

Analysis of the Online Safety and Media Regulation Bill

March 2022



Founded in 1995, the Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

Accompaniment Support Service for Children (A.S.S.C.)
Ag Eisteacht
Alcohol Action Ireland
Amnesty International Ireland
An Cosán
Aoibhneas
AsIAM
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown Camp
Bedford Row Family Project
BeLonG To Youth Services
Blossom Ireland
Catholic Guides of Ireland
Child Law Project
Childhood Development Initiative
Childminding Ireland
Children in Hospital Ireland
Children's Books Ireland
Children's Grief Centre
Clarecare
COPE Galway
Cork Life Centre
Crann Centre
Crosscare
CyberSafeKids
Cycle Against Suicide
Dalkey School Project National School
Daughters of Charity Child and Family Service
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Doras
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dyslexia Association of Ireland
Dyspraxia/DCD Ireland
Early Childhood Ireland
Educate Together
EPIC
Equality for Children
Extern Ireland
FamiliBase
Féach
Focus Ireland
Foróige
Gaelscoileanna Teo
Galway Traveller Movement
Good Shepherd Cork
Immigrant Council of Ireland
Inclusion Ireland
Institute of Guidance Counsellors
Irish Aftercare Network
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals' Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation
Jack and Jill Children's Foundation
Jigsaw
Katharine Howard Foundation
Kids' Own Publishing Partnership
Kinship Care
Leap Ireland
Let's Grow Together! Infant and Childhood Partnerships CLG.
LGBT Ireland
Mecpaths
Mental Health Reform
Mercy Law Resource Centre
Migrant Rights Centre Ireland
Mothers' Union
My Mind
My Project Minding You
Museum of Childhood Project
Music Generation
New Directions
National Childhood Network
National Council for the Blind of Ireland
National Forum of Family Resource Centres
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
Novas
One Family
One in Four
Parents Plus
Pavee Point
Peter McVerry Trust
Prevention and Early Intervention Network
Private Hospitals Association
Psychological Society of Ireland
Rainbow Club Cork
Rainbows Ireland
Rape Crisis Network Ireland (RCNI)
Realt Beag/Ballyfermot Star
Respond Housing
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
School of Education UCD
Sexual Violence Centre Cork
SIPTU
Simon Communities of Ireland
Social Care Ireland
Society of St. Vincent de Paul
SPHE Network
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
TASC
Teachers' Union of Ireland
Terenure College Rugby Football Club
Transgender Equality Network Ireland
The Anne Sullivan Foundation
The Ark, A Cultural Centre for Children
The Irish Red Cross
The UNESCO Child and Family Research Centre, NUI Galway
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
Women's Aid
Youngballymun
Young Social Innovators
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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Introduction

The Children’s Rights Alliance unites over 130 organisations working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services. We identify problems for children. We develop solutions. We educate and provide information and legal advice on children's rights.

The Children’s Rights Alliance welcomes the publication of the Online Safety and Media Regulation (OSMR) Bill in January 2022. The Bill has the potential to put an end to the age of self-regulation by the big tech and social media giants and create a level of accountability that is sorely needed. It could open the window to a safer online world for children and young people in this country.

Children make up one third of global online users.¹ Results from a National Survey of Children, their Parents and Adults regarding Online Safety conducted between December 2019 and October 2020, found that 62 per cent of children and young people in Ireland, aged nine to 17 years, use social media.² This rises to 90 per cent of 15 to 17 year olds.³ In 2020, CyberSafeKids found that 84 per cent of eight to 12 year olds in Ireland are on social media platforms despite current age restrictions.⁴ They also reported that a quarter of all children have seen or experienced something online in the last year that bothered them, with almost one third of those children having kept it to themselves rather than report it to their parents or someone else.⁵

While the online world brings unparalleled opportunity to children to learn, create, connect and socialise, it also brings unparalleled risk, including the loss of personal data, exposure to harmful content, cyberbullying, negative impacts on health and well-being, online grooming and extortion. For too long legislation and policy have not kept pace with the evolution of the online world. This has left children and young people at risk and unprepared to appropriately and safely navigate online platforms.

Research commissioned in 2021 by the Children’s Rights Alliance as part of the [1,2,3 Online Safety campaign](#) found that 91 per cent of the public believe that the Government should stand up to the big tech companies and set rules that protect the public from harmful or illegal use. This research also showed that 70 per cent of the public believe that the Government should introduce laws that hold social media companies responsible for content they allow on their platforms.⁶ Self-regulation of the industry can result in inconsistent standards being applied.

1 Unicef, *Children in the Digital World* (UNICEF 2017).

2 National Advisory Council for Online Safety, *Report of a National Survey of Children, their Parents and Adults regarding Online Safety 2021* (2021) 8.

3 *ibid.*

4 CyberSafeKids, *Annual Report 2020*, (2021) 24.

5 *ibid.* 3.

6 Children’s Rights Alliance, ‘Irish public send clear message to Government – do not shy away from regulating social media and big tech’, (Press Release 16 October 2021) <<https://bit.ly/3s8gk4T>> accessed 1 February 2022.

International standards and children's rights in the digital world

The UN Convention on the Rights of the Child (UNCRC), which Ireland ratified in 1992, predates the evolution of the digital technology that is nowadays used in everyday life meaning that the Convention does not currently encompass an article on the digital rights of children. However, a number of rights enshrined in the UNCRC apply in the context of children and the digital era including:

- Article 3 (Decisions made in the child's best interests)
- Article 12 (The child's right to participate and have their views heard)
- Article 13 (Right to freedom of expression)
- Article 15 (Freedom of association)
- Article 16 (Protection of privacy)
- Article 17 (Access to appropriate information)
- Article 28 (Right to education)

One of the most fundamental rights when it comes to the online world is the duty on governments to take on all legislative, administrative and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (Article 19).

in 2021, the UN Committee on the Rights of the Child published a General Comment or guidance on how to apply children's rights in relation to the digital environment. It notes that '[t]he digital environment is becoming increasingly important across most aspects of children's lives, including during times of crisis, as societal functions, including education, government services and commerce, progressively come to rely upon digital technologies. It affords new opportunities for the realization of children's rights, but also poses the risks of their violation or abuse'.⁷

The Committee has also recommended in its 2021 General Comment that States 'review relevant laws and policies to ensure that children are protected against economic, sexual and other forms of exploitation and that their rights with regard to work in the digital environment and related opportunities for remuneration are protected'.⁸

In 2018, the Council of Europe (COE) published its Recommendation, *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment* and noted that the online world is reshaping children's lives in many ways, resulting in 'opportunities for and risks to their well-being and enjoyment of human rights'.⁹ Recognising that businesses have a responsibility to respect children's rights,¹⁰ the COE recommends that States require businesses to meet their responsibilities by compelling them to implement measures and 'encourage them to co-operate' with the State and other stakeholders, including children.¹¹ A key proposal of these Guidelines is that, in relation to the processing of children's personal data, States should require relevant stakeholders to implement safety by design, privacy by design and privacy by default measures, taking into account the best interests of the child.¹² Legislating to incorporate these principles would help ensure that, from the planning stages of technology development onward, children and young people are protected.

