

# Submission to the Department of Justice and Equality on the Age of Consent for Digital Media

November 2016



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.

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Ag Eisteacht  
Alcohol Action Ireland  
Alliance Against Cutbacks in Education  
Amnesty International Ireland  
ASH Ireland  
Assoc. for Criminal Justice Research and Development (ACJRD)  
Association of Secondary Teachers Ireland (ASTI)  
ATD Fourth World – Ireland Ltd  
Atheist Ireland  
Autism Network Ireland  
Barnardos  
Barretstown Camp  
Bedford Row Family Project  
BeLonG To Youth Services  
Care Leavers' Network  
Catholic Guides of Ireland  
Child Care Law Reporting Project  
Childhood Development Initiative  
Children in Hospital Ireland  
COPE Galway  
Cork Life Centre  
Crosscare  
Dental Health Foundation of Ireland  
Department of Occupational Science and Occupational Therapy, UCC  
Disability Federation of Ireland  
DIT – School of Social Sciences & Legal Studies  
Down Syndrome Ireland  
Dublin Rape Crisis Centre  
Dun Laoghaire Refugee Project  
Early Childhood Ireland  
Educate Together  
EPIC  
EQUATE  
Extern Ireland  
Focus Ireland  
Foróige  
Future Voices Ireland  
Gaelscoileanna Teo  
GLEN - Gay and Lesbian Equality Network  
Headstrong - The National Centre for Youth Mental Health  
Immigrant Council of Ireland  
Inclusion Ireland  
Independent Hospitals Association of Ireland  
Inspire Ireland  
Institute of Community Health Nursing  
Institute of Guidance Counsellors  
Irish Association for Infant Mental Health  
Irish Association of Social Workers  
Irish Centre for Human Rights, NUI Galway  
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 (IYF)  
Jack & Jill Children's Foundation  
Jesuit Centre for Faith and Justice  
Kids' Own Publishing Partnership  
Law Centre for Children and Young People  
Lifestart National Office  
Mental Health Reform  
Migrant Rights Centre Ireland  
Mounttown Neighbourhood Youth and Family Project  
MyMind  
National Childhood Network  
National Organisation for the Treatment of Abusers (NOTA)  
National Parents Council Post Primary  
National Parents Council Primary  
National Youth Council of Ireland  
One Family  
One in Four  
Parentstop  
Pavee Point  
Peter McVerry Trust  
Rape Crisis Network Ireland (RCNI)  
Realt Beag  
SAFE Ireland  
Saoirse Housing Association  
SAOL Beag Children's Centre  
School of Education UCD  
Scouting Ireland  
Sexual Violence Centre Cork  
Simon Communities of Ireland  
Social Care Ireland  
Society of St. Vincent de Paul  
Sonas Domestic Violence Charity  
Special Needs Parents Association  
SpunOut.ie  
St. Nicholas Montessori College  
St. Nicholas Montessori Teachers' Association  
St. Patrick's Mental Health Services  
Step by Step Child & Family Project  
Suas Educational Development  
Sugrath  
Teachers' Union of Ireland  
Terenure Rugby Football Club  
The Ark, A Cultural Centre for Children  
The Guardian Children's Project  
The Prevention and Early Intervention Network  
The UNESCO Child and Family Research Centre, NUI Galway  
Traveller Visibility Group Ltd  
Treoir  
UNICEF Ireland  
youngballymun  
Youth Advocate Programme Ireland (YAP)  
Youth Work Ireland

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# 1. Introduction

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.

The Children's Rights Alliance welcomes the opportunity to be consulted by the Department of Justice and Equality on the GDPR and specifically on the age limit below which children require parental (or guardian) consent to sign up to online services that collect or process personal data.

