



Consultation on Data protection safeguards for children

OCO Submission on the Age of Digital Consent

December 2016

1. Introduction

The Ombudsman for Children's Office (OCO) was established in 2004 under primary legislation, the Ombudsman for Children Act 2002. The Ombudsman for Children is independent of Government and other civil society actors and is accountable to the Oireachtas. The role of the OCO is to promote and safeguard the rights and welfare of children and young people. The functions of the Ombudsman for Children are to conduct investigations of complaints regarding actions by public bodies, to promote children's rights and to provide research and policy advice to Government and other bodies.

The OCO welcomes the opportunity to make this submission to the Department of Justice and Equality on the statutory age of consent threshold ("age of digital consent") to be applied in Ireland in the case of information society services offered directly online to children, including social media as required by the General Data Protection Regulation (GDPR).¹

Article 8 of the GDPR specifies conditions applicable to the processing of the personal data of children (e.g. collection, use, sharing, storage) in the context of their usage of information society services. It imposes an obligation on providers of online goods and services offered to children to seek to obtain the consent or authorisation of a child's parent or guardian where the child is under the age of 16 years. Member States are given the option of adopting a lower age, but no lower than 13 years. This means that the choice facing the Irish Government is whether to accept the age limit of 16-years set out in the GDPR or to enact national legislation to specify a lower age limit, i.e. 13 years or possibly an age between 13 and 16.

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).

The OCO is of the view that, in exercising this choice, it is fundamental that the Department of Justice and Equality considers the following:

- Article 5 of the CRC requires that parental direction and guidance be provided in a manner consistent with the evolving capacities of the child.² The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding³ and increasing levels of agency to take responsibility and exercise their rights.⁴ The more a child knows and understands, the more his or her parents will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing;⁵ The Committee highlights that *‘in seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity’*.⁶
- A careful balancing of the rights of the child at stake is required, especially the rights to freedom of expression, information and participation with the rights to privacy and protection from all forms of violence; and
- Any future proposal of legislation or any regulation that restricts children’s rights is guided by the “best interests” principle. We note that, according to the Committee on Rights of the Child (hereinafter, the Committee) –*There is no doubt that the best interests of children as a defined group have to be established in the same way as when weighing individual interests. If the best interests of large numbers of children are at stake, heads of institutions, authorities, or governmental bodies should also provide opportunities to hear the concerned children from such undefined groups and to give their views due weight when they plan actions, including legislative decisions, which directly or indirectly affect children.*⁷

² 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. 18.

³ See UN Committee on the Rights of the Child, General Comment N. 7 (2005) on implementing child rights in early childhood, para 17.

⁴ 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. 18.

⁵ UN Committee on the Rights of the Child, General Comment N.12 (2009), CRC/C/GC/12, 20 July 2009, para. 84.

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. 20. The Committee further *“stresses that engaging adolescents in the identification of potential risks and the development and implementation of programmes to mitigate them will lead to more effective protection. By being guaranteed the right to be heard, to challenge rights violations and to seek redress, adolescents are enabled to exercise agency progressively in their own protection”*, Ibid, para. 19.

⁷ UN Committee on the Rights of the Child, General Comment N.12 (2009) on the right of the child to be heard, CRC/C/GC/12, 20 July 2009, para. 73.

Following the General Discussion Day on “Digital media and children’s rights”, the Committee 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.*⁸

Taking into consideration that the establishment of an age of digital consent directly affects children’s lives and given Ireland’s international obligations under Articles 3 and 12 of the Convention on the Rights of the Child (hereinafter, CRC), the OCO recommends that the Department of Justice and Equality consult with children and young people as part of this consultation process. Such consultation should be undertaken in accordance with good practice having regard to the principle of the voice of the child as interpreted authoritatively by the Committee in General Comment N. 12 (2009) on the right of the child to be heard.⁹

This submission has been framed in light of Ireland’s international children’s rights obligations, the recommendations of the Committee, the experience of this Office in carrying out statutory investigations of public bodies and also its advice to the Oireachtas on legislation affecting the rights and welfare of children.

