



NCCA

An Chomhairle Náisiúnta
Curraim agus Measúnachta
National Council for
Curriculum and Assessment

NCCA Submission to the Data Protection Commission on the Draft *Children Front and Centre: Fundamentals for a Child- Oriented Approach to Data Processing* document

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Introduction

The National Council for Curriculum and Assessment (NCCA) welcomes this further development to the Data Protection Commission's (DPC) work in identifying and codifying the Fundamentals for a Child-Oriented Approach to Data Processing¹. NCCA acknowledges the large amount of work which the DPC has undertaken to formulate these fundamentals, which has involved working with children and young people as well as other stakeholders such as parents, educators, children's rights organisations and organisations which process children's data. The DPC's Draft Fundamentals document will be an invaluable resource for all organisations who engage with children and young people as part of their work and NCCA are pleased to further contribute to their development.

Previous NCCA submission

NCCA contributed to the original call for submissions in April 2019². This document outlined NCCA's remit and processes for working with children and young people, including reflections on and from these experiences. In the concluding comments we outlined how we have been updating our approach to seeking consent/assent and in gathering and using children's and young people's personal data as part of our work.

The NCCA is a statutory body under the aegis of the Department of Education. The Council advises the Minister for Education on:

- curriculum and assessment for early childhood education, primary and post-primary schools.
- assessment procedures used in schools and examinations on subjects which are part of the curriculum.

¹ The *Data Protection Commission's Fundamentals for a Child-Oriented Approach to Data Processing* will be referred to in the rest of this response document as the *DPC's Draft Fundamentals document*.

² Public Consultation on the Processing of Children's Personal Data and the Rights of Children as Data Subjects under the General Data Protection Regulation, NCCA's submission to the DPC, April 2019: <https://www.dataprotection.ie/sites/default/files/uploads/2019-09/Submission%20from%20NCCA.pdf>

This advice is developed through research, deliberation, consultation and working with networks of schools and early childhood settings.

NCCA is committed to listening to, and listening for, children's and young people's voices and incorporating their perspectives and experiences into curriculum and assessment development from early childhood through to senior cycle. Examples of work in which children's/young people's voice has played a very central role include:

- Aistear: the Early Childhood Curriculum Framework
- the Primary Language Curriculum/Curaclam Teanga na Bunscoile
- the Senior Cycle Review.

Other recent and relevant work includes the development of subject-specific specifications, the development of guidance to support children in detention and care settings, and collaborative research with partner organisations.

NCCA also works directly with practitioners/teachers, managers/principals, children/young people and parents/guardians to gather video, audio and photographic examples from early childhood settings and from primary and post-primary schools of children/young people and their work. These materials are edited and annotated in preparation for publication. The overall purpose of this work is to support teaching, learning and assessment in early childhood settings as well as primary and post-primary schools.

In reflecting on and from our experience of working with children and young people, NCCA recognises the challenges and responsibility related to their privacy rights and data protection. In the submitted response (April 2019), NCCA provided examples of the separate consent templates used with children and young people. It is good to see that questions raised by NCCA in this submission have been addressed in the DPC's Draft Fundamentals document, including

- the age at which it is most appropriate and most ethical to seek written consent rather than assent from children?
- the age at which a child's/young person's consent overrides that of a parent/guardian?

Working with children and young people through their settings and schools is central to the work of NCCA. This has led to ongoing re-evaluations of the approach used in gathering consent/assent. It has also led to forward thinking and planning when informing children and young people, their settings and schools and their parents/guardians of the type of work NCCA wishes to engage in with them and why NCCA is requesting their consent/assent.

Response to the DPC Draft Fundamentals document

NCCA recognises that the DPC's Draft Fundamentals document will be a valuable resource for all organisations who work with the personal data of children and young people and welcomes this opportunity to respond to it. NCCA acknowledges the approach that the DPC adopted by consulting not just with parents, educators, children's rights organisations and organisations which process children's data, but also that they consulted specifically with children and young people. NCCA has worked hard to ensure that children's/young people's voices are gathered on, and help shape, all aspects of its work since 2007 when the Council commenced the development of the *Aistear* curriculum framework.

