

Information Commissioner's Office

# Call for evidence:

## Age Appropriate Design Code

Start date: 27 June 2018

End date: 19 September 2018



# Introduction

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The Information Commissioner (the Commissioner) is calling for evidence and views on the Age Appropriate Design Code (the Code).

The Code is a requirement of the Data Protection Act 2018 (the Act). The Act supports and supplements the implementation of the EU General Data Protection Regulation (the GDPR).

The Code will provide guidance on the design standards that the Commissioner will expect providers of online 'Information Society Services' (ISS), which process personal data and are likely to be accessed by children, to meet. Once it has been published, the Commissioner will be required to take account of any provisions of the Code she considers to be relevant when exercising her regulatory functions. The courts and tribunals will also be required to take account of any provisions they consider to be relevant in proceedings brought before them. The Code may be submitted as evidence in court proceedings.

Further guidance on how the GDPR applies to children's personal data can be found in our guidance [Children and the GDPR](#). It will be useful to read this before responding to the call for evidence, to understand what is already required by the GDPR and what the ICO currently recommends as best practice. In drafting the Code the ICO may consider suggestions that reinforce the specific requirements of the GDPR, or its overarching requirement that children merit special protection, but will disregard any suggestions that fall below this standard.

The Commissioner will be responsible for drafting the Code. The Act provides that the Commissioner must consult with relevant stakeholders when preparing the Code, and submit it to the Secretary of State for Parliamentary approval within 18 months of 25 May 2018. She will publish the Code once it has been approved by Parliament.

This call for evidence is the first stage of the consultation process. The Commissioner seeks evidence and views on the development stages of childhood and age-appropriate design standards for ISS. The Commissioner is particularly interested in evidence based submissions provided by: bodies representing the views of children or parents; child development experts; providers of online services likely to be accessed by children, and trade associations representing such providers. She appreciates that different stakeholders will have different and particular areas of expertise. The Commissioner welcomes responses that are limited to specific areas of interest or expertise and only address questions within these areas, as well as those that address every question

asked. She is not seeking submissions from individual children or parents in this call for evidence as she intends to engage with these stakeholder groups via other dedicated and specifically tailored means.

The Commissioner will use the evidence gathered to inform further work in developing the content of the Code.

### **The scope of the Code**

The Act affords the Commissioner discretion to set such standards of age appropriate design as she considers to be desirable, having regard to the best interests of children, and to provide such guidance as she considers appropriate.

In exercising this discretion the Act requires the Commissioner to have regard to the fact that children have different needs at different ages, and to the United Kingdom's obligations under the United Nations Convention on the Rights of the Child.

During Parliamentary debate the Government committed to supporting the Commissioner in her development of the Code by providing her with a list of 'minimum standards to be taken into account when designing it.' The Commissioner will have regard to this list both in this call for evidence, and when exercising her discretion to develop such standards as she considers to be desirable

In developing the Code the Commissioner will also take into account that the scope and purpose of the Act, and her role in this respect, is limited to making provision for the processing of personal data.

Responses to this call for evidence must be submitted by 19 September 2018. You can submit your response in one of the following ways:

Online

**Download this document and email to:**

[childrenandtheGDPR@ICO.org.uk](mailto:childrenandtheGDPR@ICO.org.uk)

**Print off this document and post to:**

Age Appropriate Design Code call for evidence  
Engagement Department  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow

Cheshire SK9 5AF

If you would like further information on the call for evidence please telephone 0303 123 1113 and ask to speak to the Engagement Department about the Age Appropriate Design Code or email [childrenandtheGDPR@ICO.org.uk](mailto:childrenandtheGDPR@ICO.org.uk)

### **Privacy statement**

For this call for evidence we will publish responses received from organisations but will remove any personal data before publication. We will not publish responses from individuals. For more information about what we do with personal data please see our [privacy notice](#).

# Section 1: Your views and evidence

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Please provide us with your views and evidence in the following areas:

## **Development needs of children at different ages**

The Act requires the Commissioner to take account of the development needs of children at different ages when drafting the Code.

The Commissioner proposes to use their age ranges set out in the report Digital Childhood – addressing childhood development milestones in the Digital Environment as a starting point in this respect. This report draws upon a number of sources including findings of the United Kingdom Council for Child Internet Safety (UKCCIS) Evidence Group in its literature review of Children’s online activities risks and safety.

