



**Information Commissioners Office
Consultation: Children and the GDPR Guidance**

Giving all children in Scotland an equal chance to flourish is at the heart of everything we do. By bringing together a network of people working with and for children, alongside children and young people themselves, we offer a broad, balanced and independent voice. We create solutions, provide support and develop positive change across all areas affecting children in Scotland. We do this by listening, gathering evidence, and applying and sharing our learning, while always working to uphold children's rights. Our range of knowledge and expertise means we can provide trusted support on issues as diverse as the people we work with and the varied lives of children and families in Scotland.

Children in Scotland welcomes the opportunity to respond to the Information Commissioner Office's consultation on children and the GDPR Guidance. Our response is based on our experience of engaging with children and young people, primarily for research, development and policymaking activities. We are aware that data processing issues for service provider organisations may be different, particularly with regards to sharing information. We recognise that this guidance may have particular relevance for the Children and Young People (Information Sharing) (Scotland) Bill and associated code of practice and we hope the final guidance will be used to inform the passage of that Bill.

1. Have we clearly communicated what we think controllers need to do to comply with the GDPR when processing children's personal data?

Yes

No

Please tell us about any areas where you think our explanations are unclear and explain why. If you have any suggestions about how we could improve what we have written then please let us know:

Children in Scotland welcomes guidance to support the processing of children's personal data in compliance with GDPR, and recognises the value of this guidance to many organisations across children's sector, who are gearing up to comply with the new regulations.

Rights based approach

Children have the right to express their views and be taken seriously regarding all matters that affect them¹ and we would welcome clarity over how the perspectives of children and young people have informed the development of this guidance to date.

We welcome that the guidance includes reference to the United Nations Convention on the Rights of the Child (UNCRC) and in particular Article 12. However, we would suggest that more reference could be made to the UNCRC earlier, and throughout the document, particularly within the following sections: 'At a glance', 'checklist' and 'what should my general approach to processing children's personal data be?'.

We believe that the guidance could place stronger emphasis on how organisations should include the voices of children and young people in the design and development of their data management processes. There is relevant existing literature that features children's voices in relation to privacy and the digital world, that this guidance could draw from, and we make reference to this below. We also provide a list of links to these resources in question 3.

Digital rights

It is estimated that one third of the internet users in the world are young people below the age of 18.² As ever-increasing users of digital products and services they need to be recognised as key constituents of the digital environment and should therefore be considered in the design of all digital data systems and processes.

We are in agreement with UNICEF that children should be encouraged to "*engage in public debate and discourse over the internet*".¹⁵ The digital world provides opportunities for children as well as risk and we believe this should be acknowledged within the guidance. It can be a place where children can be creative, innovative and autonomous. Children and young people should therefore have the freedom to explore the digital environment safely.

¹ <https://www.cypcs.org.uk/rights/uncrcarticles/article-1>

² <https://weshare.unicef.org/Package/2AMZIFI79K I>

Children in Scotland is a signatory to the 5Rights approach. The 5Rights framework is a UK-wide initiative which:

“promotes a positive and holistic rights-based approach that looks not only at internet safety, but literacy and empowerment for children and young people under a single framework”³

The framework translates the rights laid out in the UNCRC into five clear digital rights: the right to remove; the right to know; the right to safety and support; the right to informed and conscious use and the right to digital literacy.

We strongly recommend that the guidance includes reference to the 5Rights framework. The framework helps to reinforce children’s rights and complements statements made within the guidance.

“Our digital life is really just our life – and our digital rights are not digital at all, they are simply our existing rights as young people.” (quote from *Our Digital Rights Report*)

In particular, the 5Rights framework could inform the following sections of the guidance: ‘How does the right to erasure apply to children?’ and ‘How does the right to be informed apply to children?’ We describe this in further detail below.

The Right to Erasure

“Sometimes I regret what I post online and wish there was some easy way to make it disappear”⁴
(quote from the 5Rights Framework website)

The 5Rights framework highlights the right for children and young people to have their data removed. It states:

‘It must be right for under 18s to own content they have created, and to have an easy and clearly signposted way to retract, correct and dispute online data that refers to them’⁵.

Article 16 (right to privacy) & 17 (access to information from the media) of the UNCRC supports this. We review the GDPR guidance as being broadly consistent with this position, but suggest it could be framed more strongly from a child rights perspective.

