Submission to the United Nations Committee on the Rights of Child  
Comments on Draft General Comment No. 25 (2020)

Children’s Rights in Relation to the Digital Environment

*Contributors*: Subcommittee on Children’s Privacy, AUP Working Group on Human Rights

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*Introduction:*

The Working Group on Human Rights at the American University of Paris welcomes the Committee’s initiative to revise General Comment No. 25: Children’s Rights in Relation to the Digital Environment. As digital platforms evolve, this Working Group believes it essential to incorporate language that is both direct and inclusive in order to provide clarity and consider a variety of circumstances. Consequently, reaffirming Articles 8 and 16 of the Convention on the Rights of the Child, States are required to respect the right of the child to preserve his or her identity and to fully respect a child’s privacy. The AUP Subcommittee on Children’s Privacy proposes reinforcing the text of paragraphs 72-74 to avoid ambiguity, provide necessary explanation, and account for the contextual complexity of family situations that affect children. International law must acknowledge that the living situations of children can be quite complex; and unfortunately, parents and/or legal guardians may pose a risk to the children in their care. Thus, to ensure the well-being of all children, it is crucial to place significant focus upon the protection of children’s personal information and access to their personal data. Furthermore, the notion of maturity should be altered to include children with mental or physical disabilities.

*Recommendations:*

The AUP Subcommittee on Children’s Privacy proposes the following recommendations to the Committee:

1. Where appropriate, the General Comment should further clarify “maturity”, revising Article 72 as follows: “States should ensure that consent to process a child’s datais obtained prior to the processing and is informed and freely given by the child or, depending on the child’sage and **“physical, as well as mental”** maturity, **considering related disabilities that impact decision-making; or** by the parent or caregiver.”
2. Under circumstances that warrant a caregiver to provide consent on behalf of a child, or when requesting access to their child’s information, the General Comment should include the deliberation of *the competency of the parent or guardian*; requiring caregivers to provide **proof of legal guardianship, as well as be deemed competent** by participating parties *prior to* accepting their consent or granting them access to a child’s private information.

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| 1. Where appropriate, the General Comment should further clarify “maturity,” revising Article 72 as follows: “States should ensure that consent to process a child’s data is obtained **prior to the processing** and is informed and freely given by the child or, depending on the child’sage and **“physical, as well as mental”** maturity, **considering related disabilities that impact decision-making; or** by the parent or caregiver. |

Article 72 of the draft specifies the protection of a child's privacy as a State responsibility. As such, States are obliged to defend the rights of *all* children and the corresponding legislation should be accommodating of *all* children. Accordingly, any ambiguity around the notion of “maturity” must be eliminated. Thus, what is to be understood as “maturity,” should be clearly defined.

The CRC defines “child” as anyone under the age of 18; however, it neglects to consider potential impairments beyond one’s age that hinder cognitive decision-making and influence overall “maturity.” If age, coupled with presumed maturity, are the sole defining characteristics that determine a child’s cognitive capacity, then what is to be said of children with mental or physical disabilities? A child’s mental state must be considered when defining and ascertaining maturity. The Committee should recognize that the privacy of children unable to advocate for themselves, or fully comprehend the circumstances in which their personal information is being utilized and distributed, face a greater risk, and therefore require particular attention.

To ensure the privacy and safety of children with mental disabilities, States either draft legislation specifically focused on preserving the rights of children who have physical or mental disabilities or ratify the Convention on the Rights of Persons with Disabilities, giving special attention to the rights of disabled children in the emerging digital world. In circumstances that warrant the consent of a parent or legal guardian, the competency of the presiding caregiver should be taken into consideration by the involved parties. This will be further elaborated upon in the following recommendation.

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As outlined by Article 18 of the CRC, “parents and guardians should always consider what is best for that child. Governments should help them.” With regards to the digital environment and privacy, there exists a dual responsibility of both the State and the caregiver(s) in assuring not only a child’s right to privacy, but his or her overall safety. Sensitive information should only be disclosed to relevant parties who have legal permission to access to it. Moreover, the guardian(s) in question must showcase a certain level of competency, both of the digital environment and of the right to privacy.

The definition of parental competency is two-fold. First and foremost, reiterating the CRC, a competent parent or guardian must have the child’s best interests at heart; demonstrating themself as a responsible, capable and mentally-sound adult who does not risk the child’s physical safety. Secondly, the caregiver must have a comprehensive understanding of the digital environment and the potential threats to privacy it presents.

The urgency articulated by the General Comment draft with regards to privacy protection must take into account cases of lost custody or restricted physical contact with a child when a parent poses a threat, or when considering the risk-factors presented by those incompetent parents or legal guardians who request the right to access to a child’s personal data. States are held responsible for drafting legislation that specifies what information parents and guardians have access to regarding their children. In order to safeguard children from any possible dangers posed by unsafe parents or guardians, article 73 should be revised to require legal proof of parenthood or guardianship prior to granting access to their child’s information and in warranted circumstances: assess the caregiver’s relationship with the child; examine the existing conditions under which the parent has custody or parental rights over the child; ascertain any potential danger with respect to the parent; and gauge the parent’s overall competency. If States do not require legal proof, nor examine the general competency of the parent or guardian, children's privacy, the regulation of their personal information, and their physical and mental safety is not being sufficiently protected.

Furthermore, the digital environment creates outlets for children’s data to be collected, stored, and even made publicly accessible. It is vital that parents and guardians uphold a level competency to make informed decisions when consenting to the release of their children’s sensitive information in appropriate cases. Competent parents or guardians should be aware of the associated risks involved in releasing their child’s personal data, exercising good judgement when doing so. Parents or guardians should emphasize the protection of their child’s data by educating them on the dangers of digital spaces and how to safely navigate them.