

## **News Media Association: response to the ICO's Age Appropriate Design code consultation**

### **Summary**

The News Media Association is the voice of UK national, regional and local newspapers in all their print and digital forms. Our members publish around 1,000 news media titles – from The Times, The Guardian, the Daily Mail and the Daily Mirror to the Yorkshire Post, Kent Messenger, Monmouthshire Beacon. Collectively these publishers are by far the biggest investors in news, accounting for 58 per cent of the total spend on news provision in the UK. The NMA and its members support the system of advertising self-regulation and codes upheld by the ASA and independent system of press regulation and Editors' Code of Practice, with the majority of its members in membership of IPSO.

The Secretary of State for Culture Media and Sport recently described the 'big programme of work all across Government to create the best conditions for publications large and small to both thrive and flourish.'

Unfortunately, the ICO's proposed interpretation of the DCMS 's well intentioned age appropriate design code and standards, a UK government addition to the Data Protection Act 2018 in response to a suggestion by Baroness Kidron, could instead wreak havoc upon the news media.

Unless amended, the draft code published for consultation by the ICO would undermine the news media industry, its journalism and business innovation online. The ICO draft code would require commercial news media publishers to choose between their online news services being devoid of audience or stripped of advertising, with even editorial content subject to ICO judgment and sanction, irrespective of compliance with general law and codes upheld by the courts and relevant regulators.

The NMA strongly objects to the ICO's startling extension of its regulatory remit, the proposed scope of the draft code, including its express application to news websites, its application of the proposed standards to all users in the absence of robust age verification to distinguish adults from under 18-year olds and its restrictions on profiling. The NMA considers that news media publishers and their services should be excluded from scope of the proposed draft Code.

The ICO appears to be extrapolating an age appropriate design code into some all-encompassing instrument of internet regulation wielded by the ICO with a far expanded remit, substituting the public right to know with its view of what might be appropriate for a child to see. It seems practically any information service is 'likely to be accessed by children' if it is not barred to them. The ICO expressly does not confine the code to services targeted at children. It appears that the long established, easily applied criteria for services targeted at children upheld by existing regulators may not apply. The draft even specifically cites news websites as being within scope. Even its passing reference to a possible restriction to services accessed by a 'significant 'number of children - gives no legal certainty or comfort to news media, (an insubstantial proportion of such users can still apparently be deemed a significant number).

The DCMS, Government and Parliament could not have intended that the code provision should be interpreted so widely or have such adverse effect upon online journalism and news media publishers' digital innovation. We are not aware of any ICO evidence, impact assessment or consultation with the news media industry that would support and justify the practical application of its proposed draft code. It is vital that further consideration is given, detailed consultation and the code is radically amended prior to presentation to Parliament. The NMA is very willing to meet for discussion.

### **The problem: principle and practice**

News media companies, independent of the state and able to fund the expensive business of journalism, are recognised as the backbone of the UK news media sector and they remain best placed to serve the public interest by holding those in power to account. The UK's free press and high-quality journalism is thus predicated upon these independent commercial news media publishers, whose titles have served their national and local communities for centuries. Their trusted journalism is now acknowledged as a bulwark against the disinformation, misinformation and fake news dispersed via the global search engines and social media companies, which have also drained away the advertising revenue from the news media publishers. The UK government is seeking to sustain high quality journalism, assisting the news media industry and particularly the local press, and encourage media literacy.

Despite the severe challenges they face, publishers everywhere have embraced digital opportunities and are exploring new and different ways to bring high quality editorial content to their audiences and to monetise that content in a digital age so they can ensure its continued provision. NMA members publish some digital-only titles, but most publish across multiple platforms. Attracting and retaining audience on news websites, digital editions and online service, fostering informed reader relationships, are all vital to the ever evolving development of successful newsbrands and their services, their advertising revenues and their development of subscription or other payment or contribution models, which fund and sustain the independent press and its journalism.

