

## Joint Committee on Human Rights - The Right to Privacy and the Digital Revolution: Response of 5Rights Foundation

February 2019

### About 5Rights Foundation

The digital world was imagined as one in which all users would be equal, but this ignores the fact that a 1/3<sup>rd</sup> of internet users globally are children.<sup>1</sup> As a result, children are growing up in an environment that systematically fails to recognise both their age and the special protections, privileges, and rights that collectively constitute 'childhood'.

**A child is a child until they grow up, not until they pick up a smartphone.**

5Rights' mission is a digital environment that anticipates the presence and meets the needs of all children, so they can access it knowledgeably, creatively, and fearlessly. We work in the engine room of the digital world: proposing regulation, developing technical standards, and re-imagining the technical design of digital services.

5Rights works closely alongside children and young people. Our ground-breaking, deliberative workshops help children to develop their understanding of the digital environment and to articulate how it can better meet their needs. Both in Scotland – in partnership with YoungScot – and in England, 5Rights' Young Leaders brief ministers, government officials, and leaders from the tech sector, offering insight and making recommendations to transform public policy and technology itself.

### Introduction

We are delighted that the Joint Committee has recognised the paramount importance of privacy in the digital environment. The extent to which individual privacy is protected online impacts on a range of other rights and freedoms, particularly for children, so we welcome the opportunity to contribute to this inquiry.

5Rights will respond to the inquiry on behalf of children, referring specifically to the experiences of children online, and how children's right to privacy in particular must be upheld in the digital environment.

**Are some uses of data by private companies so intrusive that states would be failing in their duty to protect human rights if they did not intervene? If so, what uses are too intrusive, and what rights are potentially at issue?**

In spite of the global consensus that children merit special protection, technology companies routinely fail to uphold the rights of children by failing to even recognise childhood. ***This wholesale failure to provide children with a level of protection commensurate to both their stage of development and the protections they enjoy offline***

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<sup>1</sup> One in Three: Internet Governance and Children's Rights, S. Livingstone, et al, Unicef, January 2016

***does not simply denude their rights online, but in an interconnected world, denudes 'childhood' overall.***

5Rights notes the following uses of children's data that may both contravene their right to privacy and fail to uphold the principle of children's best interests:<sup>2</sup>

- **Default privacy settings** often offer the least amount of privacy for users, even child users, and default settings often favour data collection.<sup>3</sup> Emerging technologies are also increasing the amount of data that is collected by default, and connected devices have been found to lack "even basic cyber security provisions."<sup>4</sup>
- **Collection of location data** can be used to create a precise account of the habits and whereabouts of a child, including their current location, where they live, the places they like to go, and where they might go next. The fact that the collection of location data is on by default for many services and devices and is often tracked in the background without users' knowledge, puts children at greater risk of data breach or risks from other users.
- **Profiling** takes data - often very sensitive data such as location, religion, ethnicity, special educational needs, political leaning and sexual orientation<sup>5</sup> - to make predictions about children and target them with services or content (including ads). Children have little control over their profiles,<sup>6</sup> are unable to seek redress/deletion,<sup>7</sup> and profiling can also be poor - leading to false and/or discriminatory inferences<sup>8</sup> and the denial of access to goods and services.<sup>9</sup>
- **Targeted advertising and marketing** exploits children's data, often 'without informed consent'.<sup>10</sup> Advertising has been found to have a significant impact on children's purchasing behaviour,<sup>11</sup> can exploit vulnerabilities,<sup>12</sup> and can undermine a child's ability to make informed and conscious choices. This has implications for a child's rights to freedom of expression, thought, and association, among others.<sup>13</sup>
- **Commercial sharing of data** is opaque and complex. Children's data can be passed to third parties for marketing or to train new systems and artificial intelligence for unidentified purposes.<sup>14</sup> It is difficult to monitor data privacy violations or misuse,

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<sup>2</sup> Article 3, UNCRC

<sup>3</sup> [Deceived by Design](#), Forbrukerradet, 2018

<sup>4</sup> Executive Summary, [Secure by Design](#), Department for Digital, Culture, Media and Sport, 2018

