**Comments**

on the draft General Comment No. 25 on Children’s rights in relation to the digital environment

 Children’s rights in relation to the digital environment

**We hereby submit a response to the call of the Committee on the Rights of the Child regarding its draft General Comment No. 25 on Children’s rights in relation to the digital environment. We argue that the scope of the draft General Comment on the special protections measures in the ‘right to privacy’ (Section VI, E) and the ‘administration of child justice’ (Section XIII, B) should be extended to children who are subject to surveillance using digital technologies, particularly electronic monitoring (EM), via the use of wearable devices. We propose that the scope of para. 76 is extended to children in conflict with the law and that a new paragraph is inserted dedicated to the rights of children subject to EM, emphasising the need for action by States Parties in this area.**

**The recommendations draw on the findings of the project ‘Tracking children in their best interests: electronic monitoring in three European juvenile justice systems’ (TCBI) that was funded by the European Commission’s Marie Skłodowska-Curie Individual Fellowship Programme. The project was the first comparative study of the use of EM as an alternative to depriving children of their liberty as a result of being accused, or convicted, of criminal offences. The research was carried out at the University of Leeds between July 2018 and June 2020. The research team are available to provide additional information and advice should it be required by the Committee.**

**Recommendations**

We welcome the relevant and timely reflections of the draft General Comment No. 25 on the risks of systematic surveillance of children, for example in educational and care settings. However, there is an important omission in the current draft relating to the use of digital technologies in child justice as mechanisms to monitor the whereabouts and/or behaviour of children, either as part of criminal sanctions or whilst awaiting trial for alleged criminal offences. We recommend that the Committee amends its draft General Comment No. 25 to include children’s rights when digital technologies are deployed to monitor criminal justice measures. Accordingly, we propose the following amendments:

1. We recommend that the Committee extends the scope of para. 76 to children in conflict with the law in order to ensure that digital technologies are only used when necessary and proportionate and with regard to children’s right to privacy and family life.
2. The use of digital technologies, usually referred to as electronic monitoring (EM), are used increasing in many countries around the World to monitor child justice measures. Wearable EM devices and supporting systems are designed to monitor the compliance with restrictions imposed by justice authorities. The interplay of technology and the restrictions may seriously limit children’s rights as set out in the UN Convention on the Rights of the Child (UNCRC). We believe that the Committee should incorporate recommendations to address the responsibilities of States Parties to consider the implications of using EM (digital technologies) to monitor child justice measures by inserting the following paragraph in Section XII. B. on the ‘Administration of child justice’:

*‘125. The use of digital technologies as means to monitor compliance with sanctions and measures is a continuously growing phenomenon in child justice. States should provide statutory safeguards to ensure that both the restrictions and the monitoring arrangements are proportionate to (alleged) offences and take account of children’s circumstances. States should strive to minimise the risk of harm posed by the use of digital technologies, and provide age-appropriate support to children and their parent or caregiver throughout the monitoring period.’*

Finally, in line with para. 127 and para. 128 of the draft General Comments No. 25, States Parties should be encouraged to share expertise and promote good practices, regulations and protective means in their respective regions and beyond.

Supporting arguments to the comments are presented in the following sections.

**Surveillance of children in the child justice system and its implications**

Electronic monitoring (EM) was introduced as a means to support adult justice measures about 30 years ago and its use has continued to grow in both adult and child justice. Its use has increased significantly during the 2020 global pandemic when it has been deployed as a mechanism to reduce the use of custody to avoid disease transmission.[[1]](#footnote-1)

*The role of EM and the right to privacy in the child justice system*

The Council of Europe’s recommendations on electronic monitoring define it by three key characteristics: the monitored phenomenon; the devices and institutional arrangements needed; and the technology that is used.[[2]](#footnote-2) The location, movement or specific behaviour such as alcohol consumption can be monitored by currently available technologies. Technologies used for location and movement monitoring dominate the current use of EM, whilst monitoring alcohol consumption has rarely been deployed to date. The two main EM technologies used in child justice are radio-frequency and GPS-based technologies. These technologies use wearable devices (tags or bracelets), usually attached around the ankle, which are monitored remotely. The technologies available in jurisdictions vary and which is used in individual cases is dictated by the legal and policy framework of each jurisdiction. The use of both technologies has implications for children’s rights in respect of the: i) data which are collected; ii) the procedures which are required to enable effective monitoring; and iii) the degree to which the informed consent of the children and their families is sought and received.

