

OFCOM Consultation
Protecting children from harms online
Response of the Children and Young People's Commissioner Scotland.

July 2024

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.

The Commissioner is fully independent of the Scottish Government.

These draft Codes of Practice addresses material which is legal but harmful to children.¹ OFCOM have consulted separately on restricting illegal material on the internet. The main categories of material covered by these draft Codes of Practice are defined by sections 60-62 of the Online Safety Act 2023. These include “primary priority content” (PPC – defined by section 61) and “priority content” (PC – defined by section 62) as well as what the draft Codes refer to as “non-designated content” (NDC) which is described in section 60 as content “*which presents a material risk of significant harm to an appreciable number of children in the United Kingdom*”.² Unlike the first two, the Act provides no further elaboration of what this may be and OFCOM has asked, in this consultation, for views on the categories of “depressive content” and “body image”.

This is a lengthy consultation, in 5 volumes with 15 annexes and amounting to thousands of pages. There are 61 questions. Much of the content is technical or legalistic in nature, and at times bewildering in its repetition. We are concerned that its length and complexity will act as an impediment to responding for members of the public, voluntary organisations, individuals working with children and most importantly children and young people themselves. We attended three online seminars which accompanied the consultation and found these technical and apparently aimed at and attended by industry representatives.

Children's right to participate

There is no accompanying children's version of the consultation or of the draft Codes of Practice. Although we note that OFCOM has undertaken engagement with children and young people and that this has been complemented by work

¹ In line with the UNCRC, as incorporated in Scotland, we use the term children to include all people under the age of 18.

² Online Safety Act 2023. <https://www.legislation.gov.uk/ukpga/2023/50/contents>

undertaken by our colleagues at the Office of the Children’s Commissioner for England,³ we feel that it should have been possible to create a consultation specific to the draft Codes of Practice which was accessible for older children at a minimum. This would also have provided an opportunity for broader engagement amongst other groups who will find the current consultation difficult to navigate or respond to.

Children have a right to participate in all matters affecting them, as laid out in Article 12 of the UNCRC and the accompanying General Comment 12.⁴ This is a broadly interpreted right which extends not just to views being heard but to them playing an active role – their “views ... have to be seriously considered”. Specific attention should be paid to children less likely to have their rights respected.

Article 12 is one of the general principles of the UNCRC and its realisation is crucial for the realisation of all rights contained within the Convention. In this context, children’s participation in the development of the draft Codes is essential to ensuring it effectively realises children’s rights. We are concerned that a lack of children’s participation may also result in inadvertent breaches of children’s rights.

Human Rights Context

Keeping children safe, in the home, in the community and in online spaces is a key obligation of the government under the UNCRC. The intent of this legislation is therefore welcome. In the draft Codes, OFCOM clearly evidence the extent and degree of harm children may be exposed to online. We do not doubt that the intention both of the Online Safety Act 2023 and of OFCOM’s draft Codes and their wider work on this issue is to reduce children’s exposure to this harm. And it is vital that this remains central to the development and implementation of the Act.

The draft Codes of Practice engage with a wide range of children’s human rights as expressed in the UNCRC and other human rights treaties. These include the following Articles of the UNCRC:

- Article 1 – definition of a child
- Article 2 – right to be free from discrimination
- Article 3 – best interests of the child
- Article 4 – general measures of implementation
- Article 5 – evolving capacities of the child
- Article 6 – the right to life and development
- Article 12 – the right to participation in decisions
- Article 13 – the right to freedom of expression
- Article 14 – the right to freedom of thought, conscience and religion
- Article 15 – the right to freedom of association and peaceful assembly

³ 2024. Children’s Commissioner’s response to OFCOM’s ‘Protecting people from illegal harms online’ <https://www.childrenscommissioner.gov.uk/resource/childrens-commissioners-response-to-ofcoms-protecting-people-from-illegal-harms-online/>

⁴ UN. *General Comment No. 12 (2009): The right of the child to be heard.* https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F12&Lang=en