Recommendation:

The OCO recommends that, in line with international children’s rights standards, the Department of Justice and Equality engages in a meaningful consultation with children and young people on the age of digital consent.

2. Internet use by children and young people in Ireland

Children have increasing access to the Internet, starting at ever-younger ages. According to some studies one-third of users worldwide are below 18 years of age; children are online earlier and in greater numbers; and the average age of first-time Internet use is getting younger.¹⁰

According to the Report Net Children Go Mobile: Full findings from Ireland (2015)¹¹ -

- Smartphones stand out as 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 to go online;
- 40% of under 11-12 year olds have a social networking profile despite age restriction of 13;
- Instagram is the most popular media-sharing platform and is reported by 42% of 9-16 year olds as the platform they use most often for sharing photos;
- 9 out of 10 fifteen to sixteen year olds in Ireland have a social networking profile;

⁸ Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on “Digital Media and Children’s Rights”, para. 99.

⁹ UN Committee on the Rights of the Child, General Comment N.12 (2009), CRC/C/GC/12, 20 July 2009.

¹⁰ Report of the Secretary-General, *Protecting children from bullying*, UN Document A/71/213, 26 July 2016, para. 20.

¹¹ Net Children Go Mobile: Full findings from Ireland, Dr. Brian O’Neill and Thuy Dinh, (DIT), January 2015.

- 28% of Irish children go online ‘a little’ after 9pm; 14% go ‘a lot’ online after 9pm; and
- 60% of children believe they know more about the internet than their parents;

While currently in Ireland there is no specific legislation on the digital age of consent for children and young people under 18, the digital and ICT agenda has become increasingly visible in the public arena and it has shown in no uncertain terms its potential to touch children’s lives in a myriad of ways.

Recognising the benefits of digital technologies, the Government has committed in its Programme to further accelerate the Digital and ICT agenda in schools and to implement the Digital Strategy 2015-2020. In its Action Plan for Education 2016-2019, the Department of Education and Skills has committed to invest in infrastructure including high speed broadband for primary schools and increased technology-enhanced and blended learning opportunities.

With regard to the risks of digital technologies and its impact on the rights of children to be protected from harm (Article 19 CRC), and from all forms of sexual exploitation and sexual abuse (Article 34 CRC), the OCO is of the view that education is the most important and effective protective measure. Along the same lines, the UN Committee on the Rights of the Child has recently acknowledged that reaching adolescence can mean exposure to a range of risks, reinforced or exacerbated by the digital environment and that adolescents need suitable education, support and investment in measures to strengthen their capacities and equip them to deal with a challenging digital environment.¹² In its General Comment N. 16 on State obligations regarding the impact of the business sector on children’s rights, the Committee further stressed that *States should provide children with age-appropriate information regarding web-related safety so they can manage the risks and know where to go for help. They should coordinate with the information and communication technology industry so that it develops and puts in place adequate measures to protect children from violent and inappropriate material.*¹³

3. International Children’s Rights Framework

In April 2016, the Council of Europe launched its Strategy for the Rights of the Child, which identified as one of its key priorities the rights of the child in the digital environment. The Strategy recognised that new Information and Communication Technologies (ICT) affect children’s enjoyment of a significant number of fundamental rights guaranteed by the UNCRC, the European Convention on Human Rights and the European Social Charter. The

¹² 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. 12.

¹³ 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.

Strategy acknowledges that while the digital world offers children boundless learning and connectivity opportunities, it also presents challenges for the participation and protection of children in the digital environment.

We note that the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) is the first treaty to address children's protection from sexual violence in the face of challenges presented by technological developments, and to identify as an offence the solicitation of children for sexual purposes through ICTs, often known as 'grooming'. Ireland has committed to ratify this Convention and is currently in the process of discussing the Bill on Sexual Offences which will pave the way for the ratification of the Lanzarote Convention.

