

Response to Expert Group consultation on an individual complaints mechanism

From ABC, UCD Centre for Digital Policy and the ISPCC

Consultation on an Individual Complaints Mechanism

21 March, 2022

BY EMAIL: onlinesafetyconsultation@tcagsm.gov.ie

Re. Consultation on an individual complaints mechanism

To the expert group on an individual complaints mechanism,

Members from Dublin City University's Anti-Bullying Centre, University College Dublin's Digital Policy Centre, and ISPCC would like to thank the expert group for the opportunity to provide feedback on the practicalities and potential operation of an individual complaints mechanism as it pertains to the Online Safety and Media Regulation (OSMR) Bill 2022.¹

As a preface to our questions' responses, we note the following contextual factors situating the individual complaints proposal in Ireland:

First, the authors acknowledge our previous research and expertise showing how the impacts of harmful online content can be devastating for those who experience it,² gendered,³ and can carry particularly negative consequences for children.⁴ This is consistent with research

¹ See: gov.ie (1 March 2022) Consultation on an individual complaints mechanism

<https://www.gov.ie/en/publication/98270-online-safety-expert-group-on-an-individual-complaints-mechanism>

² Farries, E., & Sturm, T. (2019). Feminist legal geographies of intimate-image sexual abuse: Using copyright logic to combat the unauthorized distribution of celebrity intimate images in cyberspaces. *Environment and Planning, A*, 51(5), 1145-1165. doi:10.1177/0308518X18786964; Siapera, E.,

Moreo, E., & Zhou, J. (2018). *Hate track: Tracking and monitoring online racist speech*. Irish Human Rights and Equality Commission, <https://www.ihrec.ie/app/uploads/2018/11/HateTrack-Tracking-and-Monitoring-Racist-Hate-Speech-Online.pdf>

³ Farries, E. & Ansbro, D. (2020, November 24) RE: Harassment, Harmful Communications and Related Offences Bill 2017 [letter to members of the Oireachtas Committee on Justice and Equality]. Retrieved from <https://www.iccl.ie/wp-content/uploads/2020/11/ICCL-UCD-Submission-on-Harassment-Harmful-Communications-Bill.pdf> ; see also: Andreasen, M. B., Mazzone, A., Foody, M.,

Milosevic, T., & Norman, J. O. H. (2022). *The Gendered Experiences of Image-based Sexual Abuse: State of the Research and Evidence-based Recommendations*. Retrieved from:

<https://antibullyingcentre.ie/wp-content/uploads/2022/02/DCU-Online-Abuse-Report.pdf>

⁴ ISPCC, Opening Statement on the General Scheme of the Online Safety and Media Regulation Bill, Retrieved from:

https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_media_tourism_arts_culture_sport_and_the_gaeltacht/submissions/2021/2021-05-13_opening-statement-john-church-et-al-ceo-ispcc_en.pdf ; ABC, Written Submission to the Oireachtas Joint Committee on Education, Further and Higher Education, Research, Innovation and Science, Retrieved from:

<https://antibullyingcentre.ie/wp-content/uploads/2021/04/School-Bullying-with-specific-reference-to-cyberbullying-and-internet-security-during-Covid-19.pdf>; ABC, written submission to the Joint Committee on Media, Tourism, Arts, Culture, Sport and Gaeltacht on the OSMR, Retrieved

findings that the effects of online harms are amplified due to the nature of the online environment⁵ and that members of historically marginalised and vulnerable groups are at increased risk of experiencing such harms.⁶ People are at greater risk due to their age, LGBT+ status, race or racialisation, and ethnicity.⁷ Given these demonstrated risks and harms, we acknowledge the many children's groups and advocates in Ireland who have called for individual complaints mechanisms.⁸ The experiences of these advocates are important and their input has been pivotal in bringing this call to focus. Children and young people's voices have also been prominent in putting a spotlight on the real issues they experience every day online, and in articulating the difference such a complaints mechanism would make.⁹

