

THE 1 2 3 OF ONLINE SAFETY

Online Safety Individual Complaints Mechanism Concept Paper

Why do we need an individual complaints mechanism?

Currently the General Scheme provides definitions of harmful content for the purposes of the legislation. The definition encompasses material that would fall within the cyberbullying category as well as material promoting self-harm, suicide or eating disorders.¹ However, it does not provide for a mechanism whereby an individual who is subject to this harmful content can access the Online Safety Commissioner to make a complaint when an online platform fails to respond effectively and provide an adequate remedy.



What is currently provided for in the General Scheme?

Head 50A provides that the Media Commission shall prepare and from time-to-time revise online safety codes, governing standards and practices having regard specifically to the protection of children and young people. Designated or categories of online services will have to observe these codes, governing standards and practices.

The General Scheme does not provide a mechanism for individuals to appeal to the Commission when an online platform fails to comply with the standards of the Codes of Practice on Digital Safety. Instead, the Bill provides for a 'systematic complaints scheme'² or 'super complaints'³ designed for nominated bodies, such as expert Non-Governmental Organisations (NGO), to bring systematic issues to the attention of the Commission, an example of which could be that a vast number of complaints about a particular issue are made against a particular provider.

There is no detail on how this systemic approach would work in practice to deliver an effective remedy or a pathway to a remedy for the individual. It is not clear what threshold or number of complaints would constitute making a 'super complaint' to the Online Safety Commissioner. Notably under the proposed system nominated bodies would not have the ability nor the power to take action on any complaint being brought to them.

Why is the systematic complaints system not enough?

A systematic complaints system does not vindicate a child's right to an effective remedy. The Council of Europe recommends Member States should ensure that a child's right to an effective remedy under the European Convention of Human Rights⁴ is respected and protected when their rights have been infringed online.⁵



1 General Scheme of the Online Safety and Media Regulation Bill Head 49A

2 General Scheme of the Online Safety and Media Regulation Bill Head 52B.

3 *ibid* explanatory note at Head 52.

4 European Convention of Human Rights Art 6 and 19.

5 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' (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 8 January 2021, 24.

This means that States are required to make provision for ‘known, accessible, affordable, and child-friendly avenues through which children, as well as their parents or legal representatives, may submit complaints and seek remedies’⁶ Guidance is given on what constitutes an effective remedy and it includes inquiry, explanation, reply, correction, proceedings, immediate removal of unlawful content, apology, reinstatement, reconnection and compensation.⁷ Importantly, it provides that the process should be speedy, child-friendly and provide the appropriate redress for the child or young person.⁸

What will an individual complaints mechanism look like?

An individual complaints mechanism would involve a number of steps:

Step 1: Report to the Platform:

Where a young person is subject to harmful online content, they would first have to report the content to the online platform using its reporting procedures. The Online Safety Commissioner would have a role, as is currently set out above under Head 50A, in setting online safety codes and under Head 52A they would have the power to audit the complaints handling system of a service provider. These powers would help to ensure that the complaints systems of the online service providers are robust enough to resolve many complaints at this first step.

Step 2: Make a complaint to the Online Safety Commissioner

Only after a complaint is made first to the platform and the individual feels they were not treated fairly, could they then complain to the Online Safety Commissioner about the platform in situations where:

- They did not receive a satisfactory outcome to their complaint from the online platform; or
- The online platform did not respond within a set timeframe.

Step 3: Preliminary Examination

Once the Online Safety Commissioner receives a complaint, they will engage in a preliminary examination which would be akin to a triage process. This would involve the Office of the Commissioner reviewing the complaint to ensure:

- a. That it falls within their statutory remit and
- b. That the complaint has first been made to the online platform and the process has been completed or that no response has been received within a set timeframe.

If the matter does not fall within the remit of the Online Safety Commissioner, then the person making the complaint can take it back to the platform or to another body if more appropriate.

If the person has not been to the platform first, then they will be advised of the need to go to the platform first and raise a complaint there.