7 UN Committee on the Rights of the Child, General Comment no 25 (2021) on children's rights in relation to the digital environment, CRC/C/GC/25, para 3.

8 *ibid* at para 113.

9 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) 10.

10 UN Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights CRC/C/GC/16.

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) 11.

12 *ibid* 23.

A child's right to an effective remedy under the European Convention of Human Rights,¹³ when their rights have been infringed online,¹⁴ is also reflected in the Council of Europe's *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment*.¹⁵

One of the six thematic areas in the EU Strategy on the Rights of the Child, published in 2021, is digital and information society where the goal is to have 'an EU where children can safely navigate the digital environment, and harness its opportunities'.¹⁶ The strategy commits to the European Commission adopting an updated Better Internet for Kids Strategy in 2022.¹⁷ It also invites Member States to ensure effective equal access to the online world and digital literacy. It recommends that Member States ensure children have access to educational material and to support media literacy actions as part of a child's education to enable them to develop the ability to critically analyse online content.¹⁸ The European Commission also calls on online companies to 'ensure that children's rights, including privacy, personal data protection, and access to age-appropriate content, are included in digital products and services by design and by default, including for children with disabilities' and to 'strengthen measures to help tackle harmful content and inappropriate commercial communication, such as through easy-to-use reporting and blocking channels or effective age-verification tools'.¹⁹

Another aspect of online safety for children and young people is in relation to their privacy rights and how these are best protected. An individual's right to privacy is protected under both the International Covenant on Civil and Political Rights (Article 17) as well as the European Convention on Human Rights (Article 8) with specific protections for a child's right to privacy under the UN Convention on the Rights of the Child (UNCRC).²⁰ Online safety legislation should ensure children and young people's rights to both privacy and protection. While the right to privacy is not absolute, States should seek to achieve a proportionate balance between these rights.

13 European Convention of Human Rights Art 6 and 19.

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* (COE 2018) 24.

15 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) 11.

16 European Commission, *EU Strategy on the Rights of the Child* (Publications Office of the European Union 2021) 17.

17 *ibid* 19.

18 *ibid*.

19 *ibid*.

20 UN Convention on the Rights of the Child A/RES/44/25 (20 November 1989) Art 16.

Online Safety and Media Regulation Bill 2022

The continued momentum in progressing the Online Safety and Media Regulation Bill is welcome and is a step in the right direction for the protection of children and young people online.

The 2022 Bill provides for the establishment of a new Media Commission and sets out a number of functions of the Commission in relation to online safety.

Summary of Recommendations

- Amend the Bill to specifically provide for the establishment of an Online Safety Commissioner as part of the Media Commission by inserting the following after Section 11(1):
 - Section 11(1)(a) The Minister shall designate one or more members of the Commission as having responsibility for the exercise of the functions of the Commission specified in Part 8A.
 - Section 11(1)(b) The member(s) having responsibility for the exercise of the functions of the Commission relating to online safety shall also be known as Online Safety Commissioner.
- The Online Safety Commissioner must be adequately resourced, with appropriate ring-fenced funding and staffing, and granted robust statutory powers to sanction companies who do not comply with timebound codes for the protection of children and young people online that are in line with fair procedures.
- Amend section 7(3)(f) to provide that the Online Safety Commissioner is given the power to evaluate and regulate educational and community awareness programmes on online safety by replacing the section with the following:
 - encourage research, promote, endorse, evaluate and approve educational initiatives and community awareness programmes related to online safety and activities and co-operate for that purpose with educational bodies and community awareness programmes, and otherwise promote public awareness, knowledge and understanding, in relation to matters connected to its functions.
- Retain and expand section 7(2)(b) to provide that in all actions concerning children that the best interests of the child shall be the primary consideration.
- The definitions of harmful and age-inappropriate content should be retained in the legislation and consideration should be given to ensuring that the definitions are sufficiently clear and precise to ensure they are in compliance with other human rights standards, in particular the right to freedom of expression.²¹
- Ensure that protocols and online safety codes are developed to ensure that illegal material such as child sexual abuse materials, intimate images and material that incites hatred can be robustly and swiftly removed to cause the least possible harm and distress.
- Amend the Bill to specifically provide for an individual complaints mechanism to ensure that children and young people whose rights are not respected by the online providers and who have exhausted all appropriate channels with the relevant online service or platform, have access to an effective remedy.

²¹ Article 40.6. 1. I of the Irish Constitution

Membership of the Media Commission

Part 3 of the Online Safety and Media Regulation Bill will substitute the current Part 2 of the Broadcasting Act 2009 and provides for the establishment of the Media Commission.

Section 11(1) provides for the membership of the Commission to include a minimum of three and a maximum of six full time members. The Bill does specify that one of the members should be a dedicated online safety commissioner. The Joint Oireachtas Committee on Tourism, Culture, Arts, Sport and Media recommended that an online safety commissioner be explicitly provided for in the legislation.²²

Given the importance of online safety for children and young people, any new Media Commission should have a Commissioner whose sole responsibility and focus is online safety. Unless specifically named in law, given the wide remit of the proposed Commission and the volume of work it will undertake, there is a risk that none of the three Commissioners would be dedicated full-time to online safety.

It is welcome that the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, Catherine Martin TD, has confirmed that the Media Commission ‘will include an Online Safety Commissioner to enforce not just this legislation, but also additional forthcoming legislation, including at European level, in the coming years’.²³ The legislation should be updated to reflect this.

