



ombudsman
do leanaí
for children

Department of Communications, Climate Action and Environment:

Public Consultation
on the Regulation of Harmful Content on Online Platforms and the
Implementation of the Revised Audiovisual Media Services Directive

Submission by the Ombudsman for Children's Office
April 2019

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Introduction

In March 2019, the Minister for Communications, Climate Action and Environment initiated a public consultation on the regulation of harmful content on online platforms and the implementation of the revised Audiovisual Media Services Directive (AVMSD).¹

The stated aim of this consultation is *“to seek the views of citizens and stakeholders as to an achievable, proportionate and effective approach to regulating harmful content, particularly online”*.² In this regard, it is envisaged that new legislation will focus on the introduction of new regulation under four strands:

- Strand 1 – new online safety laws to apply to Irish residents
- Strand 2 – Regulation of Video-Sharing Platform Services
- Strand 3 – Regulation of on demand services
- Strand 4 – Minor changes to regulation of traditional TV.

The Ombudsman for Children’s Office (OCO) is an independent statutory body. One of the OCO’s core statutory functions under the Ombudsman for Children Act 2002, as amended (2002 Act) is to promote the rights and welfare of children up to the age of 18 years. The OCO has prepared this submission pursuant to Section 7(4) of the 2002 Act, which provides that the Ombudsman for Children may advise on any matter relating to the rights and welfare of children, including proposals for legislation affecting children.

A wide range of children’s rights are engaged in the online environment. It presents opportunities for children and young people to exercise many of their rights as well as risks to children’s rights to privacy and to protection from harm, abuse and exploitation. 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 and expose them to risks such as online fraud, violence and hate speech, cyberbullying, grooming for sexual exploitation, trafficking and child pornography, and targeting by armed or extremist groups.

In this regard, the OCO shares the serious concerns held by many stakeholders about the risks that children can be exposed to online. The OCO therefore welcomes this current public consultation and in particular its focus on strengthening the protection of children online by seeking to provide for a

¹ The materials relating to this public consultation, including the revised AVMSD, are available at <https://www.dccae.gov.ie/en-ie/communications/consultations/Pages/Regulation-of-Harmful-Online-Content-and-the-Implementation-of-the-revised-Audiovisual-Media-Services-Directive.aspx>.

² Department of Communications, Climate Action and Environment, *Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive. Explanatory Note* (2019), p.1. Available at <https://www.dccae.gov.ie/en-ie/communications/consultations/Documents/86/consultations/Consultation%20Explanatory%20Note.pdf>.

statutory system of oversight and regulation. As this current submission notes, the idea of establishing a digital or online safety commissioner has been a salient feature of discussions on how to strengthen provision for children's online safety since the publication of the Law Reform Commission's report on Harmful Communications and Digital Safety in 2016.³ The considerable support that exists for this idea is informed by a recognition that putting in place an appropriate, viable and effective non-judicial regulatory mechanism underpinned by primary legislation is a complex undertaking.

The OCO appreciates that this public consultation is not solely about matters affecting children. However, as per the OCO's statutory remit, this submission concerns itself with children. In doing so, this submission focuses on Strand 1, albeit with an awareness that Strand 1 connects with other strands and in particular with Strand 2.

Noting that the current proposals are at an early stage of development and that the consultation materials make no explicit reference to children's status as rights holders or to the State's obligations to respect, protect and fulfil children's rights, the primary purpose of this submission is to highlight the State's obligations to children, in particular under the UN Convention Rights of the Child (UNCRC) and with regard to the related areas of children's rights online and children's rights and business. In this regard, the OCO is of the view that the Department of Communications, Climate Action and Environment (DCCAIE) needs to consider and seek to give effect to children's rights in the context of developing proposals for an Online Safety Act and the establishment of an Online Safety Commissioner.

As the DCCAIE indicates in the public consultation materials,⁴ among the challenges that need to be addressed is to ensure that proposals for a new national regulatory structure for dealing with the removal of harmful online content are rights compatible. In preparing this submission, the OCO has sought to highlight guidance and concerns contained in a number of relevant instruments and documents, which the DCCAIE might usefully consider for the purposes of providing for a rights-compatible approach. This submission also addresses itself to several specific aspects of the current proposals under Strand 1 that require further attention in this regard, including the matter of identifying and defining harmful online content.

³ Law Reform Commission, *Harmful Communications and Digital Safety* (2016). Available at <https://www.lawreform.ie/fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf>.

⁴ Department of Communications, Climate Action and Environment, *supra* note 2, p.7.

