

A reflection on the UNCRC Best Interests of the Child principle

in the context of The Age Appropriate Design Code



citation | A Reflection on The Best Interests of the Child Principle
in the Context of the ICO Age Appropriate Design Code (2021) defenddigitalme

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defenddigitalme is a call to action to protect children's rights to privacy. We are teachers
and parents who campaign for safe, fair and transparent data processing in education, in
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1. Executive Summary

How will industry and the Office of the Information Commissioner interpret the principle ‘The Best Interests of the Child’, the leading principle of the Age Appropriate Design Code?

The Children’s Code was incorporated into the UK GDPR in 2018. Since then we have considered at defenddigitalme, whether the Best Interests of the Child principle viewed specifically as a child rights principle, brings potential conflicts and confusion into data protection governance. This may be inherent in the adoption of ideas from one area of governance into another. We have therefore explored existing precedents in law around the Best Interests of the Child *outside* data protection law, and considered the potential implications.

The ICO uses the term “the Children’s Code” so we will do the same in this paper. However this statutory code of practice will have significant effects beyond children’s activity in the digital environment because it sets out ways in which digital services “likely to be accessed by children” should comply with the UK GDPR when using children’s data, thus infers knowing which user is a child.

The Children’s Code is a collection of 15 principles to set expectations of how children’s personal data should be processed in order to be compliant with UK data protection law. Its leading principle is that the “Best Interests of the Child” are the primary consideration when designing and developing online services. The Head of Regulatory Strategy at the ICO confirmed this in a blog in July 2021, “Put simply, the best interests of the child are whatever is best for any individual child using your service.”

This principle comes from Article 3 of the United Nations Convention on the Rights of the Child (UNCRC). The Code. Anyone processing children’s data must consider and be able to demonstrate how they are acting in the best interests of children, and have balanced this right against other rights, when the use of personal data about children impacts the range of rights children hold under the UNCRC. But the ICO should clarify whether it will consider the Best Interests of the Child as being a substantive or procedural obligation on digital service providers.

Article 3 of the UNCRC in the Children’s Code should not be overemphasised at the expense of other rights and used to undermine children’s voice and choices in their own experiences in the digital environment. The UNCRC is emphatically not about protecting children as vulnerable objects of care who require protection by parents, guardians, the state, or digital service providers at the expense of children’s other rights.

The nature of the Best Interests of the Child principle is patriarchal by design. Adults deciding for children can undermine children’s autonomy and agency under Article 12 of the UNCRC. However, the duties and responsibility of parents and guardians in the second paragraph of Article 3 itself is too often left out of discussion of a child’s best interests. Parents and guardians are referenced further in Articles 5 and 18 of the UNCRC, and the latter notes that the Best Interests of the Child shall be *their* basic concern.

Decision-making on how to balance children’s rights will be new for most businesses. The Children’s Code may shift the responsibility for decisions away from parents at the point of their child’s use of digital products, and make it the responsibility of the architects and designers of tools and services, who will predetermine the available choices in a service.

Since the Children’ Code sits within the UK Data Protection regime its application is complicated by exiting the EU. Recent announcements made by the Department for Digital Culture Media and Sport suggest plans to change UK law., which are outlined in the consultation, *Data: A New Direction*.

In the context of other policy work in progress, this uncertainty means a lack of clarity, consistency, and confidence in how such principles should be applied.

Five key questions that therefore need to be addressed, are (1) Whether the ICO perceives the principle to be a substantive or a procedural right (2) How to operationalise the Code to ensure its realisation as intended (3) How the Best Interests of a Child will be balanced within the assessment of the full range of child rights by industry, (4) How it will be assessed (a) within the ICO priorities in external enforcement and (b) its own internal regulatory duties, and (5) How the wider effects of the Children’s Code will be assessed, inside and outside the field of data protection.



