

Information Commissioner consults on newly published rules to protect children online

16/04/2019

The Information Commissioner's Office (ICO) has published 'Age appropriate design: a code of practice for online services' (the code) for consultation. The code sets out the standards expected of providers of online services likely to be used by children. It includes ensuring settings are 'high privacy' by default—collecting and retaining a minimum amount of data—and that 'nudge techniques'—such as 'likes' or 'streaks'—should not be used on children. Hannah Crowther, senior associate at Bristows comments on the new code, adding: 'While many of the 16 principles in the code are—one would hope—broadly common-sense, they provide a useful framework for anyone collecting personal data about children online'. The consultation closes on 31 May 2019.

Background to the code

During the passage of the [Data Protection Act 2018](#) in September 2017, Beeban Kidron tabled amendments to the Bill that introduced the code. These amendments were adopted by the government and required the ICO to consult with industry and civil society in drawing up the code.

The ICO issued a [call for evidence](#) from industry and civil society on the code in June 2018, receiving 97 responses. It also undertook research with Revealing Reality to secure views from parents and children, the responses from which have been [published](#) on 15 April 2019.

Both calls for evidence were used to inform the code published for consultation on 15 March 2019.

Elizabeth Denham, the Information Commissioner, has said:

'The ICO's Code of Practice is a significant step, but it's just part of the solution to online harms. We see our work as complementary to the current focus on online harms, and look forward to participating in discussions regarding the Government's white paper.'

Baroness Kidron, chair of the 5Rights Foundation, who led the parliamentary debate about the creation of the code also says:

'I firmly believe in the power of technology to transform lives, be a force for good and rise to the challenge of promoting the rights and safety of our children. But in order to fulfil that role it must consider the best interests of children, not simply its own commercial interests. That is what the code will require online services to do. This is a systemic change.'

Standards of age-appropriate design

The code sets out practical guidance on 16 standards for information society services (ISS) likely to be accessed to children. These require:

- the best interests of children to be a primary consideration when designing and developing ISSs
- the standards of the code being applied to all users unless there is a 'robust age-verification mechanism to distinguish adults from children'
- nudge techniques—defined as 'design features which lead or encourage users to follow the designer's preferred paths in the user's decision making'—not being using to lead or encourage children to provide more personal data, turn off or weaken privacy protections or extend their use of ISSs

- geolocation services to be disabled by default—unless there are demonstrable compelling reasons for geolocation—with an obvious sign for children when tracking is active
- privacy settings being set to ‘high privacy’ by default—setting data collection to a minimum—unless there are demonstrable compelling reasons for a different default setting
- data collection and retention kept to the minimum level needed to provide elements of a service in which children are actively and knowingly engaged—giving children separate choices over which elements they wish to activate
- information on privacy to be concise and in language suited to children—including ‘bite-sized’ explanations about how data is used
- ISS providers to not use children’s personal data in ways that have been shown to be detrimental to their wellbeing or that go against codes of practice or regulations
- ISS providers upholding their own published terms, policies and community standards
- appropriate information for children about parental controls (if these are offered)—including an obvious sign to children for when they are being monitored by a parent or carer
- options that use profiling—defined as ‘any form of automated processing of personal data consisting of the use of person data to evaluate certain aspects relating to a natural person’—to be off by default—unless there are demonstrable compelling reasons for a different default setting
- connected toys or devices to also be compliant with the code
- online tools that help children exercise data protection rights or report concerns to be prominent and easy to access
- a data protection impact assessment to be taken to specifically assess and mitigate risks to children
- policies and procedures being put in place by ISS providers to demonstrate how they comply with data protection obligations

Hannah Crowther, senior associate at Bristows, says:

‘Some of the more interesting of the 16 principles in the code are geolocation (which should be off by default), and ‘nudge techniques’ to encourage children to provide extra data or turn off privacy protections (which are expressly prohibited). Interestingly, however, the code accepts that profiling of children can be allowed, provided sufficient protections are in place. The code also highlights a child’s right to privacy from their parents, and organisations should recognise the autonomy of the child and therefore that not everything can (or should) be achieved through parental controls.’

Claire Leven, policy director at Internet Matters, adds:

‘The focus on “Best interests of children” provisions are a real step forward—in an environment that we have long said has not been created with children in mind. So, wisely the code is rooted in the [General Data Protection Regulations 2018 (the GDPR)] provisions, and we understand that much work was done to ensure the draft code was compliant, and from this, significant implications will flow.’

Potential impacts on service providers

Crowther at Bristows says:

‘The code’s scope is wider than might otherwise be, covering children up to 18, and any online service (whether a website, app, or even connected toy) “likely to be accessed by children”. It’s therefore not only those organisations actively targeting children who will need to be aware of its content.’

The ICO has said that ISS providers who do not comply with the code are unlikely to prove that their processing is fair and compliant with the General Data Protection Regulations 2018 (the GDPR) or the Privacy and Electronic Communications Regulations (PECR).

The ICO is able to take action against ISS providers that are in breach of the code, GDPR or PECR. This includes:

- fines up to €20m or 4% of annual turnover (whichever is higher) for serious data breaches of the data protection principles
- assessment notices
- warnings
- reprimands
- enforcement notices
- penalty notices

Crowther at Bristows adds:

‘The ICO is clear that failure to act in accordance with the code will make it difficult for an organisation to demonstrate compliance with its data protection obligations, and so it would make sense for organisations to work through the ICO’s 16 principles much like a checklist, to reassure themselves they are compliant.’

The ICO will monitor compliance through proactive audits and considering complaints.

Consultation and next steps

Responses to the consultation can be submitted [online](#) until the 31 May.

In reference to the 16 provisions, Leven at Internet Matters adds:

‘There’s so much more and a short 6-week timeframe to respond. There are some fairly significant decisions to be made here, not least about the technical feasibility of some of these issues and solutions. However, the focus on children meriting special protection is absolutely right and something we wholeheartedly endorse.’

The ICO will draft a final version to be laid before Parliament. It expects this version to come into force by the end of 2019.

Sources:

[Age appropriate design: a code of practice for online services](#)

[Children’s privacy—new standards for online services will help protect children](#)

[Age appropriate design: a code of practice for online services](#)

[ICO launches consultation on Code of Practice to help protect children online](#)

[Reflecting on Age Appropriate Design Code – Information Commissioner’s Office](#)

Written by Andrew Muir.

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