1. Giving effect to children's rights

International obligations to children and their rights

The UN Convention on the Rights of the Child is the primary international legal instrument relating to children's rights. Adopted by the UN General Assembly in 1989, this Convention sets out the rights of all children under the age of 18 years.⁵ Having ratified the UNCRC in 1992, Ireland has an obligation under international law to take all appropriate measures, including legislative measures, to respect, protect and fulfil the rights of children defined in the Convention.

The rights of children set out under the UNCRC are wide-ranging and are to be understood as inalienable, indivisible and interdependent. Among the ways in which children's rights under the UNCRC can be grouped is under the following headings:

- **Survival and development rights** recognise the conditions necessary for children's survival and full development. They include the right to clean water, adequate food, shelter, education, healthcare, rest, play and recreation, and cultural activities.
- **Protection rights** provide for children's protection from all forms of abuse, neglect, exploitation and cruelty. These rights include an obligation on the State under Article 17(e) to encourage the development of appropriate guidelines for the protection of children from information and material that is injurious to their wellbeing, having regard to Article 13 (children's right to freedom of expression) and Article 18 (parents' responsibilities and State assistance to parents).
- **Participation rights** include children's right to freedom of expression, information and association and provide for children's right to express their views freely in relation to all matters affecting them and to have due weight given to their views, in accordance with their age and maturity.

Four UNCRC rights are recognised as integral to the realisation of all children's rights under the Convention. Known as the general principles of the UNCRC, they are:

- **Non-discrimination** (Article 2) – States parties to the UNCRC are required to respect and ensure the rights set out in the Convention to every child within their jurisdiction without discrimination of any kind and to take all measures necessary to ensure that children are protected against all forms of discrimination.
- **Best interests of the child** (Article 3) – The best interests of children must be treated as a primary consideration in all actions concerning them. In this regard, the UN Committee on the Rights of the Child (UN Committee) has emphasised that all measures, including legislative measures, affecting children and relevant to the implementation of children's

⁵ United Nations, *UN Convention on the Rights of the Child* (1989). Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

rights under the UNCRC must involve active, systematic consideration being given to how children's rights and interests are or will be affected by a given decision or action.⁶

- **Life, survival and development** (Article 6) – States are obliged to provide optimal conditions for childhood and are expected to interpret 'development' as a holistic concept encompassing all aspects of children's physical, mental, spiritual, moral, psychological and social development.⁷
- **Right to be heard** (Article 12) – States must assure to every child who is capable of forming their own views the right to express their views freely in all matters affecting them, with due weight given to the child's views in accordance with their age and maturity.

In light of Ireland's ratification of the UNCRC, the State's obligations to children are as follows:

- **Respect** – The State's obligation to respect children's rights is an obligation to refrain from interfering directly or indirectly with children's enjoyment of their rights.
- **Protect** – The State's obligation to protect children's rights is an obligation to prevent third parties, including businesses, from interfering with children's enjoyment of their rights.
- **Fulfil** – The State's obligation to fulfil children's rights is an obligation to adopt the necessary measures to achieve the full realisation of children's rights.

Having regard to these obligations, the DCCAE's future work to develop the current proposals to create a new Online Safety Act and to establish an Online Safety Commissioner will need to involve appropriate consideration being given to two related areas: children's rights in the online environment and children's rights and business.

Children's rights in the online environment

Although the UNCRC pre-dates the digital era, its principles and provisions are very relevant to the online environment. 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 concerning 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)

⁶ UN Committee on the Rights of the Child, *General Comment No.5: General measures of implementation of the Convention on the Rights of the Child* (2003), CRC/CGC/2003/5, para. 12. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en.

⁷ *Ibid*, para. 12.

- 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)
- 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).

Accordingly, the UN Committee on the Rights of the Child has decided to prepare a new general comment on children’s rights in the digital world. Preparatory work in this regard is underway and, as with previous general comments, this new general comment will provide guidance to States that have ratified the UNCRC, including Ireland, on how they can respect, protect and fulfil children’s rights in the online environment. Recognising that children’s rights are engaged in this environment, the UN Committee has previously considered this matter in the context of a Day of General Discussion (DGD) on digital media and children’s rights held in 2014.⁸ Among the recommendations made by the UN Committee following this DGD were:

- States should recognise the importance of access to and use of digital media and ICTs for children and their potential to promote all children’s rights.⁹
- States should adopt and effectively implement comprehensive rights-based laws and policies which integrate children’s access to digital media and ICTs and ensure children’s protection when using digital media and ICTs.¹⁰
- States should promote and facilitate the active involvement of all stakeholders, in particular children, parents and carers, and professionals working with or for children, before adopting draft laws, policies, strategies and programmes. In this regard, States should ensure that children’s views and experiences are taken into account in the context of developing laws, policies, programmes and other measures relating to digital media and ICTs.¹¹
- States should undertake research, data collection and analysis on an ongoing basis to better understand how children access and use digital and social media, as well as their impact on children’s lives. This data should be disaggregated and cover both risks and opportunities for children. The data should be used for establishing baselines, including for the formulation, monitoring and evaluation of relevant laws.¹²
- States should address the risks posed by digital media and ICTs to the safety of children, including online harassment, sexual exploitation of children, access to violent and sexual content, grooming and self-generated sexual content, through holistic strategies that ensure

⁸ UN Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion ‘Digital Media and Children’s Rights’* (2014). Available at https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD_report.pdf.