Second, we note the risk highlighted by individuals within the expert group that the OSMR Bill may be superseded by similar EU legislation currently tabled.¹⁰ For example, it is not clear to the authors how an Individual Complaints Mechanism will function alongside the role of the National Digital Services Coordinators provided for in the text of the Digital Services Act (DSA) Package.¹¹ Concerns have been raised that there will be significant overlap and

from: <https://antibullyingcentre.ie/wp-content/uploads/2021/04/School-Bullying-with-specific-reference-to-cyberbullying-and-internet-security-during-Covid-19.pdf>; ABC submission to the Joint Oireachtas Committee on Justice and Equality on Harmful Communications, Retrieved from: <https://antibullyingcentre.ie/wp-content/uploads/2021/12/Oireachtas-Joint-Committee-on-Justice-and-Harmful-Communications.pdf>

⁵ Supra notes 2, 3 and 4

⁶ Supra notes 2 and 3

⁷ Supra notes 2, 3 and 4

⁸ See Supra note 4 and also the call of the #123OnlineSafety Campaign of which ISPC is a member: <https://www.childrensrights.ie/resources/press-release-individual-complaints>; the Ombudsman for Children's Office and the Special Rapporteur on Child Protection, Professor Conor O'Mahony, retrieved from:

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_media_tourism_arts_culture_sport_and_the_gaeltacht/2021-05-12/2/?highlight%5B0%5D=conor&highlight%5B1%5D=online&highlight%5B2%5D=safety&highlight%5B3%5D=safety&highlight%5B4%5D=online&highlight%5B5%5D=safety; calls by various women politicians in Ireland: <https://www.independent.ie/irish-news/i-spend-my-evenings-blocking-abusers-td-36474560.html>; and impacts on female journalists: <https://www.theguardian.com/media/2021/may/02/un-catalogues-chilling-tide-of-abuse-against-female-journalists>

⁹ Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht debate - Thursday, 6 May 2021. *General Scheme of the Online Safety and Media Regulation Bill 2020: Discussion (Resumed)*

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_media_tourism_arts_culture_sport_and_the_gaeltacht/2021-05-06/2/?highlight%5B0%5D=conor&highlight%5B1%5D=online&highlight%5B2%5D=safety

¹⁰ Mr Ronan Lupton SC associated himself with the written submissions of Professor McIntyre.

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_tourism_culture_arts_sport_and_media/2021-07-07/3/

¹¹ Section 1 lays down provisions concerning national competent authorities, including Digital Services Coordinators, which are the primary national authorities designated by the Member States for the consistent application of this Regulation (Article 38); This has been acknowledged in Oireachtas discussions: <https://www.kildarestreet.com/committees/?id=2022-01-19a.699&s=Digital+Services+Act#g702>

conflicts between the proposed Irish scheme and the requirements of the forthcoming EU legislation – so much so that if the domestic scheme takes effect it will need to be significantly recast.¹² Officials at the Department recognise there will be overlaps and that these will need to be worked through when the DSA is finalised.¹³

Third, we see that the Expert Group requests for the practicalities and potential operation of the individual complaints mechanism will receive responses backed by limited real world data and empirical research-based evidence. Two models raised particularly for comparative evaluation include the Australian eSafety Commissioner¹⁴ and the Irish Data Protection Commission.¹⁵ Regarding the former, we have positive reports from the Australian Communications and Media Authority particularly in regards to cyberbullying complaints mechanism for young people who experienced serious cyberbullying.¹⁶ Further, in the accounts of the Australian eSafety Commissioner, the volume of incoming complaints was not raised as an issue that hampered the effectiveness of the mechanism itself.¹⁷ However, we have not seen independent evaluation reports verifying the efficacy of this function. Regarding the latter, it is well established that the Data Protection Commission, with its function as the de-facto EU regulator, has been overwhelmed despite resources totalling over EUR 19 million for 2021.¹⁸ There is also a dearth in industry evidence with respect to the breadth and depth of the problems an individual complaints mechanism is

¹² Digital Rights Ireland, Submission to Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht General Scheme of the Online Safety and Media Regulation Bill, March 2021 https://pdfhost.io/v/9Tbplu6L4_Microsoft_Word_OSMR_submission_Digital_Rights_Ireland_finaldocx.pdf; See also oral submissions

https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_tourism_culture_arts_sport_and_media/submissions/2021/2021-05-26_opening-statement-tj-mcintyre-chairman-digital-rights-ireland_en.pdf