2. Ten conclusions with recommendations for action

1. The ICO must clarify whether it sees the principle as a substantive or procedural obligation on digital service providers if it is to be operationalised in consistent ways. How companies and the ICO determine the balance between children's rights needs definition – to agency and right to protection, how to assess the Best Interests of the Child in terms of individuals or as a collective, and within their full range of rights including participation and right to privacy.
2. This shift in responsibility to put assessment of the Best Interests of the Child into a business or service design decision-making may conflict with, but must not undermine, the right and role of parents and guardians to determine what is in their own child's best interests under UNCRC Articles 3, 5 and 18.
3. The Age Appropriate Design Code, by design, risks shifting the balance of weighting given to rights to be based arbitrarily on age, rather than on the evolving capacity of a child. Other contextual factors must come into decision making around the Best Interests of the Child. The UNCRC does not weight its principles by age, but asserts the full range of rights for all children under the age of eighteen in light of their evolving capacities. This should be given due consideration in any ICO assessment of the necessity of age-gating which may have data protection implications such as excessive data collection from the child, their legal guardians, or from all users including those over eighteen.
4. The Best Interests of the Child under Article 3 UNCRC applies to children as individuals but also in general and as a group. However, children are not a homogenous demographic with one set of interests: their best interests are impacted by their maturity, capacity and individual needs. This may present tensions between the best interests of the individual and the best interests of children within a collective. Protecting vulnerable and younger child users whilst also promoting the rights of other children including those with disabilities or disadvantaged socio-economic status presents a considerable challenge to business or service design decision-making processes when operationalising the Children's Code.
5. The role of the ICO as a regulator to uphold information rights in the public interest must not be undermined by deepening of activity that goes beyond their remit in law. While children's fundamental rights and freedoms are affected by the Data Protection Act, the Best Interests of the Child is not a data protection principle. The ICO enforcement of the Investigatory Powers Act or Freedom of Information Act, and other laws within the ICO remit also affect children, and this new Code should not be unduly weighted at the expense of other ICO priorities.
6. New skills and expertise are required at the ICO to uphold the principles set out in the Age Appropriate Design Code that go beyond the existing remit. The ICO is empowered by Parliament to regulate the actions of digital service providers (Information Society Services). If providers justify their design decisions on the basis that they promote the best interests of the majority of children whilst at the expense of a minority, or that economic interests outweigh other interests, (such as the ability to access a free service over no service) the ICO risks ultimately being forced to reach conclusions as to where an appropriate substantive balance lies.
7. The ICO has a duty under the UNCRC Article 12 to give due weight to the views of children and also to parents under the UNCRC Articles 3, 5 and 18. The ICO must do so in decisions related to the enforcement of this Code.
8. How the ICO will balance its competing demands will require transparency of its process to engender trust. Firstly, decision-making on the substantive balance of the best interests of the child in enforcement; second, its role to regulate the fundamental rights to the protection of personal data; and thirdly, questions over the compatibility of these duties with the responsibilities conferred by the duty to promote economic growth under section 110(1) of the Deregulation Act 2015.
9. The ICO must reflect diverse outlooks in its recruitment and consultations since there is no single, settled view or position in law as to what is in the Best Interests of the Child and such views are often mediated by culture.
10. The Children's Code principles are not enough to operationalise its intentions, in particular where it extends beyond precedent set out in data protection law. Industry needs support through technical standards if the expectations of the Code are to be realised.

“ The Best Interests of the Child under Article 3 UNCRC applies to children as individuals but also in general and as a group. However, children are not a homogenous group with one set of interests: their best interests are impacted by their maturity, capacity and individual needs. This may present tensions between the best interests of the individual and the best interests of children within a collective. Protecting vulnerable and younger child users whilst also promoting the rights of other children, including those with disabilities or disadvantaged socio-economic status, presents a considerable challenge to business or service design decision-making processes when operationalising the Children’s Code. ”

Article 3 of the UN Convention on the Rights of the Child (entry into force 2 September 1990)

- “ 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, *taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her*, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. ”

3. The Literature Review

3.1 Summary of key findings

A review of academic literature to identify whether any consensus exists on what the Best Interests of the Child means in the context of children's digital rights found that the literature over the last ten years, often includes an emphasis on privacy concerns. However, the Best Interests of the Child principle is not restricted to their privacy needs, and a focus solely on protecting privacy would result in a poor understanding of the Best Interests of the Child.