NCCA's response to the public consultation on the DPC's draft document, *Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing*, will concern mainly the fourteen fundamentals as identified by the DPC as well as the "Tools to ensure a high level of data protection for children" (Section 7, p. 56). The document in its entirety is rich in information built around the fourteen fundamentals to better explain the rationale behind them in more detail. NCCA welcomes this approach and recognises the usefulness of the document, when finalised, as a key reference for its work involving the personal data of children and young people.

It should be noted that NCCA is not an online provider of services to either adults or children/young people. As such, some of the fundamentals may seem not to apply directly to NCCA's use of personal data. However, NCCA has responded to each of the fourteen fundamentals and, where possible, has used examples of our work practices to explain this response. These practices relate to the collection of data as well as its publication.

In line with the work NCCA undertakes, the feedback to the DPC's Draft Fundamentals document will be addressed based on the work of NCCA, which takes in both the approach to the collection of data as well as, at times, its publication.

The Fundamentals as proposed by the DPC

1. FLOOR OF PROTECTION:

Online service providers should provide a “floor” of protection for all users, unless they take a risk-based approach to verifying the age of their users so that the protections set out in these Fundamentals are applied to all processing of children’s data.

NCCA agrees with this fundamental. NCCA also agrees that the “obligation deriving from international and EU law to act in the best interests of the child is paramount when considering the position of children as data subjects and in any context where decisions are made by any organisation in connection with the processing of children’s personal data³.” Depending on their age and stage of development, children and young people may be less aware of any risks or consequences, let alone their rights, in relation to their personal data. NCCA’s approach to gathering consent/assent ahead of working with children/young people is designed to ensure that everyone involved understands what is being asked of the children/young people and how their data will be used. This requires clear, purposeful communications with children/young people, their parents/guardians and the settings/schools involved. In carrying out any piece of work that involves the gathering of consent/assent from children/young people, NCCA approaches the schools/settings first to explain the work in detail. This always involves the management of the setting/school gaining as thorough an understanding as possible of the purpose behind the work. Only then does NCCA look for the consent of parents/guardians and the assent of children/young people.

2. CLEAR-CUT CONSENT:

When a child has given consent for their data to be processed, that consent must be freely given, specific, informed and unambiguous, made by way of a clear statement or affirmative action.

NCCA agrees with this fundamental. In developing the consent and assent forms for the work NCCA undertakes, ensuring that they are understandable by all concerned has been a primary consideration. NCCA applies a Plain English approach to help children/young people to better

³ DPC’s Draft Fundamentals document, *Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing*, p. 19. 2020.

understand what is being asked of them. While it very much depends on the nature of the work itself, NCCA ensures that when gathering consent/assent, both the parent/guardian and child/young people are made aware of the work that the child will be involved in, how and where copies of that work will appear and for how long. NCCA also makes this information available in writing to the principal/teacher involved and follows up with a discussion. In this way, schools are also able to inform the parent/guardian and child/young people as to the details of the work. NCCA contact details are always made available in the consent/assent forms furnished to the settings/schools, principals/teachers, parents/guardians and children/young people should there be a need for further clarifications or questions. The text-based consent/assent form is modified using imagery, where helpful, based on the child's/young people's age and stage of development. This is especially helpful with younger children and those with learning difficulties and also forms part of the initial discussion on the day, before the work begins.

The wording of this fundamental, however, is solely focused on "consent" by the child/young person. NCCA utilises the term "assent" where it refers to children/young people who are at a stage where they may not fully appreciate or understand what is meant by 'giving consent'. This is also why NCCA asks for consent from the parent/guardian. Consent involves giving permission to or for something, whereas assent is expressing approval. Article 4, GDPR defines consent as a "freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her." At all times, NCCA tries to ensure that the child/young people understands what is being asked of them and part of this work involves informing their parents/guardians as well as the settings/schools.