³ <http://d1qmdf3vop2l07.cloudfront.net/eggplant-cherry.cloudvent.net/compressed/7660b29ac3127d42c99bf394ed4c724c.pdf>

⁴ <http://5rightsframework.com/the-5-rights/5rights-by-young-people.html>

⁵ <http://5rightsframework.com/the-5-rights/the-right-to-remove.html>

The Right to be Informed

“If I knew who was looking at or using my data I would be more responsible and think more about my online actions”⁴
(quote from the 5Rights Framework website)

We welcome that the guidance highlights that privacy notices and terms and conditions need to be ‘written in plain, age-appropriate language’. This is in line with Children in Scotland’s principles and guidelines for the meaningful participation of children and young people. The section on inclusion states that information should be presented in a way that children and young people understand and should “avoid using long words and acronyms”.⁶

Young people have expressed how terms and conditions can be written in a way that is off putting and as a result they do not fully understand what they are agreeing to;

“The companies are really smart, because they know most young people don't want to sit there reading, like, paragraphs and paragraphs about it. And even if you did the way it's worded it's complicated, so they know people won't understand it”.⁷

The 5Rights Youth Commission has produced guidelines to support the development of terms and conditions and privacy policies. Where possible, it is recommended that co-production approaches are used with the target audience group to ensure that the guidelines are inclusive and accessible.⁷

With specific regard to social media, the Children and Young People's Commissioner for England has highlighted that many children and young people sign up to complex terms and conditions for social media platforms such as Facebook, Snapchat and Instagram without fully understanding what they are agreeing to. In response, the Commissioner has produced a teaching resource to help children understand some of the implications of signing up to social media apps.⁸ We refer to this resource in Question 3 below.

The GDPR guidance recognises that for online services, children aged under 13 will require parental consent in order to engage. Regardless of this, we believe that terms and conditions and privacy notices should be written in an

⁶ <https://childreninScotland.org.uk/wp-content/uploads/2017/11/Principles-and-Guidelines-FINAL.pdf>

⁷ <http://d1qmdf3vop2l07.cloudfront.net/eggplant-cherry.cloudvent.net/compressed/2bc6968f3e8079fa49d15b8f8d131399.pdf>

⁸ <https://www.childrenscommissioner.gov.uk/2017/09/29/childrens-commissioner-launches-social-media-giants-terms-and-conditions-jargon-buster-to-give-kids-more-power-in-digital-world/>

accessible form, so that parents can easily describe to their children how any personal data relating to children and young people will be managed. This will also support the engagement of older children and young people who have additional support needs.

We are encouraged that the GDPR guidance suggests organisations use a variety of methods to explain privacy notices including videos and cartoons. Young people have also recommended that terms and conditions should be presented in the form of audio, like Siri, or video.⁷

We recommend that the guidance should emphasise that organisations need to accommodate for the different communication needs of young people. The 5Right's Youth Commission report, *Our Digital Future*, includes advice from Dyslexia Scotland on how to make Dyslexia friendly formats.³⁹ To accommodate the needs of children and young people with complex communication needs we would also suggest the use of specific communication symbols (examples include, Talking Mats¹⁰ or Widgit¹¹). To help support organisations it may be worth considering the inclusion of such examples in the guidance to highlight good practice.

The right to object

We believe the guidance needs to place stronger emphasis on communicating to children that they have the right to object to the processing of their personal data for marketing purposes. As with privacy notices this needs to be presented in a way that children and young people understand, allowing them to make informed choices.

For example, children and young people might not be aware how organisations gather evidence - *"how they use their mobile devices, where they are located, and even how they use their cursor."*¹⁵ Consequently, children might not understand that companies use a range of data to create a picture of what products and services would be of most benefit to market to that individual. We believe that companies should provide a simple explanation of what actually constitutes marketing. This would help children to be aware of the potential ways their data is being used.

2. Do you have any examples or scenarios arising from your processing of children's personal data, which we could use in our guidance to help illustrate the points we make?

⁹ <https://www.dyslexiascotland.org.uk/our-leaflets>

¹⁰ <https://www.talkingmats.com>

¹¹ <https://www.widgit.com>

- No
- Yes

Please outline your examples:

Principles and Guidelines

At Children in Scotland we have developed Principles and Guidelines for meaningful participation and engagement with children and young people. These guidelines inform and influence the approaches Children in Scotland takes to carry out participation and engagement¹². The guidelines are underpinned by the United Nations Convention on the Rights of the Child (UNCRC).