⁹ *Ibid*, para.85.

¹⁰ *Ibid*, para. 86.

¹¹ *Ibid*, paras. 87 and 99.

¹² *Ibid*, paras. 89 and 90.

children's full enjoyment of their rights under the UNCRC and its Optional Protocols. In doing so, States should always ensure a balance between promoting the opportunities provided by digital media and ICTs and protecting children from harm. Among the actions that States should take in this regard are to:

- coordinate with the ICT industry so that it develops and puts in place adequate measures to protect children from violent and inappropriate materials and other risks posed by digital media and ICTs to children
- provide fast and effective procedures for removal of prejudicial or harmful material involving children.¹³

The opportunities and risks presented by the online environment, including for children, have also been considered at European level by the European Union and the Council of Europe. Deliberations in this regard at European level are reflected in a range of conventions, regulations, directives, recommendations and strategies, including the revised AVMSD, which is included as a focus within the DCCAE's current public consultation.

Among these instruments is a 2018 Recommendation of the Committee of Ministers of the Council of Europe to member States on guidelines to respect, protect and fulfil the rights of the child in the digital environment (2018 Recommendation).¹⁴ This Recommendation merits attention by the DCCAE, in particular because it considers children's rights online in a holistic manner rather than focusing on one or more specific rights of the child in isolation from children's other rights. With reference to Member States' obligations and commitments under several international and European conventions, the 2018 Recommendation emphasises that States have primary responsibility to respect, protect and fulfil children's rights. The corresponding guidance to Member States, including Ireland, includes the following:

- In all actions concerning children in the digital environment, the best interests of the child must be a primary consideration. In assessing the best interests of the child, Member States should make every effort to balance, and wherever possible, reconcile a child's right to protection with other rights, including the right to freedom of expression and information as well as participation rights.¹⁵
- Having regard to children's right to non-discrimination, targeted measures may be needed for children in vulnerable situations given that the digital environment has the potential both to increase children's vulnerability and to empower, protect and support them.¹⁶
- States should actively engage children to participate meaningfully in devising, implementing and evaluating legislation, policies, mechanisms, practices, technologies and resources that aim to respect, protect and fulfil the rights of the child in the digital environment.¹⁷

¹³ *Ibid*, para. 105.

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* (2018). Available at https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/political_declarations/recommendation_of_the_committee_of_ministers_of_the_council_of_europe_to_member_states_on_guidelines_to_respect_protect_and_fulfil_the_rights_of_the_child_in_the_digital_environment.pdf.

¹⁵ *Ibid*, para. 1.

¹⁶ *Ibid*, para. 4.

¹⁷ *Ibid*, para. 7.

- Taking into account the development of new technologies, children have the right to be protected from all forms of violence, exploitation and abuse in the digital environment. Any protective measures should take into consideration the best interests and evolving capacities of the child and not unduly restrict their other rights.¹⁸
- In accordance with children’s right to an effective remedy when their human rights and fundamental freedoms have been infringed in the digital environment, Member States should ensure the provision of available, accessible, affordable and child-friendly avenues through which children, their parents or legal representatives can submit complaints and seek remedies. Depending on the violation in question, effective remedies may include inquiry, explanation, reply, correction, proceedings, immediate removal of unlawful content, apology, reinstatement, reconnection and compensation. In addition to judicial mechanisms, where appropriate, Member States should provide children, their parents and legal representatives with adequate and effective non-judicial redress mechanisms for handling violations or abuses of children’s rights in the digital environment.¹⁹
- As regards legislation, Member States should ensure that legal frameworks give due account to relevant international and European legal instruments and create a clear and predictable legal and regulatory environment which helps businesses and other stakeholders to meet their responsibility to respect the rights of the child in the digital environment through their operations.²⁰

Taking into account Ireland’s obligations and commitments under international and European standards and guidance, among the challenges that the DCCAE will need to address in the context of developing its proposals for an Online Safety Act and an Online Safety Commissioner is to make sure that legislative provisions made for the primary and specific purposes of strengthening the protection of children online are framed in a manner that demonstrates due regard having been given to other children’s rights that are engaged in this environment. In this regard, particular attention will need to be given to ensuring that such provisions are balanced, reasonable and proportionate and, as such, do not entail an unnecessary or unwarranted interference with children’s other rights.