One of the most common approaches to the question of legal rights for children in the digital space is for scholars to identify the human rights in the CRC which are particularly relevant.

Alper and Goggin nominate a range of CRC rights as being relevant to children (and particularly to disabled children) in the digital space, and include the best interests of the child as a general principle for decision-making.

The Best Interests of the Child is a richly textured principle, encompassing a range of interests which are codified as substantive human rights in the UN Convention on the Rights of the Child (UNCRC). These rights include a right to privacy (Article 16), and also protection against other forms of harms. A wide range of potential harms which children have a right to be protected from include freedom from mental violence, from economic exploitation, and from sexual exploitation and trafficking.

However, the UNCRC emphatically does not just view children as vulnerable objects of care who require protection from bad actors or themselves by parents, guardians, the state, or digital service providers. The UNCRC is founded on the idea that children also possess agency to participate in the social world, and that their participation rights are also important to uphold. Thus children possess UNCRC rights to express their views: and to have those views be given due weight (Article 12). Children possess rights to political expression and to express their identity; to seek, access and impart information; to have freedom of thought, conscience and religion; to freely

associate with others; and to engage in rest, leisure, and education.

Reducing the rights of children in the digital sphere to rights to be protected from harms therefore devalues the totality of children's rights.

There is therefore an evident tension between a child's right to participate in the social world – including in the digital world – and their right to be protected from harms that may arise from that participation. In children's rights law, there is an intrinsic dilemma between the protective and the empowerment approaches.

A child's ability to navigate the world's risks changes as the child matures and develops. The balance between both their needs for protection and participation will therefore shift over time.

The Best Interests of the Child is thus best understood as the balance prevailing—*at a given moment*—between the child's differing and conflicting interests in the context of their evolving capacity.

The Committee on the Rights of the Child leans into indeterminacy as a strength, arguing that the BIC is context specific and a 'dynamic' principle.

This conclusion is one that we think parents instinctively understand for their own child. Parents are constantly making assessments as to the level of freedom their children should have so as to balance safety versus that child's need to develop their own abilities to interact with the world: both online and offline. In almost every seemingly everyday decision, parents are making this kind of balancing assessment.

A number of papers in the review further discuss this balance of parental responsibility and children's rights. Far fewer address what it means to say that best interests of the child should be a 'primary consideration.'

The effectiveness of the UNCRC is also critiqued in the literature as limited due to its weak international enforcement mechanisms and uneven domestic incorporation. By contrast, although the European Convention on Human Rights (ECHR) was not designed with children specifically in mind, it is applicable to everyone.

3.2 Conclusions

When state regulation impacts children, the same balances must be addressed. Instead of relying on parental instinct, the formal rights' language of the UNCRC provides the state with a framework within which to consider and make decisions affecting children. Public policy questions about (e.g.) junk food advertising bans become formalised as rights questions between children's rights to health versus their right to receive information but should not become binary and not diminish the role of parents and guardians.

State regulation fails when it fails to protect children from harms, but it also fails when it considers the Best Interests of the Child as only encompassing a responsibility to protect. The balance between competing rights might or might not be obvious: devising rights respecting public policy can be difficult.

The difficulty in creating regulations which reflect this balance of rights and roles at a moment in time – especially when those regulations govern the activities of others, such as digital service providers – is to create regulations which both provide certainty whilst also capturing the variety and complexity of these decisions.

In the context of the Code, guidance needs to offer precision in how businesses are expected to operationalise this, meeting the unique needs of each child with any consistency.



“The Best Interests of the Child is therefore best understood as the balance prevailing—in that moment—between the child's differing and conflicting interests in the context of their evolving capacity. How are businesses expected to operationalise this?”