The proposed age ranges are as follows:

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

**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),

[Leave blank]

**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.

## **The United Nations Convention on the Rights of the Child**

The Data Protection Act 2018 requires the Commissioner to take account of the UK's obligations under the UN Convention on the Rights of the Child 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)

We would argue that the second and third of the rights set out under the UN Convention on the Rights of the Child – “privacy and family life” and “freedom from violence, abuse and neglect” – are fundamental in any discussions of protections for children in an online environment and ones which our proposal for a broad-based “duty of care”, set out in detail below, would address. The duty of care does not mean that children should not have access to on-line services. To the contrary, a duty of care suggests that systems and safeguards should be appropriate to the risks posed. Thus a duty of care can help facilitate continued age-appropriate access to information and on-line services in line with children's right to freedom of expression and access to information as set out in Article 13.

### **Aspects of design**

The Government has provided the Commissioner with a list of areas which it proposes she should take into account when drafting the Code.

These are as follows:

- 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.

**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.

As we argue below, the regulation of specific technologies and services by specified mechanisms risks becoming outdated, especially given the pace of technological and market change. While all the elements that the government has asked the ICO to take account of, when drafting the Code, are sensible and current, starting from a much broader “duty of care” principle in setting the code would allow for greater flexibility, responsiveness and effectiveness to future change by the regulator in minimising current and future harms. Specific issues should be identified as falling within the duty of care but not as exhausting its scope entirely.

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

**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.

**Q5B.** about how the ICO, working with relevant stakeholders, might use the opportunities presented and positively address any challenges you have identified.

**Q5C.** about what design standards might be appropriate (ie where the bar should be set) in each or any of the above areas and for each or any of the proposed age brackets.

**Q5D.** examples of ISS design you consider to be good practice.

**Q5E.** about any additional areas, not included in the list above that you think should be the subject of a design standard.

Please see our comments on an over-arching duty of care

**Q6.** If you would be interested in contributing to future solutions focussed work in developing the content of the code please provide the following information. The Commissioner is particularly interested in hearing from bodies representing the views of children or parents, child development experts and trade associations representing providers of online services likely to be accessed by children, in this respect.

Name [REDACTED] [REDACTED]  
[REDACTED].

Email [REDACTED]

Brief summary of what you think you could offer

I have worked on technology policy since the 1990s and was a driving force behind the creation of [REDACTED], and worked on regulatory regimes in many economic and social sectors while working in [REDACTED]. I am now a trustee of several charities. The proposals put forward below have been worked up jointly with [REDACTED], [REDACTED] [REDACTED] expert on regulation in [REDACTED].

### **Further views and evidence**

**Q7.** Please provide any other views or evidence you have that you consider to be relevant to this call for evidence.



The proposal below has been jointly developed by [REDACTED], [REDACTED], and [REDACTED]. We are working with [REDACTED] on a proposal for reducing harm from social media through the use of a statutory duty of care enforced by a regulator such as OFCOM.

This proposal has wide-ranging implications for the overall codes and regulations that might apply to social media companies and other online platforms and we welcome the opportunity to submit evidence on our thinking to the ICO enquiry.

The submission is in two parts; we have kept things brief and are happy to supply more on request:

**1 - Invoking the precautionary principle based on emerging evidence of harm to children while waiting for large scale research**

**2 - A duty of care on social media companies in respect of their users - work by [REDACTED]**

### **1 -Invoking the precautionary principle based on emerging evidence of harm to children while waiting for large-scale scientific research**

Online behaviours, and the potential harms associated with them, are evolving fast. This presents a challenge to the development of responsive interventions, whether broad or narrow in scope, from regulators and other bodies, while leaving the most vulnerable users of social media and other platforms at ongoing risk of harm.

The development of an age-appropriate design code will be no different in this regard.

There is a risk that the ICO becomes stuck in a loop of insufficient evidence to act in a fast-moving market that conventional research cannot keep up with. Bad actors might seek to exploit this in the courts. The ICO requires a basis upon which to act, and quickly, in the face of scientific uncertainty and the precautionary principle provides that.

Evidence-based policymaking requires that policy decisions should be informed by rigorously established objective evidence. Typically, action on an issue is only taken after consultation and the collection

of scientific or large-scale objective evidence. In innovative areas, there is often no long-term scientific research; or such evidence arrives too late to provide an effective measure against harms. Rapidly-propagating social media services, subject to waves of fashion amongst young people, are a particular challenge for long term objective evidence.

In the face of such scientific uncertainty, the precautionary principle provides a framework for risk-based harm prevention. After the many public health and science controversies of the 1990s, the UK government's Interdepartmental Liaison Group on Risk Assessment (ILGRA)

<http://www.hse.gov.uk/aboutus/meetings/committees/ilgra/pppa.htm> published a fully worked-up version of the precautionary principle for UK decision makers.

