

Submission on Draft General Comment No. 25 of the Committee on the Rights of the Child: Children's rights in relation to the digital environment

This submission is made on behalf of the Child Rights International Network - CRIN (www.crin.org), November 2020.

1. CRIN welcomes the wide scope of the draft General Comment and the manner in which it addresses the way in which each right of the Convention on the Rights of the Child (CRC) applies in the digital environment. This submission makes recommendations to strengthen the General Comment.

The right to non-discrimination (paras. 10-12)

2. This section identifies significant ways in which discrimination against children can occur in the digital environment: unequal access to digital services, sharing of data which can be used for traditional/direct discriminatory treatment, and automatic decision-making leading to structural/indirect discrimination. For greater clarity, we recommend enumerating these issues at the outset, and then outlining the measures that States should take to address each issue. We welcome the recognition in **para. 12** of specific groups of children for whom States may need to take particular measures to prevent discrimination, however, we note that the language referring to groups of children facing "heightened risk" may expand beyond the scope of the prohibition on non-discrimination. We recommend avoiding the term "risk" unless it is clearly connected to a risk of discriminatory treatment.

The best interests of the child (paras. 13-14)

3. The section makes important points regarding the application of best interests in the digital environment. However, for greater clarity, we would recommend a more systematic approach applying the main aspects of the literature on best interests. **Para. 14** could make explicit that:

- The best interests principle is an individual and a collective right that can apply to individual children, groups of children and children in general;¹
- The best interests principle has a procedural dimension, requiring States to assess and explain assessments of the child's best interests, what criteria this assessment is based on, and how the child's best interests have been weighed against other considerations;²
- The best interests principle covers all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children.³

4. We also recommend that the word "assumed" be removed from **para. 14**, as States are under an obligation to weigh the rights and interests of others.⁴

¹ UN Committee on the Rights of the Child (CteeRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, para. 6(a)

² Idem, para. 6(b)

³ Idem, para. 25

Right to life, survival and development (paras. 15-17)

5. We welcome the recognition of the relation between the digital environment and States' obligation to ensure the survival, growth and development of the child, including the physical, mental, moral, spiritual and social dimensions of their development.⁵ We recommend that the Committee complement the discussion of risks in the digital environment (**para. 16**) with an explicit recognition of the promotion of children's development. Children engage in a range of educational, informational, civic and social activities online that help them develop their technical and critical capacities, and the knowledge and resilience to cope with the risks.⁶

6. For greater clarity, we recommend reorganising **para. 17**. We suggest, first, setting out States' obligation to take into account the available research and evidence on the effects of digital technologies on children's development before addressing the need to take a precautionary approach if evidence is insufficient. Lastly, it could emphasise that direct social relationships remain necessary, and specific attention should be paid to children's earliest years.

The right to be heard (paras. 18-19)

Scope of the right to be heard

7. This section identifies two applications in the digital environment of children's right to be heard: the use of digital tools to consult with children regarding the whole range of legal and policy developments, and taking account of children's views in developing laws and policies on the digital environment specifically. Regarding the second, the section could state more clearly that children think in sophisticated ways about, and offer valuable insights into, the positive and negative implications of digital technology.⁷ Therefore, children's participation in ongoing discussions regarding the digital environment should not be reduced to one-off consultation processes or be confined to adult-defined issues⁸.

Giving due weight to the views of the child

8. We recommend that this section more clearly identify that children's right to be heard also requires that their views be given due weight. Decision-makers must ensure that, when the

⁴ See CRC, Article 10(2), 13(2)(a), 14(3), 15(2).

⁵ CtteeRC, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013, para. 16

⁶ UNICEF Office of Research – Innocenti and the London School of Economics and Political Science (LSE), Global Kids Online Comparative Report, November 2019. Available at: <https://www.unicef-irc.org/publications/pdf/GKO%20LAYOUT%20MAIN%20REPORT.pdf> The language we suggest is adapted from: Livingstone, S. et al., New Global Kids Online findings show that internet use can increase children's opportunities and build digital skills, 10 December 2019. Available at: <https://blogs.lse.ac.uk/mediase/2019/12/10/new-global-kids-online-findings-show-that-internet-use-can-increase-childrens-opportunities-and-build-digital-skills/>

⁷ Third, A. et al., Young and Online: Children's Perspectives on Life in the Digital Age (The State of the World's Children 2017 Companion Report), 2017. Available at:

https://www.unicef.org/publications/files/Young_and_Online_Children_perspectives_Dec_2017.pdf

⁸ Ibidem

child is capable of forming his or her own views, these views are considered seriously⁹, and offer feedback on how children's views were considered.¹⁰ In addition, it would be helpful to clarify the diverse settings in which children's right to be heard applies. Decision-makers include not just States and businesses, but also schools, civil society organisations and other institutions. All these actors must ensure that the processes through which children are heard are transparent and informative, child-friendly, inclusive and accountable.¹¹

Specific groups of children

9. We welcome the references to inclusiveness and the obligation to pay particular attention to children in disadvantaged or vulnerable situations. We recommend that the section draw a clearer connection between the right to be heard and the right to non-discrimination¹², by stating that States must take adequate measures to assure to every child the right to be heard on an equal basis.