The UN Convention on the Rights of the Child, although formulated in the pre-digital era, remains fully relevant and applicable in the digital environment.¹⁴ The Committee's Day of General Discussion on 'Digital media and child rights', held in September 2014, contributed to further broadening the scope of the Committee's reflections in this area and to the development of rights-based strategies to maximize online opportunities for children while protecting them from risks and possible harm.¹⁵ Currently, work is underway by the Children's Commissioner for England and Professor Sonia Livingstone in an effort to review the Convention and interpret the articles to bring it up to date for the digital age.¹⁶ According to Professor Livingstone, *Rights apply online as well as offline, and now it's time to work out how society can support children's rights in today's digital environments. A 'General Comment' on children's rights in the digital age could really help to make clear how children have the right to fair access to the fabulous opportunities of the internet without significant risk of harm or infringement of their rights to privacy, communication, information, play and safety.*¹⁷ In this submission we will focus on the key articles of the Convention, relevant to the discussion on the age of digital consent to be applied in Ireland.

a) Balancing the rights to Freedom of Expression, Information and Participation with the rights to Privacy and to Protection from all forms of violence

When it comes to internet use, opportunities and risks are inextricably linked, and it is crucial to balance the rights enshrined in the CRC that facilitate a child's participation in the online environment and those intended to ensure a child's safety and protection.¹⁸

¹⁴ Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on "Digital Media and Children's Rights", para. 46.

¹⁵ Office of the UN Special Representative of the Secretary-General on Violence against Children, *Releasing children's potential and minimizing risks, ICTs the Internet and Violence against children*, New York 2014.

¹⁶ Children's Commissioner for England, "Growing up digital: A report of the growing up digital task force", January 2017, p. 16.

¹⁷ Ibid.

¹⁸ Ibid.

Article 12 of the CRC gives every child the right to have his or her voice heard and to participate in actions and decisions that affect him or her. The Committee has identified the online environment as a significant emerging opportunity for strengthening and expanding adolescent's engagement in decisions relating to their education, health, sexuality, family life and judicial and administrative proceedings as well as involvement in the development, implementation and monitoring of all relevant legislation, policies, services and programmes affecting their lives, at school and at the community, local, national and international levels.¹⁹ Strongly linked to this right are the rights to freedom of expression (Article 13 CRC) and access to information (Article 17 CRC). These articles establish that children are subjects of rights and, together with article 12, they assert that the child is entitled to exercise those rights on his or her own behalf, in accordance with her or his evolving capacities.²⁰

The Committee underscores that freedom of expression relates to the right to hold and express opinions, and to seek and receive information through any media.²¹ It asserts the right of the child not to be restricted by the State party in the opinions she or he holds or expresses. As such, the obligation it imposes on States parties is to refrain from interference in the expression of those views, or in access to information, while protecting the right of access to means of communication and public dialogue.²²

In its recently published General Comment on the implementation of the rights of the child during adolescence, the Committee identifies the importance of the digital environment in the formation of children's individual and community identities,²³ and stresses that *access to information encompasses all forms of media but particular attention needs to be given to the digital environment, as adolescents increasingly use mobile technology and as social and digital media become the primary means through which they communicate and receive, create and disseminate information. Adolescents use the online environment, inter alia, to explore their identity, learn, participate, express opinions, play, socialize, engage politically and discover employment opportunities. In addition, the Internet provides opportunities for gaining access to online health information, protective support and sources of advice and counselling and can be utilized by States as a means of communicating and engaging with adolescents. The ability to access relevant information can have a significant positive impact on equality.*²⁴

¹⁹ 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. 23.

²⁰ UN Committee on the Rights of the Child, General Comment N.12 (2009), CRC/C/GC/12, 20 July 2009, para. 80.

²¹ Ibid, para. 81.

²² Ibid, para. 81.

²³ 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. 10.

²⁴ Ibid, para. 47.

