

# Response to UN Committee on the Rights of the Child (UNCRC) Consultation on the Concept Note for a General Comment on children's rights in relation to the digital environment

May 2019

1. Since early 2018, Professor Lorna Woods and William Perrin have been working, under the aegis of Carnegie UK Trust, on a detailed regulatory proposal for internet harm reduction. The introduction of a statutory duty of care, enforced by an independent regulator, is a proportionate, risk-based approach intended to reduce harms experienced by online users but with a particular application to vulnerable groups, such as children, to whom greater online protections should be afforded.
2. Action to tackle online harms and protect the rights of children will be most effective if it is international and multilateral. We very much welcome the commitment of the UNCRC to lead action in this area and are delighted to submit this summary of our work for consideration. We have also contributed to the deliberations of the UN Secretary-General's High-Level Panel on Digital Co-Operation – in person, at their workshop in London in December 2018, as well as via their consultation process.<sup>1</sup>
3. Our work formed the basis of the United Kingdom government proposals for reducing online harms through a statutory duty of care on social media to prevent people coming to reasonably foreseeable harms due to the operation of the networks. enforced by a regulator. Our approach has been duplicated by the expert group reporting to the French government on proposals for regulating social media, recommending a regulator and a duty of care<sup>2</sup>. Our approach as we set out below respects the European approach to free speech while also protecting people from harm caused by the operation of commercial social networks. We feel that the Convention strikes an important balance for children between free speech and being protected from harmful speech, a factor often overlooked in policy debate. The general comment enhances this well for the digital age.

## Background

4. Carnegie UK Trust (CUKT) was established in 1913 by Scottish-American industrialist and philanthropist Andrew Carnegie to seek:

*“Improvement of the well-being of the masses of the people of Great Britain and Ireland by such means as are embraced within the meaning of the word “charitable” and which the Trustees may from time to time select as best fitted from age to age for securing these purposes, remembering that new needs are constantly arising as the masses advance.”*

1 Our submission can be viewed here: [https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2019/03/01101237/UN-High-Level-Panel-Digital-Cooperation.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/03/01101237/UN-High-Level-Panel-Digital-Cooperation.pdf)

2 Creating a French framework to make social media platforms more accountable: Acting in France with a European vision Interim mission report “Regulation of social networks – Facebook experiment” Submitted to the French Secretary of State for Digital Affairs May 2019 <https://www.numerique.gouv.fr/actualites/remise-du-rapport-de-la-mission-de-regulation-des-reseaux-sociaux/>

5. Lorna Woods (Professor of Internet Law, Essex University) and William Perrin (Trustee of Carnegie UK Trust) have been working with CUKT on their proposals for the past 18 months. They have been published via a series of blog posts <sup>3</sup> and a new, full reference consolidates our thinking. <sup>4</sup>
6. We have vast experience in regulation, privacy and free speech issues. William has worked on technology policy since the 1990s, was a driving force behind the creation of OFCOM and worked on regulatory regimes in many economic and social sectors while working in the UK government's Cabinet Office. He ran a tech start up and is now a trustee of several charities. Lorna is Professor of Internet Law at University of Essex, an EU national expert on regulation in the TMT sector, and was a solicitor in private practice specialising in telecoms, media and technology law.
7. CUKT works across the UK and Ireland to influence policy and deliver innovative practice. Our proposal has been developed with reference primarily to the UK regulatory and legislative system, in the context of wider European legislative frameworks such as the Audio-Visual Media Services Directive and the European Convention of Human Rights. However, we are of the view that its principles and approach, focusing on systems-level decision-making and "by-design" security and safety decisions, have universal application. We would welcome the opportunity to discuss these further with your officials, or with representatives from other international organisations submitting along similar lines to your consultation.

