



Coimisiún na Meán
Consultation on the Draft Online Safety Code and Statutory Guidance
Material

Observations of the Ombudsman for Children's Office
31 January 2024

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1. Introduction

The Ombudsman for Children’s Office welcomes the publication by Coimisiún na Meán (Commission) of a consultation on its draft Online Safety Code and draft Statutory Guidance Material.¹

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, and
- to examine and investigate complaints made by or on behalf of children about the administrative actions of public bodies, schools and voluntary hospitals that have or may have adversely affected a child.

The OCO welcomes the opportunity to provide observations on the draft Code and Guidance set out in the Commission’s consultation document. We have prepared these observations pursuant to section 7(4) of the 2002 Act, which provides for the Ombudsman for Children to advise on any matter concerning the rights and welfare of children.

The Commission’s Call for Inputs stated that the Commission would take a child-centred approach to developing the Code where it impacts children, referring to the rights of children set out under both Article 24 of the EU Charter of Fundamental Rights (Charter) and Article 3 of the UN Convention on the Rights of the Child (UNCRC).² This reflects the obligation placed on the Commission by sections 139M(g) and 139ZA(h) of the [Online Safety and Media Regulation Act 2022](#) to have regard in particular to the rights of users when preparing online safety codes and guidance materials. The purpose of these observations is to highlight issues that we believe require further consideration to ensure that the draft Code and Guidance have appropriate regard to children’s rights and that Video-Sharing Platform Services providers (VSPS) respect, protect and fulfil children’s rights. The OCO encourages the Commission to consider these observations alongside the OCO’s submission on the Commission’s Call for Inputs on the online safety code in September 2023.³

2. Child rights-based approach

Question 24 of the consultation asks for comments on any section or aspect of the draft Code, while question 25 asks for comments on the draft Guidance.

The OCO’s submission on the Commission’s Call for Inputs suggested that the Commission should situate the Code with a human rights framework and give specific and explicit regard to children’s rights in the Code. In this regard, the OCO welcomes that the Commission makes explicit reference to children’s rights in the draft Code and draft Guidance. This includes:

- the requirement in sections 4.2 and 4.13 that the Commission must act in accordance with the Constitution of Ireland, the Charter and the European Convention on Human Rights;
- explicit reference in section 4.14 to the rights of the child as being among the rights of greatest relevance to the Commission in the performance of its functions;
- the inclusion of principles in sections 4.15 to 4.22 that will guide the Commission’s interpretation, application and enforcement of the Code; and

¹ Coimisiún na Meán, [Coimisiún na Meán opens public consultation on Ireland’s first Online Safety Code](#), 8 December 2023.

² Coimisiún na Meán (2023), [Call For Inputs: Online Safety](#), p. 5.

³ Ombudsman for Children’s Office (2023), [Coimisiún na Meán Call for Inputs on an Online Safety Code for Video-Sharing Platform Services: Submission by the Ombudsman for Children’s Office](#).

- the inclusion in the draft Guidance of the rights of children under the Charter and the UNCRC as factors that VSPS must have special regard to when designing, implementing and maintaining parental controls.

As noted in the introduction, the Commission’s Call for Inputs stated that the Commission would take a child-centred approach to developing the Code where it impacts children, with particular reference to the rights of children set out under both Article 24 of the Charter and Article 3 of the UNCRC.⁴ The OCO notes however that the draft Code does not make reference to the UNCRC and that the UNCRC is only referenced once in the draft Guidance in relation to parental controls. Though one of the Code’s aims is to protect children from harmful content, the Code’s provisions will engage and have an impact on several other children’s rights set out under the UNCRC. As noted in the OCO’s submission on the Commission’s Call for Inputs, these include, among others, children’s rights to access information, to freedom of expression and to privacy. **The OCO encourages the Commission to include explicit reference to the rights and principles contained in the UNCRC, when referring to children’s rights that apply to the Commission and VSPS providers in implementing the Code and Guidance.**

The OCO also notes that, aside from requiring the Commission to act in accordance with children’s rights under the Irish Constitution and European human rights instruments, there is only one instance in the draft Code and draft Guidance in which VSPS providers are expressly required to have regard to children’s rights when adopting measures to comply with the Code. The reason for which the Commission states that VSPS providers should have special regard to the rights of children in the section on parental controls in the draft Guidance, and not in respect of other obligations placed on VSPS providers, is unclear. Having regard to the OCO’s submission on the Commission’s Call for Inputs, **the OCO strongly encourages the Commission to include explicit reference to children’s rights, including children’s rights under the UNCRC, as a cross-cutting principle that VSPS providers must have regard to when implementing any obligation under the Code and Guidance that affects children. This could be achieved by:**