¹³ Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht debate - Thursday, 6 May 2021. *General Scheme of the Online Safety and Media Regulation Bill 2020: Discussion (Resumed)*, Retrieved from:

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_media_tourism_arts_culture_sport_and_the_gaeltacht/2021-05-06/2/?highlight%5B0%5D=conor&highlight%5B1%5D=online&highlight%5B2%5D=safety

¹⁴ The functions of the eSafety Commissioner are set out in Section 27 of the Online Safety Act 2021: <https://www.legislation.gov.au/Details/C2022C00052>

¹⁵ Data Protection Commission: <https://www.dataprotection.ie/>

¹⁶ Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme), Retrieved from: <https://www.infrastructure.gov.au/sites/default/files/briggs-report-stat-review-enhancing-online-safety-act2015.pdf>

¹⁷ We acknowledge the Australian eSafety Commissioner Ms. Julie Inman Grant's testimony in front of the Oireachtas Joint Committee, discussing the effectiveness of the Australian scheme:

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_tourism_culture_arts_sport_and_media/2021-07-21/2/?highlight%5B0%5D=julie&highlight%5B1%5D=inman&highlight%5B2%5D=grant&highlight%5B3%5D=safety&highlight%5B4%5D=granted&highlight%5B5%5D=online&highlight%5B6%5D=online

¹⁸ This figures were taken from: <https://www.wranqu.com/available-resources-by-member-states-for-dpa-and-enforcement-actions-personal-data-protection-is-fundamental/>

seeking to solve.¹⁹ We acknowledge the concerns raised by members in this expert group about how mechanisms and resources will be put into place to effectively manage the potential volume of complaints an individual complaints body may receive.²⁰ As we detail below, we also stress the need to better educate and resource existing regulatory bodies, to understand the nature of online crimes and harms, to provide support, compassion, and effective solutions, at speed.

Fourth, we acknowledge the limitations of the proposed solution and the existence of parallel proposals. Experts have described the limitations of singling out harmful content and removing it in a binary fashion rather than considering how AI and machine learning in corporate environments function to amplify and reward harmful forms of content in a manner that is non-binary.²¹ We query whether this focus on an individual complaints mechanism as the panacea loses sight of these larger systemic issues and query how existing parallel proposals might respond to these systemic problems. For example, the international NGO Article19 proposes the institution of social media councils (SMCs) at the national level as alternative supervisory bodies which would be independent from social media companies and more representative of specific populations.²² SMCs would explore developing non-binary approaches to content moderation in which stakeholders could all share their views on requirements in discussion with industry who could outline what is technically possible, towards reaching agreements on avenues forward.²³ Simultaneously, people are being targeted and harmed and have a right to an effective remedy.²⁴

¹⁹ Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht debate - Wednesday, 19 May 2021, *General Scheme of the Online Safety and Media Regulation Bill 2020: Discussion (Resumed)*:

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_media_tourism_arts_culture_sport_and_the_gaeltacht/2021-05-19/2/?

²⁰ Mr Ronan Lupton SC in his statement to the Oireachtas described 'complaints lines - call centres, almost - had to be set up to deal with the volume coming through.' See:

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_tourism_culture_arts_sport_and_media/2021-07-07/3/

²¹ See e.g. Douek, Evelyn, Content Moderation as Administration (January 10, 2022). forthcoming Harvard Law Review Vol. 136, Available at SSRN: <https://ssrn.com/abstract=4005326> or <http://dx.doi.org/10.2139/ssrn.4005326>; Gillespie, T., Aufderheide, P., Carmi, E., Gerrard, Y., Gorwa, R., Matamoros-Fernández, A., ... & West, S. M. (2020). Expanding the debate about content moderation: Scholarly research agendas for the coming policy debates. *Internet Policy Review*, 9(4), Article-number.

²² Article19 (2021a). Social Media Councils. One piece in the puzzle of content moderation. <https://www.article19.org/wp-content/uploads/2021/10/A19-SMC.pdf>; Article 19 (2021b).

