



## **General Scheme of the Online Safety and Media Regulation Bill 2020**

### **Submission by the Ombudsman for Children's Office to the Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht**

**4 March 2021**

#### **1. Introduction**

- 1.1. The Ombudsman for Children's Office (OCO) welcomes publication of the updated General Scheme of the Online Safety and Media Regulation Bill in December 2020 (General Scheme). As members of the Joint Committee are aware, the idea of establishing an online safety commissioner has been a salient feature of discussions on how to strengthen provision for children's online safety since publication of the Law Reform Commission's report on Harmful Communications and Digital Safety in 2016. The impact of the Covid-19 pandemic in Ireland has heightened concerns about children being at increased risk of exposure to harmful material and behaviours online, including cyberbullying, violence and hate speech, and grooming for sexual exploitation. While the scope of the General Scheme extends beyond online safety, the proposals set out in the General Scheme to establish a regulatory framework for online safety to address the spread and amplification of certain harmful online content represent a significant opportunity to strengthen the protection of children from harmful content online. Accordingly, the Joint Committee's pre-legislative scrutiny of the General Scheme is a vital task as regards ensuring that the regulatory framework provided for is fit for purpose.
- 1.2. The OCO appreciates the invitation from Joint Committee to make a written submission on the General Scheme. As members of the Joint Committee are aware, the OCO is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002 (2002 Act). Under the 2002 Act, as amended, the Ombudsman for Children has two core statutory functions:
  - to promote the rights and welfare of children up to the age of 18 years
  - to examine and investigate complaints made by or for children about the administrative actions of public bodies, schools and hospitals that have or may have adversely affected a child.

- 1.3. The OCO is making this current submission pursuant to section 7(4) of the 2002 Act and further to our previous engagement with developments relating to this proposed legislation, including through our membership of the National Advisory Council for Online Safety.<sup>1</sup> In this regard, the OCO wishes to acknowledge the very considerable preparatory work that has been undertaken in relation to this General Scheme and the consultative approach taken to its development. Having regard to children's right to be heard in all matters affecting them, the OCO also wishes to note our disappointment that children and young people under 18 have not been afforded a dedicated, child-friendly opportunity to express their views on those aspects of the proposals affecting them.<sup>2</sup>
- 1.4. As an independent statutory body whose work is underpinned by primary legislation, the OCO understands how important it is that such legislation is enabling: the prospective authority, credibility and effectiveness of the proposed Media Commission (Commission) is largely contingent on the statutory framework that will be put in place for it as well as the resources that will be available to the Commission to discharge its functions. For this reason, the OCO encourages the Joint Committee to consider one broad question as it works to scrutinise the General Scheme: do the provisions made under the General Scheme set the prospective Commission up to succeed and to enjoy public confidence as an effective statutory regulator, including with regard to online safety?
- 1.5. The main purpose of the observations set out in this current submission is to encourage members of the Joint Committee to seek additional information and clarification on a range of matters provided for under the General Scheme with a view to ensuring that the provisions made will enable the Commission to succeed and, with that, to serve the public, particularly children, well.

## **2. Observations on the General Scheme**

- 2.1. Having reviewed the General Scheme, the OCO wishes to make observations on several of the Heads, with particular reference to Heads under Part 4 of the General Scheme, which concerns 'Online Safety'. Our observations are set out briefly below.

### **Head 2 – Interpretation**

- 2.2. Among the definitions set out under Head 2 is a definition of 'children' as "*persons under the age of 18 years*". While Head 2 does not include a definition of 'minors', references to children under subsequent Heads involve use of the terms 'children' and 'minors'. In the

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<sup>1</sup> Ombudsman for Children's Office (2019), [Submission](#) to the Department of Communications, Climate Action and Environment's public consultation on the 'Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive'.

<sup>2</sup> *Ibid*, p.13.

interests of legislative clarity and consistency, it would be better for one term to be used to refer to children under 18 years of age. In this regard, the OCO is of the view that it would be preferable to use the term 'children'.