In December 2015, the European Commission, Parliament and Council reached an agreement on reform of the EU data protection rules.<sup>1</sup> Reform was seen as necessary because of inconsistencies in the application by Member States of existing EU laws in this area leading to 'complexity, legal uncertainty and administrative costs'.<sup>2</sup> The reform comprises both the General Data Protection Regulation (GDPR)<sup>3</sup> and the Directive on the use of personal data by criminal law enforcement authorities.<sup>4</sup> In describing the GDPR, the European Commission states that it

'updates and modernises the principles enshrined in the 1995 Data Protection Directive to guarantee privacy rights. It focuses on: reinforcing individuals' rights, strengthening the EU internal market, ensuring stronger enforcement of the rules, streamlining international transfers of personal data and setting global data protection standards.'<sup>5</sup>

New rules under the Regulation include the right to be forgotten, easier access to personal data, the right to know when personal data has been hacked, data protection by design and by default and stronger enforcement of the rules. Unlike a Directive from the EU, a Regulation does not require transposition into national law. The GDPR will have effect in Irish law from 25 May 2018 and will repeal the Data Protection Acts 1988 and 2003.

The GDPR recognises that 'children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data'.<sup>6</sup> Article 8 of the GDPR relates to the 'Conditions applicable to child's consent in relation to information society services' and is the subject of this submission. It provides that

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1 European Commission, 'Reform of EU data protection regulation rules' <[http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm)> accessed 14 November 2016.

2 European Commission, 'Fact Sheet Questions and Answers Data protection reform' <[http://europa.eu/rapid/press-release\\_MEMO-15-6385\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6385_en.htm)> accessed 14 November 2016.

3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

4 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA <[http://eur-lex.europa.eu/legal-content/EN/TNT/?uri=uriserv:OJ.L\\_.2016.119.01.0089.01.ENG&toc=OJ:L:2016:119:TOC](http://eur-lex.europa.eu/legal-content/EN/TNT/?uri=uriserv:OJ.L_.2016.119.01.0089.01.ENG&toc=OJ:L:2016:119:TOC)> accessed 15 November 2016.

5 European Commission, 'Fact Sheet Questions and Answers Data protection reform' <[http://europa.eu/rapid/press-release\\_MEMO-15-6385\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6385_en.htm)> accessed 14 November 2016.

6 Recital 38 provides that: 'Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. Such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child.' Recitals form part of the introductory text of a Directive and are an interpretative tool as to the intention of the text of the Directive. The GDPR has 173 recitals.

‘...in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child.

Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.’<sup>7</sup>

It goes on to provide that ‘[t]he [data] controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.’<sup>8</sup>

The Department of Justice and Equality has sought views specifically on the age under which children require parental consent to sign up to digital services (referred to as ‘the digital age of consent’) involving the collection or processing of their personal data at 16. Under the Regulation, Member States have discretion to introduce national legislation setting this limit at any age between 13 and 16.

The Children’s rights Alliance is of the view that the establishment of an age of digital consent will require a delicate balancing of the rights of the child, in particular the rights to participation and information with the rights to privacy and protection. We recommend that Ireland sets the age of 13 as the digital age of consent, rather than 14, 15 or 16 for the reasons set out below.

## 2. Children’s Rights and the GDPR

### a. Internet usage by children and young people in Ireland

Children represent almost a third of internet users globally.<sup>9</sup> Children and young people in Ireland under the age of 16 are highly engaged with digital media and technology. 86 per cent of 9 year olds have a computer in the home and this is the average age of first time internet use amongst children in Ireland.<sup>10</sup> Social networking is a ‘near universal’ feature in the lives of Irish teenagers and an increasing part of the lives of younger children.<sup>11</sup> Three in five children have a social networking profile.<sup>12</sup>

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7 General Data Protection Regulation, Art 8(1).