We draw attention to the fact that the Committee specifically highlighted in General Comment N. 9 (2006) on the rights of children with disabilities that access to information and means of communication, including ICTs and systems, such as the internet enables children with disabilities to live independently and participate fully in all aspects of life and therefore accessibility to digital media and ICTs should be provided to them.²⁵

It is of paramount importance that when deciding on a statutory age of digital consent, the Department of Justice and Equality recognizes the importance of access to, and use of, digital media and ICTs for children and their potential to promote all children's rights, in particular the rights to freedom of expression, access to appropriate information, participation, education, as well as rest, leisure, play, recreational activities, cultural life and the arts.²⁶

Any restriction to the right of freedom of expression and information must be guided by the principle of the best interests of the child and comply with the conditions for restrictions outlined in Article 13 (2) of the CRC.²⁷ In this respect, the Human Rights Committee observed that *restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interests to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.*²⁸

The GDPR acknowledges in Recital 38 that – *Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. 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.*²⁹

In Ireland, 1 in 5 children (20%) say that they have been bothered by something online in 2014. This is double the percentage (10%) reported by Irish 9-16 year olds in the EU Kids Online survey in 2011; Cyber bullying is now more prevalent than face-to-face bullying (13%

²⁵ 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.

²⁶ UN Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on "Digital Media and Children's Rights", para. 85.

²⁷ Article 13 (2) of the Convention on the Rights of the Child stipulates: The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for the respect of the rights or reputation of others; or (b) for the protection of national security or of public order, or of public health or morals.

²⁸ Human Rights Committee, General Comment N. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, para. 34.

²⁹ General data Protection regulation, Recital 38.

now compared to 4% in 2011), and this occurs most commonly on social networking services (SNS); and 43% do not know how to use the 'report abuse' button on website.³⁰

The Committee has recently acknowledged that the digital environment can expose adolescents 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.³¹ It adds that States should, through dialogue with adolescents, ascertain where breaches of privacy have taken place, including in relation to personal engagement in the digital environment and the use of data by commercial and other entities.³² States should also take all appropriate measures to strengthen and ensure respect for the confidentiality of data and the privacy of adolescents, consistent with their evolving capacities.³³

The Committee emphasises however, that while these risks raise concerns over the potential infringement of children's rights to privacy (Article 16 CRC) and protection from harm (Article 19 CRC), they should not unduly restrict adolescents' access to the digital environment. Instead, their safety should be promoted through holistic strategies, including digital literacy with regard to online risks and strategies for keeping them safe, strengthened legislation and law enforcement mechanisms to tackle abuse online and fight impunity, and training parents and professionals who work with children.³⁴ In fact, the Committee recommends that States should guarantee the protection of children's rights to privacy in relation to digital media and ICTs and develop effective safeguards against abuse without unduly restricting the full enjoyment of their rights.³⁵

Recommendations:

The OCO recommends that, to reflect international children's rights standards, national legislation should be enacted to adapt a lower age of digital consent of 13.

Establishing the age of digital consent at 13 must be fully supported by targeted educational initiatives to ensure that children, parents/guardians and schools are fully aware of the risks involved in the processing of personal data but also informed of how to respond to violations of their rights online.

³⁰ Net Children Go Mobile: Full findings from Ireland, Dr. Brian O'Neill and Thuy Dinh, (DIT), January 2015.

³¹ UN Committee on the Rights of the Child, General Comment N. 20 on the implementation of the rights of the child during adolescence, CRC/C/GC/20, para. 48.

³² Ibid, para 46.

³³ Ibid, para 46.

³⁴ Ibid, para. 48.

³⁵ UN Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on "Digital Media and Children's Rights", para. 102.