1. The data collected in the EM measures depend on the type of technology used, while the choice of a particular type of technology depends upon the interplay with the legal and policy context in which EM operates. EM is rarely a measure or sanction in itself and is most commonly used to monitor requirements of a range of sanctions and measures used for children in conflict with the law. Typically, the statutory documents define the extent to which one’s liberty can be restricted and policy makers determine which technology is used to support the restrictions to be monitored. The conditions monitored using EM vary in each jurisdiction in the extent to which they restrict the liberty of children. For example, the law may define restrictions as curfews, attendance at certain places, inclusion or exclusion zones, trail monitoring or a combination of these. Curfews are usually imposed during the evening and overnight and are monitored using radio-frequency (RF) technology, while many other restrictions require the use of GPS technologies. The technology used dictates the information which is collected. RF devices confirm the presence or absence of wearers in a particular location, plus when they leave or return and they do this 24/7 even outside of curfew hours. GPS technologies collect data on wearers at all times in all locations (subject to certain limitations, for example underground or in built up areas). For example, setting exclusion zones require confirmation that wearers’ have not entered the zone but data are collected on all of their movements 24/7. In practice, most monitoring takes place via a system of alerts, which are triggered when restrictions are breached. Whilst most jurisdictions do not routinely access all of the data collected by devices, the fact that data are available means that it is possible to do so. The collection of these data raise particular concerns when it is used for purposes other than confirming compliance with the restrictions it is monitoring. It is particularly problematic when it is accessed by law enforcement authorities to investigate involvement in crime. As technologies become more sophisticated the possibilities of monitoring children’s activities outside of the restrictions imposed increases. Consequently, it is vital that these uses of data are regulated to safeguard proportionality and privacy. If data are allowed to be used for purposes other than monitoring compliance, children should always be informed of this possibility in an age-appropriate manner (see comments on informed consent below).
2. The second element of the right to privacy is the protection of private spaces and activities. Installing, maintaining and decommissioning the equipment require monitoring agencies to enter children’s homes and visits and phone calls impact upon the private life of the children and their families. Jurisdictions have established protocols, which govern entry into private spaces including when phone calls are required, but they have been largely set up for adults. Whilst some jurisdictions have different arrangements for children, others do not. As a result, protocols relating to when children should be contacted are not always ‘child friendly’ and do not always protect their particular rights to privacy and private life or their needs. Monitoring may include phone calls during the night or situations when children are escorted on the streets by uniformed staff for maintenance purposes. The intrusion into children’s private life indicates that EM should only be used if necessary and *‘routine’* or *‘indiscriminate’* use should be avoided.
3. Similarly, jurisdictions vary in the extent to which they provide children with accurate and age-appropriate information about EM, the data which are collected and the consequences of non-compliance. Children rarely receive age-appropriate written information concerning their rights and responsibilities, which may lead to unintended non-compliance or frustration. Children and their parents are also often not made fully aware of all that may be required of them including visits from monitoring agencies and the financial implications of damaging equipment. In addition, the consent of children and/or parents is not usually required for EM to be imposed depriving them of the choice whether to agree to be monitored. Even if it is children may be put in the unenviable position of choosing between staying in the community under monitoring or being in custodial institutions.

*Using EM as a response to child offending*

The relative tariff position of EM reflecting the severity of the sanction amongst alternatives to deprivation of liberty is unclear. EM is used to monitor restrictions imposed in response to both a range of (alleged) offences, which vary according to seriousness. Its use to monitor restrictions pre-trial, when children are legally innocent, is of particular concern. The intensity of the restrictions monitored by EM varies between jurisdictions but this does not always reflect the nature and seriousness of the (alleged) offences or children’s circumstances. Considering the intrusion into the privacy of children and their families, using EM when children have failed to comply with civil measures imposed for anti-social behaviour is an example of problematic and disproportionate use of EM and its use for less serious offences should also be subject to careful legal scrutiny. Standardised models of use within jurisdictions mean that different circumstances of children are often not considered. For example, 24-hour house arrest, which prevents children attending school or training and taking part in their communities, is overly intrusive and should be prohibited. It carries the potential of inflicting serious harm on children, especially if they are confined to residential care institutions and raises further concerns about the extent to which EM is a de facto alternative to deprivation of liberty.