Recommendations:

- Amend the Bill to specifically provide for the establishment of an Online Safety Commissioner as part of the Media Commission by inserting the following after Section 11(1):
 - Section 11(1)(a) The Minister shall designate one or more members of the Commission as having responsibility for the exercise of the functions of the Commission specified in Part 8A.
 - Section 11(1)(b) The member(s) having responsibility for the exercise of the functions of the Commission relating to online safety shall also be known as Online Safety Commissioner.
- The Online Safety Commissioner must be adequately resourced, with appropriate ring-fenced funding and staffing, and granted robust statutory powers to sanction companies who do not comply with timebound codes for the protection of children and young people online that are in line with fair procedures.

²² Joint Committee on Tourism, Culture, Arts, Sport and Media, *Report of the Joint Committee on the Pre-Legislative Scrutiny of the General Scheme of the Online Safety and Media Regulation Bill (2021)* 37.

²³ Speech by Minister Catherine Martin TD, ‘Publication of Online Safety and Media Regulation Bill’, <<https://bit.ly/3Ah1dti>> accessed 19 January 2022.

Powers and Functions of the Commission

Education

Section 7 sets out the powers and functions of the Commission and provides that the Commission shall:

[...] encourage research, promote or endorse educational initiatives and activities and co-operate for that purpose with educational bodies, and otherwise promote public awareness, knowledge and understanding, in relation to matters connected to its functions.²⁴

While this provision is welcome it is of note that this relates to all the functions of the Media Commission, not just the online safety functions. In terms of formal education, online safety education forms part of the Social Personal Health Education (SPHE) programme on the national curriculum. While it is the role of the National Council for Curriculum Assessment to set the curriculum, there are a number of organisations, like Webwise for example, who provide educational programmes to schools and produce community awareness programmes on online safety. It is welcome that the Bill specifies co-operation with educational bodies. However, the Bill does not give the Commission the power to evaluate and regulate the wide-ranging educational programmes that go into schools and community awareness programmes on online safety that exist. Currently there is no single body in the State tasked with doing this work and providers of educational programmes are unregulated.

The Council of Europe (COE) *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment* recommend that States ensure the educational resources are of a high quality and should be evaluated by States and other stakeholders in order to maintain high standards of education about the digital world.²⁵

The Joint Oireachtas Committee on Tourism, Culture, Arts, Sport and Media recommended that a regulatory role in online safety education is explicitly included within the legislation for the Online Safety Commissioner.²⁶ Similar recommendations were made by the Joint Committee on Education, Further and Higher Education, Research, Innovation and Science in August 2021 calling for the establishment of an Online Safety Commissioner with an educational function.²⁷

In Australia, the eSafety Commissioner has the power under section 15 (f) of the Enhancing Online Safety Act 2015 'to support, encourage, conduct, accredit and evaluate educational, promotional and community awareness programs that are relevant to online safety for Australians'. As part of this work, they publish a list of trusted providers of online safety education on their website called the Trusted eSafety Provider Program. This is designed to give schools confidence that the external online safety provider they engage meets the eSafety Commissioner's online safety education standards.²⁸

Recommendation:

- Amend section 7(3)(f) to provide that the Online Safety Commissioner is given the power to evaluate and regulate educational and community awareness programmes on online safety by replacing the section with the following:

24 Online Safety and Media Regulation Bill s7(3)(f)

25 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 26 February 2021, 19.

26 Joint Committee on Tourism, Culture, Arts, Sport and Media, *Report of the Joint Committee on the Pre-Legislative Scrutiny of the General Scheme of the Online Safety and Media Regulation Bill* (2021) 13.

27 Joint Committee on Education, Further and Higher Education, Research, Innovation and Science, *Report on School Bullying and the Impact on Mental Health* (Houses of the Oireachtas 2021) 13.

28 Australian Government, Australian E- Safety Commissioner, What we do, <<https://www.esafety.gov.au/educators/trusted-providers>> accessed 25 February 2021.

- encourage research, promote, endorse, evaluate and approve educational initiatives and community awareness programmes related to online safety and activities and co-operate for that purpose with educational bodies and community awareness programmes, and otherwise promote public awareness, knowledge and understanding, in relation to matters connected to its functions.

Best Interests of the Child

In the exercise of its functions the Commission is tasked to ‘endeavour to ensure’ that ‘the interests of the public, and in particular the interests of children, are protected.’²⁹ While the focus on children is welcome this could be further strengthened by expanding the provision to include that in all actions concerning children that the best interests of the child shall be the primary consideration in line with Article 3 of the UNCRC.

The Committee on the Rights of the Child issued a General Comment³⁰ to clarify the meaning of this principle in 2013 and stated that it has a three-fold meaning. The best interests principle is:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.³¹

Specifically when it comes to children’s rights online the Committee on the Rights of the Child has outlined that states, when considering the best interests of the child, should have ‘regard for all children’s rights, including their rights to seek, receive and impart information, to be protected from harm and to have their views given due weight, and ensure transparency in the assessment of the best interests of the child and the criteria that have been applied.’³² Under the UNCRC, all children

29 Online Safety and Media Regulation Bill s7(2)(b)

30 UN Committee on the Rights of the Child (2013) *General Comment No. 14: 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

31 *ibid*, para 6.

32 UN Committee on the Rights of the Child, General Comment no 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, para 13

have the right to be protected from abuse, neglect and sexual exploitation.³³ While it is important to protect children and young people online, other rights such as their right to freedom of expression³⁴ and right to information³⁵ as well as their participation rights³⁶ play a key role in children's enjoyment and participation in the online world. The COE *Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment* provide that 'in all actions concerning children in the digital environment, the best interests of the child shall be a primary consideration' and further recommend that States should strike a balance between the child's right to protection and their other rights to freedom of expression, participation and access to information.³⁷ The COE also acknowledges the differing levels of maturity and understanding of children at different ages and recommends that States recognise the evolving capacities of children which can mean that the 'policies adopted to fulfil the rights of adolescents may differ significantly from those adopted for younger children'.³⁸

The Alliance believes that the Bill could be strengthened by adopting the UN Convention standard namely that the best interests should be a primary consideration in all matters affecting children. This standard has been adopted in the Constitution, Children and Family Relationships Act and the Child and Family Agency Act. Adopting this standard would be in line with approach in national legislation and offer greater clarity on how the principle should be interpreted in practice and would lead to better outcomes for all children.

Recommendation:

- Retain and expand section 7(2)(b) to provide that in all actions concerning children that the best interests of the child shall be the primary consideration.