States should also take all appropriate measures to strengthen and ensure respect for the confidentiality of data and the privacy of adolescents, consistent with their evolving capacities.

b) Child-rights due diligence

According to the GDPR, when processing the data of a child under the age of digital consent, service providers, will have the obligation to make ‘reasonable efforts’ to verify that a parent or guardian has consented to the processing of the child’s personal data ‘taking into consideration available technology’.³⁶ The Regulation also obliges data controllers to conduct assessments on the impact of envisioned data processing operation on the protection of personal data, where the processing ‘is likely to result in a high risk to the rights and freedoms of natural persons’.³⁷

In this respect, the Department of Justice and Equality must bear in mind that in light of General Comment N. 16, duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses, including internet and social media providers must meet their responsibilities regarding children’s rights and the Irish Government must ensure they do so.³⁸ This means that, in order to fulfil its obligations under the CRC, the Department of Justice and Equality must require the relevant industry to undertake child-rights due diligence.³⁹

This will ensure that internet, ICT companies and social media providers identify, prevent and mitigate their impact on children’s rights including across their business relationships and within global operations.⁴⁰ Where there is a high risk of this industry being involved in violations of children’s rights because of the nature of their operations or their operating contexts, States should require a stricter process of due diligence and an effective monitoring system.⁴¹

Referring specifically to digital media, the Committee recommended in 2014 that States should ensure a clear and predictable legal and regulatory environment which requires ICT and other relevant industries operating in the State party to respect children’s rights. Moreover, States should encourage and facilitate the development of voluntary, self-regulatory, professional and ethical guidelines and standards of conduct and other

³⁶ Data protection safeguards for children (‘digital age of consent’), Consultation paper, Department of Justice and Equality, pages 2 and 3.

³⁷ General data Protection regulation, Article 35.

³⁸ 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. 8.

³⁹ Ibid, para. 62.

⁴⁰ Ibid.

⁴¹ Ibid.

initiatives, such as the development of technical solutions promoting online safety and the adoption of child-friendly terms and conditions for the use of ICTs and digital media.⁴²

In relation to this last point, a recent report from the Children's Commissioner for England⁴³ showed that children and young people involved in a social media exercise did not understand the terms and conditions of a popular social media site that they had signed up to. These same children and young people expressed reservations about using the site when the terms and conditions were shown to them in language they could understand. The 'Growing up digital' report states that this exercise *makes it clear that the current offerings made by websites and apps to their users is not acceptable. Children and young people have the right to know how the relationship between their rights and the rights of the service they have signed up to use, functions. If it is essential that children understand the functionality of the internet then it is crucial that they learn about what they are signing up to, how their data is collected, what it is used for, and how this relates to the agreements they make.*⁴⁴

The Irish Government will be in breach of its obligations under the CRC where it fails to respect, protect and fulfil children's rights in relation to ICT and social media activities and operations that impact on children.⁴⁵ Of particular importance in this context is the State's obligation to protect children against infringements of their rights by third parties, including ICT and social media companies. This means, according to the Committee, *that States must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights. Such measures can encompass the passing of law and regulation, their monitoring and enforcement, and policy adoption that frame how business enterprises can impact on children's rights. States must investigate, adjudicate and redress violations of children's rights caused or contributed to by a business enterprise. A State is therefore responsible for infringements of children's rights caused or contributed to by business enterprises where it has failed to undertake necessary, appropriate and reasonable measures to prevent and remedy such infringements or otherwise collaborated with or tolerated the infringements.*⁴⁶

States should also establish monitoring mechanisms for the investigation and redress of children's rights violations, with a view to improving accountability of ICT and other relevant companies, as well as strengthen regulatory agencies' responsibility for the development of standards relevant to children's rights and ICTs.⁴⁷ The Committee highlights that, as part of child-rights due diligence, large business enterprises should be encouraged and, where appropriate, required to make public their efforts to address child-rights impacts. Such

⁴² Ibid, para 97.

⁴³ Children's Commissioner for England, "Growing Up Digital: A Report of the Growing Up Digital Taskforce", January 2017, p. 8 – 12.

⁴⁴ Ibid.

⁴⁵ 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. 24.

⁴⁶ Ibid, para. 28.