- including children’s rights as a principle in a cross-cutting section on principles in the Code that VSPS providers must have regard to, similar to the principles applicable to the Commission in section 4 of the draft Code;
- including reference to children’s rights in the General Guidance section of the draft Guidance; and/or
- incorporating reference to children’s rights consistently throughout the draft Code and Guidance in respect of each obligation placed on VSPS providers, similar to the approach taken to the section in the draft Guidance on parental controls.

3. Measures to be taken by VSPS providers

Parental controls

Question 11 of the consultation asks for views on the requirements in relation to parental controls. Sections 11.24 to 11.28 of the draft Code require VSPS providers to provide for parental control systems, while the draft Guidance sets out the features that the Commission considers to be effective parental controls and the considerations to which VSPS providers should have regard.

⁴ Coimisiún na Meán (2023), [Call For Inputs: Online Safety](#), p. 5.

Information on parental controls for children and their parents/guardians

The OCO welcomes that section 11.27 of the Code requires VSPS providers to explain to users how parental control systems operate and draw users' attention to them by appropriate means. **The OCO encourages the Commission to include within such a requirement that VSPS providers should provide:**

- **age-appropriate and transparent information to children who are users of the service on how parental controls operate; and**
- **information for parents/guardians of such children on how parental controls work and their appropriate use, having regard to the children's rights considerations involved in applying parental controls.**

Default safety and privacy settings

In the corresponding sections on parental controls in the draft Guidance, the Commission includes a number of default settings in a list of suggested parental controls that VSPS providers may adopt to allow parents/guardians to protect children from harmful or illegal content. The Commission advises that parental controls may include a range of features, including:

- default to privacy settings being turned on for a child;
- default to geolocation settings being turned off for a child;
- default to content that is universally suitable for children; and
- default to private rather than public sharing of any posts.⁵

It is not clear from the draft Code and Guidance if the Commission intends for parents/guardians to have the sole responsibility for deciding whether or not to apply default safety and privacy settings to children's accounts, or whether such parental controls are intended to operate in parallel to VSPS providers' obligations to apply such settings by default.

The inclusion of these measures in such a way as to suggest that it will be up to parents/guardians to decide whether or not default privacy and safety settings should be applied in their children's account, and the inclusion of default safety and privacy settings as discretionary measures, is of concern to the OCO. It also appears inconsistent with VSPS providers' data protection obligations and with the high standard set by the Data Protection Commission (DPC) in its [Fundamentals for a Child-Oriented Approach to Data Processing](#), both of which are referenced in the draft Guidance. As the Commission is aware, data protection obligations require organisations that process personal data to adopt measures that respect the principles of data protection by design and by default. Though the DPC acknowledges that there is no one-size-fits-all solution to data protection by design and default, the measures recommended by the DPC include;

- applying the strictest privacy settings to services directed at/intended for, or likely to be accessed by, children;
- turning off geolocation by default for child users; and
- defaulting to lower-risk settings when controls are delegated to parents.⁶

⁵ Coimisiún na Meán (2023), [Consultation Document: Online Safety](#), p. 69.

⁶ Data Protection Commission (2021), [Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing](#), pp. 63-65.

The DPC further emphasises that data protection by design and default obligations should not result in the delegation of responsibility to parents/guardians to turn off settings and features on their child's account.⁷ Similar guidance is included in the Australian e-Safety Commissioner's safety by design principles, the first of which – 'service provider responsibility' – states that the burden of safety should never fall solely upon the user.⁸

The Committee has emphasised that, to be in line with children's rights standards, States parties should require the integration of a high standard of safety by design and privacy by design into digital products and services that affect children.⁹ The OCO welcomes that parents/guardians may be given the ability to modify default settings, in accordance with their child's needs and evolving capacities, however the primary responsibility should be on VSPS providers in the first instance to ensure that default settings on its services that are available to and accessed by children are set to a high standard of safety by design and privacy by design. **The OCO encourages the Commission to clarify in and through the draft Code and Guidance that including default settings among the list of parental controls that VSPS providers may adopt on their service does not obviate the need for providers to adopt a high level of safety by design and privacy by design in the development and modification of features on their service.**

