

Carnegie UK Response to ICO consultation on the draft guidance for 'likely to be accessed' in the context of the Children's code

May 2023

Background to ICO consultation

The [Children's code \(or Age Appropriate Design Code\)](#) is a set of standards information society services have to follow in order to comply to their duties to protect children's data online. In September 2022, ICO clarified their position that adult-only services are in scope of this code if their services are likely to be accessed by children. To support services to determine whether children are likely to access, the ICO produced guidance in the form of [FAQs](#), a [list of factors](#) and [case studies](#).

ICO published a [consultation](#) in March 2023, asking for external bodies' feedback on the guidance provided for information society services to determine if they are likely to be accessed by children.

Background to Carnegie UK and key points of our response

Carnegie UK was set up in 1913 by Scottish-American philanthropist Andrew Carnegie to improve the wellbeing of the people of the United Kingdom and Ireland. Our founding deed gave the Trust a mandate to reinterpret our broad mission over the passage of time, to respond accordingly to the most pressing issues of the day and we have worked on digital policy issues for a number of years.

Carnegie UK have been closely involved with the development of the current Online Safety Bill from its inception. We have provided written and oral evidence to many Committees and inquiries relating to the development of the Online Safety Bill, as it progressed through pre-legislative scrutiny through to its current consideration by the House of Lords, as well as inquiries relating to the online environment more generally. We continue to provide cross-party support to parliamentarians seeking expert advice on the Online Safety Bill. Details of our work, including blogs, papers and submissions to Parliamentary Committees and consultations, can be found on our [website](#).

The Children's code, and its applicability to information society services, is linked to the Online Safety Bill. The Carnegie UK team therefore respond to the consultation with this in mind, and our recommendations centre around ensuring ICO's AADC guidance interacts with the children's safety duties in the Online Safety Bill in a complementary way.

We suggest that ICO liaises with Ofcom (once Ofcom's powers take effect) to minimise the risk of conflict between the AADC and the Online Safety Bill. Some platforms will operate across the AADC and the regime under the Bill, so the sets of requirements should be, as far as possible, asking the same things and use language consistently.

We also recommend improving the language used in the list of factors determining if a service is likely to be accessed by children, suggesting the need for tighter definitions, and changing the language to avoid unintentional hierarchies in factors. We also suggest an expansion of the case studies provided by ICO, to cover a broader range of service-types and scenarios which could be accessed by children.

Our detailed feedback on each part of ICO's guidance can be read below:

1. ICO's FAQs on whether services are likely to be accessed by children

The ICO consultation is consistent with an increasing focus by both law makers and civil society on ensuring that there are suitable protections for children and young people online. The AADC is separate to the Online Safety Bill (OSB, currently before Parliament¹), but there is crossover between what is covered under the former and the latter. For example, both cover social media platforms and search engines; both regulatory systems are risk-based and require the respective regulators to act proportionately; and both the OSB and the AADC require providers of in-scope services to consider whether their services are 'likely to be accessed' by children. Some uncertainty arises, however, around how the assessment which is to be conducted under the ICO's guidance will interact with the assessment that regulated service providers would need to carry out under the OSB.

The OSB provides for in-scope 'Part 3' services to carry out 'suitable and sufficient' (cl. 31(6)) children's access assessments (cl. 30). If such an assessment concludes that children could access the service, the latter is to be treated as 'likely to be accessed by children' (cl. 32),² and consequently the risk assessment and safety duties under cls. 10 and 11 (for regulated user-to-user services) and cls. 24 and 25 (for providers of regulated search services) of the Bill will apply. The test in the OSB (cl. 30(1)) is that it must be possible for children to access all or a part of a service and that 'the child user condition' is met in respect of that service (or part of it). The child user condition is whether the service (or part of it) attracts, or is likely to attract, a 'significant number' of child users (cl. 30(3)), namely a number which is 'significant in proportion to the total number of UK users' of the service (or part of it) based on evidence about 'who actually uses' the service (cls. 30(4)(a) and 30(4)(b)).

The ICO [position](#) is that it applies the 'likely to be accessed' test on the balance of probabilities, i.e., for an ISS to be 'likely' to be accessed, the possibility of this happening needs to be more probable than not. From the [first](#) and [third](#) FAQs, it follows that the draft guidance requires that the code (quoted under the first FAQ) should be applied:

- a. where children form 'a substantive and identifiable user group' of an **existing** (emphasis added) service (i.e., whether it can reasonably be concluded that under 18s form a 'material group' of people that use the service); and
- b. where evidence **later** (emphasis added) emerges that 'a significant number' of children in fact access the service or are likely to do so. Likewise, the guidance here explains that significant means 'material' and that it seeks to establish a de minimis threshold. It is less clear whether the bar set in this context is lower compared to (a), although this appears to be implied.

Notably, 'significant' in (b) does not mean, according to the guidance, that 'a large number of children must be using the service or that children form a substantial proportion of [the service's] users'.³ There appears to be a mismatch here between the wording of the ICO guidance and the wording used in cl. 30(4)(a) of the OSB, set out above. The distinction may prove confusing for companies, navigating two sets of regulation. Some platforms will operate across the OSB regime and the AADC, so the sets of requirements should be, as far as possible, asking the same things and use language consistently. We suggest that ICO liaises with Ofcom (once Ofcom's OSB-related powers commence) to minimise the risk of conflicts. It is necessary to assess how the two regulatory systems will interact when the OSB comes into force in order to ensure greater alignment across data protection and online safety. This includes the standards to be applied by regulated services to assess whether they are likely to be accessed by children.⁴

1 References to the OSB here are references to Online Safety Bill as brought from the House of Commons on 18 January 2023 (HL Bill 87).