*'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.'*<sup>1</sup>

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) and we commend it to the ICO for consideration as you undertake this consultation.

We believe that the ICO should therefore build elements of the precautionary principle into:

- (a) the guidelines for child appropriate design; and
- (b) ICO's own guidelines for enforcing the code

We note that the Secretary of State for Health has commissioned work from the Chief Medical Officer on scientific evidence of harm to children from social media.<sup>2</sup> This will take some time to report. The ILGRA version of the precautionary principle provides a framework for action based on the substantial early evidence of online harms to

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<sup>1</sup> Inter-Departmental Liaison Group on Risk Assessment 2002  
<http://www.hse.gov.uk/aboutus/meetings/committees/ilgra/pppa.htm>

<sup>2</sup> <https://www.bbc.co.uk/news/uk-43853678>

children provided by FiveRights, NSPCC, the Girl Guides, doteveryone etc.

## **2. Duty of care on social media companies in respect of their users who are children**

We are working with [REDACTED] on a policy project to reduce harm from social media. We have reached a draft policy conclusion that a statutory duty of care, imposed upon social media companies in respect of their users and enforced by a regulator, would reduce reasonably foreseeable harm caused by social media services. This would include issues that the code of conduct is designed to address.

Statutory duties of care are successfully used in several economic sectors and have proven robust and future-proof. The HSE regime has been underpinned by two principal statutory duties found in the Health and Safety at Work Act for more than 40 years. The focus on a duty of care on the outcome, rather than how it happens, lends such duties to rapidly changing and diverse environments such as digital services.

The e-commerce directive allows for member states to bring in duties of care<sup>3</sup> and more recent European proposals (e.g. Proposal for a Regulation on preventing the dissemination of terrorist content online (COM (2018) 640 final, Art. 3)), suggesting that such an approach is not incompatible with the requirements of EU law. Moreover, as the duty of care would focus on the systems which such companies would be obliged to put in place as well as their business practices/operational systems, this approach parallels the approach in data protection in relation to privacy by design and default, security by design and impact assessments.

Our draft work is published on [REDACTED] [REDACTED] will ultimately be submitted to a peer reviewed journal [REDACTED]. The NSPCC convinced us that a duty of care could be extended to all social media services provided for children, not just the largest. In an article for the Daily Telegraph<sup>5</sup> William Perrin explored potential consequences of a duty of care and how parents might experience services for their children.

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<sup>3</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>  
[REDACTED]

<sup>5</sup> <https://www.telegraph.co.uk/news/2018/06/21/quite-possible-social-media-firms-protect-children-could-do/>

One such possibility could be introduction of effective age verification by the social media platforms to an external, verified standard and a full suite of controls turned on by default for parents then to turn off one by one. These measures are design issues for services and would seem appropriate in the ICO's code.

The ICO consultation ranges both more widely than the focus of our work, social media services, but also more narrowly in that the consultation relates to children and data protection. However, implicit in the requirement for the code is the position that social media companies are not delivering a duty of care to their child users.

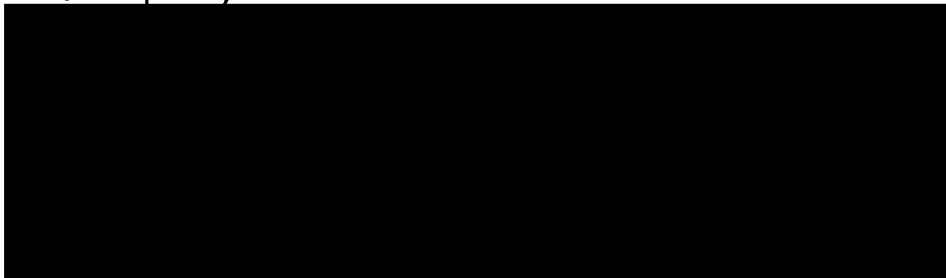
**We therefore suggest that the ICO**

- **establish in the code that companies in designing services have a duty of care towards children;**

## Section 2: About you

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**Are you:**

A body representing the views or interests of children? Please specify:	<input type="checkbox"/>
A body representing the views or interests of parents? Please specify:	<input type="checkbox"/>
A child development expert? Please specify:	<input type="checkbox"/>
A provider of ISS likely to be accessed by children? Please specify:	<input type="checkbox"/>
A trade association representing ISS providers? Please specify:	<input type="checkbox"/>
An ICO employee?	<input type="checkbox"/>
Other? Please specify: 	<input checked="" type="checkbox"/>



**Thank you for responding to this call for evidence.  
We value your input.**