33 UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) Arts 19 and 34.

34 *ibid* Art 13.

35 *ibid* Art 17.

36 *ibid* Art 12.

37 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 26 February 2021, 12.

38 *ibid*.

Harmful Online Content and Age-Inappropriate Content

Harmful online content is defined in section 139A into two categories:

- (i) Offence-specific categories of online harm which are contained in other legislation listed in Schedule 3³⁹ of the OSMR Act and any harmful content specified by the Minister under the powers conferred by section 139B.
- (ii) Online content:
 - a. by which a person bullies or humiliates another person;⁴⁰
 - b. by which a person promotes or encourages behaviour that characterises a feeding or eating disorder;⁴¹
 - c. by which a person promotes or encourages self-harm or suicide;⁴²
 - d. by which a person makes available knowledge of methods of self-harm or suicide;⁴³
 - e. specified by the Minister under the powers conferred by section 139B.⁴⁴

In addition to falling into one of the two categories above, content must **also** meet a risk test set out in section 139A(4). Online content is deemed to meet the risk test if it gives rise to—

- a. any risk to a person's life, or
- b. a risk of significant harm to a person's physical or mental health, where the harm is reasonably foreseeable.⁴⁵

If any question arises as to whether content falls into any of these categories it will be determined on the balance of probabilities.⁴⁶

Section 139B allows for additional content to be specified as harmful by the Commission making a proposal to the Minister under the procedure set out in section 139C. In making a proposal, the Commission shall have regard to the levels of risk of exposure,⁴⁷ the levels of risk of harm, in particular to children from the availability or exposure to the content,⁴⁸ the impact of automated decision-making in relation to content delivery and content moderation by the relevant online services⁴⁹ and the rights of providers and users of the services.⁵⁰

Age-inappropriate online content is defined in section 139D as;

online content that is likely to be unsuitable for children (either generally or below a particular age), having regard to their capabilities, their development, and their rights and interests, including in particular content consisting of—

- (a) pornography, or
- (b) realistic representations of, or of the effects of, gross or gratuitous violence or acts of cruelty.⁵¹

39 Online Safety and Media Regulation Bill s139A(2)(a)

40 *ibid* s139A(3)(a)

41 *ibid* s139A(3)(b)

42 *ibid* s139A(3)(c)

43 *ibid* s139A(3)(d)

44 *ibid* s139A(3)(e)

45 *ibid* s139A(4)

46 *ibid* s139A(5)

47 *ibid* s139B(5)(a)

48 *ibid* s139B(5)(b)

49 *ibid* s139B(5)(e)

50 *ibid* s139B(5)(f)

51 *ibid* s139D

The UN Committee on the Rights of the Child has recommended that states take ‘legislative and administrative measures to protect children from violence in the digital environment’ and notes that risks to children ‘include physical or mental violence, injury or abuse, neglect or maltreatment, exploitation and abuse, including sexual exploitation and abuse, child trafficking, gender-based violence, cyberaggression, cyberattacks and information warfare’.⁵² The robust definitions in particular the offence-specific categories of online harm address the majority of the specific harms listed by the UN Committee.

It will be important that protocols are developed between the Gardaí and the Media Commission to ensure the effective and swift removal of material that falls into the category of offence-specific ie illegal categories of online harm under section 139A(2)(a) such as child sexual abuse materials, intimate images and material that incites hatred. It will be important that this is addressed also in the online safety codes.

Recommendations:

- The definitions of harmful and age-inappropriate content should be retained in the legislation and consideration should be given to ensuring that the definitions are sufficiently clear and precise to ensure they are in compliance with other human rights standards, in particular the right to freedom of expression.⁵³
- Ensure that protocols and online safety codes are developed to ensure that illegal material such as child sexual abuse materials, intimate images and material that incites hatred can be robustly and swiftly removed.

⁵² UN Committee on the Rights of the Child, General Comment no 25 (2021) on children’s rights in relation to the digital environment, CRC/C/GC/25, para 82.

⁵³ Article 40.6. 1. I of the Irish Constitution

Individual Complaints Mechanism

Section 139U provides that the Commission will establish a scheme under which nominated bodies can notify the Commission about (but not limited to):

- (a) concerns arising from the manner in which a designated online service purports to comply with the online safety codes that apply to it;
- (b) concerns relating to the availability of harmful online content on a designated online service or a relevant online service;
- (c) concerns relating to the availability of age-inappropriate online content on a designated online service or a relevant online service;
- (d) measures taken by the provider of a designated online service, in purported compliance with an online safety code, which the nominated body considers excessive having regard to users' freedom of expression or other rights, or for any other reason.⁵⁴

While this is welcome, the Bill does not provide a mechanism for individuals to appeal to the Commission when an online platform or service fails to comply with the Online Safety Codes. However, the Minister has committed to setting up an expert group to examine the issue, which is due to report before the Bill reaches Committee stage.⁵⁵

After extensive pre-legislative scrutiny, the Joint Oireachtas Committee on Tourism, Culture, Arts, Sport and Media recommended that the Bill should provide for an individual complaints mechanism that is responsive to the needs and protection of children and other groups.⁵⁶ The Joint Committee on Education, Further and Higher Education, Research, Innovation and Science in August 2021 also made recommendations calling for the establishment of an Online Safety Commissioner with an investigation mandate, to include dealing with individual complaints, and an educational function.⁵⁷

The UN Committee in its 2021 General Comment highlights that 'States parties should ensure that appropriate and effective remedial judicial and nonjudicial mechanisms for the violations of children's rights relating to the digital environment are widely known and readily available to all children and their representatives'.⁵⁸

The Law Reform Commission (LRC) has recommended establishing a statutory Digital Safety Commissioner, modelled on comparable offices in Australia and New Zealand.⁵⁹ The LRC also envisioned that this office would have responsibility for publishing a Code of Practice on Digital Safety which would include an efficient take-down procedure.⁶⁰ Under the LRC proposals, if a social media site did not comply with the standards in the Code of Practice, an individual could then appeal to the Digital Safety Commissioner, who could direct a social media site to comply with the standards in the Code.⁶¹ The LRC further recommended that if a social media site did not comply with the Digital Safety Commissioner's direction, the Commissioner could apply to the Circuit Court for a court order requiring compliance.⁶²

54 Online Safety and Media Regulation Bill s139U (3)

55 Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media, 'Minister Martin presses forward with vital online safety law to establish regulator' (Press Release 12 January 2022) <<https://bit.ly/3Kuhir5>> accessed 19 January 2022.