<sup>5</sup> [Privacy Groups Claim Online Ads Can Target Abuse Victims](#), WIRED, 2019

<sup>6</sup> Tremendous quantities of personal information will be amassed before they reach the age of maturity, much of it without their knowledge or awareness. [Privacy, Protection of Personal Information and Reputation Rights](#), Unicef, 2017

<sup>7</sup> [The Datafied Child: The Dataveillance of Children and the Implications on their Rights](#), D. Lupton, B. Williamson, *New Media & Society*, 19(5), 2017; [Data is Power: Profiling and Automated Decision-Making in GDPR](#), Privacy International, 2017

<sup>8</sup> [Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679](#), Article 29 Data Protection Working Party, 2018

<sup>9</sup> [Digital Redlining: How Internet Service Providers Promote Poverty](#), Truthout, 2016

<sup>10</sup> [UK Advertising in a Digital Age](#), 1st Report of Session 2017-19, Select Committee on Communications, House of Lords, 2018

<sup>11</sup> Children who were not offered any protective measures spent more of the money than their peers who played the game with protective measures. Executive Summary, [Study on the Impact of Marketing Through Social Media, Online Games and Mobile Applications on Children's Behaviour](#), European Commission, 2016

<sup>12</sup> [Facebook Told Advertisers It Can Identify Teens Feeling 'Insecure' and 'Worthless'](#), The Guardian, 2017

<sup>13</sup> Articles 13 and 15, [United Nations Convention on the Rights of the Child, 1990](#)

<sup>14</sup> [Children in a Digital World](#), Unicef, 2017

yet the consequences of sharing children’s data can be significant.<sup>15</sup> A focus on tightening commercial sharing of data, rather than just peer-to-peer sharing of data, is crucial.

- **‘Nudge and sludge’<sup>16</sup> strategies encourage extended or compulsive use** and exist to make child users stay online for longer, thus giving more data to the services that they use. This can have broad impacts on children’s development and mental and physical health.<sup>17</sup> In South Korea, compulsive use of technology among children is formally recognised.<sup>18</sup> In the UK, children are now able to seek treatment via the NHS for video gaming addiction, which has been classified as a medical disorder<sup>19</sup> under the *World Health Organisation’s International Classification of Diseases (ICD-11)*.<sup>20</sup> The addictive capabilities of social media are, in many cases, just as strong as in gaming.

When all of this activity is carried out by companies primarily for commercial gain, as tends to be the case,<sup>21</sup> it clearly falls short of putting the ‘best interests of the child’ above any other consideration.<sup>22</sup> States therefore have a duty to intervene.

## **Are consumers and individuals aware of how their data is being used, and do they have sufficient real choice to consent to this?**

Technology companies often assert that children understand their privacy and rights online.<sup>23</sup> Yet extensive independent research repeatedly finds not only that children don’t fully understand their privacy or rights online,<sup>24</sup> but also that they are actively discouraged from understanding them by the way the information is presented online.

- **Children don’t read terms and conditions or privacy notices and are either unable or discouraged to given their length and complexity.** BBC research found that children are signing-up to services (YouTube, Twitter, Snapchat, Google, Instagram, Facebook, Reddit and Apple) with terms and conditions that require a university

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<sup>15</sup> [Disgracebook: One in Five Employers Have Turned Down a Candidate Because of Social Media](#), M. Smith, YouGov, 2017

<sup>16</sup> See Thaler and Sunstein’s *Nudge: Improving Decisions About Health, Wealth, and Happiness*, 2009

<sup>17</sup> Unicef (2017) found that ‘Technology companies come away with financial gain from advertisers, plus their users’ time, attention and personal data. Adolescents, already experiencing new and complex emotions, might not realise the potential impacts on their privacy or how they spend their time. [Children in a Digital World](#), Unicef, 2017

<sup>18</sup> In 2002, the government-funded National Information Society Agency opened the first Internet addiction prevention counselling centre worldwide and has since developed large-scale projects to tackle “the pervasive problem of technology overuse”. [Internet Addiction And Problematic Internet Use: A Systematic Review Of Clinical Research](#), D. Kuss, O. Lopez-Fernandez, World Journal of Psychiatry, 2016.