A key part of undertaking participation work with children and young people is ensuring that they are informed and understand the nature of the work they take part in. This includes what is expected of children and young people and what will happen to the information they have shared with us.

Informed Consent

As a matter of good practice, we have developed a consent policy outlining the processes we should follow when we are seeking children and young people's consent to participate in Children in Scotland activities. As an organisation we primarily engage with children and young people offline and as a result our consent policy primarily focuses on how we store and maintain personal data we have gathered directly from children rather than data gathered through online sources.

We would recommend that if organisations are engaging in activities where they need to seek consent from a child, or if they are under 13 their parent, for use of their personal data then they should develop an organisational consent policy. We strongly recommend that with children and young people aged under 13, their individual consent is sought, in addition to parental consent. This dual consent process ensures that younger children are aware of what they are engaging with, and willing participants in their own right.

Children in Scotland's consent policy has been informed by the National Children's Bureau Guidelines for Children and Young People (2011)¹³ and the Social Research Association's Ethical Guidelines.¹⁴ However, any consent

¹² <https://childreninscotland.org.uk/wp-content/uploads/2017/11/Principles-and-Guidelines-FINAL.pdf>

¹³ <https://www.nfer.ac.uk/nfer/schools/developing-young-researchers/NCBguidelines.pdf>

¹⁴ <http://the-sra.org.uk/research-ethics/ethics-guidelines/>

policy needs to be tailored and developed to fit the individual needs of the organisation.

Customised Consent

We reiterate the call made by the 5Rights youth commission to limit the unnecessary collection of young people's data. It is suggested that young people should be offered 'options to opt-in and customise our consent'.³ The commissioners highlight that this is of particular significance in relation to 'sensitive data' including: ethnicity, faith, political opinions, physical or mental health problems and sexuality.

We believe the GDPR guidance could be stronger in this regard.

The 5Rights Commissioners discuss having a range of options that would allow young people to decide on what types of data they are happy to consent to and the purposes they are happy for it to be used for. Finally, they add that all options should be set as opted out by default.

We recommend that the guidance recommends that organisations consider having a range of different options included within their consent, allowing young people to decide what data they wish to share and within whom.

3. Can you point us to any publically available resources that you think it would be useful for us to reference as 'further reading' in our guidance?

- No**
- Yes**

Please provide details:

Please see below:

1. Web Pages

Protecting your personal information

Children and Young People's Commissioner Scotland

<https://www.cypcs.org.uk/rights/access-to-information/protecting-your-personal-information>

5Rights Framework

<http://5rightsframework.com>

2. Reports/Papers

Our Digital Rights

5Rights Youth Commission Scotland Report

https://www.youngscot.net/wp-content/uploads/2017/05/Five_Rights_Report_2017_May.pdf

iRights:The Legal Framework

<http://5rightsframework.com/static/iRights-The-Legal-Framework-Report-Final-July-2015.pdf>

Privacy, Protection of Personal Information and Reputational Rights

Unicef

<https://www.unicef.org/csr/paper-series.html>

Growing Up Digital: A Report of the Growing Up Digital Taskforce

Children's Commissioner

<https://www.childrenscommissioner.gov.uk/publication/growing-up-digital/>

3. Resources

The Participation and Engagement of Children and Young People: Our principles and guidelines

Children in Scotland

<https://childreninScotland.org.uk/wp-content/uploads/2017/11/Principles-and-Guidelines-FINAL.pdf>

Young People's Rights on Social Media

Children's Commissioner

<https://www.childrenscommissioner.gov.uk/2017/09/29/childrens-commissioner-launches-social-media-giants-terms-and-conditions-jargon-buster-to-give-kids-more-power-in-digital-world/>

- 4. Are there any areas of the guidance that you think would benefit from some follow up work so that we can provide a further level of detail and advice?**

- No
- Yes

Please give details and explain why; if you have any ideas about how we might best go about any follow up work then please let us know this as well:

Lawful Basis for Processing Children’s Data

We would like to make a general comment that the guidance in relation to legal processing requires further work. At the moment, the guidance is vague and there is a concern that organisations may be unclear about the correct to processes and procedures to follow.

Consent

We note that the guidance asks organisations to consider whether consent is the appropriate method for the lawful basis for processing children’s data. We are encouraged that the guidance places emphasis on ensuring that consent is informed and that there is recognition that in some circumstances consent is not appropriate.