- Article 16 – the right to privacy
- Article 17 – the right to access to information
- Article 19 – the right to protection from all forms of physical and mental harm
- Article 23 – the rights of disabled children
- Article 24 – the right to the enjoyment of the highest attainable standard of health
- Article 28 and Article 29 – the right to an education
- Article 31 – the right of the child to play, rest and leisure
- Article 33 – the right to be protected from illicit drugs
- Article 34 – the right of the child to be protected from all forms of sexual exploitation and sexual abuse
- Article 36 – protection from exploitation
- Article 37 – protection from torture, or other cruel, inhuman or degrading treatment.
- Article 39 – the right to physical and psychological recovery

As with all human rights treaties, the rights contained within the UNCRC have been declared by the UN General Assembly to be:

*universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.*⁵

This means that children are protected by the full range of European and international human rights treaties, with the rights contained within the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the UN Conventions on the Rights of People with Disabilities and for the Elimination of all Forms of Discrimination Against Women (CEDAW) being particularly relevant. The Council of Europe also have a number of relevant treaties to which the UK is a State Party which are relevant to the draft Codes, and the Parliamentary Assembly and Committee of Ministers of the Council of Europe have both made relevant recommendations.

We note that OFCOM state that they have carefully considered the impact of the draft Codes of Practice on children’s and adults’ rights,⁶ and include sections on the UNCRC in several parts of this consultation. Some of these make reference to the United Nations Committee on the Rights of the Child’s General Comment No. 25 (2021) on children’s rights in relation to the digital environment (GC25).⁷ However, OFCOM have chosen to consider ECHR rights rather than UNCRC rights (or GC25), assuming that the Act itself is “consistent with relevant aspects of the UNCRC and

⁵ UN General Assembly. 2006. Resolution 60/251.

https://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf

⁶ OFCOM, 2024. *Protecting children from harms online: Volume 1*. Page 15-16

⁷ OFCOM, 2024. *Protecting children from harms online: Volume 2*. Page 16

<https://www.ofcom.org.uk/siteassets/resources/documents/consultations/category-1-10-weeks/284469-consultation-protecting-children-from-harms-online/associated-documents/vol3-causes-impacts-of-harms-to-children.pdf?v=336052>

General Comment 25” and then state they will disregard GC25 and instead “consider the relevant statutory duties in the Act and impacts on ECHR rights”.⁸ There is no in-depth engagement with GC25 in any section.

The failure to engage with children’s rights on a holistic basis means that at no stage is the proportionality of the various interferences in both children’s and adults’ rights required to implement the Online Safety Act considered in the context of children’s rights – including the right to be safe from harm in Article 19 of the UNCRC – which extends significantly further than the more limited scope of Article 2 of ECHR (which is, in any case, also not considered). This is a missed opportunity to ensure that the draft Codes are demonstrably compliant with children’s rights, or indeed with taking an indivisible, interdependent approach to rights required by GA resolution 60/251 as quoted above. Our view is that these interferences in children’s rights may well be justified and proportionate, but the failure to analyse them in terms of the UNCRC means there is limited evidence to support this.

Articles 6 and 19 UNCRC

Article 6 of the UNCRC requires States Parties to “*ensure to the maximum extent possible the survival and development of the child*” – a broader definition than the right to life in Article 2 of the ECHR.

Meanwhile, Article 19(1) of the UNCRC requires States Parties to:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse...

In their General Comment 15 on right of the child to freedom from all forms of violence, the UN Committee makes it clear that the “term violence has been chosen here to represent all forms of harm”,⁹ confirming Article 19’s relevance to the Act and the draft Codes. Article 6 extends beyond the conception of right to life in ECHR Article 2 to include a duty to “ensure to the maximum extent possible the survival and development of the child”. The obligations under Article 6 and 19 underpin and justify the interference in the human rights of both children and adults necessary for effective implementation of the Online Safety Act 2023 and the draft Codes.

Article 17

UNCRC Article 17, creates a right to access information via the mass media, particularly to “*material aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health*”.

⁸ IBID

⁹ UN Committee on the Rights of the Child. 2006. *General Comment No, 15 (2006) on the right to the child to freedom from all forms of violence*.
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2F2FC%2FGC%2F13&Lang=en

Article 17(e) meanwhile places obligations on States Parties to “*encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her wellbeing...*”

Article 17, together with GC25 therefore also provides a clear human rights basis for the Online Safety Act 2023 and the draft Codes of Practice.