3.3 Scope and limitations

The literature review was conducted in June-August 2021 and covers academic literature on children's digital rights, most of which has been generated since 2016. The aim of the review was to identify current trends in academic writing on this subject. It therefore has not included any material generated by governmental organisations, nor publicly available resources published by NGOs.

The literature review covers three important questions for determining the meaning of this provision in the context of children's digital rights. First, what kind of legal rights do children have in the digital space? Second, what is the relationship between the best interests of the child and the other human rights provided for in the CRC? Third, what does it mean to say that the BIC 'shall be a primary consideration'?

The scope of the review is limited to material on children's rights in the digital sphere. It therefore excludes consideration of legal regimes for protecting children online which are not rights based, including the US Children's Online Privacy Protection Act (COPPA). The literature review was conducted in English and only English language publications were included in the review. These limitations are likely to create a Euro-centric output.

The literature review is published separately in full.

4. Questions of practice

The literature review on the Best Interests of the Child in digital rights identified a range of conclusions about children's rights which can be drawn from existing literature about the digital sphere. Looking beyond this specific area of literature, a number of issues arise from considering the meaning of the Best Interests of the Child, but which do not form part of the current literature

4.1 A procedural or substantive right?

The UN Committee on the Rights of the Child argue that the Best Interests of the Child has three dimensions, which it possesses simultaneously: a substantive right, an interpretive legal principle, and a procedural right.[1]

A conceptual divide has opened up in the immigration law literature between substantivists and proceduralists. Proceduralists argue that the best way of protecting the best interests of the child is to assess the quality of decision-making. When a decision-maker can show that they have made a careful and informed assessment of the best interests of the child, the reviewing authority will be more likely to accept that the best interests of the child have been met. The assessment isn't whether the final decision is in fact in the best interests of the child, but instead whether the Best Interests of the Child has been given enough attention and weight in the decision-making process. Proceduralists argue that treating the Best Interests of the Child as only a procedural right leads to more consistent decision-making by reviewing authorities. This is particularly the case when the Best Interests of the Child is one factor amongst others within the balance of pre-existing rights (in the immigration context this is the right to family life).[2]

In contrast, substantivists argue that the Best Interests of the Child ought to be considered as a separate, substantive human right on its own accord. [3] This means that the best interests of the child should be assessed as a relevant factor in decision-making and must be balanced directly against competing interests. The outcome of the balance between different rights and interests can (and should) be directly assessed, not just the way in which the decision is reached.

It is unclear how the Information Commissioner's Office (ICO) anticipates the Age Appropriate Design Code will function in practical terms. On the one hand, the Children's Code appears to require digital service providers to treat the Best Interests of the Child as a substantive consideration:

'In order to implement this standard you need to consider the needs of child users and work out how you can best support those needs in the design of your online service, when you process their personal data.' [4]

On the other hand, it is also suggested that the ICO will be using a procedural lens when it comes to determining compliance with the Children's Code.

'If you do not follow this code, you may find it difficult to demonstrate that your processing is fair and complies with the GDPR or PECR.' [5]

However, as a domestic regulator, it may well not be appropriate for the ICO to adopt solely a procedural lens for its assessment of the best interests considerations made by digital service providers. The procedural versus substantivist debate in the literature occurs in the context of the supervisory role of the European Court of Human Rights (ECtHR). In that role, the Court has adopted a principle of subsidiarity whereby individual states are able to adopt different public policy responses and the Court will review their conformity with the Convention.[6] Subsidiarity makes sense for the ECtHR because it allows states to make different, democratically-endorsed, public policy decisions so long as a minimum rights' standard is maintained.

In contrast, the ICO's role occurs in a different context. Democratic imprimatur leads the ECtHR to tolerate a wide range of different responses to the same public policy challenge. However, if the ICO permits a wide range of different substantive answers to the same essential questions in digital design, then its decision-making will be inconsistent. That would also potentially afford a competitive advantage to those companies most willing to create a digital product with substantive privacy outcomes which do not support the best interests of the child, but which play the procedural game of appearing to 'consider' the Best Interests of the Child principle.