⁴⁷ UN Committee on the Rights of the Child, Report of the 2014 Day of General Discussion on "Digital Media and Children's Rights", para. 96.

communication should be available, efficient and comparable across enterprises and address measures taken by business to mitigate potential and actual adverse impacts for children caused by their activities.⁴⁸

We note that, in its Report on Harmful Communications and Digital Safety, the Law Reform Commission recommended that the Office of a Digital Safety Commissioner of Ireland be established on a statutory basis to promote digital and online safety and to oversee and regulate a system of “take down” orders for harmful digital communications.⁴⁹ The OCO supports this recommendation and will work with others to encourage and support safe and effective participation in social and digital media by children and young people, in line with the OCO Strategic Plan 2016-2018.

In light of the recommendations made by the Committee in 2014 on digital media and children’s rights, and with a view to achieve the best possible outcomes for children in Ireland, the OCO recommends that the Department of Justice and Equality ensures there is space for discussion and cooperation with ICT and relevant industry not only regarding the age of digital consent, but also regarding the most effective ways of applying and complying with child-rights due diligence.⁵⁰

Recommendations:

The Department of Justice and Equality should engage in a constructive dialogue and close cooperation with the ICT industry based in Ireland to clarify their role and responsibilities regarding children’s rights due diligence.

Government must ensure that Internet, ICT and social media companies apply children’s-rights due diligence in and throughout their online operations and activities by establishing a clear and predictable regulatory environment.

The Department of Justice and Equality should consider the recommendations made in the Law Reform Commission Report on Harmful Communications and Digital Safety to establish a new statutory national oversight system that would promote and support positive digital safety.

⁴⁸ Ibid, para. 65.

⁴⁹ Law Reform Commission, Report: Harmful Communications and digital safety, LRC 116 – 2016, p. 157 (para. 4.18).

⁵⁰ Ibid, para 97.

4. Other relevant issues to be taken into consideration by the DJE when establishing the age of digital consent

The OCO wishes to stress that the establishment of the age of digital consent cannot be looked at in isolation from other relevant developments currently taking place in Ireland. It is of paramount importance that the DJE recognises that lowering the age of digital consent to 13 years of age, as recommended by our Office, will require a stronger duty of care on the part of the State in relation to children and young people. It will also mean that any future legislative initiatives and criminal law reforms in the area of digital safety affecting children should involve child rights proofing at the earliest possible stage. This process will require a careful articulation of the different dimensions and facets of children's participation in the digital world.

In its recent Report on Harmful Communications and Digital Safety,⁵¹ the Law Reform Commission (LRC) has proposed two concurring approaches to deal with digital safety in Ireland: a criminal law reform approach; and a digital safety, takedown procedure and Civil Law approach. The OCO favours the latter approach, which would involve the creation of a Digital Safety Commissioner to promote and support positive digital safety and oversee efficient take-down procedure. This is also the view of the Internet Content Governance Advisory Group which has supported the position that additional criminal sanctions are not appropriate as a means of tackling a complex social problem.⁵²

As recommended in the Report, amongst other functions, the Digital Safety Commissioner would prepare and publish a Code of Practice on Takedown Procedure for Harmful Communications and would also have an important educational role to promote positive digital citizenship among children and young people.⁵³ The LRC also recommended in its Report that the OCO prepares and publishes guidance material, including guidance material for schools, relevant to digital safety of children and to harmful digital communications. The OCO is currently considering these recent proposals made by the LRC. While our Office is fully committed to encourage and support safe and effective participation in social and digital media by children and young people,⁵⁴ we need to assess our current capacity to deliver in terms of human resources and expertise in this area, as well as the need to ensure that there is a cross departmental responsibility .

In relation to the criminal law reform proposals contained in the Report (and in the draft Harmful Communications and Digital Safety Bill 2016),⁵⁵ the Commission recommends that

⁵¹ Law Reform Commission, Report: Harmful Communications and digital safety, LRC 116 – 2016.

⁵² See the non-legal recommendations made in the Report of the Internet Content Governance Advisory Group.

⁵³ Law Reform Commission, Report: Harmful Communications and digital safety, LRC 116 – 2016, p. 157-159.