<sup>19</sup> The guidelines for video gaming disorder state that for a diagnosis a victim’s behaviour must be “of sufficient severity to result in significant impairment in personal, family, social, educational, occupational or other important areas of functioning.” They would also normally be expected to have suffered it for at least a year. [Gaming Addiction Can Be Treated On The NHS After It Is Declared A Medical Disorder](#), C. Hymas, The Telegraph, 2018

<sup>20</sup> [Gaming Addiction Can Be Treated On The NHS After It Is Declared A Medical Disorder](#), C. Hymas, The Telegraph, 2018; [Gaming Disorder](#), World Health Organisation, 2018

<sup>21</sup> Unicef notes “Children are of incredible interest to businesses. They are the largest and most powerful consumer group; they are more susceptible to advertising and marketing techniques; and their preferences and behaviours are more open to influence and manipulation.” [Privacy, Protection of Personal Information and Reputation Rights](#), Unicef, 2017

<sup>22</sup> Article 3, UNCRC

<sup>23</sup> [Facebook](#)

<sup>24</sup> [Open Rights Group](#); [Human Centred Computing](#); [Horizon Digital Economy Research Institute](#)

level education to understand.<sup>25</sup> When virtually no adults read the terms and conditions,<sup>26</sup> why should children be expected to do so? 5Rights Foundation has called for strict standards on the language and presentation of terms and conditions to be enforced as part of the Age Appropriate Design Code, which will be brought into force in the UK later this year.

- **Terms and conditions are non-negotiable, offered in a take-it-or-leave-it manner that undermines consent.** YouTube, Snapchat, WhatsApp, Skype and many other online services make joining a service conditional on agreeing wholesale to terms and conditions, including privacy notices.<sup>27</sup> In practice, this means children often have no choice but to agree if they want to use a service, which raises questions about whether or not consent has really been given.
- **Children are developmentally unable to give consent.** Terms presented to children do not reflect their developmental vulnerabilities. It is unreasonable to expect children to fully understand the implications of the collection and processing of their personal data, and what the long-term impact on their privacy might be.<sup>28</sup> In *Gillick v West Norfolk [1984]*,<sup>29</sup> Mr Justice Woolf stated that ‘...a child must be capable of making a reasonable assessment of the advantages and disadvantages...in order for consent to be fairly described as true consent’.

***If children don’t read terms and conditions, don’t understand what they mean and are unable to evaluate the long-term consequences of agreeing, it is unreasonable for online services to claim that a child has given meaningful consent to process their data.***

## **What regulation is necessary and proportionate to protect individual rights without interfering unduly with freedom to use and develop new technology?**

Firstly, it is crucial that innovation and regulation to protect children’s rights are not framed as two mutually exclusive concepts. On the contrary, Sir Tim Berners-Lee,<sup>30</sup> Tristan Harris,<sup>31</sup> Senator Mark Warner,<sup>32</sup> US Financial Conduct Authority (FCA),<sup>33</sup> Farhad Manjoo,<sup>34</sup> the House of Lords Communications Committee,<sup>35</sup> George Soros,<sup>36</sup> Foursquare co-founder,

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<sup>25</sup> [Social Site Terms Tougher Than Dickens](#), BBC News, 6 July 2018

<sup>26</sup> Only 1 in 1,000 consumers access the license agreement, and most of those who do access it read not more than a small portion: [Focusing on the Fine Print: Florencia Marotta-Wurgler Breaks New Ground in her Research on Consumer Contracts](#), NYU Law News, January 2015

<sup>27</sup> “In order to use the Service, you must firstly agree to the Terms. You may not use the Service if you do not accept the Terms.” At 2.1, [Terms of Service](#), YouTube; “In order to use Snapchat or any of our other products or services that link to the Terms, you must have accepted our Terms and Privacy Policy... Of course, if you don’t accept them, then don’t use the Services.” [Terms of Service](#), Snap Group Limited; “In order to provide our Services... we need to obtain your express agreement to our Terms of Service. You agree to our Terms by registering, installing, accessing, or using our apps, services, features, software, or website.” [Legal Info](#), WhatsApp; “In order to download and/or use the Software, Products and/or Skype Websites you must first accept these Terms.” At 2.1, [Terms of Use](#), Skype Manager/Skype Connect