Facilitating the creation of a Social Media Council in Ireland. *Article19*. 1 - 9; Celeste E., & Farries E., (2022) Towards an Irish Social Media Council: Challenges and Opportunities. Abstract submission to the AoIR 2022.

²³ For example, Article19 have suggested that once the DSA comes into force, the SMC could serve as an out-of-court dispute settlement mechanism as required under Article 17. The complaints mechanism that it will operate will meet the requirements for certification as provided for in Article 18 of the Proposal for the DSA.

²⁴ EU Charter of Fundamental Rights: <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial>

Finally, we acknowledge that the extensive Joint Committee on Tourism, Culture, Arts, Sport and Media hearings, which took place during the pre-legislative scrutiny of the Bill, also involved feedback from numerous experts and rights groups, including those representing young people.²⁵ Nonetheless, we find it important that feedback from these demographics as regards to the individual complaints mechanism be solicited by the expert group as well, if at all possible within the short timeframe designated for the expert group's operation. In relation to the perspectives of children and young people, for example, this could perhaps be achieved by engaging the Department of Children, Equality and Disability Participation Unit²⁶, or via the Office of the Ombudsman for Children.²⁷

With this contextualisation, the authors provide input to these matters in response to some of the suggested questions.

Question 1. What value would you see an individual complaints mechanism adding to the regulatory framework for online safety set out in the Bill in terms of a) avenues of redress and b) reducing risk of harm?

The value an individual complaints mechanism could add is to provide an appeal mechanism to the regulator when service fails to effectively respond to a complaint. The mechanism might enable more direct engagement with the service(s) on behalf of the individual. An individual complaints mechanism could therefore complement the existing mechanisms available from other institutions, which do not provide sufficient avenues of redress for victims of various types of online harms and exposure to harmful online content. We discuss this further below. This value may be contingent on also ensuring those other institutions are appropriately resourced and that the addition of a new complaints mechanism does not create overlap and conflicts between them, or with the requirements of the forthcoming EU legislation.

Furthermore, an individual complaints mechanism could provide additional value if it were also used as a tool for compensation and reparation for those individuals affected by failures of companies' moderation systems. Since one of the key structural features of the Bill is to impose administrative and financial sanctions on media providers, we question whether the proceeds of such financial sanctions should only be directed to the regulator? Or should an individual complaints mechanism also be used to channel repairs to individuals who experienced significant harms on platforms, warranting redress.

Existing mechanisms available from other institutions

²⁵ See for example the Joint Committee on Media, Tourism, Arts, Culture, Sport and Gaeltacht debate (13 May, 2021), Retrieved from: https://www.oireachtas.ie/en/debates/debate/joint_committee_on_media_tourism_arts_culture_sport_and_the_gaeltacht/2021-05-13/2/

²⁶ Government of Ireland, Department of Children, Equality, Disability, Integration and Youth Unit, Retrieved from: <https://www.gov.ie/en/policy-information/dff67e-participation/>

²⁷ Ombudsman for Children. Retrieved from: <https://www.oco.ie/>

The changes proposed by the Government through the OSMR Bill will address the issue of complaints handling through Codes of Conduct (Practice) and/or via a 'super complaints scheme' to address systemic issues. In respect of making an individual complaint about harmful content one comes across online and wishes to report, presently in Ireland one must complain under a variety of fragmented policies and procedures. These include the policies of the platform providers and also defamation proceedings, which a complainant must typically bring in the High Court. Defamation proceedings involve delays and costs for proceedings which may or may not be successful.