Evolving capacities (paras. 20-22)

Parental responsibilities and evolving capacities

10. Article 5 of the CRC is primarily focused on the rights and responsibilities of parents in giving direction and guidance to children in the exercise of their rights in a manner that is consistent with the evolving capacities of the child. We recommend that the Committee clarify the connection between this section and the scope of Article 5.

11. Specifically, **para. 21** refers to policies reflecting an appropriate balance between protection and emerging autonomy. This language draws on the CRC's General Comment 20¹³, but it might inadvertently imply that it is the State that directly decides how children engage with the digital environment with respect to article 5. Instead, the section could explain that, under Article 5, States should provide guidance and support for parents and caregivers recognising children as independent rights-holders, whose interests might diverge from those of their parents. It should also explain the scope of the rights of children and the obligations of their parents in circumstances where parental permission for children's activities or uses of their data is required.

12. We welcome the focus on the role of businesses and other actors in this context. However, we recommend clarifying the meaning of the last sentence of **para. 21** as there is currently an ambiguity as to whether this section recommends that children should not be excluded from services, that services should have varying levels of accessibility for children.

Legislation (para. 24)

⁹ CtteeRC, General comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, 20 July 2009, para. 28

¹⁰ Idem, para. 45

¹¹ Idem, para. 134

¹² Idem, paras. 75-79

¹³ CtteeRC, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 20

13. For clarity, we recommend amending the wording of **para. 24**: “(...) review and update national legislation **relating to the digital environment** to ensure **the legislation** is compatible with the rights (...) and that it remains relevant (...)”.

Comprehensive policy and strategy (paras. 25-27)

14. At **para. 25**, we recommend this shorter formulation: “States should ensure national policies (...) address children’s rights **in the** digital environment (...)”.

Data collection and research (para. 31)

15. We suggest this addition to **para. 31**: “States should ensure the production **and protection** of robust, comprehensive data (...)”.

The business sector (paras. 36-39)

16. We welcome the recognition of the impact of the business sector on children’s rights in the digital environment. However, we note that some of the language in **para. 37** on businesses’ responsibilities departs from the language of the Convention (services being “misused” to threaten children’s “well-being”) in a manner that risks conflating children’s rights violations, legal and illegal conduct. We recommend amending **para. 37** to read that “States should require businesses to ~~prevent their networks or online services from being misused for purposes that threaten children’s safety and well-being~~ avoid causing or contributing to violations of children’s rights¹⁴ (...)”.

17. Businesses should also commit to respecting and supporting children’s rights.¹⁵ Businesses are in a key position to research and create new digital tools that could enhance children’s rights online. Businesses should hear children’s views, and meaningfully engage with them during the decision-making process regarding particular products or services. Any engagement with children must meet the highest standards for child-friendly consultations.¹⁶

Remedies (paras. 44-49)

Extraterritorial jurisdiction and extradition

18. We welcome the strong focus on remedies within the draft General Comment. Regarding the recognition of the application of extraterritorial jurisdiction in the context of children’s rights violations that take place online and cross borders (**para. 49**), we recommend that the General Comment make explicit links with the extraterritorial application of the Optional

¹⁴ For related content see CtteeRC, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, CRC/C/GC/16, 17 April 2013, paras. 26-31 (and in particular para. 28)

¹⁵ UNICEF and Save the Children, Children’s Rights and Business Principles, 2012. Available at: <https://resourcecentre.savethechildren.net/library/childrens-rights-and-business-principles-crbp>

¹⁶ CtteeRC, General comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, 20 July 2009, para. 134. All processes in which children are heard and participate must be: (a) transparent and informative, (b) voluntary, (c) respectful, (d) relevant, (e) child-friendly, (f) inclusive, (g) supported by training, (h) safe and sensitive to risk, (i) accountable.

Protocol on the sale of children, child prostitution and child pornography, as well as provisions related to extradition.¹⁷

Access to information (paras. 51-58)

Information injurious to children's well-being

19. The draft General Comment includes content that alludes to article 17(e) of the Convention (**paras. 55 to 57**), which encourages States to “ensure the development of guidelines to protect children from information and material injurious to their well-being”. This provision is at risk of being misinterpreted as permitting restrictions on children's right to access information to which States object, whether in relation to information about health, sexuality, politics or religion.¹⁸ We recommend that the Committee take the opportunity to clarify the application of this provision.