3. ZERO INTERFERENCE:

Online service providers processing children's data should ensure that the pursuit of legitimate interests do not interfere with, conflict with or negatively impact, at any level, the best interests of the child.

NCCA agrees with this fundamental. As an organisation working in the education sector, NCCA is very aware of the need to ensure work is undertaken with the best interests of the child/young person in mind. Through training and the upskilling of all staff, and in accordance

with the organisation's Child Safeguarding Statement⁴, NCCA maintains a high level of vigilance at all times when working with children/young people and their personal data. As such, NCCA works to ensure that there is no conflict or negative impact due to the processing of any data in relation to children's/young people's best interests from the initiation of data collection to its publication in the form of reports or examples of their work.

4. KNOW YOUR AUDIENCE:

Online service providers should take steps to identify their users and ensure that services directed at/ intended for or likely to be accessed by children have child-specific data protection measures in place (Section 3.1 "Knowing your audience")

NCCA agrees with this fundamental. NCCA does not specifically direct services at children/young people. Any work undertaken that involves children/young people leads to a specific output designed to support teachers and schools with teaching and learning as it involves curriculum development specifications or programmes. However, NCCA agrees that any online services directed at children/young people should be using a privacy by design approach and must have child-specific data protection measures in place from the outset.

5. INFORMATION IN EVERY INSTANCE:

Children are entitled to receive information about the processing of their own personal data irrespective of the legal basis relied on and even if consent was given by a parent on their behalf to the processing of their personal data.

NCCA agrees with this fundamental. NCCA takes the processing and retention of children's/young people's data very seriously. While much of our work centres on the development of curriculum frameworks and specifications that can remain in place for a significant period of time, there is currently a limit of six years placed on the retention of children's/young people's data that we use to support this work. We also inform settings/schools, parents/guardians and children/young people of this limit and clarify that

they can request the removal/deletion of their data during this time. For example, a child who gave assent to be recorded in a video, alongside their parents' consent in 4th/5th class in primary school, may wish it removed on entry into post-primary school. NCCA, upon verification of their details, will remove the video. While these requests are historically low, NCCA does honour them.

Should a child/young people contact NCCA independently of their parent/guardian, a judgement will need to be made regarding how their request is dealt with, even initially in verifying the identity of the child/young people to ensure they receive the correct information. This may also depend on their age and stage of development.

6. CHILD-ORIENTED TRANSPARENCY:

Privacy information about how personal data is used must be provided in a concise, transparent, intelligible and accessible way, using clear and plain language that is comprehensible and suited to the age of the child.

NCCA agrees with this fundamental. NCCA regularly revisits the wording in the consent/assent forms used to obtain consent from parents/guardians and children/young people. In the case of younger children, NCCA ensures that the setting/school along with the parents/guardians understand how NCCA will use the child's/young person's personal data, for what purpose, for how long and how they can request it to be removed/deleted. The language used for the children's/young people's assent form is simplified with a view to their age and stage of development. NCCA has also created an image-based assent form for very young children. An example of the form is included in Appendix A.

7. LET CHILDREN HAVE THEIR SAY:

Online service providers shouldn't forget that children are data subjects in their own right and have rights in relation to their personal data at any age. The DPC considers that a child may exercise these rights at any time, as long as they have the capacity to do so and it is in their best interests.

NCCA agrees with this fundamental. NCCA is not an information society service and as such does not operate a website/app that offers gaming, social media or the like. However, while the digital age of consent might not necessarily apply to the work of NCCA, consent and assent is still of paramount importance in NCCA's work with children/young people and their

parents/guardians. NCCA recognises the rights of children in relation to their personal data and the fact that the digital age of consent is not to be used to prevent them from accessing their data. While the DPC's Draft Fundamentals document does outline several solutions that are used by the FTC in America to verify age (p. 40), NCCA is a small organisation and would not be in a position to easily implement some of these.