Children’s rights and business

Following its most recent examination of Ireland’s progress in implementing its obligations to children under the UNCRC, the UN Committee recommended that the State should establish and implement regulations to ensure that the business sector complies with international and national standards, particularly with regard to the rights of the child. Among the specific recommendations made by the UN Committee in this regard is that the State should strengthen its regulatory framework for industries and enterprises operating in the State to ensure that their activities do not negatively affect the rights of the child. Furthermore, the UN Committee recommended that, in

¹⁸ *Ibid*, para. 50.

¹⁹ *Ibid*, paras. 67, 69 and 70.

²⁰ *Ibid*, paras. 74 and 78.

pursuing this measure and other measures, the State should be guided by the UN's "Protect, Respect and Remedy" Framework.²¹

This Framework was set out in a 2008 report to the UN Human Rights Council by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises. It comprises three core and complementary principles:

- **Protect** - the State duty to protect against human rights abuses by third parties, including business
- **Respect** - the corporate responsibility to respect human rights
- **Remedy** - the need for effective access to remedies.²²

This "Protect, Respect and Remedy" Framework provided a basis for the Guiding Principles on Business and Human Rights (Guiding Principles) that were adopted by the Human Rights Council in 2011.²³ Applicable to all States and to all business enterprises and having the objective of improving standards and practices in respect of business and human rights, these Guiding Principles recognise:

- States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms
- the role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights
- the need for rights and obligations to be matched to appropriate and effective remedies when breached.²⁴

Under these Guiding Principles, the State's duty to protect human rights comprises foundational and operational principles. Operational principles associated with the State's duty to protect human rights encompass States' regulatory and policy functions. In this regard, the Guiding Principles advise that measures, which States should take in meeting their duty to protect include enforcing laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically assessing the adequacy of such laws and addressing any gaps.²⁵

Equally, the Guiding Principles set out foundational and operational principles for business enterprises to respect human rights. The operational principles outline how business enterprises can embed their responsibility to respect human rights and how they can identify, prevent, mitigate and

²¹ UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland* (2016), CRC/C/IRL/CO/3-4, para. 24. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2fCO%2f3-4&Lang=en.

²² Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (2008), A/HRC/8/5. Available at <https://www.refworld.org/docid/484d2d5f2.html>.

²³ Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (2011), HR/PUB/11/04. Available at https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf.

²⁴ *Ibid*, p.1.

²⁵ *Ibid*, p.4.

account for how they address adverse human rights impacts, including by conducting human rights due diligence.²⁶

As regards access to remedies, the Guiding Principles clearly state that States must take appropriate steps to ensure through judicial, administrative, legislative and other appropriate means that access to an effective remedy is available to those in their jurisdiction whose rights have been abused. In this regard, the Guiding Principles consider State-based judicial mechanisms, State-based non-judicial grievance mechanisms, and non-State-based grievance mechanisms. In relation to non-State-based grievance mechanisms, the Guiding Principles identify a role for States, which involves States considering ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms. In the interests of addressing grievances early and providing direct remediation, business enterprises themselves are advised to establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely affected. Notably, the Guiding Principles set out effectiveness criteria for non-judicial grievance mechanisms, whether these mechanisms are State-based or non-State-based. In order to ensure their effectiveness, non-judicial grievance mechanisms should be:

- (a) **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes
- (b) **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access
- (c) **Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation
- (d) **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms
- (e) **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake
- (f) **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognised human rights
- (g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Operational-level mechanisms should also be:

- (h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.²⁷

²⁶ *Ibid*, pp.13-26.

²⁷ *Ibid*, pp.27-34.

These Guiding Principles have informed the subsequent development of instruments relating to business and human rights at European and national level: in 2016 the Committee of Ministers of the Council of Europe adopted a Recommendation on human rights and business²⁸ and in 2017 the Department of Foreign Affairs published a National Action Plan on Business and Human Rights covering the period 2017 to 2020.²⁹

As regard business and children's rights, in 2013 the UN Committee on the Rights of the Child published a general comment on State obligations regarding the impact of the business sector on children's rights.³⁰ In its opening comments, the UN Committee notes the opportunity and threat presented by business for children's rights:

*"Business can be an essential driver for societies and economies to advance in ways that strengthen the realisation of children's rights ... However, the realisation of children's rights is not an automatic consequence of economic growth and business enterprises can also negatively impact children's rights."*³¹