Articles 13 to 16 UNCRC

Articles 13 to 15 of the UNCRC provide children with a range of civil rights and freedoms, which are similar to those contained in ECHR Articles 9 to 11, but with important differences. These are the key rights which will be interfered with by the measures in the Online Safety Act and the draft Codes. Their consideration in developing the draft Codes should have been considered essential. Notwithstanding the UNCRC’s (lack of) legal status in UK law, they are used by the European Court of Human Rights to interpret the equivalent ECHR Articles as they relate to the children.

As with the equivalent ECHR rights, the UNCRC provides specific conditions in which these rights can be restricted or interfered with, however in the case of the UNCRC these reflect the additional protections given to children. The UN Committee on the Rights of the Child expands on this, in its General Comment No. 20 on the rights of the child in adolescence. In particular, it addresses questions around the limitations which may (or may not) be placed on older children in respect to these rights.

UNCRC Article 13 extends beyond a right of freedom of expression to encompass a right to seek, receive and impart information of all kinds in any kind of media (of the child’s choice).

UNCRC Article 16 provides a right to privacy equivalent to that in Article 8 of the ECHR but extends this to a right to protection against interference or attacks against a child’s honour or protection.

Our view is that the approach taken to human rights has not been comprehensive enough, resulting in a missed opportunity to fully consider children’s rights in the development of the draft Codes. This means that there is a risk of unintended consequences, such as introducing measures which potentially breach children’s rights and may fail to meet the aims of the Act. The failure to take account of the UNCRC and the accompanying, extensive range of guidance on children’s rights from both the UN Committee on the Rights of the Child and the Council of Europe is particularly concerning in relation to Volume 3 where significant interferences with children’s rights to expression, association and access to information are proposed.

The rights contained within the UNCRC are broader and more wide-ranging than those contained within the European Convention on Human Rights (ECHR) and are particularly focussed on the additional protections needed by children. Although OFCOM, as a reserved body, is not within the scope of the UNCRC (Incorporation) (Scotland) Act 2024, the UK government is required by international law to act in accordance with the UNCRC. More importantly, the UNCRC is used as an interpretative tool both by domestic courts but, increasingly, by the European Court of Human Rights and is therefore an important tool in understanding the impact of

the draft Codes on the full range of children's rights. For examples in the context of the right to Education in Article 2 of Protocol No. 1 of the ECHR, see the European Court of Human Rights' *Guide on Article 2 Protocol No. 1 to the European Convention on the Human Rights*,¹⁰ which is clear that in its application to children, the ECHR should be read in conjunction with the UNCRC.

Non-designated content

The Online Safety Act makes provision for additional harmful content to be included within the scope of the draft Codes of Practice. This is referred to as non-designated content and in the first instance, OFCOM are proposing inclusion of body image content and depressive content. We think this needs careful consideration and we welcome the acknowledgement that additional research is needed on this content.

One key difference we would highlight is that both types of content present a more complex assessment of children's rights in terms of protection from harm and access to information. Our view is that a thorough Children's Rights Impact Assessment (CRIA) should be undertaken when considering extending the draft Codes to any form of non-designated content and ensure that children actively participate in the proposals.

For example, it is clear that content which normalises suicide is highly likely to be harmful, but content which normalises depression may in fact reduce harm. Depression is a common illness experienced by a large proportion of children and adults. De-stigmatising mental health conditions can be an important way to support children experiencing depression and is a common strategy used by reputable mental health charities. Depressive content may also result in considerable impact on children's own freedom of speech and the freedom of speech of others, particularly where artistic content falls within the scope of the draft Codes, either intentionally or inadvertently as a result of automatic content moderation, particularly for search services. This could also interfere with children's access to information for educational purposes, including literary and artistic works studied for qualifications, such as the War Poets, Sylvia Plath or Edvard Munch.

Body image is a broad and contested term. What does and does not constitute a positive body image is far from settled. Content intended to support positive body image, may be criticised for promoting obesity. Conversely, as the consultation notes, content focussed on body building can have both positive and negative impacts – promoting fitness but potentially also disordered eating.

Recovery Content

The classification of recovery content as content harmful to children needs extremely careful consideration. Any assessment of harm in should consider the potential interference with children's right to access information, particularly information which

¹⁰ Council of Europe, 2024. https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_protocol_1_eng

may support recovery. Any such interference must be proportionate to the risk of harm. This must be informed by children's experiences of accessing this information, rather than adult judgments. Inclusion of this content in the draft Codes must be proportionate to the risk of harm it presents and as with other content, content moderation systems must be sufficiently nuanced not to disproportionately restrict access to non-harmful content.

