



To: childrensconsultation@dataprotection.ie

Re: The Fundamentals for a Child-Oriented Approach to Data Processing

The Department of Children, Equality, Disability, Integration and Youth (‘the Department’) welcomes the child-oriented and children’s rights focused approach to data processing, and the Data Protection Commission’s commitment to drive improvements in standards of data processing.

We note the reference to Article 12 of the United Nations Convention on the Rights of the Child, and welcome the inclusion of the voices of children informing the content of the ‘Fundamentals’ document (the document).

We welcome the introduction of child-specific data protection interpretative principles and recommended measures that will enhance the level of protection afforded to children against the data processing risks posed to them by their use of, or access to services in both an online and offline world. We support the DPC’s contention that organisations should comply with the standards and expectations established in the document, when their services are directed at, intended for, or likely to be accessed by children.

We note the guidance under section 1.3 in relation to organisations that should comply with the Fundamentals. In this regard we would highlight the requirements under the Children First Act 2015 for organisations that provide relevant services to children to (i) keep children safe from harm while they are availing of the service, (ii) carry out a risk assessment to identify whether a child could be harmed while receiving the services, and (iii) develop a Child Safeguarding Statement outlining the policies and procedures in place to manage the risks identified. In assessing the requirement to comply with the Fundamentals, organisations should also consider whether they come within the category of a “relevant service” as defined by the Children First Act 2015, and if so, comply with obligations arising in that regard. Organisations should also have regard to the addendum to the Children First National Guidance (published January 2019) which clarifies that organisations providing relevant services to children need to consider online safety risks in the context of preparing Child Safeguarding Statements (<https://www.gov.ie/en/policy-information/d1b594-children-first/>).

We welcome the DPC’s clear statement under section 2.4 that child protection/welfare measures should always take precedence over data protection considerations affecting an individual and that the GDPR, and data protection in general, should not be used as an excuse, blocker or obstacle to sharing information where doing so is necessary to protect the vital interests of a child or children.

Online safety is a key concern for parents and children. A recent survey of parents carried out on behalf of the Department found that 37% of parents had sought information, advice or support about online safety in the previous 6-month period. The provision of guidance for organisations who process children’s data has the potential to enhance protections for children and will be of benefit to both children and their parents.

From a research perspective, there are still grey areas around consent and who can exercise the data rights of a child, and implications for research. The independent data rights of children are



important, and the issue of when these rights can be exercised by children is dealt with in section 4.2. This section sets out a non-exhaustive list of factors that should be considered by an organisation in deciding whether it is in the best interests of the child that their parent(s)/ legal guardian(s) step into their shoes and exercise their data protection rights. The list of factors includes the duty of confidence owed to a child. The promise of confidentiality to children participating in research is fundamental to their participation, and from an ethical perspective parents are usually informed of this promise when consenting to the child's participation in research. The duty of confidence suggests that even if a child is not yet competent to exercise their own rights, parents who have consented to their participation in research could not exercise the child's data rights, except without their explicit permission, as this would amount to a breach of the duty of confidence.

In Ireland, for data protection purposes, the minimum age at which online service providers can rely on a child's own consent to process their personal data is 16, whereas for other offline services or activities for data protection purposes a child is somebody under the age 18. This has implications for researchers engaging with older teenagers, particularly about topics that may be personal to themselves. In these situations, the consent of a parent/legal guardian is still required for data protection purposes for a young person 16-18 years to participate in a research project. This can present an impediment to conducting important research on particular topics or experiences which young people (or older minors) may not have discussed with parents. Indeed, you can consent to a clinical trial at the age of 16 – this document implies that you would need parental consent for the processing of data, which potentially makes the consent to be involved in the trial moot.

The Department feels that the document will be helpful for commercial organisation in developing their approach to data processing. However, we feel that the document is at points under-theorised and could do with clearer delineation of the document's scope and the issues involved. For instance, do the Fundamentals apply to non-commercial organisations such as Government bodies and to non-commercial activities such as research in the public interest? We think they do apply, but this should be explicit. Without such clarity, the implications of the document for public bodies are currently ambiguous and potentially problematic.

We recommend:

- Including clearer guidelines on access to data subject rights.
- Including guidelines on age appropriate consent.
- Including some advice on how to assess competence for consent. The document acknowledges that age is not an accurate measure of competence, but offers no alternatives.
- While there is a welcome focus on the rights of children as users of digital media and the associated risks and data protection implications, the document could give further consideration to the diversity of children as a cohort. For example, there is limited reference to babies and younger children as data subjects.
- The document suggests producing consent documents that can be understood by a child – is it necessary to produce a range of consent documents that are tailored to suit different ages or capacities? Simplified versions of consent information may not even be legally valid if the content is oversimplified.
- There is limited guidance in respect of children in different contexts, including children with disabilities and vulnerable children. Specific attention could be given to these children including consideration of the development of a special category of our younger citizens that

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require additional protection such as refugee children or those seeking asylum and children in the care of the state.

- Clarifying the distinction between processing children’s data and providing access to content or a service to children. Do the 14 Fundamentals apply to just the former, or to both?
- Producing additional DPC guidance for researchers.
- ‘Gamification’ of consent should be prohibited, as we think this could lead children into agreeing too readily to consent.
- Including guidelines as to what counts as “reasonable efforts” to verify where a child is below the age of 16. Might there be methods in other jurisdictions that could be drawn upon in terms of online age verification of children, and whether this may need to be stratified in terms of different child age groups, and the appropriate means of seeking consent (or parental consent) across different ages (e.g. 4 years old versus 17)?

Finally, if possible we would welcome further details in the document outlining the child consultation approach and what the children said, included either in the main text or in an appendix of the document, including tracked tangible outcomes of this participation, outlining where their views have been heard and actioned.

Thank you for your extensive work on this matter, and for giving the Department an opportunity to respond.

Yours sincerely,