**Submission of the Australian Government**

**Advanced version of the Committee on the Rights of the Child’s draft General Comment on children’s rights in relation to the digital environment**

1. The Australian Government (Australia) presents its compliments to the United Nations Committee on the Rights of the Child (the Committee) and has the honour to refer to the Committee’s call for submissions on its draft General Comment on children’s rights in relation to the digital environment dated 12 August 2020.[[1]](#footnote-1)
2. Australia is a longstanding party to the Convention on the Rights of the Child (the Convention), and is firmly committed to upholding the Convention’s obligations.
3. Australia appreciates the Committee’s work in preparing the draft General Comment and its role in promoting the further implementation of the Convention and assisting States Parties in fulfilling their reporting obligations.[[2]](#footnote-2)
4. Australia thanks the Committee for the opportunity to provide a written submission on the draft General Comment. It sets out its views below and invites the Committee to clarify certain statements in the draft General Comment regarding the scope of the legal obligations under the Convention and its implementation.
5. At the outset, Australia wishes to emphasise that it affirms the need for all States to take steps to ensure the protection of children from online harms and technology-facilitated abuse. Australia reaffirms the real world impact on children from online harms and acknowledges that conduct that takes place online can be as damaging as conduct that takes place in the physical environment, and in many instances online harms can be more pervasive due to the ubiquitous and enduring nature of online communications. Keeping children safe online is crucial to ensure that children can enjoy the opportunities of the online world.
6. Australia welcomes the Committee’s focus on the opportunities, risks, and challenges for children’s rights in the digital environment. While Australia does not regard General Comments as legally binding on States Parties, Australia appreciates the Committee’s guidance on legislative, policy and other measures by which States may seek to implement their obligations under the Convention. For example, Australia strongly welcomes the recognition by the Committee in Part VII of the draft General Comment of the role digital technologies play in facilitating violence against children and the need for States to ensure business enterprises meet their responsibility to effectively protect children from harm online.

**Distinguishing between obligations of States Parties and recommendations**

1. Australia submits that the draft General Comment does not consistently distinguish between the legal obligations of State Parties under the Convention and implementation steps which are recommended by the Committee but which are not obligatory. For example, in paragraph 10, the Committee notes that States are obliged to ensure the right to non-discrimination but then follows with references to measures that a State ‘should take’ to implement such obligation.
2. Australia recommends distinguishing more clearly in the General Comment between Convention obligations and the Committee’s recommendations. It should also clarify that the implementation steps it recommends are not the only means for a State Party to implement its obligations under the Convention.

**Best interests of the child**

1. Australia strongly affirms the importance of considering the best interests of the child as a primary consideration, consistent with Article 3(1) of the Convention. However, paragraph 14 of the draft General Comment states that States ‘shall apply the best interest of the child as the *determining* principle’ [emphasis added] when regulating the digital environment and considering the potential harms and violations of children’s rights. Australia considers that the statement that States are obliged to apply the best interests of the child as ‘the determining principle’ is not supported by the text of the Convention and is inconsistent with the reference to the best interests of the child in paragraph 13. Australia recommends that the draft General Comment use the language of ‘as a primary consideration’ in accordance with Article 3(1).

**Remedies**

1. Australia acknowledges that the digital environment includes business operations with global reach and the difficulties posed in regulating such an environment. Paragraph 49 of the draft General Comment recommends that ‘States should consider measures to allow for extra-territorial jurisdiction, when there is a reasonable link between the State and the conduct concerned’. Australia would welcome further analysis from the Committee on how international law on the jurisdiction of States should be interpreted and applied in the digital environment given that those rules have been based on the physical location and conduct of natural and legal persons or their nationality.

**Right toprivacy**

*Encryption*

1. Paragraph 72 of the draft General Comment states:

States shall take legislative and other measure to ensure that children’s privacy is respected and protected by all organisations and in all environments that process their data … States should encourage the adoption of privacy-by-design, such as end to end encryption, in services that impact on children.[[3]](#footnote-3)