20. We recommend that the Committee explicitly recognise that article 17(e) must be interpreted in a manner that is consistent with the Convention as a whole, and that restrictions on access to information cannot be discriminatory (e.g. restrict children's access to content about sexuality or gender identity), limit access to information that promotes children's access to the highest attainable standard of health (e.g. information about reproductive healthcare), restrict children's freedom of religion (e.g. restrictions on access to information about certain religions).

21. We also recommend that the Committee avoid merging online content of a fundamentally different nature at **para. 55**. In particular, the grouping of illegal content with legal content may encourage States to impose disproportionate restrictions that may violate the rights of access to information and freedom of expression under the Convention.¹⁹

Community content rules

22. **Para. 57** underlines the importance of digital providers' own community content rules. Regarding the enforcement of these rules, however, we recommend the Committee emphasise, as other UN experts have, that content moderation represents a delegation of regulatory functions to private actors whose processes may be inconsistent with due process standards and whose motives are principally economic. Therefore, questions of fact and law

¹⁷ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, articles 4, 5, and 6.

¹⁸ See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/69/335, 21 August 2014, para. 49. Available at:

<https://undocs.org/A/69/335>; CRIN, Access Denied: Protect rights - unblock children's access to information, 2014. Available at:

https://archive.crin.org/sites/default/files/access_to_information_final_layout.pdf.

¹⁹ The Travaux Préparatoires indicate that the caveats about protecting children from injurious information arose, at least in part, from the racist ideologies of the apartheid era, so are meant to eliminate prejudice, not spread it. See UN Office for the High Commissioner for Human Rights and Save the Children Sweden, Legislative History on the Convention of the Rights of the Child, Volume 1, New York and Geneva: 2007, p. 483, para. 39. Available at:

<https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf> See also CRIN, Access Denied: Protect rights – unblock children's access to information, 2014, p. 4. Available at: https://archive.crin.org/sites/default/files/access_to_information_final_layout.pdf

regarding children's access to information should generally be adjudicated by public institutions.²⁰

Freedom of expression (paras. 59-62)

Internet shutdowns and national intranets

23. This section would be enriched by recognising the ways in which internet shutdowns²¹ and national backup systems of connection through a national intranet impact children's rights. Internet shutdowns are always a disproportionate restriction on children's freedom of expression, and can seriously undermine the protection of their other rights.²² Similarly, giving children access to a national network only, thereby blocking them from the World Wide Web, poses very serious restrictions on their freedom of expression.

Freedom of thought, conscience and religion (paras. 63-65)

Relationship with the right to privacy

24. We are concerned that the language in the last sentence of **para. 63** and in **para. 64** might invite a reading of States' obligations which does not recognise the reality of personalisation, profiling and behavioural targeting and the application of relevant data protection standards in this context. The use of children's data is primarily an issue of children's right to privacy, and States' obligations in this regard are clearly addressed in the section on privacy of the draft General Comment.

Violence (paras. 82-88)

General application of the prohibition on violence in digital environment

25. The Draft General Comment identifies a number of important ways that the prohibition on violence against children applies in the digital context, but does not explicitly state the scope of the application of this prohibition online.

26. We recommend that the Committee make clear that the prohibition on violence against children applies online as offline, and that States have the same obligation to take appropriate legislative, administrative, social and educational measures to protect children from all forms of violence. This recognition would set a point of general application from which specific issues relevant to the digital environment can be addressed.

Violence against children and the concept of "harm"

²⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, 6 April 2018, para. 17. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/35

²¹ Access Now, Targeted, Cut Off, and Left in the Dark: The #KeptOn report on internet shutdowns in 2019, 2020. Available at: <https://www.accessnow.org/cms/assets/uploads/2020/02/KeptOn-2019-report-1.pdf>

²² ARTICLE 19, The Right to Protest: Principles on the protection of human rights in protests, 2016, p. 22. Available at: https://www.article19.org/data/files/medialibrary/38581/Right_to_protest_principles_final.pdf

27. In the digital context, the use of the term “harm” is ambiguous and is often used in a way that extends beyond violence as it is defined within the CRC to cover issues such as disinformation as well as younger children’s access to social media.²³ While these issues may engage children’s rights under the CRC, they are not forms of violence against children that fall within the scope of article 19.

28. We recommend that the Committee avoid the term “harm” in section VII of the General Comment to avoid undermining the clarity of the scope of the prohibition on violence against children that has developed through the Global Study on Violence against Children and the Committee’s General Comment No. 13.

