

Written submission to the Information Commissioner's Office *Call for evidence - Age Appropriate Design Code*

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1. Introduction

This response builds on a written submission made to the publication by the Information Commissioner's Office on December 21, 2017 of its *Draft Guidance recommendations relating to data controllers' compliance with regard to the collection, storage and processing of children's personal data*.

The *Age Appropriate Design Code* (Code) marks an important phase in the implementation of processes that enable children's developmental needs and interests to be better accommodated in data driven environments. It is important to stress that the Code should be understood not in the sense of a separate children's digital rights policy. There is a clear feeling, not least from the debates during the passage of the Data Protection Bill in the House of Lords, information society services providers (ISS) that the Code should embed a mindset which embraces the fact that as children interact with technologies and content in diverse ways, the opportunities and challenges for their growth, learning and flourishing require creative and innovative strategies and approaches.¹ Baroness Kidron's observation illustrates the rationale for the Code and the problem it is intended to solve:

"Self-regulation has not provided a high bar of data protection for children. On the contrary, we have seen a greedy disregard of children's needs from some sections of the tech sector in their eye-watering data collection policies. The introduction of a statutory code makes very clear what is required of them, and although data protection is crucial, it is not the only issue that confronts children in the digital environment. The principle which these amendments establishes—that a child is a child, even online—must now be established in every aspect of a child's digital life, as a cultural and legal norm."

In addition to the points raised above, it is also important to recognize that we are at an inflection point. As children's lifeworlds become increasingly connected, there is also a real need to raise cultural awareness that technology should not invariably be regarded as a "solution" but must be seen as part of a range of choices children, parents and educators should be considering when thinking about the developmental needs of the child.²

2. Development needs of children at different ages

The proposal to use age thresholds is an important commencing point through which information and communication services providers that can be supported in their efforts to better contextualize the mechanisms and strategies to be adopted when taking into account of

¹ 'Data Protection Bill [HL] - Hansard' <[https://hansard.parliament.uk/lords/2017-12-11/debates/154E7186-2803-46F1-BE15-36387D09B1C3/DataProtectionBill\(HL\)](https://hansard.parliament.uk/lords/2017-12-11/debates/154E7186-2803-46F1-BE15-36387D09B1C3/DataProtectionBill(HL))> accessed 4 September 2018.

² OfCom, 'A Decade of Digital Dependency' (Ofcom, 1 August 2018) <<https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/decade-of-digital-dependency>> accessed 18 September 2018 and Bruce Schneier, *Click Here to Kill Everybody: Security and Survival in a Hyper-Connected World* (First edition, WW Norton & Company 2018).

children's developmental needs. To this extent the following age brackets are consistent with the Convention's expectation that a child's evolving capacities is always considered alongside prevailing conditions that promote growth, flourishing and capabilities:³

3-5

6-9

10-12

13-15

16-17

Q1. In terms of setting design standards for the processing of children's personal data by providers of ISS (online services), how appropriate you consider the above age brackets would be (delete as appropriate):

Very appropriate

It is particularly appropriate as children depending on their state of dependence, interdependence and independence interact with communication technologies and social media in different ways and not fixed in time.⁴

Q1A. Please provide any views or evidence on how appropriate you consider the above age brackets would be in setting design standards for the processing of children's personal data by providers of ISS (online services)

Very appropriate also in light of Section 123(7) Data Protection Act 2018:

"age-appropriate design" means the design of services so that they are appropriate *for use by, and meet the development needs of, children;*" (my emphasis)

The recommendations from the Committee of Ministers to ensure that children's rights and developmental advocate a "child focused" approach to policymaking, in the sense of requiring all ISS to regard the foundational principles enshrined in the best interests standard under Article 3 United Nations Convention on the Rights of the Child (Convention) as the default rule, and specifically, to provide the narrative and tools through which information rights and data processing principles issues of interpretation, remedies and compliance will now be resolved.⁵

³ 'Child Development' (UNICEF) <https://www.unicef.org/cwc/cwc_58619.html> accessed 18 September 2018., OfCom, 'Children and Parents: Media Use and Attitudes Report' (2017) https://www.ofcom.org.uk/data/assets/pdf_file/0020/108182/children-parents-media-use-attitudes-2017.pdf and T Berry Brazelton and Stanley I Greenspan, *The Irreducible Needs of Children: What Every Child Must Have to Grow, Learn, and Flourish* (Perseus Pub 2000).