56 Houses of the Oireachtas, *Joint Committee on Tourism, Culture, Arts, Sport and Media Report of the Joint Committee on the Pre-Legislative Scrutiny of the General Scheme of the Online Safety and Media Regulation Bill* (2021) 11- 12.

57 Joint Committee on Education, Further and Higher Education, Research, Innovation and Science, *Report on School Bullying and the Impact on Mental Health* (Houses of the Oireachtas 2021) 13.

58 *ibid* at para 44.

59 Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116 - 2016) 144.

60 *ibid*.

61 *ibid*.

62 *ibid*.

The current Bill does not follow the recommended approach of the LRC, or the existing models in Australia ([eSafety Commissioner](#)) or New Zealand ([Netsafe](#)) in providing a mechanism for individuals to appeal to the Online Safety Commissioner when a an online service provider fails to comply with the standards of the Online Safety Codes. The powers of the Commission set out in the current Bill should be amended in line with the recommendations of the Oireachtas Media Committee. The inclusion of an individual complaints' mechanism is vital to ensure that children and young people whose rights are not respected by the online service provider(s) and who have exhausted all appropriate channels with the relevant service or platform, have access to an effective remedy in line with their rights under the European Convention of Human Rights.⁶³ This should also align with the clear description of a child-friendly remedy outlined in the Council of Europe *Guidelines*⁶⁴ while also complying with the UN Committee on the Rights of the Child's guidance.⁶⁵

The lack of an individual complaints' mechanism relating to online services means that there is a discrepancy between where a broadcaster or provider of an audiovisual on-demand media service fails to comply with a media code and where an online service provider fails to comply with an online safety code. In relation to a broadcaster's failure to comply with a media code, an individual can make a complaint directly to the Media Commission under section 11 which substitutes section 48 of the Broadcasting Act 2009. Under this section, once a complaint is made within the relevant timeframes set out in the legislation⁶⁶ the Commission may refer the complaint in the first instance to the service or broadcaster concerned,⁶⁷ dismiss the complaint⁶⁸ or refer it to an authorised person for investigation.⁶⁹ Where a complaint is referred or dismissed, the Commission must notify the person who made the complaint about its action 'as soon as practicable'⁷⁰ and place a notice on its website about the action taken within 60 working days from the date that the complaint was received.⁷¹

The procedures for investigation are set out in section 139Z which are considered in detail later in this paper. Section 139Z (1) provides that the Commission can appoint an authorised officer to carry out investigations. An investigation can be commenced where the Commission has reason to suspect that there has been a contravention.⁷² This section applies to the complaints that will be received under proposed new section 48 relating to broadcast and audio-visual on demand media services.

A similar procedure could be adopted for individual complaints relating to online services or platforms where in effect the Commission will engage in a pre-investigation screening of complaints to ensure that they are dealt with in the appropriate way (reverted back to the provider, dismissal or investigation). This would ensure that there is no discrepancy between online services and media services.

There is clear public support for such a measure. In 2021, as part of the [1,2,3 Online Safety campaign with 18 of its members](#), the Children's Rights Alliance, commissioned public polling on online safety and 77 per cent of those surveyed believe that an Online Safety Commissioner should have the

63 European Convention of Human Rights Arts 6 and 13.

64 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.

65 *ibid* at para 44.

66 S48(2) :A complaint shall be made in writing to the Commission not more than 30 days after—

(a) where the complaint relates to one broadcast, the date of the broadcast, (b) where the complaint relates to 2 or more unrelated broadcasts, the date of the earlier or earliest, as the case may be, of those broadcasts, (c) where the complaint relates to 2 or more related broadcasts, of which at least two are made on different dates, the later or latest of those dates, or (d) where the complaint relates to programme material made available on an audiovisual on-demand media service, the date the programme material ceased to be available on that service.

67 Online Safety and Media Regulation Bill 2022 s11 which substitutes a new section 48(3) into the Broadcasting Act 2009.

68 *ibid*.

69 *ibid*.

70 *ibid*.

71 *ibid*.

72 Online Safety and Media Regulation Bill s139Z A

power in law to investigate complaints made by members of the public when social media companies fail to uphold the rights of the person.⁷³

While there are concerns about the volume of complaints that the Online Safety Commissioner could receive, including from online users across the EU as many of the online platforms are headquartered in Ireland, this is not a reason to exclude an individual complaints mechanism from the scope of the legislation. Each online service or platform should have its own efficient and effective complaints system that deals with complaints at the local level. It is only the most complex cases that should need to be resolved by the Media Commission, provided that the online platforms put in place their own appropriate complaints mechanisms which comply with the legislation and the codes of conduct that the Online Safety Commissioner will develop.

Failure to provide an individual complaints mechanism based on concerns of volume denies children and young people access to an effective remedy which they have a right to under Article 6 (right to fair procedures) and Article 13 (right to an effective remedy) of the European Convention on Human Rights. Any complaints mechanism introduced must be in compliance with these rights. The Council of Europe recommends Member States should ensure that a child's right to an effective remedy under the European Convention of Human Rights⁷⁴ is respected and protected when their rights have been infringed online.⁷⁵ 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'.⁷⁶ 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.⁷⁷ Importantly, it provides that the process should be speedy, child-friendly and provide the appropriate redress.⁷⁸

Recommendation:

Amend the Bill to specifically provide for an individual complaints mechanism to ensure that children and young people whose rights are not respected by the online providers and who have exhausted all appropriate channels with the relevant online service or platform, have access to an effective remedy.

73 Children's Rights Alliance, 'Irish public send clear message to Government – do not shy away from regulating social media and big tech', (Press Release 16 October 2021) <<https://bit.ly/3s8gk4T>> accessed 1 February 2022.

74 European Convention of Human Rights Art 6 and 13.

75 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.