Among the sectors that the UN Committee expresses concerns about in this regard are the digital media and ICT sectors:

*"Digital media is of particular concern, as many children can be users of the Internet but also become victims of violence such as cyberbullying, cyber-grooming, trafficking or sexual abuse and exploitation through the Internet. Although companies may not be directly involved in such criminal acts, they can be complicit in these violations through their actions; for example, child sex tourism can be facilitated by travel agencies operating on the Internet, as they enable the exchange of information and the planning of sex tourism activities. Child pornography can be indirectly facilitated by Internet businesses and credit-card providers. ... States 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."*³²

Building on, among other things, the Guiding Principles and work undertaken by the UN Global Compact, Save the Children and UNICEF to develop a set of principles on children's rights and business principles,³³ the UN Committee focuses its guidance on States' obligations to ensure that children's rights are respected, protected and fulfilled in the context of the business sector and that effective remedies are available to children when infringements or violations of their rights occur.

²⁸ Council of Europe, *Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business* (2016). Available at <https://rm.coe.int/human-rights-and-business-recommendation-cm-rec-2016-3-of-the-committee/16806f2032>.

²⁹ Government of Ireland, *National Plan on Business and Human Rights 2017-2020* (2017). Available at <https://www.dfa.ie/media/dfa/alldfawebstemedial/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf>.

³⁰ UN Committee on the Rights of the Child, *General Comment No.16 on State obligations regarding the impact of the business sector on children's rights* (2013), CRC/C/GC/16. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en.

³¹ *Ibid*, para. 1.

³² *Ibid*, para. 60.

³³ UNICEF, The UN Global Compact and Save the Children, *Children's Rights and Business Principles* (2012). Available at https://www.unicef.org/csr/css/PRINCIPLES_23_02_12_FINAL_FOR_PRINTER.pdf.

In setting out a framework for States' implementation of their obligations to children in this area, the UN Committee highlights the importance of legislative, regulatory and enforcement measures. Noting that legislation and regulation are essential instruments for ensuring that the activities and operations of business enterprises do not have a negative impact on or violate children's rights, the UN Committee advises that "*States should enact legislation that gives effect to the rights of the child by third parties and provides a clear and predictable legal and regulatory environment which enables business enterprises to respect children's rights*".³⁴ In this regard, the UN Committee recommends that "*States will need to gather data, evidence and research for identifying specific business sectors of concern*" in order to "*meet their obligation to adopt appropriate and reasonable legislative and regulatory measures to ensure that business enterprises do not infringe children's rights*".³⁵

As regards enforcement measures, the UN Committee observes that "[g]enerally, it is the lack of implementation or the poor enforcement of laws regulating business that pose the most critical problems for children."³⁶ Correspondingly, the UN Committee recommends that States should employ a range of measures to ensure effective implementation and enforcement. These measures include:

- strengthening regulatory agencies responsible for the oversight of standards relevant to children's rights so they have sufficient powers and resources to monitor and investigate complaints and to provide and enforce remedies for abuses of children's rights
- providing effective remedy through judicial and non-judicial mechanisms and effective access to justice.³⁷

This guidance with regard to legislative, regulatory and enforcement measures is echoed by the UN Committee in its Report of the 2014 Day of General Discussion on Digital Media and Children's Rights. Among other things, the UN Committee recommends in this report that States should:

- ensure a clear and predictable regulatory environment which requires ICT and other relevant industries operating in the State to respect children's rights
- 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
- strengthen regulatory agencies' responsibility for the development of standards relevant to children's rights and ICTs
- require businesses to undertake child-rights due diligence with a view to identifying, preventing and mitigating their impact on children's rights when children are using digital media and ICTs.³⁸

In terms of remedies, the observations of the UN Committee in its 2013 general comment are noteworthy:

³⁴ UN Committee on the Rights of the Child, *supra* note 30, para. 53.

³⁵ *Ibid.*

³⁶ *Ibid.*, para.61.

³⁷ *Ibid.*, paras. 61(a) and 61(d).

³⁸ UN Committee on the Rights of the Child, *supra* note 8, paras. 96 and 97.