## Our view on the purpose, scope and structure of the Comment

8. We welcome the aim of the General Comment to strengthen the case for greater action to clarify how the "rapidly evolving" digital environment impacts on the full range of children's rights in positive and negative ways. We feel that full set of rights, proposed in the general comment, cover the right areas to ensure that children can fully realise the benefits of the digital world, as well as expect protection from its potential harms. The proposed structure for the comment, focusing on those key groups of rights to be realised in the digital world, looks appropriate.
9. Our proposal – which we set out in summary below – provides a regulatory framework to realise the right for all users, but particularly vulnerable groups such as children, to be protected from a range of harms (including violence and sexual exploitation) as well as to protect their health and wellbeing. It fits neatly within a rights-based framework, particularly in delivering the "protection rights" envisaged in the general comment, such as the right to "protection from violence, sexual exploitation and harm", and the right to "protection of privacy, identity and data processing".
10. We acknowledge in our work that education and digital literacy is a vital supporting component to protect children's rights online more broadly, but it is not our main focus. We instead look at the need for urgent legislative measures to ensure that social media and other online providers take action at a system level ("by design") to ensure that their services are designed in such a way to protect their users so far as possible from reasonably foreseeable harm, so allowing children to access the opportunities afforded by digital services concomitant with their individual competence and developmental stage. Our approach we hope will encourage of a range of services appropriate

<sup>3</sup> <https://www.carnegieuktrust.org.uk/project/harm-reduction-in-social-media/>

<sup>4</sup> [https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf)

to different age-groups/stages of development. As a corollary, the policy debate we hope moves from being principally about parental control and responsibility to oversee the child's internet use. While parental oversight remains important, the child's right to develop his or her own preferences and interests distinct from those of the parents should also be protected.

11. Our approach therefore addresses two of the questions set out by the Committee in its concept note: *how should the practices of businesses operating in the digital environment support the realisation of children's rights?* (in short, we would say, by designing in protections to reduce the risk of reasonably foreseeable harms – whether this be from inappropriate to age content; illegal or harmful content; being exploited for content; as well as risks for addiction and data farming); and *how can States better realise their obligations to children's rights in relation to the digital environment?* (under our proposals by defining at a high level the harms from which they should be protected, tasking service providers to deal with issues as a systems and design issue, and then appointing an independent regulator to work with companies, civil society and others to assess and monitor the impact of the harm reduction process.)

### Designing in measures to protect the rights of children online

12. We argue in our detailed proposals that spaces are designed and operated with at least a basic level of safety in mind, given that they are used for different purposes and by different groups. While some threats may be more or less general (threat from fire) others may be context specific; concerns in relation to user safety would be different between for example a children's playground and a nightclub. Code is the architecture of cyberspace and affects what people do online: code permits, facilitates and sometimes prohibits. Of course, there are limits to the extent of such control. But it is becoming increasingly apparent that the architecture of the platform – as formed by code - also nudges us towards certain behaviour, whether this is the intention of the software designer or not. While the work of Lessig on this subject was oriented along a different line, it reminds us that the environment within which harm occurs is defined by code that the service providers have actively chosen to deploy, their terms of service or contract with the user and the resources service providers deploy to enforce that.<sup>5</sup>
13. While technological tools can be used for positive reasons as well as have negative impacts, it is important to remember that they are not neutral<sup>6</sup>, nor are they immutable. Corporate decisions drive what content is displayed to a user. Service providers could choose not to deploy risky services without safeguards or they could develop effective tools to influence risk of harm if they choose to deploy them.
14. Indeed, Sean Parker a co-founder of Facebook said in a 2017 interview: 'God only knows what it's doing to our children's brains. The thought process that went into building these applications, Facebook being the first of them, ... was all about: How do we consume as much of your time and conscious attention as possible?... It's a social-validation feedback loop ... exactly the kind of thing that a hacker like myself would come up with, because you're exploiting a vulnerability in human

5 See Lawrence Lessig, "The Law of the Horse: What Cyberlaw Might Teach", (1999), 113 Harv. L. Rev. 501; also "Code and Other Laws of Cyberspace" (Cambridge MA: Basic Books, 1999) and "Code: version 2.0" (Cambridge MA: Basic Books, 2006)

6 W. Hartzog, Privacy's Blueprint: The Battle to Control the Design of New Technologies (Cambridge, MA: Harvard University Press, 2018)

psychology.’<sup>7</sup> Part of the ethos underpinning the ‘by design’ approach is the concern to ensure that other issues are taken into account in design and operational choices.