⁴ UK Council for Child Internet Safety, 'Education for a Connected World' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683895/Education_for_a_connected_world_PDF.PDF> accessed 16 September 2018. 'Child Safety Online: A Practical Guide for Providers of Social Media and Interactive Services' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487973/ukccis_guide-final__3_.pdf> accessed 15 September 2018.

⁵ Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment (*Children's Rights*) <https://www.coe.int/en/web/children/newsroom/-/asset_publisher/6ZtVCaG3cc7i/content/new-recommendation-adopted-on-children-s-rights-in-the-digital-environment> accessed 18 September 2018., 'PRIVACY, PROTECTION OF PERSONAL INFORMATION AND REPUTATION RIGHTS' (UNICEF) <https://www.unicef.org/csr/files/UNICEF_CRB_Digital_World_Series_PRIVACY.pdf>. UNICEF, 'CHILDREN ARE

An additional point should also be made at this juncture. The Code should not be regarded as a standalone policy instrument. It is equally important to emphasise that the Government also bears responsibility in ensuring that ISS take seriously their responsibilities towards children and their developmental needs:

“In preparing a code or amendments under this section, the Commissioner must have regard—
(a) to the fact that children have different needs at different ages, and
(b) to the United Kingdom’s obligations under the United Nations Convention on the Rights of the Child.” (Section 123(4) Data Protection Act 1998)

If a coherent and principled strategy towards children is to be embedded, it is not only ISS information processing practices that should be regulated but also situations where sharing takes place with public sector agencies and authorities which now hold children’s health, education, social welfare and criminal justice information.⁶ In passing it should also be noted that there is very little public awareness, transparency and accountability of any data sharing arrangements.

Q2. Please provide any views or evidence you have on children’s development needs, in an online context in each or any of the above age brackets.

See above.

4. The United Nations Convention on the Rights of the Child

As noted previously, the Data Protection Act 2018 requires the Commissioner to take account of the UK’s obligations under the Convention when drafting the Code.

Q3. Please provide any views or evidence you have on how the Convention might apply in the context of setting design standards for the processing of children’s personal data by providers of ISS (online services)

There is consensus that the Convention provides a principled and coherent framework for safeguarding and promoting children and their interests.⁷ The Council of Europe’s Committee of

EVERYONE’S BUSINESS: WORKBOOK 2.0’ (2014)

<https://www.unicef.org/csr/css/Workbook_2.0_Second_Edition_29092014_LR.pdf> accessed 15 September 2018. Council of Europe, Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment. See for example Human Rights Guidelines for Internet service providers (Council of Europe and EuroISPA) (2008) and the Human Rights Guidelines for online games providers (Council of Europe and ISFE) (2008), and the Children’s Rights and Business Principles (2012) drawn up by UNICEF, the UN Global Compact and the NGO Save the Children, United Nations Committee on the Rights of the Child’s General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights,

⁶ Niamh McIntyre and David Pegg, ‘Data on Thousands of Children Used to Predict Risk of Gang Exploitation’ *Guardian* (17 September 2018) <<https://www.theguardian.com/society/2018/sep/17/data-on-thousands-of-children-used-to-predict-risk-of-gang-exploitation>>. ‘State of Data 2018: Report for Policy Makers with a View to GDPR’ (defenddigitalme, 13 May 2018) <<https://defenddigitalme.com/2018/05/state-data-2018-lessons-for-policy-makers-with-view-to-gdpr-in-education/>> accessed 18 September 2018.

⁷ David Archard and Marit Skivenes, ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17 *The International Journal of Children’s Rights* 1

<<http://booksandjournals.brillonline.com/content/10.1163/157181808x358276>> accessed 3 September 2018, UNICEF Office of Research- Innocenti, ‘Children and the Data Cycle: Rights and Ethics in a Big Data World’ (UNICEF-IRC) <<https://www.unicef-irc.org/publications/907-children-and-the-data-cyclerights-and-ethics-in-a-big-data-world.html>> accessed 26 August 2018, Edward van Daalen, Karl Hanson and Olga Nieuwenhuys, ‘Children’s Rights as Living Rights’ (2016) 24 *The International Journal of Children’s Rights* 803

Ministers recently issued a series of recommendations that reinforce the role and status of children's rights and the UN Convention on the Rights of the Child.⁸ These recommendations succinctly set out the reach of the best interests principle in creating conditions for a child's growth, learning and flourishing namely:⁹ (i) Access to the digital environment; (ii) Right to freedom of expression and information; (iii) Privacy and data protection; (iv) Right to education; and Provision for Meaningful Remedies.