Children's Access Assessments

This volume outlines how services can assess whether or not they need to undertake a Children's Access Assessment. Stage 1 permits services not to undertake an assessment if they are using highly effective age assurance and although we have some concerns about the operation of age assessment in terms of content moderation (see below) we acknowledge that these will be services which are aimed at people over the age of 18. There will inevitably still be some risk of a child accessing services (usually an older child) which will need to be addressed.

This volume includes a section called "Rights Assessment" which discusses the potential interference in the privacy rights (under Article 8 ECHR) of adults and children presented by age assurance. We do not consider the suggested process to be an effective assessment of human rights.

By not considering children's UNCRC rights, this section disproportionately concentrates on the privacy rights (Article 8 ECHR) of adults (and children) rather than the very legitimate aim of protecting children from harm. Interference with human rights can be justified to protect children from harm (Articles 6 and 19 UNCRC). In making this assessment, ECHR and UNCRC rights should be treated as having equal and equivalent value. Without doing so, there is a significant risk that the decision will be that requiring age verification could be judged to be disproportionate, even where it is not.

We also note that although a number of sources are quoted which address children's rights, General Comment 25 should have been considered when drafting this section.

Draft Children's Register of Risk

We note that this is an extensive section providing evidence-based assessments and a wide range of specific online harms which are specified in the Online Safety Act 2023. We welcome the range of evidence consulted, which demonstrates the breadth, complexity and impact of online harms, and the inclusion of a range of research that included direct work with children and young people. We have not undertaken a detailed analysis of this section but have the following observations.

The draft Codes acknowledge the ever-changing nature of online harms, for example in the context of generative AI. The different forms of online harm identified in the Act are considered, with a review of the risk factors each present. There are a number of common factors, including content recommender systems and the potential for advertising-based services in particular to increase the risk of children encountering

each type of content. The draft Codes also acknowledge links between the online and offline lives of children, particularly in the context of bullying.

OFCOM commits to continuing to develop their research and engagement programme. This process should continue to include engagement with a diverse range of children (within this response, child has the meaning given in the UNCRC i.e. everyone under the age of 18). We would welcome an early review of the effectiveness of the draft Codes, to include significant participation from children and young people, to ensure that it is meeting its intended aim of reducing the harm children are exposed to. We note that the Northern Ireland Commissioner for Children and Young People is proposing that this consultation body and framework is drawn on in the monthly review of the Online Safety Act by the NICCY Youth Panel, as detailed in their response to this consultation.

The draft Codes highlight that, with regard to both suicide and self-harm and eating disorder content, some content that appears to be in the context of awareness raising, support, recovery or safety planning may fall within this category. However, it is important to acknowledge that some of this content is information children have a right to access and that limiting access must be proportionate to the risk of harm posed by specific pieces of content. It is not compatible with children's rights to draw limitations so broadly as to prevent access to content which is not harmful, or because it may be harmful to other children, for example mental health support content which addresses the existence of self-harm or suicide, in the context of awareness raising or safety planning.

We acknowledge that technological solutions to content moderation are likely to play an important part in implementing the draft Codes, but this content inevitably needs careful consideration. One way in which it could be addressed, for example, is through the use of "white lists" categorising content from recognised sources, such as mental health charities. It is also important that complaints systems are able to address content which has been wrongly classified as harmful.

Recommended age groups

This section divides groups into five categories, aged 0-5, 6-9, 10-12, 13-15 and 16-17. We are pleased that these age groups are evidence based and are not pinned to school year groups which would not apply in Scotland. However, we believe that this entire section would be significantly strengthened if it was understood through the lens of children's evolving capacities. The concept of evolving capacities is introduced in Article 5 of the UNCRC and was elaborated on by the work of Gerison Lansdown for UNICEF's Innocenti Global Office of Research and Foresight.¹¹ This provides a child rights basis for understanding the process through which children move from parents making all decisions for them to a position where children make

¹¹ Lansdown, Gerison. 2005. *The evolving capacities of the child*. Available at: <https://resourcecentre.savethechildren.net/document/evolving-capacities-child/>

their own decisions, with support and guidance from their parents. The Committee on the Rights of the Child has also addressed this in the context of older children in General Comment 20 on the implementation of the rights of the child during adolescence.¹² The General Comment is a useful resource to understand the changing role of parents in adolescence as well as ensuring that any interference with their rights of association, freedom of expression and access to information are balanced with their right to be kept safe in a proportionate way.