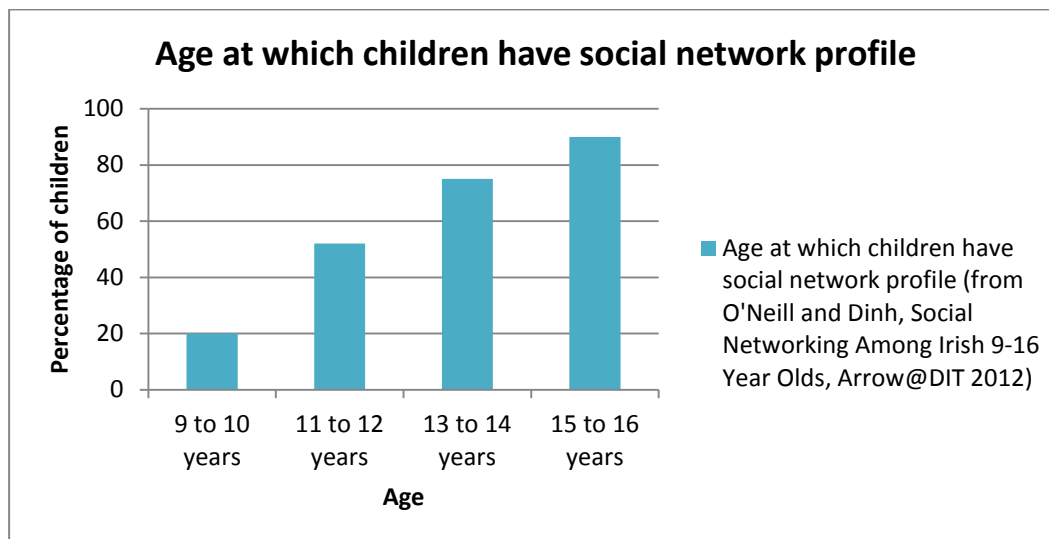
8 *ibid*, Art 8(2).

9 Sonia Livingstone, John Carr and Jasmina Byrne, ‘One inThree: Internet Governance and Children’s Rights.’ Innocenti Discussion Paper No.2016-01, UNICEF Office of Research, Florence, 2016.

10 Brian O’Neill, Simon Greha, Kjartan Ólafsson, ‘Risks and safety for children on the internet: the Ireland report.’ (LSE, 2011) <<http://arrow.dit.ie/cserrep/22/>> accessed 27 October 2016, 7.

11 Brian O’Neill and Thuy Dinh, ‘Social Networking Among Irish 9-16 Year Olds’ (Arrow@DIT, 28 June 2012) <<http://arrow.dit.ie/cgi/viewcontent.cgi?article=1028&context=cserrep>> accessed 3 November 2016, 1.

12 *ibid*.



Over half of the young people surveyed use the internet daily or almost daily and 36 per cent use it once or twice a week.<sup>13</sup> Breaking these figures down by age group, one third of 9-10 year olds go online daily and this increases to nearly three quarters of 15-16 year olds.<sup>14</sup> Reports of personal data misuse amongst Irish children are low. Just 12 per cent of young people had experienced some form of personal data misuse with the most common form being someone using a child's password or pretending to be them online.<sup>15</sup> Commercial exploitation of personal data was not part of the study.

## b. Current situation under Irish law

Currently, there is no specific legislation on the digital age of consent of minors in Ireland. The Data Protection Acts 1988 and 2003 do not set out a minimum age at which a person can give consent to the processing of their data.<sup>16</sup>

Section 2(A)(1) of the Data Protection Acts provides that

‘where a person by reason of his or her physical or mental incapacity or age, is or is likely to be unable to appreciate the nature and effect of giving consent, such consent may be given by a parent or guardian or a grandparent, uncle, aunt, brother or sister of the person provided that the giving of such consent is not prohibited by law.’

Where a person is under the age of majority (18), the Acts require the data controller to make a judgement on whether the young person can appreciate the implications of giving consent.<sup>17</sup> The GDPR will replace the Data Protection Acts 1988-2003.

## c. Balancing the right to participate with the right to privacy

Under the UN Convention on the Rights of the Child, a child is considered to be any person under the age of 18. Article 12 of the Convention is one of its core principles and provides for the child's right to participate and to have their views heard. This right is also set out in Article 24 of the EU

<sup>13</sup> Brian O'Neill, Simon Greha, Kjartan Ólafsson, 'Risks and safety for children on the internet: the Ireland report.' (LSE, 2011) <<http://arrow.dit.ie/cserrep/22/>> accessed 27 October 2016, 7.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*, 41.

<sup>16</sup> 'Processing' of data under Article 4 of the GDPR means 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction'.

<sup>17</sup> Article 1 of the Data Protection Act 1988 provides that a data controller is a person who controls the contents and use of personal data.

