protection and further attention should be given to making provisions in the Bill that set out the specific protections that children will be entitled to as users of information society services.

Notwithstanding the fact that the GDPR affects children and that several of its Recitals and Articles make explicit reference to children, the GDPR does not include a definition of the ‘child’. Similarly, the current General Scheme does not include a definition of the ‘child’. We are of the view that an explicit definition of the ‘child’ needs to be included in the Bill. Furthermore, this definition should be in keeping with the definition of the ‘child’ set out in Article 1 of the UN Convention on the Rights of the Child, namely as “every human being below the age of eighteen years”.

Explicit reference is made to children in the following Recitals and Articles of the GDPR:

Recitals

- Recital 38 (special protection with regard to children’s personal data)
- Recital 58 (the principle of transparency, including information and communication for children)
- Recital 65 (the right to have personal data rectified and erased)
- Recital 71 (profiling)

Articles

- Article 6 (lawfulness of processing)
- Article 8 (conditions applicable to a child’s consent in relation to information society services)
- Article 12 (transparent information, communication and modalities for the exercise of the rights of the data subject)
- Article 40 (codes of conduct)

¹³ Department of Children and Youth Affairs (2015), National Strategy on Children and Young People’s Participation in Decision Making (Dublin: Government Publications), p.17.

- Recital 75 (risks associated with processing personal data, including risks associated with processing personal data of vulnerable natural persons, in particular children)
- Article 57 (promoting public awareness and understanding of the risks, rules, safeguards and rights relating to data processing)

That explicit references are made to children in these Recitals and Articles is notable given that other Recitals and Articles in GDPR, which also concern children, do not include any such explicit references to them. Accordingly, it appears to us that, where explicit references are made to children in the GDPR, explicit references should also be made to children in equivalent provisions in the current legislation. In this regard, we note that Head 36 of the General Scheme, does not refer explicitly to children even though Article 12(1) of the GDPR does. We encourage that further work to prepare the Data Protection Bill 2017 includes a focus on strengthening the visibility of children in the Bill and ensuring that explicit references to children in the GDPR are reflected explicitly and as appropriate in relevant sections and provisions of the Bill.

Through its references to children, the GDPR can be seen to recognise children, both explicitly and implicitly, as a “vulnerable” group of information society service users (Recital 75) because they may be less aware of their rights as well as of the risks, consequences and safeguards in relation to the processing of their personal data (Recital 38). Accordingly, the GDPR acknowledges that children “merit specific protection” (Recital 38).

Explicit recognition of children’s potential vulnerability appears to be limited in the current General Scheme to a provision under Head 19, which seeks to give effect to Article 10 of the GDPR and which concerns the processing of personal data relating to criminal convictions and offences. We would suggest inclusion in the Bill of a provision that recognises children as meriting “specific protection”.

Moreover, we would welcome further attention being given to making provisions in the Bill, as necessary and appropriate, that set out the specific protections that children will be entitled to as users of information society services. Taking into account Recital 38 and Recital 71 of the GDPR, we anticipate that such provisions should include specific protections in relation to “the use of personal data of children for the purposes of marketing and creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to the child”. In this regard, we suggest that deliberations on the specific protections that should be afforded to children under the legislation might usefully be informed by the Article 6(1)(f) of the GDPR, which appears to tip the balance in favour of the interests, fundamental rights and freedoms of data subjects who are children, in circumstances where processing of personal data is necessary for data controllers and third parties to pursue “legitimate interests”.

5. The age of digital consent

Recommendations:

- The Data Protection Bill 2017 should provide for the age of 13 years to be the age of digital consent.
- Further consideration and clarification should be given as to whether the obligations arising in relation to information society services offered directly to children will apply to information society services used by young people who are of the age of digital consent.
- The Bill should make explicit provision for the derogation set out in Recital 38 of the GDPR in relation to preventive or counselling services offered directly to a child who is under the age of digital consent. Consideration needs to be given to which services will constitute “preventive and counselling services offered directly to a child”. Consideration also needs to be given to the measures that will be required to enable such services to collect children’s personal data for the purposes of improving service provision to children while at the same time safeguarding against the commercial use of this data.
- The Bill should make explicit provision as regards data controllers’ positive obligations to ensure that the information they provide to young people who are of the age of digital consent and to holders of parental responsibility respectively is readily accessible and sufficiently clear. The provision of accessible, clear information is vital to ensuring that young people and holders of parental responsibility can make fully informed decisions about whether they wish to give, refuse or withdraw consent.
- Consideration should be given to providing in the Bill and/or through other measures, including codes of conduct, for appropriate safeguards to be put in place so that techniques used to verify age and consent do not infringe privacy rights and contradict the principle of data minimisation promoted through the GDPR.
- Appropriate measures need to be taken to develop and strengthen the digital literacy competencies and skills of children, young people and parents/guardians.