29. To ensure this section is consistent with the scope of article 19, we recommend amending this section as follows:

- **Para. 82:** “States shall take legislative and regulatory measures to ~~prevent risks of harm that children may face~~ protect children from violence in the digital environment”.
- **Para. 87:** “States should develop regulatory approaches to encourage and enforce the ways businesses meet these responsibilities, taking all reasonable and proportionate technical and procedural steps to combat ~~criminal and harmful behaviour directed at children in relation to the digital environment~~ all forms of violence against children.”

“Sexting”

30. The draft General Comment includes a welcome recommendation that States should pursue preventive, safeguarding and restorative justice approaches wherever possible when children commit violence against each other in the digital environment. At **para. 85**, however, “sexting” is included within a list of violent behaviours in a manner that may undermine the Committee’s previous recommendation that children who engage in consensual sexual acts should not be criminalised for doing so.²⁴

Terminology

31. We recommend replacing the term “child offenders” (**para 86**) with “~~children accused of criminal offences~~” to bring the language in this paragraph in line with the terminology introduced within General Comment No. 24.

Family environment and alternative care (paras. 89-95)

Family environment and evolving capacities

32. As addressed above in the context of evolving capacities, using language that frames protection and autonomy as in opposition might give the unintended impression that rights are in conflict with each other, rather than interdependent and mutually supportive. We

²³ UK Department for Culture, Media and Sport; Home Office, *Online Harms White Paper*, 12 February 2020. Available at: <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper#the-harms-in-scope>

²⁴ CtteeRC, General Comment No. 24 (2019) on children’s rights in the child justice system, CRC/C/GC/24, 18 September 2019, para. 12.

recommend that **para. 92** should reflect that “(...) guidance should support parents to realise the full range of rights of their children, and prioritise positive parenting (...)”.

Basic health and welfare (paras. 101-106)

Right to health and misinformation

33. This section identifies the challenges of misinformation and the spread of materials or services damaging to children’s health (**para. 104**). However, any restriction on children’s access to information, or the sharing of information online, engages the rights of access to information and free expression, and any restriction must be in accordance with the limitation provisions of those rights. For this reason, we recommend that discussion of the regulation of misinformation within the General Comment is included within those corresponding sections to ensure that the application of the relevant rights is clear. We also recommend that the Committee avoid the term “known harms”, as the uncertainty of this term risks interpretations that are not consistent with the full rights of the Convention.

The right to culture, leisure, and play (paras. 115-120)

34. We welcome the recognition in **para. 119** of the negative impact of advertising and gambling-like design features. However, as argued above, the reference to exposing children to risks of harm is vague in that it does not make it clear which right under the Convention is being violated by these practices, whether in relation to privacy or economic exploitation.²⁵

Administration of child justice (para. 124)

35. We welcome the recognition of the ways that cybercrime laws impact children, but urge the Committee to also address the ways that justice systems are changing in response to technological development.

Digitisation of courts and justice systems

36. The digitisation of court infrastructure can provide increased accessibility and efficiency, but also negatively impact the rights of children in contact with the justice system. The use of technology such as video links²⁶ can provide a child-sensitive means for children to give evidence, but used improperly can undermine children’s ability to engage with proceedings in which they are involved.

37. We urge the Committee to recognise the impact of technological developments on justice processes, in particular that where the digitisation of court proceedings results in a lack of in-person contact with children, it may undermine the child’s ability to meaningfully engage with the courts and, within the criminal justice system, frustrate rehabilitative and

²⁵ See UNICEF, Child Rights and Online Gaming: Opportunities and challenges for children and the industry, 2019, p.22. Available at: https://www.unicef-irc.org/files/upload/documents/UNICEF_CRBDigitalWorldSeriesOnline_Gaming.pdf.

²⁶ See Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice: Explanatory memorandum, para. 128. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804b2cf3.

restorative justice measures built on developing relationships with the child. Where children are deprived of their liberty, in-person contact is equally necessary to ensure the well-being and rehabilitation of children.

Data protection for information about children within the justice system

38. The data of children within the justice system is particularly sensitive and requires additional safeguards and protections beyond other personal data.²⁷ As recognised by the Committee, the records of children in contact with the criminal justice system should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of the case. These records should not be used in adult proceedings in subsequent cases, and records of children who have committed an offence should be automatically removed when a child reaches the age of 18.²⁸ Where States use private companies to carry out functions within the justice system, they must ensure that these companies are bound by the same duties with regard to children to respect, protect and fulfil children's rights with regard to their role in the justice system.

²⁷ CtteeRC, General Comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, para. 67.

²⁸ *Idem*, para. 71.