Fundamental Rights Charter which applies when national authorities apply an EU regulation, such as the GDPR, directly.<sup>18</sup>

In addition to the right to participate, access to the internet facilitates children and young people to enjoy rights to freedom of expression,<sup>19</sup> to access appropriate information<sup>20</sup> and freedom of association and peaceful assembly<sup>21</sup> in the online environment. The UN Committee on the Rights of the Child (hereafter, 'the UN Committee') has also highlighted the importance of access to digital technology to children with disabilities. The Committee recommends that States ensure the accessibility of digital media and information and communications technology (ICT) for children with disabilities and recommends that States promote their use to reinforce the creation of inclusive communities and education systems and to combat discrimination of negative stereotypes including by actively consulting with children with disabilities.<sup>22</sup> These rights must be carefully balanced with the child's right to privacy and protection from having their data processed and exploited for marketing or commercial purposes when accessing online services.<sup>23</sup>

The question at issue here is not whether an age of digital consent should be instated. This will happen regardless of the action taken at this stage. However, it is worth noting that Article 5 of the UN Convention on the Rights of the Child recognises that children have evolving capacities and as their competencies grow, 'there is a reduced need for direction and a greater capacity to take responsibility for decisions affecting their lives.'<sup>24</sup> In the UK case of *Gillick*, which concerned the capacity of children to consent to medical treatment, the court found that rather than propagate rigid age limits, the law should have the capacity for development reflecting the 'growth and maturity of the human personality'.<sup>25</sup> It noted that growing up is a 'continuous process' and the law must be sensitive to 'human development and social change'.<sup>26</sup> Article 5 recognises that children will acquire competencies at different ages and that will vary according to circumstances. Therefore children 'require varying degrees of protection, participation and opportunity for autonomous decision-making in different contexts and across different areas of decision-making.'<sup>27</sup>

As evidenced from the statistics above, children and young people in Ireland have a high level of engagement with the digital media and ICT. The risks associated with online activity for young people are well documented<sup>28</sup> but it is also important to highlight the benefits. A recent report by OFCOM, the UK Communications Regulator, shows that children use the internet for peer-to-peer sharing, to support offline creativity such as learning the guitar, to get involved in civic activities and to chat to

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18 Official Journal of the European Union, 'Charter of Fundamental Rights of the European Union 2012/C 326/02, 26 October 2012. Art 24(1). It provides that 'Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.'

19 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 13.

20 *ibid*, Art 17.

21 *ibid*, Art 15.

22 Committee on the Rights of the Child, 'Report of the 2014 Day of General Discussion "Digital media and children's rights"' (UNCRC, 2014) <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2014.aspx>> accessed 14 November 2016, 24.

23 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 16.

24 Gerison Lansdown, 'The evolving capacities of the child' (UNICEF innocent Insight, 2005) <<https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>> accessed 15 November 2016, ix.

25 *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] 1 AC 112 <[http://www.hrcr.org/safrica/childrens\\_rights/Gillick\\_WestNorfolk.htm](http://www.hrcr.org/safrica/childrens_rights/Gillick_WestNorfolk.htm)> accessed 15 November 2016.

26 *ibid*.

27 Gerison Lansdown, 'The evolving capacities of the child' (UNICEF innocent Insight, 2005) <<https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>> accessed 15 November 2016, ix.

28 See for example Sonia Livingstone and Leslie Haddon, *EU Kids Online: Final report* (LSE, London, 2009) <[http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20I%20\(2006-9\)/EU%20Kids%20Online%20I%20Reports/EUKidsOnlineFinalReport.pdf](http://www.lse.ac.uk/media@lse/research/EUKidsOnline/EU%20Kids%20I%20(2006-9)/EU%20Kids%20Online%20I%20Reports/EUKidsOnlineFinalReport.pdf)> accessed 15 November 2016.

friends.<sup>29</sup> Any attempt to roll back or restrict children's rights in this area must be in the child's best interests<sup>30</sup> and approached with caution. The UN Committee provides that States should guarantee the protection of children's privacy rights in relation to digital media and ICTs 'and develop effective safeguards against abuse without unduly restricting the full enjoyment of their rights'.<sup>31</sup>

In instating an age of digital consent at 16, service providers may simply change their age limits to 16 across the board and relieve themselves of the burden of seeking parental consent under the GDPR. This would have a significant knock on effect on the participation of young people in online services. It must also be kept in mind that given that the numbers of 9-12 year olds accessing social media even with an age limit of 13 already in place, it can be assumed that there is a significant level of circumvention of these limits and the implementation of any legal age limit will require substantial commitment and effort by industry.