76 *ibid.*

77 *ibid.*

78 *ibid.*

Online Safety Codes

Designation of Relevant Online Services

Section 139E (1) provides that the Commission may designate online services to be relevant online services. The online safety codes may then be applied to these services. The section provides that the Commission when deciding whether to designate a service shall have regard to:

- a. the nature and the scale of the service or of services within the category,
- b. provision made or that may be made by online safety codes that
- c. may be applied to the service or to services within the category,
- d. other provisions of or made under this Act that apply to designated online services,
- e. levels of availability of harmful online content on the service, or on services within the category,
- f. levels of risk of exposure to harmful online content when using the service, or services within the category,
- g. levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it on the service, or on services within the category,
- h. the rights of the provider of the service, or providers of services within the category, and
- i. the rights of users of the service, or users of services within the category.

Currently the Bill leaves discretion to the Commission as to whether an online safety code will be applied to a designated service. This provision could be strengthened by requiring that were a service is designated a relevant online service that the relevant online safety codes shall be applied to that service.

Under section 139J the Commission shall maintain a register of designated online services that is made available to public which should state any online safety code relevant for that service.⁷⁹ This is a welcome provision as it will assist the public in knowing what services or platforms fall under the scope of the Commission and what duties are associated with that.

Online Safety Codes

The Bill provides in section 139K that the Commission may make codes to be known as online safety codes to be applied to designated online services.⁸⁰ The section sets out

- An online safety code may make provision with a view to ensuring—
- (a) that service providers take appropriate measures to minimise the availability of harmful online content and risks arising from the availability of and exposure to such content,
 - (b) that service providers take any other measures that are appropriate to protect users of their services from harmful online content,
 - (c) that service providers take any other measures that are appropriate to provide the protections set out in Article 28b(1)(a), (b) and (c) of the Directive, and
 - (d) that service providers take any measures in relation to commercial communications on their services that are appropriate to protect the interests of users of their services, and in particular the interests of

⁷⁹ Online Safety and Media Regulation Bill s139J (2)(b)

⁸⁰ *ibid* s139K(1)

children.⁸¹

The use of the term 'may make provision with a view to ensuring' falls short of that which is used in section 46N which relates to the media services codes that can be put in place by the Commission in relation to broadcasters and providers of audiovisual on-demand media services. This provides that 'Media service codes may provide for standards and practices to ensure'.⁸² The use of the term 'to ensure' places a stronger obligation on the Media Commission than the use of the term 'with a view to ensuring'. While the Bill makes it explicit that an online safety code may make provision that service providers are required to take appropriate measures to protect users from harmful content, the section does not make any reference to age-inappropriate content as defined in section 139D. Consideration should be given to including this in the next iteration of the Bill.

Commercial Communications

The provisions in relation to commercial communications are stronger insofar as they are proposed for the media service codes compared to those set out above that are provided for in relation to online safety codes. Section 46N sets out that in relation to the media service codes

- (2)(d) that commercial communications—
 - (i) protect the interests of the audience, and
 - (ii) in particular, where they relate to matters likely to be of direct or indirect interest to children, protect the interests of children having particular regard to the general public health interests of children,

(5) Provision made for the purpose referred to in subsection (2)(d)(ii) may prohibit the inclusion in programmes of commercial communications relating to foods or beverages considered by the Commission to be the subject of public concern in respect of the general public health interests of children, in particular those foods or beverages which contain fat, trans-fatty acids, salts or sugars.

(6) In preparing a media service code the Commission may consult the relevant public health authorities about any provision made for the purpose referred to in subsection (2)(d)(ii).⁸³

There is an argument to be made for replicating the provisions in section 46N related to commercial communications in media service codes in section 139K for online safety codes.

Application of Online Safety Codes

Online safety codes will be applied to a designated service if the Commission has determined that the code applies to the service or if the service falls within a category designated by the Commission to which the codes apply.⁸⁴

In determining whether the code is to apply the Commission shall have regard to in particular the following:

- (a) the nature and the scale of the service, or of services within the category,
- (b) levels of availability of harmful online content on the service, or on services within the category,
- (c) levels of risk of exposure to harmful online content when using the service, or services within the category,
- (d) levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it on the service, or on services within the category,

⁸¹ *ibid* s139K(2)

⁸² *ibid* s46N(2)

⁸³ *ibid* Bill s46N(2)

⁸⁴ *ibid* s139L(1)

- (e) the rights of the provider of the service, or providers of services within the category, and
- (f) the rights of users of the service, or users of services within the category.⁸⁵

It is welcome that the list includes a particular reference to both the rights of service users and the protection of children. This should be retained as the Bill progresses.

Preparation of Online Safety Codes

Section 139M sets out what the Commission shall have regard to when preparing an online safety code (note not an exhaustive list):

- (a) the desirability of services having transparent decision-making processes in relation to content delivery and content moderation,
- (b) the impact of automated decision-making on those processes,
- (c) the need for any provision to be proportionate having regard to the nature and the scale of the services to which a code applies,
- (d) levels of availability of harmful online content on designated online services,
- (e) levels of risk of exposure to harmful online content when using designated online services,
- (f) levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it,
- (g) the rights of providers of designated online services and of users of those services

This list could be strengthened by including a requirement that the best interests of children will also be considered in line with the UN Convention on the Rights of the Child.

Before making an online safety code the Commission shall consult with any advisory committee established and any other people the Commission deems appropriate.⁸⁶ Consideration should be given to including a requirement to consult with children and young people about the development of an online safety code.

The Commission must provide the Minister with a copy of the online safety code⁸⁷ which must be then laid before the Houses of the Oireachtas.⁸⁸ The Commission also has the powers to amend, revoke⁸⁹ or review the online safety codes⁹⁰ and the Minister may request the Commission to carry out a review of the operation of an online safety code which the Commission must carry out and provide the Minister a report in a reasonable time.⁹¹

Online safety codes have the potential to have a positive impact in terms of the behaviour of online services and platforms. In the United Kingdom, the statutory Age-Appropriate Design Code – also known as the Children’s Code – came into effect in September 2020 with a 12-month implementation period. It takes a risk-based approach to age-appropriate design and mandates online platforms to take the “best interests” of their child users into account when processing their personal data, or face fines of up to four per cent of annual global turnover.⁹² It applies to ‘online products or services (including apps, programs, websites, games or community environments, and connected toys or devices with or without a screen) that process personal data and are likely to be accessed by children in the UK’⁹³ meaning that the company itself does not need to be UK-based. In

85 *ibid* s139L(3)

86 *ibid* s139N(1)

87 *ibid* s139N(2)

88 *ibid* s139N(3)

89 *ibid* s139N(4)

90 *ibid* s139N(5)

91 *ibid* s139N(6)

92 Section 123 The Data Protection Act (DPA) 2018 as amended.

93 Information Commissioner’s Office, *Age appropriate design: a code of practice for online services*, (ICO 2020) 8.

advance of the end of 12 month implementation period, TikTok, Google and Youtube all updated their settings to comply with the Code.⁹⁴

Recommendations:

- Amend section 139E (1) to read:

The Commission may designate a relevant online service as a service to which **relevant** online safety codes **shall** be applied under Chapter 3.
- Amend section 139K(2) to align it to the comparative section on Media Codes to read:

An online safety code may make provision to ensure
- Amend section 139K(2) to include that an online safety codes may make provision to ensure that service providers take appropriate measures to protect users.
- Amend section 139K (2) (d) to align it with the provisions in section 46N related to commercial communications in media service codes.
- Amend Section 139M to include a requirement that the best interests of children will be considered when developing an online safety code and that children and young people will be consulted during the process.