“Non-judicial mechanisms, such as mediation, conciliation and arbitration, can be useful alternatives for resolving disputes concerning children and enterprises. They must be available without prejudice to the right to judicial remedy. Such mechanisms can play an important role alongside judicial processes, provided they are in conformity with the Convention and the Optional Protocols thereto and with international principles and standards of effectiveness, promptness and due process and fairness. Grievance mechanisms established by business enterprises can provide flexible and timely solutions and at times it may be in a child’s best interests for concerns raised about a company’s conduct to be resolved through them. These mechanisms should follow criteria that include: accessibility, legitimacy, predictability, equitability, rights compatibility, transparency, continuous learning and dialogue. In all cases, access to courts or judicial review of administrative remedies and other procedures should be available.”³⁹

Drawing on existing international and European instruments, including the UN Guiding Principles and the UN Committee’s general comment highlighted above, the 2018 Recommendation of the Committee of Ministers of the Council of Europe also engages with children’s rights and the business sector and does so with particular reference to the digital environment. The Recommendation states that the Governments of Member States need to “require” business enterprises to meet their responsibility to respect children’s rights in the digital environment.⁴⁰ The implementing measures that the Recommendation advises Member States to take include legislative, regulatory and remedial measures. In outlining these measures, the Recommendation can be seen to recall, affirm and urge Member States to implement measures promoted by UN instruments and mechanisms, including with respect to ensuring that:

- legal frameworks give due account to relevant international and European legal instruments and create a clear and predictable legal and regulatory environment which helps businesses and other stakeholders meet their responsibility to respect the rights of the child in the digital environment through their operations⁴¹
- children, their parents or legal representatives have access to effective remedies via appropriate, accessible State-based judicial mechanisms, State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms.⁴²

Recommendations

The DCCAE’s future work to develop the current proposals for an Online Safety Act and an Online Safety Commissioner needs to include a purposeful focus on giving effect to children’s rights, including by:

- employing a rights framework and making appropriate provision for children’s rights within this framework, including the general principles of the UNCRC as set out under Articles 2, 3, 6 and 12

³⁹ UN Committee on the Rights of the Child, *supra* note 30, para. 71.

⁴⁰ Council of Europe, *supra* note 14, p.3.

⁴¹ *Ibid*, paras. 74 and 78.

⁴² *Ibid*, paras. 67-71.

- providing children and young people under 18 with a meaningful, timely, age-appropriate and child-friendly opportunity to express their views in relation to those aspects of the current proposals which affect them so that the DCCAE's future work to develop the proposals is informed by and gives due account to the perspectives of children and young people themselves
- giving careful attention to international and European guidance and recommendations concerning the interrelated areas of children's rights online and children's rights and business, including guidance and recommendations relating to legislative, regulatory and remedial measures.

2. Providing for appropriate regulation

Since the publication of the Law Reform Commission's report on Harmful Communications and Digital Safety in 2016, the idea of establishing a statutory digital or online safety commissioner has become a salient feature of debates and deliberations on measures needed to strengthen provision for online safety, in particular for children. The idea enjoys considerable support, including among legislators and among civil society organisations working in the area of children's rights and child protection.⁴³ It has also been recognised, however, that putting in place an appropriate, viable and effective non-judicial regulatory mechanism underpinned by primary legislation is complex.

In November 2018 the UN's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur) wrote to the Permanent Mission of Ireland to the UN in Geneva to outline his concerns about the Digital Safety Commissioner Bill 2017 (2017 Bill),⁴⁴ a Private Members' Bill that is currently at third stage before Dáil Éireann.⁴⁵ As the Tánaiste and Minister for Foreign Affairs noted in his letter of response of 31 December 2018,⁴⁶ a number of concerns highlighted by the Special Rapporteur have also been raised at national level, including in the context of examination of the 2017 Bill by the Oireachtas Joint Committee on Communications, Climate Action and Environment.⁴⁷

In addition to instruments referenced in the previous section of this submission and due to its specific focus, the Special Rapporteur's communication about the 2017 Bill will be an important and useful reference point for the DCCAE in the context of its work to develop proposals for an Online

⁴³ Joint Committee on Children and Youth Affairs, *Report on Cyber Security for Children and Young Adults* (2018). Available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_children_and_youth_affairs/reports/2018/2018-03-29_report-on-cyber-security-for-children-and-young-adults_en.pdf.

⁴⁴ *Digital Safety Commissioner Bill 2017*. Available at <https://www.oireachtas.ie/en/bills/bill/2017/144/>.

⁴⁵ This communication is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24169>.

⁴⁶ This communication is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34462>.

⁴⁷ See, for example, Joint Committee on Communications, Climate Action and Environment, 25 October 2018 and 6 November 2018, available at https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_communications_climate_action_and_environment/2018-10-25/debate/mul@/main.pdf and https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_communications_climate_action_and_environment/2018-11-06/debate/mul@/main.pdf.

Safety Act and the establishment of an Online Safety Commissioner. As well as facilitating the development of viable proposals, this communication, together with previous reports by the Special Rapporteur, including a report to the UN Human Rights Council in 2018 on online content regulation,⁴⁸ will further assist the DCCA to develop proposals that are rights compatible.