The aim of the GDPR in protecting young people from the commercial online marketing practices of service providers such as social media and gaming platforms is laudable. Currently, data practices targeting teenagers are the same as those used to target adults and it is arguable that these are beyond the digital literacy skills of most adults not to mind teenagers.<sup>32</sup> The GDPR places much of the responsibility to manage the data protection of Europe's children and young people on to their parents or guardians. Irish young people are said to have low digital literacy skills compared to their European counterparts.<sup>33</sup> Recent research from DCU shows that over half of parents expressed 'a frustrating lack of knowledge about privacy techniques, filtering and password controls'.<sup>34</sup> It is also worth noting that 36 per cent of 9-16 year olds surveyed, believe that they 'know more about the internet than [their] parents'.<sup>35</sup> Therefore, to ensure that young people and their parents or guardians and educators are equipped with the information they need to make informed decisions in this area, education support and awareness-raising must be provided to them. We welcome the statement by the Department of Justice and Equality that under the GDPR, the Data Protection Commissioner will be required to develop 'appropriate child friendly materials...which convey an understanding not only of the risks that may arise when personal information is supplied online but also the remedies that are available under data protection law'.<sup>36</sup> Similar materials for adults will also be required.

To fully respect the views of the child, we must accept that this means that the views of children will not always be aligned to those of their parents or guardians. Online services to young people, such as those provided by organisations that provide support to LGBT children or children experiencing

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29 OFCOM, 'Children and parents: media use and attitudes report' (OFCOM, 2016) <[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0034/93976/Children-Parents-Media-Use-Attitudes-Report-2016.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0034/93976/Children-Parents-Media-Use-Attitudes-Report-2016.pdf)> accessed 16 November 2016, 7-8, 81.

30 Under Article 24 of the EU Charter of Fundamental Rights, 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.' This right is also a core principle of the UN Convention on the Rights of the Child and is a guiding principle in the balancing of key rights Official Journal of the European Union, 'Charter of Fundamental Rights of the European Union 2012/C 326/02, 26 October 2012, Art 24(2). See also Article 3 of the UN Convention on the Rights of the Child.

31 Committee on the Rights of the Child, 'Report of the 2014 Day of General Discussion "Digital media and children's rights"' (UNCRC, 2014) <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2014.aspx>> accessed 14 November 2016, 22.

32 Sonia Livingstone, 'Sonia Livingstone on the GDPR, No more social networking for teens?' (Better Internet for Kids, 31 March 2016) <<https://www.betterinternetforkids.eu/web/portal/practice/awareness/detail?articleId=687352>> accessed 15 November 2016. She refers to practices such as cross platform, mobile location tracking and productive analytics as examples.

33 Brian O'Neill, Simon Greha, Kjartan Ólafsson, 'Risks and safety for children on the internet: the Ireland report.' (LSE, 2011) <<http://arrow.dit.ie/cserrep/22/>> accessed 27 October 2016, 18.

34 Dublin City University, 'DCU research reveals digital divide between parents and children' <<https://www.dcu.ie/news/2016/feb/s0216g.shtml>> accessed 15 November 2016.

35 Brian O'Neill, Simon Greha, Kjartan Ólafsson, 'Risks and safety for children on the internet: the Ireland report.' (LSE, 2011) <<http://arrow.dit.ie/cserrep/22/>> accessed 27 October 2016, 19.

36 Department of Justice and Equality, 'Data protection safeguards for children ('digital age of consent') Consultation Paper' <[http://www.justice.ie/en/JELR/Consultation\\_paper\\_Digital\\_Age\\_of\\_Consent.pdf](http://www.justice.ie/en/JELR/Consultation_paper_Digital_Age_of_Consent.pdf)> Files/Consultation\_paper\_Digital\_Age\_of\_Consent.pdf, 2.



bullying, such as ISPPCC's Childline for example, are critical to the many young people who access them as they may not be able to discuss certain issues with their parents or guardians or may require support in order to do so. These organisations regularly retain personal data from the young people who access their services in order to hone and improve those services.