It might be argued that such an approach by a company would be identified by a procedural review because there would likely be a significant disconnect between

the procedural 'consideration' of the best interests of the child and the substantive outcome. However, identifying such a disconnect can only be achieved by taking a view on what substantive outcome (or at least, range of outcomes) is permissible. **The ICO should clarify whether the Best Interests of the Child is a substantive or procedural obligation on digital service providers.**

4.2 A 'primary' consideration

The literature review identified that it is well established that the Best Interests of the Child is a 'primary consideration', but what this means in practice is unexplored in the academic literature. The first principle of the Age Appropriate Design Code is that the Best Interests of the Child should be a primary consideration when you design and develop online services likely to be accessed by a child.[7] However, the Children's Code also leaves the meaning of 'primary consideration' substantively unexplored.

It says that:

The placing of the best interests of the child as a 'primary consideration' recognises that the best interests of the child have to be balanced against other interests. For example the best interests of two individual children might be in conflict, or acting solely in the best interests of one child might prejudice the rights of others. It is unlikely however that the commercial interests of an organisation will outweigh a child's right to privacy.[8]

However, this provides little actual guidance as to how to conduct a balancing assessment, not least one which treats the best interests of the child as not just a consideration in the balancing exercise, but the *primary* consideration. Without conceptual certainty, it is impossible to state why it is unlikely that commercial interests will outweigh a child's right to privacy, and how one is to determine when the unlikely has genuinely arisen.

Furthermore, if the ICO conceives of the Best Interests of the Child as being a *procedural* right, when does a digital service provider adequately consider the best interests of the child as a primary consideration: when the best interests of the child are considered first or when they are given more weight than other considerations?

The Supreme Court, in the immigration context, have found that to treat the Best Interests of the Child as a primary consideration:

...did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of

the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. [9]

It is not, however, the case that considering the best interests first is the same as treating them as a primary consideration, only that by considering them first means that the best interests of the child are given adequate attention. As Lord Kerr in another case identified:

...there is much to be said for considering those interests first, so that the risk that they may be undervalued in a more open-ended inquiry can be avoided. [10]

These cases seem to suggest that to treat the Best Interests of the Child as a primary consideration, the nature of a primary consideration has both substantive and procedural dimensions. Revision of the Children's Code or supplementary material is likely needed to clarify what the ICO envisage it to mean to treat the Best Interests of the Child as a primary consideration.

4.3 An individual or collective right?

The ICO Age Appropriate Design Code suggests that considerations of the Best Interests of the Child might require a balance to be struck between the best interests of an individual child and the best interests of children as a whole:

the best interests of two individual children might be in conflict, or acting solely in the best interests of one child might prejudice the rights of others. [11]

However, beyond this acknowledgement, there is no guidance for digital service providers on how to identify when such a conflict might arise and how to resolve it.

The Best Interests of the Child is a dynamic concept that requires an assessment appropriate to the specific context [12], according to the UNCRC Committee on the Rights of the Child General Comment no.25 on children's rights in relation to the digital environment. (Part III, B)

In a recent UK Supreme Court judgment challenging the policy of restricting social welfare payments to households comprising more than two children, the Court considered the Government's argument:

It might be argued that children's best interests would always be better served by a more generous benefits system. But Parliament was told that reducing spending on welfare benefits would allow the Government to protect other expenditure of benefit to children: on education, childcare and health [13]

The Government's argument in this case was essentially that protecting the best interests of some children (the third or later children of welfare recipients) would impair the best interests of other children, and that the best interests of the few should make way for the best interests of the many. In this case the Supreme Court found that it was essentially a question of political judgment, one that it would overstep the Court's constitutional role to determine:

Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.[14]

However, the ICO is in a different constitutional position to the Supreme Court: the ICO is specifically empowered by Parliament to regulate the actions of digital services providers. If digital service providers try to justify any generic design decisions on the basis that it promotes the best interests of the majority of children whilst harming the best interests of a minority, the ICO will not be able to avoid having to come to its own conclusions as to where an appropriate substantive balance lies.