Media literacy

Question 18 of the consultation asks for views on the requirements in relation to media literacy measures, while question 25 asks for views on the draft Guidance. Section 13.1 of the draft Code requires VSPS providers to provide effective media literacy measures and tools and to take steps to raise users' awareness of those measures and tools. Section 13.2 further requires VSPS providers to publish an action plan specifying the measures it will take to promote media literacy, to update this plan annually and to report to the Commission on the impact of the measures taken. The corresponding section of the draft Guidance sets out the qualities of effective measures to promote media literacy, their aims, and the measures that the Commission advises providers to consider undertaking.

Though the OCO welcomes the inclusion of a requirement that VSPS providers should provide media literacy measures for users, we are concerned by the absence of a specific requirement to provide media literacy measures that are child-friendly and that address the needs of children who are users of VSPS. In particular, we are concerned by the absence of:

- measures to raise awareness among children as to the functions and features of the particular service, the harmful content and prohibited user-behaviour that may arise on the provider's service, and the service's online safety features; and
- measures to raise awareness among parents of same in order to support parents to assist their child in realising their rights when using the service.

Having regard to the OCO's submission on the Commission's Call for Inputs, **the OCO encourages the Commission to include an explicit requirement in section 13 of the draft Code that VSPS providers should provide media literacy tools that are child-friendly for children and their parents, and corresponding information in the draft Guidance on how VSPS providers should do so.**

⁷ Ibid., p. 66.

⁸ eSafety Commissioner, [Safety by Design: Principles and background](#).

⁹ UN Committee on the Rights of the Child (2021), [General comment No. 25 \(2021\) on children's rights in relation to the digital environment](#), CRC/C/GC/25, para. 70, 77, 89, 110 and 116.

User complaints

Question 12 of the consultation asks for views on the requirements in the draft Code in relation to user complaints, while question 25 asks for comments on the draft Guidance. Section 11.29 of the draft Code requires VSPS providers to establish and operate transparent, easy-to-use and effective procedures for handling and resolving user complaints while Section 11.30 of the Code requires VSPS to handle complaints in a diligent, timely, non-discriminatory and effective manner.

As the OCO noted in its submission on the Call for Inputs, children's rights standards require that procedures for handling complaints made by and on behalf of children are child-friendly. In this regard, the OCO recommended that the Commission include a requirement in the Code that VSPS providers must put in place child-friendly complaints procedures. In [A Guide to Child-Centred Complaints Handling](#), the OCO has set out seven core principles of good practice for dealing with complaints made by and on behalf of children in a child-centred manner. The OCO sets out the concrete actions that organisations can take to implement the core principles, thereby ensuring that their complaints processes are child-centred. We note that other organisations similarly recommended the inclusion of a requirement that VSPS providers put in place child-friendly complaints processes.¹⁰

The OCO welcomes that, in the section on complaints in the draft Guidance, the Commission advises VSPS providers to have regard to the OCO's guide in the case of complaints made by children. However, we note that the draft Code does not place an explicit requirement on VSPS providers to provide complaints procedures that are child-friendly. We also note that the corresponding sections of the draft Guidance do not elaborate on the type of measures that VSPS providers should take to ensure that the principles of transparency, easy-to-use and effectiveness, referenced in Section 11.29 of the draft Code, are translated into complaints-procedures established and operated by them, including how providers can apply these principles to complaints affecting children. Similarly, it is not clear from the Code and corresponding sections in the draft Guidance what type of measures the Commission expects VSPS providers to take to ensure that their handling of complaints is conducted in a diligent, timely, non-discriminatory and effective manner in practice, including with regard to complaints affecting children.

The OCO encourages the Commission to include an explicit requirement in the draft Code that VSPS providers should establish child-friendly procedures for handling and resolving complaints made by or on behalf of children who are users of VSPS. The OCO also encourages the Commission to elaborate on the corresponding measures that can be taken by VSPS providers in the draft Guidance, in order to ensure that their complaints-handling processes are child-friendly, including with reference to the OCO's guide.

4. Future supplementary measures and related guidance

Online safety impact assessments

Question 28 of the consultation document asks for considerations on the draft supplementary measures for inclusion in the Code and draft supplementary guidance set out in Appendix 3.