Assessments, which take account of (alleged) offences and accurately measure the potential impact of EM on children and their families, are key to ensuring that EM is used proportionately. Assessment tools currently in use have different ways of measuring suitability, technological feasibility, potential restrictions and the involvement of parents and do not consistently take account of concerns about children’s right to privacy and family life or the potential harm caused by EM. The extent to which children are involved in the assessment process also varies. Particular concerns arise when children are not supervised and do not have access to support during the process so that their needs are not taken into account in operational expectations.

*Need for responsive strategies in monitoring arrangements*

EM is often called an ‘assistive tool’ that serves child justice purposes only in conjunction with the restrictions laid down in law and policy, yet, these ‘joint’ means of intervention increase the intensity of the measures or sanctions. Many of EM’s implications for the everyday lives of children are connected to the technology and not necessarily to the restrictions. These ‘additional’ implications need to be considered in order to comply with the UN’s holistic approach to children’s rights. A responsive strategy should consider child justice and child protection staff as key actors.

EM devices can have an adverse impact on children’s participation in society, including education and their rehabilitation. Children may be prevented from participating in activities due to concerns about the visibility of the devices, particularly in the summer months. It might also impact upon the ways in which others react to wearers and carries with it the potential of stigmatisation related to the involvement with justice measures. Consequently, States should ensure that children receive support to communicate their needs associated with devices and share necessary information about EM with peers and responsible adults, thereby minimising the potential for negative social impacts and to support integration.

Being subject to EM may result in distress and anxiety and may also disrupt the dynamics of children’s positive social engagement and relationships and/or getting a good night’s sleep. Examples include visits and phone calls during night time hours and problems with the equipment. Monitoring arrangements need to be responsive to children’s needs, living arrangements and rights. To facilitate a responsive approach to EM children should have regular contact with professionals trained to understand and address children’s needs throughout the monitoring process.

We would be pleased to have the opportunity to discuss the wider issues in more detail or to respond to any specific questions which the Committee has and our contact details are below.

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**The ‘Tracking Children in their Best Interests’ project**

‘Tracking children in their best interests: electronic monitoring in three European juvenile justice systems’ (TCBI) was a two year project that aimed to address the gap in comparative knowledge about the use of EM with children between the minimum age of criminal responsibility (MACR) and 18 years. The research was carried out in three European jurisdictions: England and Wales, Hungary, the Netherlands, where these measures are legally available for the respective age group. The project was funded by the European Commission’s Marie Skłodowska-Curie Individual Fellowship Programme and was carried out by Dr Eszter Párkányi and Professor Anthea Hucklesby at the Centre for Criminal Justice Studies, School of Law, University of Leeds, UK between July 2018 and June 2020.

The aim of the project was to investigate the use of EM measures in child justice in three European jurisdictions and to understand the methods by which the special needs of children are identified and addressed. It used a mixed method approach drawing on a documentary analysis of relevant law and policy; interviews with stakeholders from policy and practitioner communities, interviews with children subject to EM, observations used for triangulating information gained from the literature and practitioners, administrative data relating to children subject to EM and focus groups with school students. Altogether, more than 130 policy makers, practitioners and children participated in the research. Findings provide a comprehensive picture of the law and policy, which regulates the use of EM with children and how EM operates in practice.

For further information about the project please visit the project website at: <https://trackingchildren.leeds.ac.uk>.

1. #  See, for instance at Tabachnik, C (2020) ‘Covid-19 Created a Bigger Market for Electronic Ankle Monitors’*, Bloomberg News*, 14 July 2020, available at: <https://news.bloomberglaw.com/white-collar-and-criminal-law/covid-19-created-a-bigger-market-for-electronic-ankle-monitors>; and Youth Justice Legal Center (2020) ‘Young offenders may be eligible for temporary release as a result of Covid-19’, available at: <https://yjlc.uk/young-offenders-may-be-eligible-for-temporary-release-as-a-result-of-covid-19/>

 [↑](#footnote-ref-1)
2. Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring [↑](#footnote-ref-2)