1. Australia strongly affirms the importance of children’s privacy, and also recognises the importance of keeping children safe online and protected from harm. While strong encryption plays a crucial role in protecting personal data, privacy, intellectual property, trade secrets and cyber security, such encryption is being increasingly exploited by terrorists, sexual predators and other criminals to conceal illicit activities that are harmful to children. End to end encryption can erode the ability of companies to detect and report harmful and illegal conduct and content on their platforms and significantly impedes law enforcement agencies in their ability to investigate and prosecute serious crimes, including serious crimes against children.
2. In light of this, Australia does not support the position set out in the draft General Comment that end to end encryption should be encouraged by States. Such a ‘privacy protection’ focus does not sufficiently take into account the abuse and crime that occurs online, and the vulnerability of children online in particular, as targets for predators and grooming groups who may use end to end encryption and other technology to carry out and conceal their illegal and harmful activities (whether that be to incite violence, abuse of children, non-consensual sharing of intimate images or otherwise). We would ask the Committee to carefully consider the impacts of its draft recommendation in paragraph 72 in light of the role that governments and technology companies play in protecting children online and preventing the sharing of child sexual abuse material.
3. Accordingly, Australia recommends that at a minimum the draft General Comment acknowledge that end to end encryption is not appropriate in all circumstances and that the General Comment include an explicit statement recommending that States implement measures that address safety risks to children while also protecting their privacy. This would be more consistent with the approach taken in paragraphs 55 and 57 regarding access to information, where the draft General Comment acknowledges that content controls should protect children against harmful material while also protecting their freedom of expression and privacy.
4. Paragraph 72 of the draft General Comment encourages States to ‘ensure that children’s privacy is respected and protected by all organisations and in all environments that process their data’. Australia considers that this recommendation for States to ensure that children’s privacy is protected in *all* organisations and environments is overly broad and should be qualified to reflect that only arbitrary or unlawful interferences are prohibited under Article 16 of the Convention.

*Access to data*

1. Paragraph 73 of the draft General Comment addresses children’s access to their own data.[[4]](#footnote-4) While Australia affirms the importance of the right of children to access their own personal information, there is no acknowledgement in the draft General Comment that this right is subject to reasonable and lawful limitations. This would include, for example, refusal where access would pose a serious risk to the life, health or safety of any individual, or to public health or safety. Australia recommends that this be made clear in the draft General Comment.
2. Australia further notes that paragraph 73 appears to affirm that States should provide children with access to their data in order to delete it. The paragraph does not acknowledge that the deletion of data can be achieved by States in other ways, including by imposing information security requirements on the data holder to delete data when it is no longer required. Australia recommends that this be made clear in the draft General Comment.
3. Paragraph 74 of the draft General Comment states that ‘children’s data gathered for defined purposes… shall … have a clearly defined period of retention’. Australia submits that the requirement for a defined period of retention is not a legal obligation under the Convention and that it is open to States Parties to implement other measures to ensure that data is not retained unlawfully or unnecessarily.

*Consent*

1. The draft General Comment recommends that States obtain consent from children or, depending on the child’s age and maturity, from the child’s parent or caregiver, before data processing or sharing occurs.[[5]](#footnote-5) While Article 12 of the Convention provides for consideration to be given to ‘the age and maturity of the child’, Australia’s view is that such consideration needs to include an assessment of the child’s *capacity* to understand the concept of consent, which is of primary importance.
2. Australia also notes that there are circumstances where children’s right to privacy is protected through data transparency (notice and collection requirements) and control (access and security requirements) rather than specific consent, and that such measures are consistent with the Convention.

**Threats other than terrorist groups**

1. The draft General Comment addresses the threat to children’s development and wellbeing from terrorist groups.[[6]](#footnote-6) Australia considers that framing the threat in terms of ‘terrorist groups’ does not capture the very real threat to children posed by terrorist individuals, such as self-radicalised or extreme right wing threats, which tend not to identify as a group, or violent extremists who have not yet been designated as terrorist groups. Australia recommends that these other sources of threats to children’s development and wellbeing be made clear in the draft General Comment.

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1. Australia reiterates its support for the work of the Committee and avails itself of the opportunity to renew to the Committee the assurance of its highest consideration.
1. Committee on the Rights of the Child, Draft General Comment No. 25 on Children’s rights in relation to the digital environment (13 August 2020) (‘draft General Comment’). [↑](#footnote-ref-1)
2. Committee on the Rights of the Child, *Rules of Procedure*, CRC/C/4/Rev.5 (1 March 2019), rule 77. [↑](#footnote-ref-2)
3. Draft General Comment, paragraph 72. [↑](#footnote-ref-3)
4. Ibid, paragraph 73. [↑](#footnote-ref-4)
5. Ibid, paragraphs 72, 74 and 112. [↑](#footnote-ref-5)
6. Ibid, paragraphs 16, 55 (referring to ‘terrorist armed groups’) and 86. [↑](#footnote-ref-6)