5. Aspects of design

The Government has provided the Information Commissioner with a list of areas (which can be broadly understood as technologies which now increase children's *visibility and accessibility* as they interact with information and services) which will be brought under the scope of the Code:

- default privacy settings,
- data minimisation standards,
- the presentation and language of terms and conditions and privacy notices,
- uses of geolocation technology,
- automated and semi-automated profiling,
- transparency of paid-for activity such as product placement and marketing,
- the sharing and resale of data,
- the strategies used to encourage extended user engagement,
- user reporting and resolution processes and systems,
- the ability to understand and activate a child's right to erasure, rectification and restriction,
- the ability to access advice from independent, specialist advocates on all data rights, and
- any other aspect of design that the commissioner considers relevant.

When approaching the interplay between ISS and the operation of Convention norms and principles, it is not possible to exaggerate the complex and relational shifts introduced into childhood, which result from children crossing a "threshold into a world different from everything that came before" as soon as they interact with mobile devices, access content and services and communicate with others.¹⁰

Any ground to be made in developing a meaningful and responsive child-focused Code will need to ameliorate the consequences of information asymmetries and power imbalance that exists between children and ISS. The challenges posed by each of these areas identified as requiring regulatory or technological intervention are too well-known to be rehearsed. To this extent, the answers given previously extend to the following questions:

Q4. Please provide any views or evidence you think the Commissioner should take into account when explaining the meaning and coverage of these terms in the code.

Q5. Please provide any views or evidence you have on the following:

<<http://booksandjournals.brillonline.com.liverpool.idm.oclc.org/content/journals/10.1163/15718182-02404006>> accessed 26 August 2018.

⁸ Note 5

⁹ Ibid.

¹⁰ James Gleick, *What Just Happened: A Chronicle from the Information Frontier*. (Vintage Imprint ; Knopf Doubleday Publishing Group ; Random House, Incorporated Distributor 2003) p. 269

Q5A. about the opportunities and challenges you think might arise in setting design standards for the processing of children’s personal data by providers of ISS (online services), in each or any of the above areas.

Viewed in isolation, these questions make a fundamental assumption about the ease with which transparency, education and resilience will help redress longstanding power imbalances and information asymmetries.¹¹ Even where ISS use labeling and rating systems, bundling services in exchange for access to personal information render the safeguards illusory.¹² In addition to this, given that children generate vast volumes of personal data from the use of mobile devices, Apps and computers, the Code must demonstrate a clear commitment to hardwiring Convention norms and principles into each technology/practice as a default rule.¹³ An outline will be provided of 5 avenues for exploration:

1. The best interests principle, which requires the child’s Convention interests (and not merely the information rights) to be a paramount consideration.¹⁴
2. Privacy by design, rather than the ISS settings functionality (eg geolocation, behavioral advertising and marketing) must be a default rule for services, devices, over the top services, and Apps. Practices that displace this norm, must be ‘red flagged’ and any use must be demonstrated for their equivalence with Convention foundational assumptions.¹⁵
3. Purpose Limitation, Data Minimisation and Fair Processing rules should be interpreted in line with the best interests principle, rather than the much lower threshold which is seen as an acceptable compromise for the digital economy.¹⁶
4. Profiling of a child as a norm cannot be seen as being commensurate with the normative foundations of the best interests principle. What is the case in the physical world should be the norm in the networked environment. Bias, discrimination and inaccuracies can go unnoticed and resulting harms may only become manifest when children become adults. The present balancing test proposed by the Article 29 Working Party leaves children exposed to profiling being normalised through cultural ambivalence to personalised

¹¹ Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services (Adopted by the Committee of Ministers on 4 April 2012 at the 1139th meeting of the Ministers’ Deputies), Wolfie Christl, ‘Corporate Surveillance In Everyday Life. How Companies Collect, Combine, Analyze, Trade, and Use Personal Data on Billions’ [2017] Cracked Labs <<http://crackedlabs.org/en/corporate-surveillance>> accessed 14 September 2018.