15. In that regard, we see the introduction in the UK of an “Age Appropriate Design Code”, on which the Information Commissioner’s Office is currently consulting, as an important step forward in enshrining proportionate measures for the protection of children – and particularly their privacy – into the design of online services<sup>8</sup>. Data protection is not only essential to protect a child’s right to privacy in the 21st century, it is also fundamental part in child online safety, particularly as it governs the way that a child is seen, contacted and/or encouraged into behaviours that may not be in their best interests.<sup>9</sup> Indeed, rec 38 GDPR states: “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.” These protections sit at the heart of the right to privacy, but also could impact a child’s freedom of expression, freedom of association and so on.

### Risk-based regulation: the precautionary principle

16. With regard to the State’s obligations to children’s rights in relation to the digital environment, we have noted that one of the challenges frequently cited by legislators and decision-makers in bringing forward robust regulatory proposals to reduce online harms is a lack of long-term evidence of causation. Evidence is building but it is still partial. For example, a recent OFCOM/ICO research paper (‘Internet users’ experience of harm online’<sup>10</sup>) has helpfully established an evidence base of harms independent of lobby groups. OFCOM’s sample size of 1,600 is an order of magnitude better than most extant research, but still short of large-scale multi-annual randomised control trials, which are very difficult to secure in an area of innovative technology that suffers from waves of fashion in its user base. In academic literature, there is a lot of emerging evidence of correlation between some forms of online activity and harms to individuals<sup>11</sup>, but research in this area struggles to identify causation.
17. As a result, rapidly-propagating social media services, subject to waves of fashion amongst young people, are a particular challenge for legislators and regulators. The harms are multiple, and may be context- or platform- specific, while the speed of their proliferation makes it difficult for policymakers

7 Article: ‘Sean Parker unloads on Facebook: “God only knows what it’s doing to our children’s brains”’ Axios, Mike Allen Nov 9, 2017 <https://www.axios.com/sean-parker-unloads-on-facebook-god-only-knows-what-its-doing-to-our-childrens-brains-1513306792-f855e7b4-4e99-4d60-8d51-2775559c2671.html>; more recent journalism suggests that YouTube also ignored risks to users or to the information environment in the search for engagement: M. Bergen, ‘YouTube Executives Ignored Warnings, Letting Toxic Videos Run Rampant’ Bloomberg, 2 April 2019, available: <https://www.bloomberg.com/news/features/2019-04-02/youtube-executives-ignored-warnings-letting-toxic-videos-run-rampant> (accessed 3 April 2019)

8 <https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/age-appropriate-design-a-code-of-practice-for-online-services/>

9 See European Data Protection Board: Guidelines on Automated Individual Decision-making and Profiling for the purposes of Regulation 2016/679 (wp251rev.01), 6th Feb 2018 (available: [https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=612053](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612053)). “Profiling can perpetuate existing stereotypes and social segregation. It can also lock a person into a specific category and restrict them to their suggested preferences. This can undermine their freedom to choose, for example, certain products or services such as books, music or newsfeeds.” (pp. 5-6)

10 See <https://www.ofcom.org.uk/research-and-data/internet-and-on-demand-research/internet-use-and-attitudes/internet-users-experience-of-harm-online>

11 <https://www.nhs.uk/news/mental-health/worrying-rise-reports-self-harm-among-teenage-girls-uk/#where-does-the-study-come-from>; ISER study: <https://doi.org/10.1186/s12889-018-5220-4>

to amass the usual standard of long-term objective evidence to support the case for regulatory interventions.<sup>12</sup>