An existing mechanism of particular note is the Data Protection Commission which offers an individual complaints mechanism where a person has a concern about how their personal data has been handled. The Law Reform Commission in its 2016 Report states "Such a cause of action could be particularly beneficial in the context of harmful digital communications if based on the constitutional right to privacy."²⁸ However, the Data Protection Commission is clear that while its remit "...is primarily concerned with its own area of regulation, namely, data protection, it recognises that the regulation of online safety issues, including harmful content, and data protection will naturally complement and be mutually supportive of each other."²⁹

An Garda Síochána also offer a number of avenues including Garda National Protective Services Bureau (GNPSB),³⁰ which provides support to its members who are investigating a range of sexual and online crimes. The GNPSB's Online Child Exploitation Unit also investigates reports of cyberbullying it receives.³¹ The Garda National Cyber Crime Bureau (GNCCB) is the national Garda unit tasked with the forensic examination of computer media seized during the course of any criminal investigations, including online harassment and child exploitation offences.³² Hotline.ie is the Irish national reporting centre where members of the public can securely, anonymously, and confidentially report concerns in respect of illegal content online, especially child sexual abuse material (CSAM).³³ Hotline.ie also operates an

²⁸ Page 138, Para 3.28, Law Reform Commission. Harmful Communications and Digital Safety Report. (2016). Retrieved from:

https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf

²⁹ Joint Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht debate - Wednesday, 5 May 2021 General Scheme of the Online Safety and Media Regulation Bill 2020: Discussion (Resumed). Retrieved from:

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_media_tourism_arts_culture_sport_and_the_gaeltacht/2021-05-05/3/

³⁰ An Garda Síochána National Protective Service Bureau, Retrieved from:

<https://www.garda.ie/en/about-us/organised-serious-crime/garda-national-protective-services-bureau-gnpsb-/>

³¹ An Garda Síochána Online Child Exploitation Unit. Retrieved from:

<https://www.garda.ie/en/about-us/organised-serious-crime/garda-national-protective-services-bureau-gnpsb-/online-child-exploitation/>

³² An Garda Síochána, Garda National Cyber Crime Bureau (GNCCB). Retrieved from:

<https://www.garda.ie/en/about-us/organised-serious-crime/garda-national-cyber-crime-bureau-gnccb-/>

³³ Irish National Centre for Combatting Illegal Content Online, Retrieved from: <https://hotline.ie/>

individual complaints mechanism for those who want to report Intimate Image Abuse, an offence under the *Harassment, Harmful Communications, and Related Offences Act 2020*.³⁴ In recent years, rights experts, observing deficiencies in Irish policing, have advocated a wholesale process of reform for An Garda Síochána to ensure “a rights-based policing service emerges which is professional, legitimate and fully supported by the public it is there to serve”.³⁵ Such reform must necessarily be also directed to the policing of online harms. The Commission on the Future of Policing in Ireland has also advocated that the capacity and expertise of the existing online policing mechanisms like the GNCCB be expanded as a matter of urgency and the personnel appointments in the field be fast tracked.³⁶

The protection of people online is a key policy priority for the authors. This includes ensuring their right to a remedy: “...free, widely-known, safe, confidential and child-friendly complaint and reporting mechanisms to the relevant authorities”, as recommended in the General Comment No. 25 on children’s rights in relation to the digital environment.³⁷ The authors promote the availability of similarly accessible mechanisms to all marginalised identities and communities. The addition of a well-defined individual complaints mechanism could add significant value to the regulatory framework for online safety in the OSMR Bill, as it could give individuals an avenue for redress that is not explicitly provided for elsewhere. This would be contingent however on ensuring there are no overlaps and conflicts with the EU regulations and that other Irish bodies which we have identified above are similarly appointed and resourced per previous expert recommendations.

b) Reducing risk of harm

An individual complaints mechanism could help ensure that children and adults who are victims of abusive targeting, and whose cases are not effectively handled by online platforms, have access to regulator’s support which can prevent serious harm. For example, if a person is experiencing persistent abuse across multiple platforms (some of which may not even be designated by the Commission and are outside of the scope of voluntary arrangements as explained in Section 139W) which cannot be adequately removed by the existing reporting mechanisms; and if the nominated bodies do not draw the Commission’s attention to this particular case, then allowing the individual in question to bring their case to the regulator, would constitute a welcome addition to the regulatory framework in terms of avenues of redress and reducing the risk of harm.