However, we are concerned with the use of the term ‘onus’ in the context of children providing consent. In line with the UNCRC children have the right to share their views on all matters that affect them. Our view is in line with UNICEF that we should “*empower children as active digital rights holders*”¹⁵. They should be able to choose what types of data they share and with whom. We recognise that organisations have the responsibility to ensure that consent is informed. We believe this should be the case for children aged under 13 as well as those aged 13 and over.

Legitimate Interests

The guidance in relation to ‘legitimate interests’ remains fairly vague and would also benefit from some further work. Organisations who choose ‘legitimate interests’ as their form of processing are asked to balance their interests, and those of third party organisations, against the fundamental rights and freedoms of children. This assumes that organisations are fully aware of the interests of third party organisations and the impact that these could potentially have on the rights and freedoms of children.

We are also concerned that organisations can make a judgement call on the types of data they share and with which organisations. Without clear

¹⁵https://www.unicef.org/csr/files/UNICEF_CRB_Digital_World_Series_PRIVACY.pdf

guidance, organisations may choose to divulge data which may be unnecessary to their practices and processes.

As mentioned in response to question 2, children are concerned about the unnecessary sharing of 'sensitive data' with a range of different actors. In the case of 'legitimate interests' children and young people will be largely unaware of the types of data and whom this data is shared. This is also a factor when considering 'necessity tests' in Article 6 and again we would stress the need for clear and age appropriate information on what is been done with their data and why.

We are concerned that within this context, the voices of children and young people are largely excluded. In line with Article 12 they should be consulted and listened to in all decisions affecting them. We would recommend that more time is spent determining what qualifies as 'legitimate interests'. If an organisation chooses to legally process data using 'legitimate interests' then this needs to be articulated within the privacy notice. Again, we would emphasis that this needs to be communicated in a format accessible to children and young people.

Performance of a Contract

We do not feel that we are best placed to comment on this area of guidance. However, we would like to highlight that we are uneasy around the disparity across the UK in terms of the legal age of capacity. The guidance notes that the legal capacity to enter into contracts in Scotland is 16. In contrast, within the rest of the UK there is no definite age (although children over 7 can generally enter into contracts). Inconsistency across the UK is problematic for UK based organisations who work across the four nations.

5. If you answered yes to question 4, are you aware of any work that is already underway that might help us in this?

- No
- Yes

Please provide details:

6. Are there any areas of the guidance where you think an alternative interpretation of the requirements of the GDPR would be appropriate?

- No
- Yes

Please provide details, including why you think the alternative is appropriate:

Please see answer to question 4 in relation to legal processing.

7. If the ICO were to do some follow up work to this guidance would you be interested in contributing to this?

- No
 Yes

Please provide contact details. If you wish, you may also outline how and why you think you might be able to help:

One of Children in Scotland's strategic priorities is to champion the participation and engagement of children and young people on key issues affecting them. We would be happy to discuss any engagement work with children and young people to help the further development or implementation of this guidance.

To discuss this further, please contact Amy Woodhouse, Head of Policy, Projects and Participation awoodhouse@childreninscotland.org.uk

8. Please provide any further comments or suggestions on our draft guidance.

We recognise that the GDPR will come into effect before the UK leaves the European Union (EU). It is proposed that GDPR will be written into UK law before March 2019 and will remain in force unless the UK Government decides to repeal the legislation. The legislation offers some new protections for children and young people and helps to provide consistency across Europe. We reiterate the call made by the Children and Young People's Commissioner for England, that the government must ensure that a search engine's 'Rights to Remove' is still available to children in this country.¹⁶ We hope that any future development within this area will help build on and enhance protections outlined in GDPR.

We would like to make a general comment regarding the language used within this guidance. We appreciate that it is written for the purposes of organisations and groups in a variety of sectors. However, we would like to take this opportunity to highlight that the guidance should be careful not to describe children as data to be 'marketed' or 'profiled' as this is inconsistent with a child's rights approach. Examples of this include the following headings: 'What if I want to market Children?' & 'What if I want to profile children or make automated decisions about them?'. The UNCRC exists in

¹⁶ <http://d1qmdf3vop2l07.cloudfront.net/eggplant-cherry.cloudvent.net/compressed/37c0acd85e9ec969e0f3780784af843b.pdf>

recognition of the fact that children and young people have specific needs because of their additional vulnerability. It is particularly important, therefore, that this guidance is written and framed in a way that supports and protects their rights within the context of data protection.