The industry is therefore deeply concerned by the potential impact of the ICO's draft code on Age Appropriate Design upon the free press. The practical application of the ICO's draft proposals for scope, interpretation and enforcement of standards could be deeply damaging to news websites, even though their digital publications are not aimed at children and there is no evidence that they contribute to the problems which the draft Code seeks to address. It also distorts competition. It will not apply to online services without a UK establishment and with a lead supervisory authority other than the ICO. It also discriminates against the non- broadcast non- state funded commercial news media. Publishers contend that the current draft Code if literally applied could threaten the entire business model of independent, online news publication. The independent commercial media's huge investment in news journalism is reliant upon advertising and audience to fund it. Their investment in news journalism- news media publishers account for 58 per cent of total news spend and according to Ofcom are by far the largest contributors- and their news output depends upon that funding. As publishers comment, without advertisements there would not be news, save that provided by the BBC.

The proposed draft would be highly restrictive of rights to freedom of expression and other fundamental rights, without proper justification. In practice, it would appear to require currently freely and generally available lawful news websites either to provide a child- appropriate service to all users by default, with the option of age- verification mechanisms to allow adults to opt out of code protection, or to require 'robust age verification' to demonstrate that only adults are likely to access services- and also to be put at risk of draconian fines that would destroy news media publishers.

Even if organisations opted for a child appropriate service, with the draft code's stipulated (though questionably workable) evidenced protective processes, explanations, consents tailored to the five age categories from infant to 17 year old, the media could still be severely penalised for lawful, code compliant editorial content, or distribution and promotion of their content could be deterred. This could be because the ICO - which is not a media standards content regulator- might deem the editorial content to be 'inappropriate for the age range' (p26) or child "being fed content that is detrimental to their health and well-being", p 4. Its profiling prohibitions and controls would devastate audience and advertising upon which publishers' revenues depend.

There is surely no justification for the ICO to attempt by way of a statutory age appropriate design code, to impose access restrictions fettering adults (and children's) ability to receive and impart information, or in effect impose 'pre watershed' broadcast controls upon the content of all currently publicly available, free to use, national, regional and local news websites, already compliant with the general law and editorial and advertising codes of practice upheld by IPSO and the ASA.

In practice, the draft Code would undermine commercial news media publishers' business models, as audience and advertising would disappear. Adults will be deterred from visiting newspaper websites if they first have to provide age verification details. Traffic and audience will also be reduced if social media and other third parties were deterred from distributing or promoting or linking titles' lawful, code compliant, content for fear of being accused of promoting content detrimental to some age group in contravention of the Code. Audience measurement would be difficult. It would devastate advertising, since effective relevant personalised advertising will be rendered impossible, and so destroy the vital commercial revenues which actually fund the independent media, its trusted journalism and enable it to innovate and evolve to serve the ever-changing needs of its audience.

The draft Code's impact would be hugely damaging to the news industry and wholly counter to the Government's policy on sustaining high quality, trusted journalism at local, regional, national and international levels.

The draft Code's requirements and the restrictions which in practice it imposes upon news media publishers are not justified- they are not required by the specific provision of the Data Protection Act 2018 , there is no evidence of harm requiring such address and are neither necessary nor proportionate restrictions upon freedom of expression.

Newspapers online content, editorial and advertising practices do not present any danger to children. The ICO has not raised with the industry any evidence of harm, necessitating such drastic restrictions, caused by reading news or service of advertisements where these are compliant with the law and the standards set by specialist media regulators. Publishers and editors are responsible for content published and for general compliance with the law. Publishers voluntarily accept additional controls over practice and publication. The NMA is a member of the Committee of Advertising Practice and its members observe the Codes upheld by the Advertising Standards Authority. Members comply with the Editors Code of Practice and their own editorial policies, with most members in membership of IPSO. Editors must be free to exercise their own editorial judgement on presentation of lawful and code compliant news content, which may address distressing matters and justify considered use of strong imagery with impact upon an audience, whether in print or online.