18. However, we believe that the traditional approach of not regulating innovative technologies needs to be balanced with acting where there is good evidence of harm but there has not been enough time to establish authoritative evidence. We see this as a core challenge for establishing and operating a new regulatory regime and have sought a robust basis for action in the face of scientific uncertainty.
19. After the many public health and science controversies of the 1990s, the UK government's Interdepartmental Liaison Group on Risk Assessment (ILGRA) published a fully worked-up version of the precautionary principle for UK decision makers.<sup>13</sup>

*'The precautionary principle should be applied when, on the basis of the best scientific advice available in the time-frame for decision-making: there is good reason to believe that harmful effects may occur to human, animal or plant health, or to the environment; and the level of scientific uncertainty about the consequences or likelihoods is such that risk cannot be assessed with sufficient confidence to inform decision-making.'*

20. The ILGRA document advises regulators on how to act when early evidence of harm to the public is apparent, but before unequivocal scientific advice has had time to emerge, with a particular focus on novel harms. The ILGRA's work is still current and hosted by the Health and Safety Executive (HSE), underpinning risk-based regulation of the sort we propose. We would urge that the UNCRC considers adopting a similar "precautionary principle" in its General Comment.
21. While applicable to a broad range of online harms, our proposals have particularly resonated with UK-based children's charities and others looking to address the particular risks faced by children in today's digital world and a statutory duty of care has been recommended in that context by: the UK Chief Medical Officers<sup>14</sup>, the NSPCC<sup>15</sup>, the Children's Commissioner for England<sup>16</sup>, the House of Commons Science and Technology Committee<sup>17</sup> and the All-Party Parliamentary Group on Social Media and Young People's Mental Health<sup>18</sup>. The UK Government's recent Online Harms White Paper<sup>19</sup> has also drawn heavily on our thinking in its own recommendation for a duty of care, and we are currently considering the detail of their proposals before submitting a formal response to their consultation.

12 See for example the recent UK government and tech company responses to the death of Molly Russell in the UK: <https://www.theguardian.com/politics/2019/jan/26/matt-hancock-facebook-social-media-suicide-self-harm-young-people>; and <https://www.theguardian.com/technology/2019/feb/07/instagram-bans-graphic-self-harm-images-after-molly-russells-death>

13 <http://www.hse.gov.uk/aboutus/meetings/committees/ilgra/pppa.htm>

14 UK Chief Medical Officers Commentary on Screen Time and Social Media map of reviews, February 2019: <https://www.gov.uk/government/publications/uk-cmo-commentary-on-screen-time-and-social-media-map-of-reviews>

15 NSPCC (Taming the Wild West Web, February 2019: <https://www.nspcc.org.uk/globalassets/documents/news/taming-the-wild-west-web-regulate-social-networks.pdf>);

16 Anne Longfield, Children's Commissioner publishes a statutory Duty of Care for online service providers, February 2019: <https://www.childrenscommissioner.gov.uk/2019/02/06/childrens-commissioner-publishes-a-statutory-duty-of-care-for-online-service-providers/>

17 House of Commons Science and Technology Committee (Impact of Social Media and Screen Use on Young People's Health, January 2019: <https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/822/82202.htm>

18 All-Party Parliamentary Group on Social Media and Young People's Mental Health and Wellbeing/Royal Society of Public Health (#NewFilters, March 2019: <https://www.rsph.org.uk/our-work/policy/wellbeing/new-filters.html>)