4.4 Children's agency

defenddigitalme does not take any position in the debate over children and gender dysphoria treatment, but recent case law in this area indicates a fresh trend towards challenges to the recognition of children's agency in that context, and the weight given to the role of the parent in matters of a child's life, with specific moral and cultural framings.[15]

Children's agency is important not just in terms of allowing them to choose to do more, but also in allowing them to choose to do less. In the digital sphere, children should be able to exercise agency to (for example) choose to withhold personal information, to change privacy settings so that they share less than the default, and to decline to use services which fail – in the child's own assessment – to adequately balance privacy and utility.

Restricting children's ability to exercise agency, even when done with good intentions, can lead to coercing children to engage with digital services or activities to which they object. This risk is particularly acute in settings, such as schools, which already exercise a measure of coercive control over children.



In the digital environment, the principle of children's right to agency within the Best Interests of the Child is the foundational interest behind providing children with options to vary privacy settings or to opt-out entirely. Undermining agency as a foundational aspect of the Best Interests of the Child principle is in fact acutely hazardous to the best interests of the child where it restricts children's ability to make choices that best protect their own digital privacy.

4.5 Who determines the best interests of the child?

The question as to who determines the Best Interests of the Child is not just one that engages high legal theory of substantive versus procedural review, but also a practical question of who is engaged in whatever processes of review are demanded by the ICO. It is therefore encouraging that the ICO highlights the importance of consulting with children as part of conducting the Data Protection Impact Assessment (DPIA). The views of the child are an important general principle for respecting children's human rights, and Article 12(1) UNCRC states that:

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

Article 12 is not per se a ‘right to be consulted’ (although it can sometimes be referred to as such) and the Children’s Code provides that directly consulting children afresh on specific design issues may be disproportionate.

However, the Children’s Code seems to unnecessarily restrict the duty to consult, stating that:

“Depending on the size of your organisation, resources and the risks you have identified, you can seek and document the views of children and parents (or their representatives), and take them into account in your design. We will expect larger organisations to do some form of consultation in most cases. If you consider that it is not possible to do any form of consultation, or it is unnecessary or wholly disproportionate, you should record that decision in your DPIA, and be prepared to justify it to us.” [16]

Yet the UNCRC Article 12 does not suggest that there are any circumstances in which it is unnecessary to give due weight to children’s views on matters affecting them.

Where it is disproportionate to conduct a specific consultation, the ICO should still require digital service providers of all sizes to consider other forms of evidence of children’s views. There is already some general literature available to digital service providers which include evidence of what children’s view of privacy are in some digital contexts.[17] Permitting digital service providers to justify failing to engage with any expression of children’s views appears contrary to Article 12 as well as potentially giving licence to digital service providers to ignore inconvenient general findings about children’s views under the guise that it would be disproportionate to conduct a specific consultation exercise.

Who determines what is in the Best Interests of the Child also engages questions of representation. Consultations with children and parents should ensure engagement with diverse audiences. Livingstone and Bulger identify a common assumption of a ‘competent’ user [18] in digital policy making.

Although headline figures suggest very high rates of Internet usage by children in the UK (98% using the Internet at home) these headlines mask considerably different rates of usage of different kinds of digital products.[19] Familiarity with different digital products are likely to create differently competent digital users: watching Netflix, playing Fortnite, browsing Ebay, and using Snapchat, are all considerably different types of consumer online experience, and of little help developing transferable technical skills.

Finally, digital competence is also likely to be mediated by factors such as disability [20] and socio-economic status.[21] Consultations which only engage with competent child users should not satisfy the requirements of the Children’s Code.

Whether the rights of parents under the UNCRC Articles 3, 5 and 18 will be considered in balancing such rights remains to be seen or tested in law in this context.