## Head 10 – Functions

2.3. The OCO welcomes that the functions of the proposed Commission set out under Head 10 include:

- promoting public awareness, encouraging research and conducting public information campaigns for the purpose of educating and providing information to the public in relation to online safety and media literacy
- promoting educational initiatives and activities relating to online safety.

2.4. The OCO notes that the General Scheme appears to be otherwise silent on the proposed awareness raising and education functions of the Commission, including with regard to online safety. We share the concern of the Children's Rights Alliance that the General Scheme does not provide for the Commission to evaluate or regulate educational and community awareness programmes about online safety.<sup>3</sup> The OCO encourages the Joint Committee to examine the scope for an amendment to the General Scheme to provide for the Commission to fulfil this function.

## Head 19 – Membership of the Commission

2.5. The provisions made under Head 19 in relation to membership of the Commission do not make explicit reference to or provision for an Online Safety Commissioner. The absence of an explicit provision in this regard is notable given that:

- the establishment of an Online Safety Commissioner has been a core component of proposals to regulate harmful content on online platforms since these proposals were first announced in 2019
- the explanatory notes under Head 10 state that the *"Minister wishes that individual Commissioners can take responsibility for clearly delegated functions"* and that *"[t]his is particularly relevant in the case of the Online Safety Commissioner"*.

2.6. While the OCO understands that this lacuna under Head 19 is deliberate and that it is intended that an Online Safety Commissioner will be a member of the proposed Commission, we suggest that it may be preferable to make explicit provision for this role in the legislation itself.

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<sup>3</sup> Children's Rights Alliance (2021), [Report Card 2021](#), p.213.

## Head 49A - Categories of harmful online content

2.7. The OCO appreciates the challenges associated with defining harmful online content in law and the careful consideration that has been given to formulating the proposed approach set out under Head 49A. In this regard, the OCO understands why it is not proposed to define harmful online content as a singular concept and notes that the Department has not identified a jurisdiction where defining harmful online content or online harm in law has been attempted. Furthermore, the OCO has no difficulty with the four specific areas identified under Head 49A being classified as harmful content. However, we do have residual concerns about the proposal to enumerate *categories* of harmful content. In particular, it remains unclear whether the proposed use of categories provides for an approach that is sufficiently specific to:

- satisfy the need for the legislation to be rights compliant
- enable the Commission to discharge its functions in respect of harmful online content appropriately and effectively.

2.8. The OCO expects that work by the Office of the Parliamentary Counsel to prepare a legal draft of the Bill will facilitate an assessment of whether the proposed use of categories provides for a rights-compliant approach. We also encourage the Joint Committee to avail of the opportunity presented by its pre-legislative scrutiny of the General Scheme to examine both of these matters further.

## Head 49C – Definition of age-inappropriate online content

2.9. Part 4 of the General Scheme incorporates a distinction between ‘harmful online content’ (Head 49A) and ‘age-inappropriate online content’ (Head 49C). The OCO understands that, in principle, there may be types of content that it is inappropriate for children to be exposed to without such content necessarily or always already being harmful to children. Having regard to Head 49B, the OCO also appreciates that the General Scheme has a built-in mechanism to enable the Commission to propose categories of ‘harmful online content’ in addition to those currently enumerated under Head 49A. However, taking into account the types of material currently referenced in the definition of age-inappropriate online content under Head 49C,<sup>4</sup> the OCO encourages the Joint Committee to obtain further clarification about the criteria used to differentiate between ‘harmful online content’ and ‘age-inappropriate online content’ and how these criteria have been applied in the context and for the purposes of devising Head 49C.<sup>5</sup>

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<sup>4</sup> The types of material specified as ‘age-inappropriate’ under Head 49C are a) material containing or comprising gross or gratuitous violence, b) material containing or comprising cruelty, including mutilation and torture, towards humans or animals, and c) material containing or comprising pornography.

<sup>5</sup> Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media (2020), [Online Safety and Media Regulation Bill. Annex to the Regulatory Impact Analysis](#), pp.177-207.