¹² See terms of service in ‘Games - The Best Free Games Online for Kids - CBBC - BBC’ <<https://www.bbc.co.uk/cbbc/games>> accessed 18 September 2018.

¹³ ‘Privacy in an Age of Hyperconnectivity’ (European Data Protection Supervisor) </data-protection/our-work/publications/speeches/privacy-age-hyperconnectivity_en> accessed 18 September 2018.

¹⁴ UNCRC, General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1), CRC/C/GC/14 (2013), John Eekelaar, ‘The Emergence of Children’s Rights’ (1986) 6 Oxford Journal of Legal Studies 161, Michael Freeman, ‘Why It Remains Important to Take Children’s Rights Seriously’ (2007) 15 The International Journal of Children’s Rights 5 <<http://booksandjournals.brillonline.com/content/10.1163/092755607x181711>> accessed 18 September 2018.

¹⁵ As to the limitations see ‘Children and Mobile Location Based Services’ (Ofcom, 30 September 2016) <<https://www.ofcom.org.uk/tv-radio-and-on-demand/advice-for-consumers/television/protecting-children/advice-guides-for-parents/mobile-location-based-services>> accessed 18 September 2018. At present, not many mobile service operators have updated their codes: ‘Codes of Practice | Mobile Networks | Mobile Operators | Mobile UK’ <<http://www.mobileuk.org/codes-of-practice.html>> accessed 18 September 2018.

¹⁶ Article 29 Working Party (2013), Opinion 3/2013 on purpose limitation, WP 203, 2 April 2013. See also CJEU, Joined cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others [GC], 8 April 2014.

recommendations and individualized marketing recommendations.¹⁷ It is worth reinforcing the recommendation made by the Committee of Ministers:¹⁸

“Profiling of children, which is any form of automated processing of personal data which consists of applying a “profile” to a child, particularly in order to take decisions concerning the child or to analyse or predict his or her personal preferences, behaviour and attitudes, should be prohibited by law. In exceptional circumstances, States may lift this restriction when it is in the best interests of the child or if there is an overriding public interest, on the condition that appropriate safeguards are provided for by law.”

5. Consent and raising children’s awareness to the collection and the monetization of their personal information are important to enabling some degree of control. It should be noted that consent is only one ground for lawful processing. The role and value of consent as an instrument for curbing practices of ISS should not be overstated. Access to services tend to be bundled with the expectation that consent would be provided. The rights to erasure, rectification and revocation have long been available to children under data protection laws. Within this sphere of information rights, it will be imperative to develop a sliding scale of accountability (in keeping with the concept of a child’s evolving capacity), whereby children above the age of 16 can be assumed to have much deeper understanding of how their personal data should be accessed and used.
6. If we have learnt anything from the Cambridge Analytica Saga, it must be that redress and complaint processes are critical to creating a level playing field and ensure that abuses of dominance and power are not glossed over. To date there has been very little understanding of the role of Article 3 of the Convention as a mechanism for mediating interactions between children and ISS. This is a gap that must be filled if children’s voice and participation is to be made meaningful. It is suggested that while the mechanisms for redress provided by data protection law are invaluable, the best interests principle provides an additional layer of constitutional safeguards for children, which prescribes what is to be taken into account and how redress and complaint processes are to be governed.¹⁹ By way of contrast, the Data Protection Impact Assessment is an example of the extent to which data protection law has to evolve towards the adoption of a principled and systematic approach to the determination of the impact of processing activities on the best interests of the child. There is a sense that data protection rules too prioritise the normative imperatives of the digital economy and externalize the social costs onto individuals. To help bridge the gap that presently exists in data protection policy making and governance, the considerable work and expertise of the Committee on the Rights of the Child would expand the avenues through which the Convention’s vision of childhood can be embraced.²⁰

¹⁷ ‘Result Details’ <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808b79f7> accessed 18 September 2018.

¹⁸ Note 5

¹⁹ UNCRC, General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44(6)), CRC/GC/2003/5 (2003)

²⁰ Ibid. Also UNCRC, General Comment No 12: The Right of the Child to Be Heard, CRC/C/GC/12 (2009)