Scottish law recognises that a parent’s role is more about guidance once a young person turns 16. Yet in the 2016 “Named Persons” case, *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent)* (Scotland) emphasised the obligation of parents under the UN Convention on the Rights of the Child in the ruling that

“In the case of article 18(1) [...] provides that: ‘States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be **their** basic concern.’ (emphasis supplied)”

Article 5 of the UNCRC recognises both the role of legal guardians and their position in relation to the State as recipients of direction and guidance, and the importance of children’s evolving capacity, not age.

“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

This issue of representation is also one which applies to the ICO. It too has a duty under Article 12 to give due weight to the views of children and also respect Article 5, and thus must do so in decisions related to the enforcement of the Children’s Code. Furthermore, there is no single, settled view as to what is in the Best Interests of the Child and such views are often mediated by culture.[22]

5. Concluding remarks: current positions and the direction of change

Since this research was completed, the ICO has published: “The Children’s Code: best interests framework” [23] to accompany the Age Appropriate Design Code.

The ICO sets out the intention of the framework to help those to whom it applies, “conceptualise and navigate the range of rights children hold under the UNCRC.”

It highlights the rights expected to be impacted most by data processing and sorts them into three categories:

Self: Data processing should respect children’s rights to physical and emotional wellbeing and development. It should also support their evolving capacity to form and express their own identity, boundaries and sense of self.

Support: Data processing should respect children’s rights to have access to resources that support them to develop and flourish. These resources include family bonds and guardianship, economic and social capital and legal rights that support their right to participate in decisions that have a bearing on their life.

Society: Data processing should respect the rights of groups of children, including those with vulnerabilities and specific needs. It should acknowledge that children have a stake in society’s shared resources and institutions.

The new direction of travel

The practical direction of travel is therefore not determined by changes in law through this Code but it is nudged by what the ICO suggests compliance with the Code makes necessary. [24]

One of the framework’s more problematic sections is based on the age-requirements framing the Children’s Code which are fraught with risk of introducing or exacerbating the very problems it was intended to solve.

Age assurance encompasses a range of techniques for estimating or verifying the ages of children and users but may result in discrimination, harm to privacy, restricted participation and processing of additional, excessive, and unnecessary personal data of a child and their adult friends, relations, parents and guardians, if demanded in age ‘approval’ processes.

One of the more surprising suggestions in the framework, made without any context, is that users may consider “artificial intelligence” to estimate or verify the age of child users.” How or why, and why the suggestion is not technology neutral is unclear.

Age assurance encompasses a range of techniques for estimating or verifying the ages of children and users but may result in discrimination, harm to privacy, restricted participation and processing of additional excessive and unnecessary personal data of a child and their adult friends, relations, parents and guardians, if demanded in ‘approval’ processes.

The suggestions made in the framework intended to mitigate risks of the technical solutions adopted because of the Code, are becoming more elaborate, rather than taking strong or absolute positions in the Code on when data processing should not routinely apply to a child. Or on the risk of excessive data collection of hard identifiers “about all Internet users, not just the children” regardless of the tools used, a concern that the ICO raised to the House of Lords Communications and Digital Committee enquiry on Children and the Internet in 2016. [25]

This risk mitigation requires very strong safeguards but the direction of travel is to reduce or remove those safeguards. Inference is based on profiling and data created from that will be used in age-gating services. Profiling according to recital 71 of the GDPR should not routinely apply to a child, as the Code itself identifies in Standard 12.

Children’s personal data must be accurate and the use of such data must be informed.

The DCMS consultation, *Data: A New Direction* proposes such informed processing for new inferences should stop. We disagree.

Operationalising the process of determining the balance between children’s best interests within the full range of rights, requires the support of technical standards’ definitions in order for industry to proceed with confidence. Its users need trustworthy safeguards and way to exercise rights to ensure public trust is upheld.