While the focus of the Special Rapporteur is necessarily on the right to freedom of opinion and expression, his communication of November 2018 expresses respect for the Government's interest in ensuring the online safety of children and other users.⁴⁹ This recalls a reference to the importance of protecting children in a report by the Special Rapporteur's predecessor to the Human Rights Council in 2010:

"While upholding the right to freedom of expression, Governments have a duty to protect children from information that could undermine their dignity and development. They should therefore establish protective mechanisms and define their content, scope and implementation methods in their domestic human rights law."⁵⁰

In providing this guidance, the former Special Rapporteur references a subsequent section in his 2010 report that sets out permissible restrictions and limitations on the right to freedom of expression. Making specific reference to Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR)⁵¹ and emphasising that the protection fundamental human rights must be the prevailing consideration for any proposed restriction or limitation, the Special Rapporteur highlights that permissible restrictions must be exceptional and must meet three well-established conditions:

- **Legality** – Any restriction or limitation on the right to freedom of expression must be provided by law. Among other things, laws imposing restrictions or limitations must be accessible, concrete, clear and unambiguous and must set out the remedy against or mechanism for challenging an illegal or abusive application of the restriction or limitation.
- **Necessity** – Any restriction or limitation must be specific, proportionate and no more than is necessary. The burden of demonstrating that the restriction or limitation is the least intrusive possible and that it actually protects, or is likely to protect, a legitimate State interest, lies with the State.
- **Legitimacy** – Any restriction must only be imposed to protect legitimate aims, whereby these aims are limited to those specified under Article 19(3) of the ICCPR and include respect for the rights or reputations of others.⁵²

⁴⁸ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report of the Special Rapporteur to the Human Rights Council on online content regulation* (2018), A/HRC/38/35. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/096/72/PDF/G1809672.pdf?OpenElement>.

⁴⁹ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 45, p.6.

⁵⁰ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report of the Special Rapporteur to the Human Rights Council on groups in need of attention, limitations to the right to freedom of expression, and protection of journalists* (2010), A/HRC/14/23, para. 52. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/130/49/PDF/G1013049.pdf?OpenElement>.

⁵¹ United Nations, *International Covenant on Civil and Political Rights* (1966). Available at <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

⁵² Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 50, section C, pp. 12-16.

In setting out his views on the 2017 Bill, the current Special Rapporteur recalls this three-part test and expresses concern that restrictions established by the Bill are inconsistent with it and, therefore, with the requirements of Article 19(3).⁵³ Among the corresponding issues raised by the Special Rapporteur that are of direct relevance to aspects of the DCCAE's current public consultation are those highlighted briefly below.

Identifying and defining harmful content

In his communication of November 2018, the Special Rapporteur notes that the 2017 Bill does not provide any guidance on what forms of digital communications would be considered 'harmful'. He expresses corresponding concern that, due to the absence of any definition of the scope of 'harmful digital communications', the 2017 Bill would *"lead to undue censorship and incentivise social media platforms and other "digital service undertakings" to restrict content that is perfectly legitimate and lawful."* He also expresses concern that the absence of any definition would effectively delegate significant control over interpretation to non-judicial mechanisms, i.e. to digital service undertakings and the proposed Digital Safety Commissioner.⁵⁴

Among the questions posed by the DCCAE in its public consultation is how harmful online content should be defined in national legislation and whether certain categories of content should be considered as harmful content. The categories of content referenced by the DCCAE in this regard are:

- serious cyberbullying of a child (i.e. content which is seriously threatening, seriously intimidating, seriously harassing or seriously humiliating)
- material which promotes self-harm or suicide
- material designed to encourage prolonged nutritional deprivation that would have the effect of exposing a person to risk of death or endangering health.⁵⁵

Having regard to the Special Rapporteur's concerns, it is vital that the DCCAE's work to develop the current proposals for an Online Safety Act and an Online Safety Commissioner provides for concrete, clear and unambiguous definitions of any terms that it plans to use in the proposed legislation (e.g. 'harmful', 'threatening', 'intimidating', 'harassing', 'humiliating') and ensures that these definitions are included in legislation itself.

If particular categories of content are to be included on the basis that they constitute harmful online content, any such categories will need to be clearly and precisely defined in order to provide for transparency and shared understanding. Furthermore, any such categories, if included, will need to form part of a prescribed list. In this regard, the OCO suggests that it would be prudent for the DCCAE to ensure that decision-making about what to include in any such list is transparent and appropriately evidence-based. In addition to mitigating against any risk of *"heavy-handed viewpoint-*

⁵³ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 45, pp. 3-6.

⁵⁴ *Ibid*, p. 6.