⁶ 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’ (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 8 January 2021, 24.

⁷ *ibid.*

⁸ *ibid.*

Step 4: Investigation

Where the complaint passes the preliminary examination, the Online Safety Commissioner would then commence an investigation of the complaint to try to achieve a resolution. This would involve the Commissioner engaging both with the platform and the person making the complaint. The investigation would focus on how the platform engaged with the complaint and if they dealt with the complaint in line with the Codes of Practice.

If the issue cannot be resolved by the Commissioner engaging directly with the platform, a decision would then be issued by the Online Safety Commissioner which could include take down orders.

Step 5: Enforcement

If the Online Safety Commissioner's decision is not carried out by the platform, they can bring the platform to court to have their decision enforced.

If the person making the complaint is not happy with the way in which the Online Safety Commissioner made their decision after the investigation they can seek to have it reviewed by the courts.

Would an individual complaints mechanism result in content that is potentially criminal in nature being referred to the civil regulator?

No. The inclusion of a preliminary examination of a complaint by the Office of the Online Safety Commissioner would ensure that they would only investigate complaints that come within its remit under the legislation.



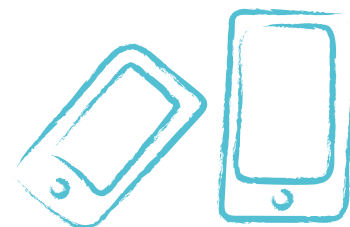
Would an individual complaints mechanism incentivise regulated online services to refer matters to the regulator rather than to take responsibility for resolving the matter themselves?

No. The individual complaints mechanism would require the online platforms to engage with the complaint themselves first. An individual will not be able to make a complaint against another individual, instead their complaint would relate to how the online service handled the complaint made to them and if this was done in line with the law and codes of practice set out by the Online Safety Commissioner. Head 50A provides that the Media Commission shall prepare online safety codes, governing standards and practices of online services requiring them to operate more robust complaints systems. This should mean that the individual complaints mechanism would only be used in circumstances where a platform's reporting procedures failed to engage effectively with a complaint. We believe that having an individual complaints mechanism would in fact help strengthen online services' own complaints systems.

Will the Online Safety Commissioner receive an unworkable volume of complaints?

The Online Safety Commissioner would be used as a last resort in situations where online services/platforms themselves fail to deal with complaints in the proper manner. The use of a system that incorporates a preliminary examination would help to ensure only those complaints that fall within the statutory remit would move forward to investigation. The power of the Online Safety Commissioner to set Codes of Practice would provide a mechanism for the Commissioner to ensure that robust complaints systems are in place for the individual platforms and therefore increasing the likelihood of resolution for people at the very first step.

A similar approach is in operation in Australia. The Australian eSafety Commission includes an individual complaints mechanism which has proved very effective. Over the course of 2019/2020, the Office of the eSafety Commissioner reported:



- **14,573 reports about potentially prohibited online content**
- **Issued 16 notices to Australian and overseas services in relation to abhorrent violent material**
- **690 complaints about serious cyberbullying targeting Australian children.⁹**

What do we want to see happen next with the proposed legislation?

The proposed powers of the Commission should be amended to include an individual complaints mechanism to ensure that when online providers do not respect the rights of children and young people, and they have exhausted all appropriate channels with the relevant platform, they will have access to an effective remedy in line with their rights under the European Convention of Human Rights.¹⁰ This should also align with the Council of Europe Guidelines which state that in the digital environment an effective remedy includes inquiry, explanation, reply, correction, proceedings, immediate removal of unlawful content, apology, reinstatement, reconnection and compensation.¹¹

⁹ Australian Communications and Media Authority, Annual Reports 2019-202, p200.

¹⁰ European Convention of Human Rights Arts 6 and 19.

¹¹ 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' (COE 2018) <<https://bit.ly/2Xp9hpE>> accessed 8 January 2021, 24.