The need for children to be afforded specific protection with regard to the processing of personal data has been recognised in the GDPR.<sup>37</sup> Recital 38 of the GDPR provides that such specific protection 'should apply to the use of personal data of children for marketing or creating user profiles and the collection of personal data when using services offered to a child. In such cases, it provides that parental consent should not be necessary in the context of preventative or counselling services offered directly to a child.'<sup>38</sup> Children and young people often contact organisations providing online support in confidence and must be allowed to continue to do so without having to obtain the consent of their parent or guardian. The online services provided by these organisations to children of all ages must be protected. Whether or not these organisations fall under the definition of 'preventative or counselling services offered directly to a child' will require clarification by the Department of Justice and Equality. Moreover, if they do not, a mechanism must be found to allow them to continue to provide the same level of service to all children, regardless of their age, and to collect personal data, as they currently do for non-commercial purposes, without the need for the consent of parents or guardians.

It is noted above that the UN Committee provides that States should 'develop effective safeguards against abuse without unduly restricting the full enjoyment of their rights'. Options should be explored as to how the State might do this to allow the personal data of children to be collected to improve services without requiring the consent of parents or guardians but not to be exploited or used for commercial purposes. It appears from the wording of the Regulation that States have the option to 'maintain or introduce more specific provisions to adapt the application of the rules...to ensure lawful and fair processing'.<sup>39</sup> This relates to data processing that is necessary for compliance with a legal obligation to which the data controller is subject or to processing that is necessary for the performance of a task carried out in the public interest.<sup>40</sup> It is worth exploring whether these rules, or other mechanisms, could be used to allow the State to put in place specific legislative protections or exceptions to allow children to participate online without having their data used for commercial gain.

### **Recommendations:**

- The Children's Rights Alliance recommends that the age of digital consent should be set at the lowest age possible, in this case, 13, so long as children, their parents or guardians and educators are provided with adequate educational support to make informed decisions as to the processing of their personal data.
- Explore measures, legislative or otherwise, to ensure that the personal data of children can be collected to allow service providers to improve their services while ensuring that it is not used for commercial purposes.
- Clarify whether organisations providing online support services to children and young people will have to obtain and make efforts to verify consent of parents and guardians before processing a child's personal data for not-for-profit use.

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37 General Data Protection Regulation, Recital 38.

38 A recital is part of the introductory text of an EU Directive and is an interpretative tool as to the intention of the text. There are 173 recitals in the GDPR.

39 General Data Protection Regulation, Art 6(2).

40 *ibid*, Article 6.



- Protect online support services to young people and ensure that organisations providing such support can continue to provide the same level of service to all children regardless of their age and to collect personal data as they currently do for non-commercial purposes without the need for the consent of parents or guardians.

#### d. The role of industry

With regard to current industry practice, 13 years of age has become the de facto age of consent in many countries set by website operators and social media providers, including in Ireland.<sup>41</sup> This appears to be based on the Children’s Online Privacy Protection Act of 1998 (COPPA) in the United States,<sup>42</sup> where many of the world’s most popular online services originated.<sup>43</sup> The Act restricts website and online service providers from collecting personal information from children under the age of 13.<sup>44</sup>

The UN Committee has noted that ‘there is no international legally binding instrument on the business sector’s responsibilities vis-a-vis human rights.’<sup>45</sup> It goes on to say that it recognises that duties and responsibilities to respect children’s rights go beyond the State and apply to private actors and businesses. Therefore, the Committee provides that ‘all business must meet their responsibilities regarding children’s rights and States must ensure they do so’ and not undermine States’ ability to meet their children’s rights obligations.<sup>46</sup> The State must ensure that businesses in Ireland are aware of and compliant with their responsibilities in this area.