³⁴ <https://www.irishstatutebook.ie/eli/2020/act/32/enacted/en/print>

³⁵ Kilpatrick A (2018) A Human Rights-Based Approach to Policing in Ireland, Irish Council for Civil Liberties, 2018, at 6. Retrieved from: <https://www.iccl.ie/wp-content/uploads/2018/09/Human-Rights-Based-Policing-in-Ireland.pdf>

³⁶ Commission on the Future of Policing in Ireland (2018) The Future of Policing in Ireland, at p27 Retrieved from <https://assets.gov.ie/180551/8b6b5065-5720-4a24-a40c-a2b15446770c.pdf>

³⁷ United Nations Human Rights Office of the High Commissioner: General Comment Number 25 (2021) on children’s rights in relation to the digital environment. Retrieved from: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx>

As we explain in our response to question 9, we envisage this support as Tier 2 type of service. The individual or parent/guardian as appropriate would need to provide evidence of the abuse and failures to have the content removed/ abuse cease (e.g. screenshots of having repeatedly blocked one or multiple accounts and inability to have the content removed despite having reported such abusive content). Sometimes, it is critical for a person experiencing bullying and cyberbullying to receive help in time, and if they are unable to see the content removed or the abuse stopped, it sends the wrong message that such abuse is sanctioned.³⁸ This can contribute to feelings of hopelessness, and having a responsive body to which people can turn to in such situations can be critical for more severe relentless cases of abuse.³⁹

Regarding children in particular, many children feel reluctant to report abuse to parents and teachers or even to tell their friends.⁴⁰ Having an option for the child to report on their own; to do so anonymously; and to provide instructions for children on how to report in a child-friendly easy to understand manner, is crucial from our perspective. Such an approach contributes to the implementation of the United Nations Convention on the Rights of the Child (UNCRC) Article 12, that children have the right to be heard on matters that concern them.⁴¹

Therefore, we see an individual complaints mechanism as a possible avenue for securing the provisions in the Bill laid out Sections 139K(4 and 5). These currently state that the Commission will set the standards for designated services' complaints handling, which should ideally secure better scrutiny of the effectiveness of the designated companies' internal reporting tools and mechanisms; as well as provisions for auditing (Section 139P).

Question 2. Do you see any conflict or synergies between an individual complaints mechanism and existing provisions in the Bill, for example online safety codes on complaints handling?

We do not see at present any apparent conflict with the provision set out in Section 139k(5) and an individual complaints mechanism. Such reporting demands from the regulator to the designated companies could place a significant burden on small and medium size enterprises, but we are not best positioned to comment on this.

³⁸ Milosevic, T., & Vladislavjevic, M. (2020). Norwegian children's perceptions of effectiveness of social media companies' cyberbullying policies: an exploratory study. *Journal of children and media*, 14(1), 74-90.

³⁹ Hinduja, S., & Patchin, J. W. (2019). Connecting adolescent suicide to the severity of bullying and cyberbullying. *Journal of school violence*, 18(3), 333-346.

⁴⁰ Mishna, F., Birze, A., Greenblatt, A., & Khoury-Kassabri, M. (2021). Benchmarks and bellwethers in cyberbullying: the relational process of telling. *International Journal of Bullying Prevention*, 3(4), 241-252.

⁴¹ United Nations Human Rights Office of the High Commissioner. General Comment (25) on children's rights in relation to the digital environment. Retrieved from: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx>

The super complaints scheme proposal will allow the Media Commission to establish a “super complaints scheme” where nominated bodies can bring issues to the attention of the Commission and this could allow for synergy with an individual complaints mechanism. The authors understand the purpose of this super complaints scheme will be for systemic issues. However, in a radio interview Minister Martin⁴² has suggested that it will allow individuals to bring individual complaints via this scheme, where their complaint satisfies a “risk test” where there is any risk to a person’s life or a significant risk to a person’s physical or mental health, (OSMR, S.139A, Subsection 4). Should this be in the intention of the scheme it will need to be explicitly laid out as such and realistic thresholds put in place to avoid it being out of people’s reach, rendering it ineffective. Also, consideration needs to be given as to how speedily such a scheme would be as an alternative to an individual complaints mechanism where an individual goes directly to the Online Safety Commissioner where a platform/service fails to address their complaint effectively and/or efficiently.