Article 8(1) of the GDPR provides that, in relation to the offering of information society services directly to a child, the processing of the personal data of a child will be lawful where the child is at least 16 years old. Member States can provide by law for a lower age, but this lower age cannot be below 13 years. In this regard, we note that Head 16 of the current General Scheme, which will give effect to Article 8 of the GDPR, does not yet specify a proposed age of digital consent as a separate Government decision is being sought in relation to this matter.

From a children’s rights perspective, we believe that taking a solely age-based approach to legislating for when it will be lawful for a child to engage in a particular activity is not optimal since it fails to take adequate account of children’s evolving capacities and of the diversity of capacity that can exist among children of the same age. Member States are

required to comply with Article 8(1), however, and as such with the age-based approach it takes and the parameters it sets in this regard.

In light of this, we recommended in our submission to a consultation undertaken by the Department of Justice and Equality in 2016 on the age of digital consent that Irish legislation should provide for the lower age of 13. In our view, providing for 13 as the age of digital consent takes more appropriate account of children and young people's internet use and of the integral role that the online environment plays in their lives. Moreover, such a provision is more in keeping with international children's rights standards as it represents a more appropriate, proportionate approach to balancing the different rights of the child engaged as well as the opportunities and risks that the online environment presents to children and young people.

In addition to mitigating against undue restrictions being placed on young people's access to the online environment, providing for 13 as the age of digital consent will promote a more nuanced, holistic approach to addressing risks that young people may encounter. As the UN Committee on the Rights of the Child highlighted in its 2016 General Comment on the implementation of the rights of the child during adolescence, education focused on developing young people's digital literacy is a core element of such an approach.¹⁴ While this matter may be largely outside the scope of the current legislation, we are of the view that consideration needs to be given to mainstreaming digital literacy as a core set of competencies and skills that children are supported to develop from a young age in the context of their formal education at primary level and to strengthen as young people at post-primary level.

We note that Article 8(1) of the GDPR concerns the processing of the personal data of a child by information society services offered directly to a child. While it is unclear which information society services constitute services offered directly to a child, there are information society services (for example, social media platforms) that are used by children and young people, which have not been specially designed for children and young people and that are not specifically directed at children, let alone exclusively so. This raises a question about whether or not the age of digital consent, once established, will apply to such services and, as such, whether or not such services will be required to fulfil the same obligations to young people who are of the age of digital consent as regards supporting them to give, withdraw and refuse consent in an informed way. This and related matters arising in respect of the age of digital consent may be considered by the WP29 in its preparation of guidance on the wider issue of consent under the GDPR. We would encourage further consideration to be given to these matters and any future guidance

¹⁴ UN Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016, para. 48.

provided by the WP29 in this regard in the context of work to draft and finalise the current Bill.

Article 8(1) further provides that where a child is under the age of digital consent, the processing of their personal data will only be lawful if consent is given or authorised by the holder of parental responsibility over the child. In this regard, Recital 38 of the GDPR states that the “consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child.” In light of the vital role played by such services (for example, Childline) and given that parental consent may in some cases act as a barrier to children accessing such services, we welcome this derogation. Noting that the current General Scheme does not include a reference to this derogation under Head 16 or elsewhere, we strongly encourage explicit provision to be made for this derogation in the Bill. In this regard, consideration needs to be given to which services constitute “preventive and counselling services offered directly to a child” and, with that, what clarification needs to be provided for in the Bill as well as further to such provision being made in order to ensure that children have uninhibited access to appropriate preventive and counselling services directed to them, in accordance with their best interests. Consideration should also be given to what measures are required to enable such services to collect children’s personal data for the purposes of improving service provision to children while at the same time safeguarding against the commercial use of this data.