⁵⁵ Department of Communications, Climate Action and Environment, *supra* note 2, p. 3.

based regulation”,⁵⁶ which the Special Rapporteur has cautioned against, this approach will enable the DCCAE to provide an objective explanation and justification as to why it is proposed to include certain categories of content and not others.

Status of proposed Online Safety Commissioner

While the regulatory structures have yet to be worked out, it is currently envisaged that the proposed Online Safety Commissioner will be established on a statutory basis under an Online Safety Act.

With reference to his 2018 report to the Human Rights Council, the Special Rapporteur emphasises in his communication of November 2018 that “*States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression.*”⁵⁷ With reference to the 2017 Bill, and having regard to the role and powers proposed for a Digital Safety Commissioner under this Bill, the Special Rapporteur expresses concern that the Commissioner would be an extrajudicial mechanism appointed by the executive branch. Among the related concerns raised by the Special Rapporteur is a concern about how the independence of the Commissioner will be guaranteed.⁵⁸

If the proposal to establish an Online Safety Commissioner as a statutory non-judicial mechanism is pursued, it will be necessary to make explicit provision in the proposed Online Safety Act for the statutory independence of the Commissioner, where such provision is to the effect that the Commissioner shall be independent in the performance of their functions under the Act. Furthermore, for the purposes of demonstrating and safeguarding the independence of this statutory body, it will be important for the DCCAE to give serious consideration to who will formally appoint the Commissioner and who the Commissioner will be accountable to, and to make appropriate corresponding legislative provision for these matters. It will also be important to ensure that there is an open and transparent public recruitment process for the appointment of a Commissioner. While the Commissioner would not be a strictly judicial authority, such measures may assuage concerns about and mitigate against any real or perceived risk of interference by the executive.

Functions and powers

The DCCAE has proposed several roles for an Online Safety Commissioner and this is compounded by the consideration that it appears is being given to the idea that the Commissioner – however called and structured – might also act as a National Regulatory Authority in respect of Video-Sharing Platform Services (VSPS) under the revised AVMSD. In this regard, among the functions currently being contemplated for the Commissioner under Strands 1 and 2 are:

⁵⁶ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 48, para. 66. The Special Rapporteur reiterates this point in his communication of November 2018 (see p. 5).

⁵⁷ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* note 45, p. 6.

⁵⁸ *Ibid*, pp. 6-7.

- **Certification** – certifying that services are operating an Online Safety Code in a manner that is ‘fit for purpose’ as regards meeting the requirements of the AVMSD and meeting “*the policy goal under the national legislative proposal*”
- **Oversight** – requiring regular reports from services on the operation of particular aspects of their service
- **Audit** – conducting audits of the measures services have in place in order to assess whether they are sufficient
- **Issue of notices** – issuing interim and final notices to services regarding failures of compliance, with the power to seek Court injunctions to enforce such notices
- **Imposition of fines** – imposing administrative fines in relation to failures of compliance
- **Reporting** – publishing the fact that a given service has failed to comply or cooperate with the regulator
- **Appeals** – direct involvement in a notice-and-takedown system through requiring a service to remove an individual piece of content within a set timeframe, depending on the nature of the content and having received an appeal from a user who is dissatisfied with the response they have received from a service provider to a complaint they have made
- **Mediation** – providing independent mediation or impartial dispute resolution between VSPS and service users.⁵⁹

In the context of developing its proposals in this regard, the DCCAE will need to assess, determine and clarify a number of matters, including:

- whether the performance of each of the proposed statutory functions by a statutory non-judicial mechanism is rights compatible
- what specific objective(s) will be achieved through each proposed statutory function and, as such, whether it can be demonstrated that the function in question is necessary and legitimate
- whether the proposed statutory functions complement each other
- how the proposed functions position the Commissioner vis à vis other bodies and whether one or more of the proposed functions duplicate or overlap with functions currently performed by other bodies
- whether tasking the Commissioner with also fulfilling the function of a National Regulatory Authority in respect of Video-Sharing Platform Services (VSPS) under the revised AVMSD is appropriate and viable.

Recommendations

For the purposes of ensuring that provisions made for an Online Safety Commissioner under a proposed Online Safety Act are both viable and rights compatible, areas that the DCCAE should also give further attention to in the context of future work to develop its current proposals include:

- identifying and defining harmful online content in a manner that is objective, evidence-based, specific, concrete, clear and unambiguous

⁵⁹ Department of Communications, Climate Action and Environment, *supra* note 2, pp. 10-11.

- providing for the statutory independence of an Online Safety Commissioner, however called and structured
- assigning statutory functions to an Online Safety Commissioner that are necessary, legitimate, appropriate and compatible, and that complement the functions currently performed by other bodies.