⁹⁴ Alex Hearn, UK children's digital privacy code comes into effect, *The Guardian*, 2 September 2021.

Compliance and Investigations

Compliance with Online Safety Codes

The Commission may require a provider of a designated online services to provide it with information relating to their compliance with an online safety code over any period or a succession of periods.⁹⁵ If the provider fails without reasonable excuse to comply or provides false information, knowing that it is false or being reckless as to whether it is false, they are guilty of a category one offence.⁹⁶

The Commission under section 139P has the power to appoint someone to carry out an audit⁹⁷

- (a) to enable the Commission to assess compliance by the provider with provisions of an online safety code that relate to the handling of communications by which users raise complaints or other matters relating to designated online services with the providers of those services, and
- (b) to provide the Commission with information to identify any trends in complaints or other matters raised by such communications that may be relevant to the Commission's functions under this Part.⁹⁸

The person carrying out the audit will provide the Commission with a report⁹⁹ and the Commission will provide a copy of this to the provider, the Minister and make it available on their website.¹⁰⁰ If the provider fails to comply without reasonable excuse, they will be guilty of a category 1 offence.¹⁰¹

It is welcome that the Commission has the power to carry out audits of complaints handling by online services and platforms. This is one way to help ensure that a child's right to an effective remedy is respected¹⁰² and would play an important role in ensuring that an individual complaints mechanism would only deal with more complex cases. Where the Commission is able to identify systematic issues or trends, this would help to ensure that online services and platforms take action to address these problems hopefully leading to a reduction of complaints in that area.

Online safety guidance materials and advisory notices

Section 139R provides that the Commission may issue guidance materials for providers of relevant online services on any matter that an online safety code can be provided for or any matter for 'the protection of minors and the general public from harmful online content and age-inappropriate online content'.¹⁰³ In so doing the Commission shall consult with any advisory committee or any other person they think appropriate.¹⁰⁴ Where the Commission considers there is an urgent need to bring to the attention of a provider any matter on which falls into the above, the Commission may issue an online safety advisory notice to the provider or providers on the matter.¹⁰⁵

95 Online Safety and Media Regulation Bill s139O(1)

96 *ibid* s139O(6)

97 *ibid* s139P(1)

98 *ibid* s139P(3)

99 *ibid* s139P(7)

100 *ibid* s139P(8)

101 *ibid* s139P(10)

102 European Convention of Human Rights Art 6 and 19.

103 Online Safety and Media Regulation Bill s139R(1)

104 *ibid* s139R(2)

105 *ibid* s139R(3)

In preparing any guidance materials or advisory notices the Commission has to have regard to

- (b) the desirability of services having transparent decision-making processes in relation to content delivery and content moderation,
- (c) the impact of automated decision-making on those processes,
- (d) the need for any provision to be proportionate having regard to the nature and the scale of the services concerned,
- (e) levels of availability of any online content, and of age inappropriate online content, on relevant online services,
- (f) levels of risk of exposure to harmful online content, or of exposure of children to age-inappropriate online content, when using relevant online services,
- (g) levels of risk of harm, and in particular harm to children, from the availability of such content or exposure to it,
- (h) the rights of providers of relevant online services and of users of those services¹⁰⁶

These provisions are welcome and should be retained as the Bill progresses.

Voluntary arrangements with providers in third countries

Section 139W provides that the Commission can enter into a voluntary arrangement with a provider in a third country, where—

- (a) the provider is not under the jurisdiction of the State or another Member State, but
- (b) the service would be a relevant online service if the provider were under the jurisdiction of the State.¹⁰⁷

Under a voluntary arrangement the provider agrees:

- (a) to comply with any online safety code, and any guidance materials issued under section 139R, that may be specified in the arrangement, to the extent specified in the arrangement,
- (b) to comply with any request made by the Commission under subsection (5), and
- (c) that the Commission may publish the information it is required to publish in accordance with subsections (4) and (6).¹⁰⁸

Where a voluntary arrangement is entered into the Commission may request information from the provider as to its compliance with any online safety code of guidance materials¹⁰⁹ and if there has been a failure to comply may publish on its website information about the nature of the failure.¹¹⁰ This section is to be welcomed as it will allow providers who are not based in Ireland to agree to be bound by the Online Safety Codes and will encourage a standard of best practice.

Investigations

Section 139Z (1) provides that the Commission can appoint an authorised officer to carry out investigations. An investigation can be commenced where the Commission has reason to suspect that there has been a contravention.¹¹¹

106 *ibid* s139S

107 *ibid* s139W (1)

108 *ibid* s139W (2)

109 *ibid* s139W (5)

110 *ibid* s139W (6)

111 *ibid* s139Z A

Notice must be provided to the provider of any investigation being commenced under Section 139ZB. This notice must be in writing and include a statement of the 'nature and particulars of the suspected contravention', terms of the investigation¹¹² and the provider will have 10 days to respond.¹¹³

The powers of the authorised officer are set out in section 139ZC. Following the completion of an investigation, the authorised officer has to prepare a report under section 139ZE. A draft of this report along with any material relied upon has to be furnished to the provider under section 139ZE(3) and the provider has 28 days to make submissions in writing on the draft report. An authorised officer shall, after the report has been finalised, supply a copy to the provider.¹¹⁴

After the Commission receives the final report it shall give the provider the final report and notice in writing that the provider has 28 days to make submissions on the final report.¹¹⁵ The Commission also has the power to hold an oral hearing¹¹⁶ and request further information¹¹⁷