Age assurance measures

OFCOM's own evidence is that children begin to go online from an early age. Many younger children will be accessing online services with a parent's device and as a result be using a parent's account (which has been verified as belonging to an adult) rather than their own. The likelihood of this occurring is highest amongst the youngest children who are less likely to have their own device.

The State cannot absolve itself of human rights duties to protect children from harm simply by placing legal duties on service providers through the Online Safety Act 2023. It must take "*all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse...*".¹³

The Codes should ensure that Service Providers actively avoid children accessing inappropriate content, even when using an account verified as belonging to an adult. The continued reports of inappropriate content linked to popular children's characters appearing on major online video-sharing platforms, including on sub-sites branded as child friendly, suggests that existing actions by service providers are inadequate and we are concerned that those measures may not be sufficient to avoid this.¹⁴

We believe that the risks that children face online cannot be addressed solely through technological means and that there is need for greater awareness raising and advice for parents, particularly those of very young children, on how to keep their children safe online. Whilst a range of advice is available from different sources, much requires parents to actively seek this out.

Recommender systems

We note that recommender systems are an area of specific concern, in that they may suggest harmful content even if the child has not looked for content of that type

¹² UN Committee on the Rights of the Child. 2016. Implementation of the rights of the child during adolescence. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-20-2016-implementation-rights>

¹³ UNCRC Article 19. <https://www.cypcs.org.uk/rights/uncrc/full-uncrc/#29>

¹⁴ Guardian, 2022. You Tube Kids shows videos promoting drug culture and firearms to toddlers. <https://www.theguardian.com/technology/2022/may/05/youtube-kids-shows-videos-promoting-drug-culture-firearms-toddlers>

(based on similarities between that child and another who has) and that they may continue to delivery harmful material if the child interacts with any.

Recommender systems will be experienced by different children in different ways and their experiences will change over time as algorithms develop. We would welcome this being included in the ongoing review work undertaken by OFCOM. Children should be actively involved in this work, to ensure that their experiences inform any review.

User reporting and complaints

We welcome the acknowledgement of the importance of user reporting and complaints mechanisms and the barriers that children can face when using them. We agree that complaints systems can often be too burdensome, complicated and difficult to understand, and we support the measures proposed on this. To be effective, user reporting mechanisms and complaints processes must be accessible to children and young people. If there is a single process, it should be child friendly by design – this will also meet the needs of adults.

We note that our colleagues at the Northern Ireland Commissioner for Children and Young People (NICCY) heard that some children were reluctant to report material for fear that the algorithm would react to any reaction to the material. Transparency of processes should help address this, but we also feel that service providers should have an obligation to make their complaints processes known to children and young people (and other users) and make appropriate reassurances.

To ensure that children's rights to freedom of expression and to access to information (Article 13 and 17) are not disproportionately restricted, user reporting and complaints processes must also include provision allowing either a content provider or user to challenge a decision that access to content should be restricted. For example, if the website of a mental health organisation is inadvertently flagged as harmful content by a search engine, both the organisation and any child trying to access it should be able to challenge this.

User support

We welcome the empowerment of children in this section, which includes measures such as requiring children to have the option to accept or decline invitations to group chats, to block and mute other users' accounts, to disable comments on their own posts and to signpost children to appropriate support. We also support the requirement for age-appropriate user support materials. This section demonstrates what is effectively a children's rights-based approach and would be strengthened by articulating this.

Impact Assessments

The draft Codes and accompanying consultation would be significantly strengthened by the completion of a Children's Rights Impact Assessment (CRIA). Any adequate CRIA would have flagged the issues we have raised about the potential for

unintended or inadvertent breaches of children's rights under Articles 13 to 17 of the UNCRC and allowed for mitigations to be put in place to address these. More importantly, it would have strengthened the human rights case for the draft Codes and in particular help demonstrate that the potential interferences with the human rights of both children and adults were proportionate and justifiable in human rights terms.