⁵⁴ See Ombudsman for Children's Office, Strategic Plan 2016-2018, Objective 2.3: *We will work with others to encourage and support safe and effective participation in social and digital media by children and young people.*

⁵⁵ Law Reform Commission, Report: Harmful Communications and digital safety, LRC 116 – 2016, p. 162-187.

*no prosecution for the offences discussed in the Report may be brought against children under the age of 17 except by or with the consent of the Director of Public Prosecutions. The procedural protection reflects the Commission's strong view that it would be highly undesirable to criminalise children under the age of 17 years for behaviour undertaken as a result of their inherent immaturity and where there is no intention to cause serious distress. It also reflects one of the Commissions guiding principles in this Report that in the case of children and young people, the criminal justice process should be seen as a last resort and only after other responses, such as education or suitable diversion programmes, have been applied.*⁵⁶

From a children's rights perspective, this raises two main concerns. First of all, the protections recommended to avoid applying the criminal law to children and young people in the same way as adults only apply up to the age of 17. This is not in line with the Children Act 2001 or the UN Convention on the Rights of the Child which defines a child as every human being below the age of 18 (Article 1 of the UNCRC). It is important that the UNCRC definition of child is used consistently across all legislation, including future legislation involving digital media.

Secondly, the procedural safeguards recommended by the report (the use of diversion and the requirement of the consent of the DPP in relation to both summary and indictable offences) should be reviewed to ensure that they provide sufficient safeguards to avoid criminalisation of children with regard to harmful digital communications apart from in very exceptional circumstances. This is particularly important given the low age of criminal responsibility in Ireland and the extent to which children are involved in digital communications generally. As stated in the LRC Report⁵⁷, a less coercive response is required when dealing with children. Therefore, any future legislation in this area should distinguish between adults and children and, where appropriate, should legislate for them differently.

The OCO advises that strong consideration be given to the development of a separate model, outside of the criminal justice system, which uses restorative practices where children are involved in harmful digital communications, similar to what is available in Australia. This would be in line with international children's rights standards which reflect the fact that keeping children out of the system altogether is often the most effective form of intervention. This would also sit well with the general approach in relation to education and awareness of what it means to be a good digital citizen.

⁵⁶ Law Reform Commission Report on Harmful Communications and Digital Safety, Paragraph 33

⁵⁷ Law Reform Commission Report on Harmful Communications and Digital Safety, Paragraph 1.71

The OCO is conscious that it will take time to establish an Office of the Digital Safety Commissioner and for it to become fully operational in Ireland. Until such time as an Office of this nature is established, it is important to recall that the UNCRC⁵⁸ called upon States to promote and facilitate regular public debates and the active involvement of all stakeholders, in particular children, parents and other caretakers, professionals working with or for children, including in the educational field, civil society and ICT and other relevant industries, before adopting draft laws, policies, strategies and programmes, and when setting up services for child victims.

The Committee furthermore recommended that States effectively evaluate the impact of digital media and ICT related policies, programmes, practices and decisions on the rights, well-being and development of all children. States should thereby ensure that the fundamental principles of the Convention, including the right to non-discrimination, the right to have the child's best interests taken as a primary consideration, the right to life, survival and development and children's right to express their views in matters affecting them, are effectively prioritized and meaningfully implemented.

Recommendations:

Any future legislative initiatives and criminal law reforms in the area of digital safety affecting children should involve child rights proofing at the earliest possible stage. This process will require a careful articulation of the different dimensions and facets of children's participation in the digital world. A child rights impact assessment should be carried out with regard to the various relevant pieces of legislation proposed with regard to digital consent and digital safety.

The Department of Justice should ensure the active involvement of all stakeholders, in particular children, parents and professionals working with or for children, including in the educational field, civil society and ICT and other relevant industries, before adopting draft laws, policies and strategies in relation to digital safety.

Strong consideration be given to the development of a separate model, outside of the criminal justice system, which uses restorative practices where children are involved in harmful digital communications

⁵⁸ Committee on the Rights of the Child, Report of the 2014 Day of General Discussion, *Digital media and children's rights*.