Transparency is a core principle of the GDPR. In this regard, the GDPR recognises that in order for consent to be valid, it must be informed and freely given. Article 7 of the GDPR, which sets out the conditions for consent, states explicitly that data controllers must be able to demonstrate that data subjects have consented to the processing of their personal data and that “the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an easily accessible form, using clear and plain language.” Accordingly, explicit provision should be made in the Bill as regards the positive obligations of data controllers to ensure that the information they provide to young people who are of the age of digital consent and to holders of parental responsibility respectively is readily accessible and sufficiently clear as to enable young people and holders of parental responsibility to make a fully informed decision about whether they wish to give, refuse or withdraw consent, as the case may be.

In this regard, it is important to bear in mind that, like young people, parents/guardians and other adults who are “holders of parental responsibility” need to be provided with supports to strengthen their own digital literacy so that they are empowered to make informed decisions about the prospective processing of their own as well as their children’s personal data. The need to build capacity among parents/guardians in this area is indicated by a recent Irish study, which examined 900 parents’ internet usage and knowledge. Among other things, this study found that over half of parents expressed a lack of knowledge about

privacy techniques, filtering and password controls. Moreover, although parents perceived themselves to be vigilant in monitoring their children's computer and internet usage, there is an over-reliance on their children giving them accurate accounts of their online activity.¹⁵ The findings of a separate study published in 2015, indicate that, while most parents are actively involved in guiding their children's internet use and more parents are communicating with their children about what they do on the internet, levels of active parental mediation are slightly lower than they were in 2011. Notably, notwithstanding parental involvement, 60% of the children who participated in the study self-reported that they know more about the internet than their parents and 59% claimed to know more than their parents about using smartphones.¹⁶

A further matter that requires consideration in light of Article 8 of the GDPR concerns the verification techniques that will be used to verify age in respect of young people who are of the age of digital consent and, similarly, to verify that consent has been given or authorised by holders of parental responsibility for children under the age of digital consent. In its future guidance on the issue of consent, the WP29 may provide greater clarity about what techniques may be used and what will constitute "reasonable efforts" on the part of data controllers to verify that consent has been given or authorised by holders of parental responsibility. At this juncture, however, it is our view that consideration needs to be given to providing in the Bill and/or through other measures, including codes of conduct (Article 40(2)(g)), for appropriate safeguards to be put in place so that the verification techniques used do not infringe unduly on privacy rights and contradict the principle of data minimisation, which the GDPR promotes.

6. The right to erasure ('right to be forgotten')

Recommendation:

- Provisions in the Bill concerning the right to rectification and erasure should make explicit reference to the rights of children and young people in this regard.

Head 35 of the General Scheme concerns the right to rectification, erasure or restriction of processing. The explanatory notes provided under this Head indicate that its purpose is to give effect to Article 16 and Recital 47 of Directive (EU) 2016/680.

No reference is made under Head 35 to the GDPR. In terms of ensuring that the Bill makes appropriate provision for the rights of children, this gap is notable since the GDPR does consider the 'right to be forgotten' in relation to children. One of the grounds stipulated

¹⁵ O'Higgins Norman, J and McGuire, L, Cyberbullying in Ireland: A Survey of Parents Internet Usage and Knowledge, DCU National Anti-Bullying Research and Resource Centre 2016.

¹⁶ See O'Neill and Dinh (2015), p.6 and p.33.

under Article 17 of the GDPR in relation to data subjects' right to erasure concerns personal data "that have been collected in relation to the offer of information services referred to in Article 8(1)" (Article 17(1)(f)). As indicated in the previous section of this submission, these are services offered directly to a child. Recital 65 of the GDPR recognises that 'the right to be forgotten' "is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved in the processing, and later wants to remove such personal data, especially on the internet." Recital 65 further states that the "data subject should be able to exercise that right notwithstanding the fact that he or she is no longer a child."