Question 3. What risks do you foresee if there were no individual complaints mechanism?

The risk that we see is that the current reality will remain: It is often the case that harmful online content lingers on the platforms, slipping through moderation cracks, leaving users and marginalised groups in particular without a remedy. We have detailed in this submission existing issues with resourcing and expertise which also require remedy. There are numerous further risks under the OSMR, including: if nominated bodies do not detect an issue with one or more platforms; if designated platforms fail to address harmful online content, despite the measures outlined in Section 139k(5); if harms occur on a platform outside the mandate of the Regulator or jurisdiction of Ireland or another member state; or if such platform is not within the scope of a voluntary agreement per Section 139W. There is also the risk of retraumatizing individuals who are already harmed and who under existing systems may have to tell/relive their trauma multiple times until a resolution is reached.

We note that ISPCC obtained a legal opinion through the Public Interest Law Alliance (PILA) on whether an individual complaints mechanism, as provided for in the Australian *Enhancing Online Safety Act 2015* is mandated by the Revised AVMSD.⁴³ This opinion states that the Government must provide for such mechanisms as code making, complaints and disputes handling to transpose the relevant sections Article 28a and Article 28b of the revised Directive to achieve the result intended by the Directive, which would include an individual complaints mechanism to provide for an effective remedy. It further notes that the designation of the Media Commission as public servants and its establishment in statute, will mean that such a Commission and its Commissioners under Section 2.1(h) of the Irish Human Rights and Equality Act 2014, are subject to Section 42 of the Act, namely the Public Sector Equality and Human Rights Duty. This legal obligation means that such public bodies must uphold the equality and human rights of everyone affected by its policies and strategies; the Online Safety Commissioner is no different. In meeting this obligation, the Commissioner will need to be able to demonstrate how it proposes to protect the rights of users, in particular their right to an effective remedy.

⁴² RTE Radio 1, Online Safety. Retrieved from: <https://www.rte.ie/radio/radio1/clips/22050053/>

⁴³ ISPCC legal opinion available from Fiona.Jennings@ispcc.ie

Question 5. Should a distinction be made between those categories of harmful online content which are connected to a criminal offence (which would require the involvement of appropriate law enforcement bodies) and those other categories of harmful online content?

We propose categories of harmful online content connected with a criminal offence should be distinguished from other categories of harmful online content. Our position is consistent with the position articulated in the European Parliament's resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues. The resolution posits that "any legally mandated content take-down measures in the Digital Services Act should concern illegal content only, as defined in EU and national law, and that the legislation should not include any undefined concepts and terms as this would create legal uncertainty for online platforms and put fundamental rights and freedom of speech at risk".⁴⁴

Members of this authored submission have raised concern with a process that requires complainants to engage with criminal law procedures and officials in ways that are possibly retraumatizing in seeking the swift removal of harmful content. However, we also acknowledge that the Gardai have been embodied with particular powers not afforded to other bodies to ensure democratic process and the rule of law. This points to our earlier comments that, in seeking to solve the problem of harmful content online, and to ensure the well-being of complainants procedurally, existing bodies like An Garda Síochána must be urgently resourced and reformed in order to ensure rights-based policing services which adequately support the public.

Question 8. Should an individual complaints mechanism be overseen by a) An Coimisiún by the same Online Safety Commissioner who has oversight over the systemic regulatory framework, b) by a second Online Safety Commissioner be appointed to carry out this function or c) by a separate body to An Coimisiún?

This question illustrates well the potential further overlap between existing regulatory mechanisms and further mechanisms proposed in the Bill. Our feeling is that the function could be retained within the Online Safety Commissioner and that guidance feedback could be provided to this body through a separate body like the Social Media Council.

Question 9. Should an individual complaints mechanism be structured as a) being a first line service (tier 1) or b) as an avenue of appeal (tier 2) for those who have already engaged with a designated online service subject to an online safety code on complaints handling?