There is no evidence that the proposed Age Appropriate Design code constraints are necessary protections in respect of generally accessible newspapers, paid for or free, online- or indeed in print. After all, for child protection purposes in the offline world, adults are not required to produce a

passport for access to newspapers or to areas where newspapers' front pages are on public display. No border control type regime of production of passports, age recognition or credit cards is imposed upon publisher, newsagent, retailer or library, enforced by huge fine if they cannot produce evidence of such checks. Nor in the alternative, are newspaper titles for child protection purposes required by law to demarcate readership and content and their publishers forced to prove that these are both strictly controlled and tailored to the prescribed five stages of child development set out in the draft Code.

There has never been any suggestion, at the time of government amendment of the Data Protection Bill to introduce an age appropriate design code or subsequently, that the ICO should suggest such far reaching controls over news websites. Nor has the ICO approached the NMA or, to our knowledge, any of its members to discuss such a proposition and its potential effect.

UK and EU legislators have taken care to respect press freedom and to avoid the imposition of broadcast like statutory restrictions on prevention of harm to minors to newspapers whether print or online. The Communications Act 2003, the current AVMS Directive as implemented and interpreted, the revised AVMS Directive all deliberately avoided any such curb over electronic versions of newspapers and newspaper websites. The GDPR governs only processing of personal data and it requires robust protection for freedom of expression including specific exemptions for processing for journalistic purposes ( eg Article 85). The ICO ought not extrapolate GDPR Recital 38 and the specific marketing, profiling, data collecting practices in services directly offered to a child, to which that recital refers, in justification of such far reaching proposed restrictions upon the freedom to impart and receive information and press freedom. The ICO ought not misrepresent or ignore the legal balance which must be struck between freedom of expression and other rights by dismissing them as mere industry concerns and commenting that 'it is unlikely that the commercial interests of an organisation will outweigh a child's right to privacy'. Indeed, proposed draft texts of the EU ePrivacy regulation acknowledge the importance of enabling publishers' use of cookies to maintain news sites funded by advertising and publishers across Europe are seeking to ensure its proper recognition. The ICO must also have full proper regard to the Human Rights Act 1998 and ECHR Article 10 freedom of expression right and to the EU Charter of Fundamental Rights, in particular Article 11 right to freedom of expression and information and Article 16 freedom to conduct a business. The draft Code fails even to give due weight to the child's right of freedom of expression under UNCRC Article 13.1 and the restricted circumstances in which this right can be curtailed under 13.2. or to Article 17, which requires the recognition by state parties of 'the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources' and that 'States Parties shall: (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of Article 29;'

The draft Code can be amended to ameliorate these adverse effects upon news media. The GDPR itself does not require the publication of an age appropriate design code. The Code originates from a UK government amendment to the Data Protection Act 2018, with the standards stipulated by the DCMS. Neither Government, nor Parliament, nor statutory wording stipulate the imposition for child protection purposes of such unnecessary, disproportionate, stringent restrictions upon newspaper websites and other online news services.

*'The Commissioner must prepare a code of practice which contains such guidance as the Commissioner considers appropriate on standards of age-appropriate design of relevant information society services which are likely to be accessed by children.'*

The NMA and its news media members therefore urge revision of the draft Code stressing the necessity for total exemption for news publishers and also that the Code should make clear that it permits profiling and practices which deliver advertising compliant with the current standards upheld by the Advertising Standard Authority. We would welcome an early meeting with the ICO to discuss the draft Code and how to avert such adverse impact upon the news media, its journalism and the public whom it serves.

24 May 2019

**NMA Contact Details (Please note new office address from 24 May 2019)**

Santha Rasaiah,  
LPR Director,



News Media Association  
Second Floor  
16-18 New Bridge Street  
London  
EC4V 6AG