19 <https://www.gov.uk/government/consultations/online-harms-white-paper>

## In summary: a statutory duty of care for social media

22. Our proposal sets out how a statutory duty of care would require most companies that provide social media or online messaging services to protect people from reasonably foreseeable harms that might arise from use of those services. This approach is risk-based and outcomes-focused. A regulator would ensure that companies delivered on their statutory duty of care and it would have sufficient powers to drive compliance.
23. Social media service providers should each be seen as responsible for a public space they have created, much as property owners or operators are in the physical world. Everything that happens on a social media service is a result of corporate decisions: about the terms of service, the software deployed and the resources put into enforcing the terms of service.
24. In the physical world, Parliament has long imposed statutory duties of care upon property owners or occupiers in respect of people using their places, as well as on employers in respect of their employees. Variants of duties of care also exist in other sectors where harm can occur to users or the public. A statutory duty of care is simple, broadly based and largely future-proof. It focuses on the objective – harm reduction – and leaves the detail of the means to those best placed to come up with solutions in context: the companies who are subject to the duty of care. A statutory duty of care returns the cost of harms to those responsible for them, an application of the micro-economically efficient ‘polluter pays’ principle. The E-Commerce Directive permits duties of care introduced by Member States.
25. Parliament should guide the regulator with a non-exclusive list of harms for it to focus upon. These should include harms to children arising criminal activity directed towards them (e.g. grooming); accessing age-inappropriate content as well as emotional harm arising eg from cyber-bullying (especially where there is a racial, religious, gendered element). This latter point is important in trying to ensure equal access to the benefits of online services..
26. Our proposal is for the regime to cover services that:
  - Have a strong two-way or multiway communications component;
  - Display user-generated content publicly or to a large member/user audience or group.
27. The regime would cover reasonably foreseeable harm that occurs to people who are users of a service and reasonably foreseeable harm to people who are not users of a service. This is particularly important in relation to children’s rights, where risks to rights such as the protection of privacy and identity as well as to health and wellbeing (for example through cyber-bullying) might take place on platforms where the individual that is being harmed is not themselves a user.
28. Central to the duty of care is the idea of risk. If a service provider targets or is used by a vulnerable group of users (e.g. children), the risk of harm is greater and service provider should have more safeguard mechanisms in place than a service which is, for example, aimed at adults and has community rules agreed by the users themselves (not imposed as part of ToS by the provider) to allow robust or even aggressive communications.

29. Regulation in the UK has traditionally been proportionate, mindful of the size of the company concerned and the risk its activities present. Small, low-risk companies should not face an undue burden from the proposed regulation. However, some groups are sufficiently vulnerable (e.g. children) that any business aiming a service at them should take an appropriate level of care, no matter what its size or newness to market. Again, taking a “by design” approach means that baking in harm reduction to the design of services from the outset reduces uncertainty and minimises costs later in a company’s growth.

### How would regulation work?

30. We recommend an independent regulator (we cite Ofcom in the UK), to be funded on a polluter pays basis by those it regulates either through a levy or the forthcoming internet services tax. The regulator should be given substantial freedom in its approach to remain relevant and flexible over time. We suggest the regulator employ a harm reduction method similar to that used for reducing pollution: agree tests for harm, run the tests, the company responsible for harm invests to reduce the tested level, test again to see if investment has worked and repeat if necessary. If the level of harm does not fall or if a company does not co-operate then the regulator will have sanctions.
31. In a model process, the regulator would work with civil society, users, victims and the companies to determine the tests and discuss both companies harm reduction plans and their outcomes. The regulator would have the power to request information from regulated companies as well as having its own research function. In assessing whether a statutory duty of care had been met, the regulator would examine whether a social media service operator has had particular regard to its audience. For example, a mass membership, general purpose service open to children and adults should manage risk by setting a very low tolerance for harmful behaviour in the same way that some public spaces, such as say a family theme park take into account that they should be a reasonably safe space for all. The regulator is there to tackle systemic issues in companies and, in this proposal, individuals would not have a right of action to the regulator or the courts under the statutory duty of care.
32. The regulator needs effective powers to make companies change behaviour. We propose large fines set as a proportion of turnover, along the lines of the GDPR regime. We have also made suggestions of powers that bite on Directors personally, such as fines given the way charismatic founders continue to be involved in running social media companies.
33. The industry develops fast and urgent action is needed. This creates a tension with a traditional deliberative process of forming legislation and then regulation. We are urging the UK government to find a route to act quickly and bring a duty of care to bear on the companies as fast as possible and would suggest that the UN’s work on the General Comment should also move swiftly. There is a risk that if we wait three or four years the harms may be out of control. This isn’t good for society, particularly vulnerable groups like children, nor the companies concerned.

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