The OCO welcomes that Section 1.1 of Appendix 3 proposes to introduce a requirement in the Code that VSPS providers must undertake online safety impact assessments prior to introducing a new function relating to user-generated videos or a substantial modification to such functions, and that

¹⁰ CommSol (2023), [Summary of Submissions to Call for Inputs - "Developing Ireland's First Binding Online Safety Code for Video-Sharing Platform Services"](#), pp. 102-104.

VSPS providers must complete a safety impact assessment for existing services within one year of the adoption of the Code. The OCO also welcomes that the assessment methodology will have regard to the principle of safety by design, the safety of children, and children's rights under Article 24 of the Charter.

However, neither the Code nor supplementary guidance make it clear what steps VSPS providers should take to ensure that their assessments are carried out in compliance with children's rights set out in Article 24 of the Charter. In addition, though the Commission made reference in its Call for Inputs to the possibility of risk assessments including child rights impact assessment (CRIA),¹¹ it is not clear if the Commission intends for the draft supplementary measures and corresponding guidance to adopt an approach to online safety impact assessments that incorporates CRIA.

Article 24 of the Charter states, among other things, that in all actions relating to children, the child's best interests must be a primary consideration. This provision is derived from the best interests of the child principle enshrined in Article 3 of the UNCRC. Ensuring that the best interests of the child are a primary consideration in all actions relating to children, whether taken by public bodies or private organisations, requires that such organisations undertake continuous CRIA.¹² Though the Committee states that different methodologies and practices may be developed when undertaking CRIA, they must at a minimum use the UNCRC, as well as general comments and concluding observations issued by the Committee, as a framework for assessment. This means underpinning assessments with the four general principles of the UNCRC and assessing the impact on the range of rights that children have under the UNCRC, including children's right to protection from harm as well as other children's rights, such as access to information, privacy and freedom of expression.

In its guidance on children's rights in the digital environment, the Committee and the Council of Europe have stated that States parties should require business enterprises to regularly undertake CRIA and to take reasonable and proportionate measures to manage and mitigate any risks to children and their rights identified through such CRIA.¹³ In our submission on the Commission's Call for Inputs, we recommended that VSPS providers should be required to undertake CRIA as part of the process to identify, prevent and mitigate risks of harm to children on their service. We note that the DCEDIY and other organisations have similarly expressed support for the application of CRIA.¹⁴

The OCO encourages the Commission, as it further develops the proposed supplementary measures, to consider incorporating CRIA within the requirement in the draft Code that VSPS providers must carry out safety assessments. The OCO also encourages the Commission to include guidance in the associated sections of the draft supplementary guidance on how providers can implement CRIA when undertaking online safety risk assessments. Such guidance should, among other things, set out:

¹¹ Coimisiún na Meán (2023), [Call For Inputs: Online Safety](#), p. 22.

¹² UN Committee on the Rights of the Child (2013), [General comment No. 14 \(2013\) on the right of the child to have his or her best interests taken as a primary consideration \(art. 3, para. 1\)](#), CRC/C/GC/14, para. 35 and para. 99; UN Committee on the Rights of the Child (2013), [General comment No. 16 \(2013\) on State obligations regarding the impact of the business sector on children's rights](#), CRC/C/GC/16, paras. 78-81.

¹³ UN Committee on the Rights of the Child (2021), [General comment No. 25 \(2021\) on children's rights in relation to the digital environment](#), CRC/C/GC/25, para. 23; Council of Europe (2018), [Guidelines to respect, protect and fulfil the rights of the child in the digital environment: Recommendation CM/Rec\(2018\)7 of the Committee of Ministers](#), p. 26.

¹⁴ CommSol (2023), [Summary of Submissions to Call for Inputs - "Developing Ireland's First Binding Online Safety Code for Video-Sharing Platform Services"](#), p. 8 and pp. 116-117.

- the children’s rights that VSPS providers must take into account, both under the Charter and the UNCRC, when assessing new or existing functions;
- how providers can appropriately take such rights into account; and
- the steps that providers should take to ensure that the process of undertaking assessments is itself child-centred and rights-based.

The European Network of Ombudspersons for Children has developed guidance on how to conduct a CRIA, which may be useful to the Commission in its work in this regard.¹⁵

¹⁵ European Network of Ombudspersons for Children (2020), [*Common Framework of Reference on Child Rights Impact Assessment: A Guide on How to carry out CRIA*](#).