5RIGHTS FOUNDATION

The Data (Use and Access) Bill and children's data

House of Lords – Second Reading
5Rights Foundation
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Introduction

The over-use of children's data increases their risk of harm. It is used to power toxic algorithms that trap them in cycles of harmful content,[1] recommender systems which connect them with predators[2] and discriminatory AI systems used to make decisions about them with life-long consequences.[3] Children are uniquely vulnerable when their data is not handled in their best interests and giving them a high level of data protection is fundamental to keeping them safe and is central to upholding their rights online.

The UK is a world leader on children's data protection. In 2018, Parliament introduced the **Age Appropriate Design Code**[4] as part of the Data Protection Act, which set out 15 standards organisations must abide by when handling children's data, enforceable by the Information Commissioner's Office (ICO). Since it came into force in 2021, companies around the world – including the biggest tech companies in Silicon Valley – have made changes to the design of their platforms in order to make them safer for children.[5]

Any proposals by Government to make changes to the UK's data protection regime must uphold these vital protections that keep children safe and protect them from harm.

At a glance: Implications of the Data (Use and Access) Bill

5Rights welcomes provisions in the bill which will increase accountability of tech platforms. The bill will amend the Online Safety Act to allow **researchers to access data from social media companies** to develop understanding of how the design of their platforms cause harm, building on measures that give **coroners access to data** to

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[1] The inquest into the death of 14-year-old Molly Russell found that she "died from an act of self-harm whilst suffering from depression and the negative effects of on-line content." See: *Molly Russell: Prevention of future deaths report*

[2] See: The Verge (2023) *Instagram's recommendation algorithms are promoting paedophile networks*

[3] Eynon, R. (2023) "Algorithmic bias and discrimination through digitalisation in education: A socio-technical view." *World Yearbook of Education 2024*

[4] 5Rights Foundation (2021) *UK Age Appropriate Design Code*

[5] See: Woods, S. (2024) *Impact of digital regulation on children's digital lives*, Digital Futures for Children Centre, 5Rights Foundation, London School of Economics

support inquests into the deaths of children by putting in place data preservation orders. These provisions will ensure that tech companies are held accountable for harms to children on their services.

However, provisions in the bill which will amend key principles of the UK's data protection regime risk watering down existing protections and transparency requirements with regard to children's personal data and will expose them to harm.

The Secretary of State for Science, Innovation and Technology has recently stated that he wants to see an online world with children's safety "baked in from the outset".[6] However, the Government will fail to achieve this without safeguarding children's data.

Analysis and recommendations

As currently drafted, the bill:

1. **Gives equivalence to economic interests and children's safety. The regulator must prioritise and enforce against risk of harm to the public.**

In **Clause 90** (Duties of the Commissioner in carrying out its functions), the bill introduces new duties that the Information Commissioner must have regard to when carrying its regulatory functions, with 'the desirability of promoting innovation' and the 'desirability of promoting competition' included and above safeguarding public and national security and children's rights.

It is the role of regulatory bodies to enforce regulation and protect the public, businesses and organisations. 5Rights has previously raised the issue of the ICO's lack of enforcement of the Age Appropriate Design Code, which risks greater harm to children.[7]

Economic interests must not receive equivalence with children's rights and their safety. The regulator must remain independent and distinct from political aims.

2. **Makes it easier for big tech to use children's personal information to build products and features under the guise of 'scientific research'.**

Clause 67 (meaning of research and statistical purposes) **and Clause 68** (consent to processing for the purposes of scientific research) would liberalise the use of personal data for scientific purposes.

The new definition includes "*any research that can reasonably be described as scientific, whether publicly or privately funded, and whether carried out as a*

[6] Department for Science, Innovation & Technology (2024) *First UK-US online safety agreement pledges closer co-operation to keep children safe online*

[7] 5Rights Foundation (2024) *ICO research illustrates risk to children's data*

commercial or non-commercial activity. Such references include processing for the purposes of technological development or demonstration [...]".

While genuine scientific research in the public interest is important, this definition is drawn too widely and could, without safeguards, be used by tech companies to build commercial products or scrape data for use in AI models to use without consent under the guise of 'scientific research'.

Clause 77 (Information to be provided to data subjects) would allow data controllers to process data for scientific research without providing information to the data subject – meaning tech companies would not have to let subjects know their data has been used for this purpose.

This broad definition and lack of clarity around what constitutes scientific research risks introducing subjectivity into the regulation, creating uncertainty for controllers and risks children's data being exploited for commercial purposes.

3. Allows for the use of children and their parents' data in AI and machine learning without robust safeguards, increasing their risk of discrimination and other harm.

Clause 80 (Automated decision-making) will change Article 22 of UK GDPR[8] from a general prohibition on the sole use of automated decision-making (ADM) without human involvement in decisions with a legal or similarly significant effect to only being prohibited if based on special category data.

The impact assessment for the bill makes clear that one of its aims is to support the use of data for AI and machine learning.[9] However, whilst the bill brings forward new safeguards that prohibits ADM based on special category data and ensures data subjects must be informed where this happens and allows them to request human oversight, this will not mitigate the risks of unfair and discriminatory decisions – felt most acutely by children and other vulnerable groups[10][11][12] – which are still found widely in AI systems.