As stated previously, NCCA would need to verify the identity of the person requesting access to their data, be it to check it's correct, amend it or have it removed/deleted. Should it be verified that the request is from a child/young person, NCCA will need to take into account the age and stage of development of the child/young person before coming to a judgement as to how best to respond to the request. NCCA does ask for parental consent too before working with children and this data would form part of the verification process. For NCCA, this method of verification is currently the most appropriate and proportionate to the processing work that is carried out.

8. CONSENT DOESN'T CHANGE CHILDHOOD:

Consent obtained from children or from the guardians/ parents should not be used as a justification to treat children of all ages as if they were adults.

NCCA agrees with this fundamental. Even if a "floor of protection" is established under Fundamental 1, the responsibility of data protection for children/young people is to always work with their best interests in mind. Just as users of a service might consist of both children and adults, this cannot be seen as a way to generalise how the personal data of children is treated in relation to that of adults. NCCA has been working in the area of child/young people voice for some time where consultations with young people of all ages have taken place. Child's/young person's voice is now seen as integral to our consultative processes. These consultations are very much planned with the age and stage of development of the children/young people involved in mind and are carried out by staff who understand NCCA's approach to data protection for young people and who have been trained in child protection.

9. YOUR PLATFORM, YOUR RESPONSIBILITY:

Companies who derive revenue from providing or selling services through digital and online technologies pose particular risks to the rights and freedoms of children. Where such a company

uses age verification and/ or relies on parental consent for processing, the DPC will expect it to go the extra mile in proving that its measures around age verification and verification of parental consent are effective.

NCCA agrees with this fundamental. NCCA is a statutory body under the aegis of the Department of Education and is not a company that derives revenue from providing or selling services through digital and online technologies. Section 7 of the DPC's Draft Fundamentals document outlines useful tools that can be employed to ensure a high level of data protection for children and young people. This section alongside the noting of the UK's Information Commissioner's Office Age Appropriate Design Code and the US's FTC methods to verify the provision of parental consent, are seen by NCCA as offering very valuable and existing approaches that could be replicated in an Irish context.

10. DON'T SHUT OUT CHILD USERS OR DOWNGRADE THEIR EXPERIENCE:

If your service is directed at, intended for, or likely to be accessed by children, you can't bypass your obligations simply by shutting them out or depriving them of a rich service experience.

NCCA agrees with this fundamental. As stated under the response to Fundamental 7, NCCA is not an information society service and as such does not provide a website/app that offers gaming, social media or the like. The websites run by NCCA and the information contained within them are publicly accessible. As such, there is no requirement for age verification.

11. MINIMUM USER AGES AREN'T AN EXCUSE:

Theoretical user age thresholds for accessing services don't displace the obligations of organisations to comply with the controller obligations under the GDPR and the standards and expectations set out in these Fundamentals where "underage" users are concerned.

NCCA agrees with this fundamental. Where a minimum user age has been set by an organisation they should comply with their obligations as data controllers in how they manage the verification of this and in how they process the data involved of those deemed under the age they have set.

12. PROHIBITION ON PROFILING:

Online service providers should not profile children and/ or carry out automated decision making in relation to children, or otherwise use their personal data, for marketing/ advertising purposes due to their particular vulnerability and susceptibility to behavioural advertising, unless they can clearly demonstrate how and why it is in the best interests of the child to do so.

NCCA agrees with this fundamental. NCCA does not engage in profiling children/young people in its work and takes its responsibility for processing children's/young people's personal data seriously.

13. DO A DPIA:

Online service providers should undertake data protection impact assessments to minimise the data protection risks of their services, and in particular the specific risks to children which arise from the processing of their personal data. The principle of the best interests of the child must be a key criterion in any DPIA and must prevail over the commercial interests of an organisation in the event of a conflict between the two sets of interests.

