CarnegieUK TRUST

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Call for evidence: Age Appropriate Design Code

November 2018

Your views and evidence

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

Q. 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

Q. 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.

Q. *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.

Further views and evidence

Q. *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 William Perrin, a Trustee of Carnegie UK Trust, and Professor Lorna Woods, Professor of Internet Law at the University of Essex. We are working with Carnegie UK Trust 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 Woods and Perrin for Carnegie UK trust

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.' [1]

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

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

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

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

We are working with Carnegie UK Trust 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[3] 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 the Carnegie UK Trust website[4] as a series of blog posts and will ultimately be submitted to a peer reviewed journal by Professor Woods. 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[5] William Perrin explored potential consequences of a duty of care and how parents might experience services for their children.

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;

About you

Other? Please specify:

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3 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031

4 https://www.carnegieuktrust.org.uk/blog/social-media-regulation/

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