As stated in our responses to questions 1 and 2, we see the complaints mechanism as being primarily an avenue of appeal (tier 2). The mechanism would be an opportunity for users to demonstrate that they have exhausted all possible options in terms of reporting the content to the platform(s). This approach might address the issue of volume of received complaints and ensure that complaints that reach the regulator are not trivial in nature.

⁴⁴ European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues posed: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0274_EN.html

We find it difficult to envisage what Section 139k(5) will look like in practice, but we imagine that the designated companies will be asked to self-assess their complaints handling, which they will provide in an aggregate form (e.g. this many reports have been received and have been handled in this time frame); and that they will not be providing any details about the individuals who reported content which was not removed as it did not violate Terms of Service (we do not know if such divulging would be constitutional and allowed from the perspective of privacy regulation either). Perhaps one avenue to pursue, depending on feasibility, might be to request reporting to the nominated bodies which would then be obliged to review the evidence supplied by the user in the given case, and forward such vetted requests to the regulator. The regulator would need to ensure that the nominated bodies have the resources to handle such complaints.

Question 10. How should the success or otherwise of an individual complaints mechanism be measured?

We think that it is critical to measure the success from the perspective of end users, and children and minority groups in particular, who have relied on the mechanism for help. This measure could be quantitative (survey questionnaires), but it is also important to capture mechanism users' experiences in a qualitative manner, for example via interviews with such individuals. This would also constitute an opportunity to examine the extent to which content removal is an effective remedy for various types of harmful content and provide data with the aim of updating social media content policies.

In line with DSA Article 31, vetted researchers from academic institutions and independent research bodies with expertise in the area should play a role in this process and be provided with access to necessary data to execute such evaluation.

Question 11. What would be the appropriate period for review of the operation of an individual complaints mechanism?

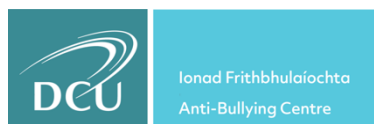
We suggest a period of review of no less than three years and no more than five years after the complaints mechanism is initiated. This interval would also allow designated and vetted researchers to design empirical methods for meaningful evaluation, as we describe in our Question 10 response. It is also supported by the time frames proposed for other pieces of legislation: The 'age of digital consent' review in the Data Protection Act 2018 is set at three years⁴⁵ and the Digital Services Act Package is due to be reviewed five years from when it comes into force.⁴⁶ Therefore, in order to design empirical methods for the meaningful evaluation that we describe in our Question 10 response, and based on the time frames proposed for other pieces of legislation, we are of the opinion that the evaluation time frame be no less than 3 years.

⁴⁵ Gov.UK. The Data Protection Act. Retrieved from: <https://www.gov.uk/data-protection>

⁴⁶ Regulation of the European Parliament and of the Council, on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC. Retrieved from: https://ec.europa.eu/info/sites/default/files/proposal_for_a_regulation_on_a_single_market_for_digital_services.pdf

About the organisations

DCU Anti-Bullying Centre (ABC) is a national university designated research centre located in DCU's Institute of Education. The Centre is known globally for its research excellence in bullying and online safety. It is home to scholars with a global reputation as leaders in the field. The work of the Centre builds on 25 years of research in which we were the first in Ireland to undertake studies on school, workplace, homophobic and cyberbullying.



The members of **the UCD Centre for Digital Policy** believe that policy making and evaluation must be deliberative, emergent, and iterative, with sociocultural values at their core. Such an ambitious agenda will require working with stakeholders and beneficiaries to develop effective and evidence-based formal and informal regulation and institutional digital policies, maintain such policies over time, and foreground urgent issues of sustainability, equity, and human rights. The members of the centre draw on interdisciplinary methods from computing, law, design, human rights, and social science to create policy, amplify positive effects on society (especially vulnerable citizens, who may include women, people of colour, the poor, migrants, children, and others), and study policymaking across technologies and sectors.



ISPCC is *for* children. Our purpose is to listen to them, empower them, strengthen their resilience and enable them to live their best possible lives. ISPCC provides a range of services directly to children and families and advocates for change to enhance the lives of children in Ireland. ISPCC's work is made possible through public and corporate support, as well as funding provided by government agencies for the delivery of specified services.



About the authors

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