NCCA agrees with this fundamental. Should an organisation wish to engage a new technology which could result in a high risk to the rights and freedoms of natural persons, then it is imperative that they carry out a Data Protection Impact Assessment ahead of any developmental work. The DPIA should also be revisited during and at the completion of the work as any use of new technologies tend to lead to implemented changes with affects that may have been unforeseen at the start. This is even more important where the personal data might belong to children or young people.

14. BAKE IT IN:

Online service providers that routinely process children's personal data should, by design and by default, have a consistently high level of data protection which is "baked in" across their services.

NCCA agrees with this fundamental. While NCCA is not an online service provider, all staff are cognisant of the requirement to protect the personal data of the people they interact with as part of their work. NCCA provides regular sessions for all staff as a reminder of their obligations under GDPR, and training is ongoing. The consent/assent forms used by NCCA are

reviewed regularly as part of this work. It is important that staff understand their obligations in relation to the collection, processing and storing of the personal data of children/young people.

When reviewing any aspects of the work undertaken by staff in relation to the personal data of children/young people, part of this involves NCCA implementing the approach of data protection by design and default. For example, older consent/assent forms were phased out and replaced with newer forms that took this into consideration.

Response to Section 7: Tools to ensure a high level of data protection for children

Section 7 of the DPC's Draft Fundamentals document addresses the need for data controllers to, "implement appropriate technical and organisational measures to ensure and be able to demonstrate that processing is performed in accordance with this Regulation" (p. 57). This section concentrates on the requirements around DPIAs when introducing new technologies that are likely to result in a high risk to the rights and freedoms of individuals and the obligation of adopting a data protection by design and default approach built in to the very start of a product's/service's design.

In the case of data protection by design, the list of examples (p. 59) given by the DPC will be very helpful. Organisations can use this list as a starting point as they develop their own approaches to data protection by design when considering how they develop approaches that best suit the individuals whose data they will become responsible for and how these will work within their own organisation.

Conclusion

Being involved in similar, lengthy and intricate consultations, NCCA appreciates the large amount of work that has gone into the production of the draft *Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing* document. It is set to become an important reference document for organisations which process children's/young people's data. It was good to see the inclusion of direct quotations, capturing the feedback from both adults and children/young people throughout the DPC's Draft Fundamentals document. These showed that while even the adults and children/young people did at times disagree around the issues concerning data privacy and protection, all took a very serious and thoughtful approach in commenting on them. These were very supportive of the DPC's sections throughout the report and help to emphasise the fact that there, "is no one-size-fits-all solution to data protection" (DPC, Draft Fundamentals document, p. 59).

In its own work, NCCA cannot stress highly enough the importance of doing things with the best interests of the child in mind. As an organisation that works closely with settings/schools;

with and through practitioners, principals and teachers; with parents/guardians and their children to support curriculum development work for early childhood settings, primary and post-primary schools, such a focus is paramount. NCCA could not complete its remit as fully and as comprehensively if it were not for these people taking part and giving over their trust. This is why, and in regard to the DPC's Draft Fundamentals document, it is important that NCCA and all organisations who collect data from children/young people, do so with their best interests in mind. The document has brought together a wide range of information to better explain, support and scaffold organisations in their use of the fourteen fundamentals when deciding on how they will approach the gathering, processing, storing, rectifying and deleting of children's/young people's personal data. NCCA looks forward to viewing and using the fundamentals in the finalised document.

Appendix A

Example of assent form used with younger children:

ASSENT FORM FOR CHILDREN

Child's name		
Parent's consent given	Yes	No

I am happy to take part in an activity about going to school.		
I am happy for you to share my activity with my new school.		
You can tell what I said about my activity to my new school.		

Thank you very much

This form was developed as part of NCCA's preschool to primary school transition initiative to gather children's assent to take part in video recordings and to share their drawings⁵.

⁵ *Preschool to Primary School Transition Initiative Final Report*, February 2018: <https://ncca.ie/media/4435/preschool-to-primary-school-transition-initiative-final-report.pdf>