<sup>28</sup> [Privacy, Protection of Personal Information and Reputation Rights](#), Unicef, 2017

<sup>29</sup> [Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security \[1984\] Q.B. 581](#)

<sup>30</sup> [World Wide Web Foundation](#)

<sup>31</sup> [Essays](#), Tristan Harris

<sup>32</sup> [Potential Policy Proposals for Regulation of Social Media and Technology Firms](#), U.S. Senator Mark Warner, 2018

<sup>33</sup> [The Big Tech Competition Dilemma](#), Financial Conduct Authority, 2018

<sup>34</sup> [How the Frightful Five Put Start-Ups in a Lose-Lose Situation](#), New York Times, 2017

<sup>35</sup> [UK Advertising in a Digital Age](#), House of Lords Select Committee on Communications, 2018

<sup>36</sup> [Remarks Delivered at the World Economic Forum](#), 2018

Naveen Selvadurai and former Facebook employee, Josh Lee,<sup>37</sup> believe that innovation is fettered by the current status quo where a few players dominate the industry.

***Safety, rights and ethics - by design and default – reinforce innovation by introducing standards to which all companies must adhere. It levels the playing field by allowing new players to enter the market armed with prior knowledge of its rules. It also necessitates new and different business models, thereby creating a more diverse, competitive sector. On the rare occasions where there is a genuine conflict between innovation and regulation, it is government’s role to find in favour of the best interests of the child.***<sup>38</sup>

In January 2019, 5Rights published *Towards an Internet Safety Strategy*, which made a number of suggestions for regulation that would bring the protections that children enjoy offline, into the digital environment. These included:

- **A harmonisation bill** to require all legislation to be interpreted in a manner that creates parity of protection and redress online. This legislation would operate in a similar way to Section 3 of the Human Rights Act 1998, which creates an obligation to interpret existing law in a way that is compatible with human rights.
- **The development of universal design standards.** For example, 5Rights is currently developing *Universal Standards for Childhood*, working with standards agencies around the world, including the Institute of Electrical and Electronics Engineers (IEEE) and British Standards Institute (BSI). These will create effective guidance, impact assessments, technical standards and certification models for those manufacturing, operating and delivering services in a digital environment. The standards seek to create a world fit for children and childhood and are being developed for global use and adoption.
- **A duty of care for the digital environment.** William Perrin and Professor Lorna Woods suggest that this well-established concept from the ‘physical world’ be implemented online, meaning that providers of online services would be responsible for protecting their users from a range of foreseeable harms.
- **The Age Appropriate Design Code**, currently being introduced in the UK, which will require online service providers to deliver the highest level of data protection for children and young people by design and default.<sup>39</sup> The Code must be supported by a fully resourced regulator with powers of oversight, enforcement, and sanction. The Information Commissioner’s Office will fulfil that role initially, but consideration should be given to establishing a specific, standalone regulator as becomes necessary.

The Australian Competition and Consumer Commission is currently considering a similar approach to embedding privacy by design and default, as part of its Digital Platforms inquiry.<sup>40</sup>

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<sup>37</sup> [Will Facebook Kill All Future Facebooks?](#) WIRED, 2017

<sup>38</sup> Article 3, [Convention on the Rights of the Child](#), 1990

<sup>39</sup> [Information Commissioner’s Office](#), Age Appropriate Design Code, 2018

<sup>40</sup> [Australian Competition and Consumer Commission](#), Digital Platforms inquiry, 2017-19

## **If action is needed, how much can be done at national level, and how much needs international cooperation?**

Given the transnational nature of the technology sector, action is clearly preferable where it is taken consistently around the world. This global approach is already common in a range of other sectors, such as the aviation sector where regulation is harmonised around the world to ensure consistent levels of safety, overseen by the *UN's International Civil Aviation Organisation* and its national equivalents.<sup>41</sup>

But we note that even global initiatives have become fragmented. Probably the most effective body in tackling the technology sector's overarching power is the EU. Post-Brexit, the UK should seek the closest possible ties with Europe in this policy area, whilst still working toward a global response.