## **50A – Online safety codes**

- 2.10. Head 50A specifies a number of online safety codes that the Commission may prepare as regards standards and practices which designated online services will be required to observe. However, it is unclear whether or not it is proposed that the legislation will require or enable the Commission to develop the online safety codes specified. The OCO suggests that it would be helpful for the Joint Committee to obtain clarification about whether it is envisaged that the indicative list of codes referenced under Head 50A will be included in the Bill and, if so, whether it is anticipated that the Commission will have discretion to decide if it develops these particular codes.

## **51A – Online safety guidance materials**

- 2.11. Head 51A provides that the Commission may issue guidance materials on matters relevant to harmful online content and age-inappropriate online content. As currently provided for, the proposed status of such guidance materials is insufficiently clear. It is proposed that relevant and designated online services “*shall*” have regard to these guidance materials “*as appropriate*” without any information being provided as to what is intended by use of the phrase “*as appropriate*”. Furthermore, the OCO’s understanding is that these guidance materials will not contain any legal obligations. The OCO encourages the Joint Committee to establish what the status of the proposed guidance materials will be and what steps, if any, the proposed Commission will be able to take if one or more relevant and designated online services do not have “*appropriate*” regard to guidance issued by the Commission.

## **52B – Systemic complaints scheme**

- 2.12. The OCO welcomes the suggestion under Head 50A that among the codes that the Commission may develop is a code focused on user complaints- and/or issues-handling mechanisms operated by designated online services or categories thereof. From our extensive experience of discharging our statutory complaints function, the OCO is of the view that, where possible, local resolution of complaints serves service users, including children, well. Practical measures directed towards supporting good complaints-handling practice by service providers are important as regards facilitating the appropriate and effective local resolution of complaints.
- 2.13. We also welcome the proposals set out under Head 52A, which provide the Commission with the authority to audit user complaint- and/or issues-handling mechanisms operated by designated online services and to issue corresponding compliance notices to services. In this regard, it appears to the OCO that this role will facilitate the Commission to take a proactive, targeted and agile approach to addressing issues of concern.
- 2.14. However, the OCO is concerned about the proposals for a systemic complaints scheme set out under Head 52B. It is proposed that the Commission will be tasked with devising and

operating a systemic complaints scheme and that this task will include outlining the process for nominating bodies that can notify the Commission of systemic issues and the process and standards to be followed by these nominated bodies.

2.15. Given that Head 52A tasks the Commission with devising the proposed systemic complaints scheme, very limited information is provided in the General Scheme itself about what this scheme may look like in practice, including as regards:

- which specific bodies may ultimately be designated as nominated bodies
- what types of expertise it is envisaged such bodies will have
- how these bodies will be resourced to fulfil the role proposed for them
- how these bodies will determine which complaints or issues may be notified to the Commission.

This absence of clarity is problematical in so far as it mitigates against an assessment of whether or not the proposed approach is appropriate and likely to be effective.

2.16. The OCO is aware that the proposal to establish a systemic complaints scheme is pragmatic and linked to attendant concerns about the resources the Commission would require to deal with the potential volume of individual complaints that could be brought to it directly in relation to issues arising with online services. While understandable, this rationale appears to the OCO to be primarily system-oriented rather than person-centred. Among other things, it is unclear how much consideration has been given to the matter of whether the proposed systemic scheme will be an accessible and effective mechanism for service users, including children.

2.17. Having regard to children's right to an effective remedy, the OCO is concerned that the proposed approach risks creating significant barriers to children being able to seek redress. The OCO encourages the Joint Committee to scrutinise the proposals set out under Head 52A from a service user perspective and in particular from children's rights perspective, and to take into account relevant European and international guidance in this regard.<sup>6</sup>

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<sup>6</sup> UN Committee on the Rights of the Child (2003), [General Comment No.5, General measures of implementation of the Convention on the Rights of the Child \(arts. 4, 42 and 44, para. 6\)](#), para.24; Council of Europe (2018), 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](#), section 3.7, p.22f.