Under section 139ZK the Commission has to power to decide on the balance of probabilities whether a contravention has occurred and whether or not to impose a sanction. If the Commission decides to issue a sanction they must give notice to the provider as soon as practicable after making the decision.¹¹⁸ Decisions will be published on the Commission website.¹¹⁹

112 ibid s139ZB(2)

113 ibid (3)(b)

114 ibid s139ZE(6)

115 ibid s139ZJ(1)

116 ibid s139ZJ(3)

117 ibid s139ZJ(4)

118 ibid s139ZL

119 ibid s139ZP(5)

Sanctions

Financial Sanctions

Section 139ZO sets out the financial sanctions that can be imposed which 'shall not exceed—

- (a) in the case of an individual, €20,000,000, or
- (b) in the case of a provider that is not an individual, €20,000,000 or, if greater, 10 per cent of the relevant turnover of the provider in the financial year preceding the date of the decision under section 139ZK to impose the sanction.¹²⁰

'Relevant turnover' means turnover of the provider attributable to the service which gave rise to the contravention.¹²¹

In determining the level of sanction, a list of considerations that the Commission shall have regard to is set out in section 139ZO(3) which includes:

- (a) the nature, gravity and duration of the contravention;
- (b) the degree of harm to particular people or to the public caused as a result of the contravention;
- (c) the extent of any failure by the provider to co-operate with an investigation, provided that acknowledgement of a contravention shall not in itself constitute grounds for reduction of a sanction;
- (d) any explanation accepted by the Commission for the contravention or the failure to co-operate with an investigation;
- (e) any gain (financial or otherwise) made, or any loss (financial or otherwise) avoided, by the provider or by any person in which that provider has a pecuniary interest or beneficial interest, as a consequence of the contravention;
- (f) whether a previous decision in respect of the provider
- (g) the nature and timeliness of any steps taken by the provider to bring the contravention to an end, and any steps taken by the provider to remedy the consequences of the contravention;
- (h) the absence or ineffectiveness of internal mechanisms or procedures intended to prevent such a contravention;
- (i) the extent to which the contravention was contributed to by the act or omission of a third party, and the extent to which the provider took steps to identify, and mitigate the effect of, the act or omission;
- (j) the extent to which the contravention was contributed to by circumstances beyond the control of the provider, and the extent to which the provider took steps to identify, and mitigate the effect of, those circumstances;
- (k) the extent to which the management of the provider knew, or ought to have known, that the contravention was occurring or would occur¹²²

120 *ibid* s139ZO(1)

121 *ibid* s139ZO(2)

122 *ibid* s139ZO(3)

Providers have a right to appeal the decision under section 139ZP within 28 days of the notice being provided to them.

Notice to end a contravention

The Commission has the power to issue a notice to end a contravention under section 139ZT. This can happen when the Commission has decided following investigation that a contravention has occurred and following notice of their decision to contravention is continuing. The notice must contain:

- (a) the steps which the Commission requires the provider to take to put an end to the contravention, and
- (b) the period within which those steps must be taken.¹²³

Any provider who fails to comply is guilty of a category one offence.¹²⁴

Access Blocking Order

The Commission may apply to the High Court to seek an access blocking order requiring an internet service provider or a provider of an application store service to block access in the State to a relevant online service or an audio-visual on-demand media service under section 139ZU (1).

The Court can make the order if it is satisfied that the provider has actual knowledge that it is making available content that falls into the one of the offence specific categories of harm (see above) and either:

- (a) where the service is a designated online service—
 - (i) the content is made available in contravention of an online safety code which applies to the service, and
 - (ii) the provider has been convicted of an offence under section 139ZT(4) for failure to comply with a notice to end the contravention.¹²⁵

Content Limitation Notice

Section 139ZV provides that where content appears to the Commission, in the course of an investigation or otherwise, to be harmful online content the Commission may give notice in writing to the provider of the designated online service

- (a) where the content appears to the Commission to fall within the offence-specific category of harmful online content defined in section 139A(2)(set out in appendix 1 for ease), requiring the provider to remove it or to disable access to it, or
- (b) in any other case, requiring the provider to remove the content, to disable access to it, or to limit the availability of it.¹²⁶

In issuing the notice the Commission shall have regard to:

- (a) the nature and the scale of the service or services provided by the provider;
- (b) the technical capacity of the provider;
- (c) levels of risk of harm, and in particular harm to children, from the availability of the content or exposure to it;

123 *ibid* s139ZT(2)

124 *ibid* s139ZT(4)

125 *ibid* s139ZU(3)

126 *ibid* s139ZV(1)

- (d) the rights of the provider and users of the designated online service, and of the uploader of the content;
- (e) the rights of persons to whom the content may pertain;
- (f) the proportionality of any requirement contained in the notice, in light of the matters referred to in paragraphs (a) to (e).

The Commission also has the power to seek:

- (a) that the provider restrict access to the content to persons who have attained the age of 18 years, or such other age less than 18 years as the Commission may specify;
- (b) that a warning or specified information be placed by the provider with the content in a way specified in the notice;
- (c) that the provider limit the ability of users of the designated online service to interact with the content;
- (d) that the provider ensure that prominence is not given to the content, or the content is not recommended to users of the designated online service, or to users below a specified age, including by automated means.¹²⁷

The procedures for a content limitation notice are contained in section 139ZW and include a provision that the provider, and uploader where relevant, has 28 days to make submissions in relation to the notice.¹²⁸ Where the content is user-generated, the provider shall take all reasonable steps to provide a copy of that notice and a copy of this section to the uploader of the content within 2 days of receiving it.¹²⁹ The uploader also may make submissions within the period specified by the Commission.¹³⁰ On receipt of any submissions, the Commission can confirm or revoke the notice.¹³¹ If a provider fails to comply with the notice they will be guilty of a category three offence.¹³² Both the provider and the uploader have a right of appeal to the Circuit Court under section 139ZX.

127 *ibid* s139ZV(4)
128 *ibid* s139ZW(1)(f)
129 *ibid* s139ZW(2)
130 *ibid* s139ZW(5)
131 *ibid* s139ZW(7)
132 *ibid* s139ZW(9)



Our Voice Heard, Our Safety Online

Proposed Individual Complaints Mechanism -
 This complaints system would be applicable to the harms outlined in the Online Safety and Media Regulation Bill.