However, solutions can still and should still be instigated by individual states or groups of states. Both the *General Data Protection Regulation (GDPR)* in the EU and more recently the *California Consumer Privacy Act 2018 (CCPA)* demonstrate how action in one territory, or territories, can influence practice among digital service providers globally. In the UK, both the *Age Appropriate Design Code* and the upcoming *Online Harms white paper* represent opportunities for the UK Government to create a regulatory regime that can, and should, be replicated globally.

Finally, whether action is taken nationally or internationally, leadership is vital in responding to privacy-related challenges. Taking the UK as an example, several government departments have a role to play in this area, including the Department for Digital, Culture, Media and Sport, the Home Office, the Ministry of Justice, the Department of Health, and the Department for Education. How these knit together, who is responsible for delivery, and where the final authority lies, both nationally and internationally, is necessary to ensure that responses are coherent and coordinated.

## **To what extent do international human rights standards, such as the UN Guiding Principles on Business and Human Rights, have a role to play in preventing private companies from breaching individuals' rights to privacy?**

In a world where human rights, including children's rights, are frequently not upheld, international human rights standards serve an important purpose. They have long been used in relation to issues affecting the offline world, and there is no reason they should not be similarly employed in relation to the online world.

We note that there are a number of ongoing projects designed to do just this. Last year the UN convened a High-level Panel on Digital Cooperation, which has sought input from industry, governments, academics, and NGOs on strengthening cooperation on solving

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<sup>41</sup> [The International Civil Aviation Organization \(ICAO\)](#)

issues in the digital realm. The Panel will publish a report in April 2019 outlining good practice and proposing methods for cooperative, cross-sector working.<sup>42</sup>

5Rights Foundation is currently working on behalf of the Committee on the Rights of the Child to create a General Comment on the Convention in relation to the Digital Environment. The General Comment will clarify how this rapidly evolving environment impacts on the full range of children's rights in positive and negative ways. Its purpose will be to strengthen the case for greater action and elaborate what action is required by States in order to meet their obligations to promote and protect the rights of the child in, and through, the digital environment.

Whether binding or not, these guidelines and standards *clarify* the existing duties of states and companies under international law. This is helpful in assisting states and companies to meet their obligations where and when they are minded to do so, it builds pressure on those not yet meeting their obligations, it removes excuses for inaction based on ignorance or uncertainty, and it can help to clarify the need for and shape future regulation.

By way of example, the GDPR as it exists now is the result of an iterative process, preceded initially by non-binding guidelines. In 1980, the Organisation for Economic Cooperation and Development (OECD) issued *Recommendations of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data*.<sup>43</sup> The guidelines set out a number of basic principles to underpin (and harmonise) national privacy legislation, all of which were subsequently incorporated into the EU's *Data Protection Directive*,<sup>44</sup> the precursor to the current GDPR.

**For further information or to invite 5Rights to give oral evidence, please contact Jay Harman at [jay@5rightsfoundation.com](mailto:jay@5rightsfoundation.com).**

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<sup>42</sup> [UN High-level Panel on Digital Cooperation](#), est. 2018

<sup>43</sup> [Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data](#), OECD, 1980

<sup>44</sup> [Directive 95/46/EC](#), 1995

**Further reading:**

[Response to the High-level Panel on Digital Cooperation](#), 5Rights Foundation, 2019

[Towards an Internet Safety Strategy](#), 5Rights Foundation, 2019

[5Rights Foundation's Response to the Information Commissioner's Call for Evidence on the Age Appropriate Design Code](#), 5Rights Foundation, 2018

[Deceived by Design](#), Norwegian Consumer Council, 2018

[Disrupted Childhood](#), 5Rights Foundation, 2018

[Digital Childhood](#), 5Rights Foundation, 2017

[Privacy, Protection of Personal Information and Reputation Rights](#), Unicef, 2017