If industry passes on the cost of assessment, its design accommodations, and ongoing compliance to users, then children and their families may bear the brunt of these hidden costs through further economic exploitation of their personal data. The costs of applying the Children's Code may not only be for business but have unintended implications and costs for children and families in particular where family relationships may wind up being exploited beyond the purposes of age assurance.

The regulatory and legal environment

In principle, there need be no conflict between the promotion of economic growth and the regulation of compliance with the duty to observe the fundamental right to the protection of personal data.

In practice, the fact that the Information Commissioner is recruiting for a Head of Economic Analysis, at the time of writing – to oversee a team of ten economists, analysts and policy professionals and work to introduce a standardisation of approach to economic analysis, reporting and processes, “vital to our understanding of data and privacy issues” – suggests a diversion from the core role of regulatory enforcement and a parallel emphasis on the duty of economic growth imposed on the ICO in the Deregulation Act 2015.

The DCMS consultation proposal, *Data: A New Direction*, reiterates this duty on the data protection regulator.

If and how these duties will clash may be first felt in the area of children's data protection given the reach of the principles that go beyond narrowness of the ICO remit within data protection law.

The Children's Code does not create a new law. Nor does it create new technical standards. But the statutory Code of Practice suggests new ways in which existing data protection laws and standards are assessed, interpreted, and applied. And it demands the introduction of new ways of assessment of children's rights in the digital environment.

It remains to be seen whether there will be unintended consequences for how the principle of the Best Interests of the Child is viewed or applied in other sectors in future, as a result of adoption in data governance, and any precedents that may emerge.

The Code became enforceable from September 2, 2021. The impact of changes made across the digital landscape

It remains to be seen whether there will be unintended consequences for how the principle of the Best Interests of the Child is viewed or applied in other sectors in future, as a result of adoption in data governance.

and beyond it as a result, must be objectively assessed at a future date.

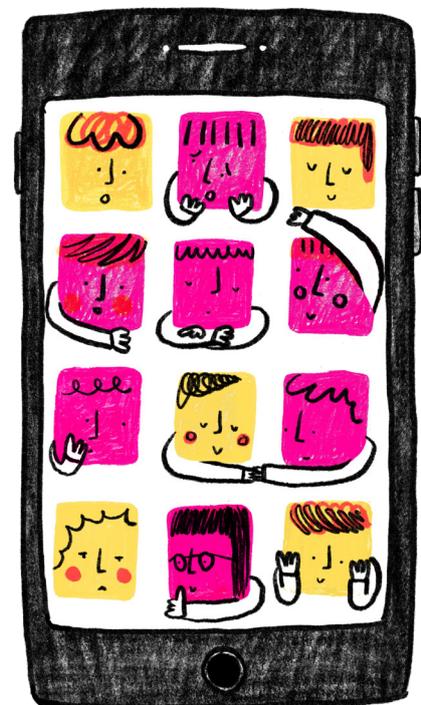
However some of the requirements of the Code are already being undermined by the recently proposed changes in UK data protection law. An example is the transparency principle undermined by both the proposed scrapping of scrutiny of algorithms and rights to access data about you, free of charge.

While the definition of 'Information Society Services' is drawn from the Technical Standards and Regulations Directive (EU) 2015/1535 (the "Directive") it is expected by the ICO to affect “the vast majority” of online services used by children. (The Code excludes “preventive or counselling services”. Any changes in UK data protection law may or may not mean changed definitions in future.[26]

At the same time, we are braced for a review of the Human Rights Act. The effectiveness of the UNCRC is limited due to its weak international enforcement mechanisms and uneven domestic incorporation. By contrast the European Convention on Human Rights (ECHR), although not designed with children specifically in mind, has mechanisms (albeit also with limitations) that include a functional Court.

So while we look to Codes of Practice for guidance and setting expectations, every route for enforcement must be vigorously defended as the mechanism to uphold the full range of children's human rights in the digital environment.

The effectiveness of the UNCRC is limited due to its weak international enforcement mechanisms and uneven domestic incorporation.



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who campaign for safe, fair and transparent data processing in education, in England, and beyond.