From a preliminary review of the GDPR, it is not entirely clear whether it provides for children to exercise a right to be forgotten when they are children or whether what is being contemplated is limited to an adult's right to exercise this right in relation to personal data that was processed about her/him when she/he was a child. We believe that children and young people should be able to exercise the right to erasure of their personal data when they are still children and young people, subject to lawful restrictions. Allowing for children and young people to do so would be a protective measure that would take account, among other things, of Recital 38 of the GDPR, which acknowledges that "children merit specific protection with regard to their personal data, as they may be less aware of the risk, consequences and safeguards concerned ... in relation to the processing of their personal data." Accordingly, we are of the view that provisions in the Bill concerning the right to rectification and erasure should make explicit reference to children and young people's right in this regard.

7. Communications addressed to children

Recommendation:

- The Bill should place an explicit positive obligation on data controllers to provide information and communication to children and young people in language and formats that ensure children and young people can easily understand the information and communication.

Head 36 of the General Scheme concerns communications with data subjects and provides that information under Head 33 (right to information) and communication under Heads 34 (right of access) and 35 (right to rectification, erasure or restriction of processing) provided to data subjects must be in a concise, intelligible and easily accessible form, using clear and plain language.

This Head aims to give effect to Article 12 of the Directive (EU) 2016/680. As with Head 35, no reference is made to the GDPR in the explanatory notes under Head 36. This lacuna is

notable in light of the fact that Article 12(1) of the GDPR not only makes explicit reference to children, but emphasises that data controllers must take appropriate measures to provide information and communication relating to processing to data subjects in a concise, transparent, intelligible and easily accessible form, using clear and plain language, “in particular for any information addressed specifically to a child.” Recital 58 of the GDPR, which focuses on the principle of transparency, also makes explicit reference to the child, stating: “Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand.”

Taking into account Ireland’s obligations to children under Article 3 (best interests of the child) and Article 13 (the right to freedom of expression, including the right to receive information) of the UNCRC as well as the aforementioned provisions of the GDPR, it is vital that the Bill places an explicit positive obligation on data controllers to provide information and communication to children and young people in language and formats that ensure that children and young people can *easily* understand the information and communication.

8. Raising awareness among children and young people of their data protection rights

Recommendation:

- Consideration should be given to how relevant public bodies in Ireland, including the proposed Data Protection Commission, can coordinate and, where appropriate, collaborate on measures aimed at equipping children and young people with the knowledge and skills they need to navigate the online environment as confident, competent digital citizens.

Head 8 of the current General Scheme concerns the functions of the proposed Data Protection Commission. Among the functions envisaged for the Commission are to act as the supervisory authority referred to in Article 51 of the GDPR and to thereby perform the tasks and exercise the powers conferred by Articles 57 and 58 of the GDPR respectively.

Among the tasks of the supervisory authority set out in Article 57 of the GDPR is to “promote public awareness and understanding of the risks, rules, safeguards and rights in relation to processing” (Article 57(1)(b)). In this regard, the GDPR states that “activities addressed specifically to children shall receive specific attention”.

We welcome the recognition given in the GDPR to the importance of raising public awareness and understanding of risks, rules, safeguards and rights that arise in relation to the processing of personal data and the particular reference made to children in this regard.

Accordingly, we welcome the explicit reference to Article 57 of the GDPR under Head 8 of the General Scheme.

In its General Comment of 2013 on State obligations regarding the impact of the business sector on children's rights, the UN Committee on the Rights of the Child referenced the role that State actors should play as regards providing "children with age-appropriate information regarding web-related safety so they can manage the risks and know where to go for help."¹⁷ Taking into account the different roles and responsibilities of various public bodies in Ireland in relation to raising awareness among and educating children and young people (including the Department of Education, the National Council for Curriculum and Assessment, schools and the Ombudsman for Children's Office) as well as a prospective educational role for the proposed Digital Safety Commissioner,¹⁸ we suggest that consideration should be given to how a coordinated and, where appropriate, collaborative approach might be taken by different public bodies in Ireland, including the proposed Data Protection Commission, to ensure that children and young people are equipped with the knowledge and skills they need to navigate the online environment as confident, competent digital citizens.¹⁹

¹⁷ See UN Committee on Rights of the Child, General Comment N. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, 17 April 2013, para. 60.

¹⁸ Law Reform Commission, Report on Harmful Communications and Digital Safety 2016 LRC 116-2016 paras 3.66 – 3.91.

¹⁹ See UN Committee on the Rights of the Child, General Comment N. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016, para. 12.