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[8] Information Commissioner's Office (ND) *What does UK GDPR say about automated decision-making and profiling?*

[9] Department for Science, Innovation & Technology (2024) *Impact Assessment for the Data (Use and Access) Bill*, p. 2

[10] AI tools used by the Home Office have the potential to "encode justices" and automate the approval of life-changing decisions. See: The Guardian (2024) *'AI' tool could influence Home Office immigration decisions, critics say*

[11] In 2020, 39.1% of pupils A-Level grades in England were downgraded as a result of a 'mutant' algorithm used to predict their results. The algorithm in particular favoured private schools and impacted disadvantaged areas the hardest. See: The Guardian (2020) *A-Level and GCSE results in England to be based on teacher assessments in U-turn* and *England A-level downgrade hit pupils from disadvantaged areas hardest*

[12] Research into machine-learning models in the social care system found that, on average, if the model identifies a child at risk, it is wrong 6 out of 10 times. Further, machine-learning models missed 4 out of 5 children at risk. See: What Works for Children's Social Care (2020) *Machine learning in children's services: Does it work?*

Removing special category data will not prevent discrimination

Removing special category data from ADM does not prevent discriminatory outcomes as many AI models can learn bias based not on protected characteristics, but by other features closely correlated to these characteristics.[13] For example, a model that does not include racial background but does include surnames can be used to infer this background.

Case study

An algorithm used in a school safeguarding software which refers children to the Prevent programme replicates historic biases against children from minority ethnic backgrounds. Removing ethnicity as a feature would not remove the bias – we would still expect the model to disproportionately over-flag children with surnames suggesting a certain ethnicity.

This issue has been raised previously by the ICO,[14] who has said that "*simply removing special category data (or protected characteristics) does not guarantee that other proxy variables cannot essentially reproduce previous patterns… These problems can occur in any statistical model, so the following considerations may apply to you even if you don't consider your statistical models to be 'AI'.*"

Biases can also be unintentionally embedded by developers too, for example in the qualities of the best candidate for a job.

Safeguards to ensure data subjects are aware of decisions made using solely ADM may not deliver transparency

5Rights and ICO research has demonstrated that privacy policies and other published terms detailing how data is used are often inaccessible to children.[15][16]

While it is an important and welcome principle that information should be given to data subjects about significant decisions taken through solely ADM (AI explainability), it is essential that this is meaningful and personalised so that a child or their parent can exercise their right to contest those decisions, and the right to seek human intervention at the request of the data subject. The current drafting of the bill leaves this vague.

We are concerned that the Government is seeking to water down existing rights to not be subject to decisions using solely ADM while, at the same time, not bringing forward any regulation or rules to protect people from discrimination in decisions made by AI systems – despite the considerable evidence of its harmful impact.

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[13] AI Blindspot (ND) *Discrimination by Proxy*

[14] Information Commissioner's Office (ND) *What about fairness, bias and discrimination?*

[15] Revealing Reality (2024) *Children's Data Lives 2024: A report for the ICO*

[16] 5Rights Foundation (2021) *Tick to Agree – Age appropriate presentation of published terms*

The Government must provide clarity and more robust safeguards to protect children from discrimination in AI systems and not seek to water them down.

4. Liberalises the use of children's data which waters down protections for children's data.

Provisions in **Clause 70** (Lawfulness of processing) **and Clause 71** (The purpose limitation) will liberalise the use of children's data without considering their rights and freedoms or gaining consent from the data subject for further processing. The downgrading these principles for children risks the misuse of their data exposing them to harm.

- **Clause 70** introduces cases where processing data is automatically lawful and does not require the use of said data to balance against the rights and needs of the individuals. One of the new automatic lawful bases for the processing of data is for "*safeguarding vulnerable individuals*", including children.
- **Clause 71** amends Article 5 of GDPR[17] which protects individuals' data from being reused beyond the purpose for which it was originally given or collected. The bill lists new cases for where further processing is automatically compatible with the original purpose including the "*safeguarding of vulnerable individuals*", including children.

As discussed above, granting further use on the basis of safeguarding vulnerable children can lead to discriminatory and harmful outcomes for children.

The Age Appropriate Design Code is clear that a child's data should be used only for the stated purpose and only to the extent that children could reasonably be said to understand that purpose.

All children's data must be considered 'special' and 'individual'. There must be no expansion to 'legitimate processing' that could result in routine access to, or processing of, children's data. Nothing in the bill should result in a downgrade of these protections.

We would appreciate if you could raise the above concerns with the minister at second reading by asking the following questions:

- Will the minister commit to upholding the existing protections for children's data protection in the Age Appropriate Design Code?
- Does the minister agree that protecting children's data is a crucial aspect of keeping them safe online, and will she ensure that this is the primary priority of the Information Commission?

[17] Information Commissioner's Office (ND) *A guide to the data protection principles*

- Can the minister provide assurances that the proposals to allow the use of personal data in scientific research is only intended for genuine academic research, and is not a free pass for tech companies to exploit children's data for their own commercial gain?

For further information please contact: colette@5rightsfoundation.com

About 5Rights Foundation

5Rights develops new policy, creates innovative frameworks, develops technical standards, publishes research, challenges received narratives and ensures that children's rights and needs are recognised and prioritised in the digital world. While 5Rights works exclusively on behalf of and with children and young people under 18, our solutions and strategies are relevant to many other communities.

Our focus is on implementable change and our work is cited and used widely around the world. We work with governments, inter-governmental institutions, professional associations, academics, businesses, and children, so that digital products and services can impact positively on the lived experiences of young people.

5Rights is a registered charity. Charity number: 1178581.