2 Cls 32(4) and 32(6) also set out two further cases in which a service could be deemed likely to be accessed by children.

3 This is presumably a reference to UK users, as suggested by the list of factors provided in the guidance. Some more clarity would be helpful here.

4 As was recommended by the Joint Committee on the Draft OSB in its 2021 [report](#) (HL Paper 129, HC 609, para. 211).

2. ICO's list of factors determining if a service is likely to be accessed by children

The draft guidance comprises a range of non-exhaustive factors to be considered when assessing the 'likely to be accessed' test. It would be helpful to clarify, however, the criteria on the basis of which the division between 'actual evidence/ information you have' and 'other evidence to consider' has been made. Why do core factors like a service's design features, business/ operating model and subject matter of content on a service are listed as 'other evidence' and not as 'actual evidence or information you have'? The distinction between 'actual evidence/ info. you have' and 'other evidence to consider' may risk projecting the later as secondary or inferior, creating a misguided sense of hierarchy, even though the regulatory model under the AADC is designed to be systemic and harms to children are underpinned by systemic drivers and incentives. One suggestion is to divide the list broadly into: (a) a potential group of factors concerning evidence that can be gathered from existing business practices of which companies have direct and clear awareness (e.g., internal analytics); and (b) a possible group of factors referring to extrinsic evidence (e.g., independent or market research etc).

The draft guidance could make clearer what is expected from services in terms of assessing the list of factors provided. The 'Checklist' section (appearing at the top of the guidance) indicates that services are expected to 'follow the full list of factors'. This suggests a more literal adherence to the entire list and implies a requirement or expectation to strictly assess each item on the list without disregarding any of them. However, the answer to the [penultimate](#) FAQ ('How do we demonstrate our decision-making about whether children are likely to access our service?') reads in para. 3 'failure to consider the whole list of factors [...]'. This might suggest a broader and more flexible approach that involves giving due thought and attention to all the factors on the list. The difference between the two phrases may be subtle but it is worth clarifying what is envisaged: does the ICO wish to emphasise strict adherence to the factors listed, or emphasise the importance of taking all the factors into account but allowing for some discretion in how they are assessed?

The list of factors and accompanying notes could be further tightened to give less scope for providers to argue that there is insufficient evidence of a 'significant number' of child users to apply the standards of the code. For instance, the 'types of content, design features and activities' factor is framed around what children are 'interested in' (and the respective notes say 'any information that estimates, identifies or classifies that the content is likely to be of interest to children'). The factor concerning advertising (listed earlier), however, refers to advertisements 'directed at or likely to **appeal** to children' (emphasis added). Both modes of expression convey a general association with children, but; the former ('of interest to') implies content designed or selected to engage or intrigue them, whereas the latter ('appeal') emphasises qualities/ features that are likely to attract children (e.g., because they are fun and enjoyable). The latter arguably better reflects Parliament's intention to ensure that the application of the AADC did not exclude services that children use in reality (as opposed to only focusing on services designed for children). Note that 'appeal' is used in several of the case studies in the draft guide too, it is also used in Ofcom's Broadcasting Code in the definition of content that is 'likely to be accessed by children',⁵ as well as the ASA's restrictions on under-18s' exposure to creative content concerning sensitive product categories, like weigh-control and slimming products, gambling, lotteries, alcohol, tobacco, and e-cigarettes.⁶

Moreover, the guidance would benefit from clarifying whether 'design features' in the list also include factors such as a service's digital functionalities that are particularly likely to be appeal to child users, or functionalities that children would expect to see or functionalities that may create incentives for them to participate or join. The guidance could also prompt services to consider the extent to which any of the listed factors may vary depending on the age group to which a child user may belong.

⁵ Ofcom Code, [Section 1](#) (Protecting the Under-18s).

⁶ CAP Code, Sections 13, 15, 17, 18, 21, 22. Note the stricter rules for under-18s that came into force on 1 October 2022 in relation to gambling and lotteries, introducing a new 'strong' appeal test that prohibits content (imagery, themes and characters) that has a strong level of appeal to under-18s regardless of how it is viewed by adults; for more information, see ASA, [Gambling and lotteries guidance - protecting under-18s](#) (1 October 2022). There are equivalent provisions in the BCAP Code which applies to ads on radio and television services licensed by Ofcom.

3. Case studies provided by ICO demonstrating how adult services are likely to be accessed by children

Case studies would benefit from greater consistency in relation to the wording of the 'likely to be accessed' test. Case studies 1 & 2 refer to online dating: case study 1 in relation to pornography and case study 2 in relation to social media make reference to a 'significant number' of children (or 'significant user group'), but case study 1 in relation to games refers to 'a substantial number' of children.

Moreover, one more case study could be added under each of the games and social media sectors to ensure parity between the subject-matters covered. For example, case study 1 under online dating and case study 2 under pornography concern examples of services that have already implemented 'robust age assurance' measures but similar examples are not included in respect of games and social media.

Developing case studies on search engines and content streaming services would be useful too. In relation to games, case studies could also consider the incipient expansion of virtual reality games and discuss examples involving the new generation of immersive online games.

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