Under the GDPR, service providers, as data controllers, will be required to obtain the consent of a parent or guardian when processing the data of a child under the age of digital consent. They will be required to make ‘reasonable efforts’ to verify that a parent or guardian has consented to the processing of the child’s personal data ‘taking into consideration available technology’. It also obliges data controllers to conduct assessments on the impact of envisioned data processing operation on the protection of personal data, where the processing ‘is likely to result in a high risk to the rights and freedoms of natural persons’.<sup>47</sup> While this is a welcome inclusion, the obligation on service providers under the GDPR is potentially weak. How are ‘reasonable efforts’ to be defined and determined and is the inclusion of the phrase ‘taking into consideration available technology’ an opt-out for businesses who are in control of that technology?

#### Recommendation:

- Ensure that businesses based in Ireland provide services to children and young people are aware of their responsibilities in this area.

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41 Brian O’Neill, ‘Report of the Internet Content Governance Advisory Group’ (DIT 2014) <<http://arrow.dit.ie/cgi/viewcontent.cgi?article=1052&context=cserrep>> accessed 15 November 2016, 53.

42 Federal Trade Commission, ‘Children’s Online Privacy Protection Rule (“COPPA”)’ <<https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule>> accessed 15 November 2016.

43 Brian O’Neill, ‘Report of the Internet Content Governance Advisory Group’ (DIT 2014) <<http://arrow.dit.ie/cgi/viewcontent.cgi?article=1052&context=cserrep>> accessed 15 November 2016, 53.

44 15 U.S. Code § 6502 (a)(1), “It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under subsection (b) of this section.”

45 UNCRC ‘General Comment No. 16 on State obligations on the impact of the business sector on children’s rights’ (2013) UN Doc CRC/C/GC/16, para 8.

46 *ibid.*

47 General Data Protection Regulation, Art 35.

### 3. Hearing the voices of children and young people

Article 12 also provides for the right of the child to be heard in all matters affecting them and for those views to be given 'due weight accordance with the age and maturity of the child'. This is also a right under the EU Charter of Fundamental Rights<sup>48</sup> and the Government has made commitments in this area under *Better Outcomes, Brighter Futures, The National Policy Framework for Children and Young People 2014-2020*<sup>49</sup> and its constituent strategy *The National Strategy on Children and Young People's Participation in Decision-Making 2015-2020*.<sup>50</sup> The UN Committee has called on States to ensure that 'children are consulted in order to take into account their views and experiences in developing laws, policies, programmes, and in the setting up of services, and other measures relating to digital media and [information technology]'.<sup>51</sup> It is our understanding that children and young people were not consulted for their views as part of the development of the GDPR by the EU<sup>52</sup> and neither were impact assessments carried out to gauge the effect of implementing a digital age of consent.<sup>53</sup> Given the centrality of digital technology and media to the lives of Irish children and young people, it is critical that children and young people are given the opportunity by the Department of Justice and Equality to voice their opinion as part of their consultation process.

#### Recommendations:

- Ensure that meaningful consultations with children and young people to be held on the age of digital consent.
- Undertake a national impact assessment to understand the impact of the different ages of digital consent on children and young people in Ireland.

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48 Official Journal of the European Union, 'Charter of Fundamental Rights of the European Union 2012/C 326/02, 26 October 2012. Art 24(1). Their views are to be 'taken into consideration on matters which concern them in accordance with their age and maturity'.

49 Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures, The National Policy Framework for Children and Young People 2014-2020* (Department of Children and Youth Affairs 2014).

50 Department of Children and Youth Affairs, *The National Strategy on Children and Young People's Participation in Decision-Making 2015-2020* (Department of Children and Youth Affairs 2015).

51 Committee on the Rights of the Child, 'Report of the 2014 Day of General Discussion "Digital media and children's rights"' (UNCRC, 2014) <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2014.aspx>> accessed 14 November 2016, 21.

52 Sonia Livingstone, 'To be 13 or 16, that is the question: the implications for UK teenagers of the European General Data Protection Regulation' (LSE Media Policy Project Blog, 2016) <<http://bit.ly/2e5dwBi>> accessed 15 November 2016.

53 John Carr, 'Poor process, bad outcome' (Better Internet for Kids, 2016) <<https://www.betterinternetforkids.eu/web/portal/news/detail?articleId=687465>> accessed 15 November 2016.