# **1. Introduction**

**Centre for Child Law**

Comments on

Draft General Comment No. 25 (202X)

Children’s Rights in Relation to the Digital Environment

November 2020

The Centre for Child Law (the Centre) is a public interest strategic litigation organisation registered with the Legal Practice Counsel in South Africa. The Centre contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, advocacy, research and education.

The Centre’s mission is to work towards the development of child law and the realization of children’s rights. While children’s rights have advanced significantly in South Africa since South Africa’s constitutional dispensation 26 years ago, challenges remain. The Centre’s priorities reflect a specific commitment to the achievement of the vision set out in the South African Constitutional framework; the United Nations Convention on the Rights of the Child (UNCRC); the African Charter on the Rights and Welfare of the Child as well as the Sustainable Development Goals.

# **Centre’s position on Draft General comment No. 25: Children’s Rights in relation to the digital environment**

Children’s lives are becoming increasingly digital and the Centre for Child Law supports the Committee’s decision to develop a General Comment that will guide States in protecting and promoting children’s rights in the digital environment. South Africa continues to increasingly immerse itself in the digital environment. It is our view as the Centre for Child Law, that given South Africa’s digital advancements, it is imperative that laws and regulatory frameworks start focusing more specifically on the protection of children’s digital rights. We also acknowledge and welcome the Committee’s decision which recognises children’s evolving capacities while balancing children’s protection needs and their autonomy.

# **Comments**

**V. General measures of implementation: Paragraph B: Comprehensive policy strategy**

**We would like to draw the attention of the Committee to paragraphs**

**Paragraph 26 and 124:** The Centre notes with concern that States are not encouraged to also take into consideration the protection needs of children who are not victims but who may be considered perpetrators or offenders in the digital environment. We are of the view that child offenders in this context also need support in order to help them use the technology responsibly and in a manner that respects other people’s rights. We recommend that provision be also be made in State policies and strategies.

We note that paragraph 124 encourages States should be consider the effects of cyberlaws on children and should focus on prevention and creating alternatives to a criminal justice response. We would suggest that States are encouraged to distinguish between actions that are consensual and those that are non-consensual between children i.e a child sharing a self-crated selfie that with one child vs the child who receives the selfie sharing it with others without the permission of the one who created it. It is important that the laws and policies are crafted in a nuanced manner.

**Paragraph 27:** There is mention of ‘effective child online protection and safeguarding policies where children access the digital environment’. The Centre would like to highlight an unregulated space such as WIFI hotspots in parks etc where children can access the digital environment from their devices in the absence of adults. We propose that all publicly available hotspots be included in this paragraph so as to ensure that online protection and safeguarding policies are also put in place to protect children.

**G. Dissemination of information, awareness-raising and training**

**Para 33-34:** The Centre would like to draw the attention of the Committee to the absence or omission of child offenders under this sub-heading. We note and appreciate guidance offered to States on how to identify child victims of online harm. However, we are of the view that child offenders in the digital environment can also benefit from awareness raising campaigns specifically targeted at their needs. Sometimes children will cause harm to their peers sometimes intentionally and other times out of pure ignorance or lack of knowledge so the Centre is of the view that there should be targeted communications for children who cause harm in the digital space as well as for those actors who are legally obligated to help these children.

**I. The business sector**

**Para 36-39**: Under this sub-heading the Centre would like to underscore the need for businesses to have ‘privacy policies and terms and conditions’ which are child friendly. The terms and conditions as well as the privacy policies are often too long and not child friendly and children often accept, sign off or accept ‘terms conditions’ that they do not understand. In line the children’s evolving capacities, the Centre advocates for policies that can comprehended by children so as to help them make informed decisions and understand what it is they are doing as well as the implications thereof in the digital environment. Therefore, the business sector should be encouraged to have child-friendly versions of information in relation to their online platforms.

**J. Commercial advertising and marketing.**

**Paragraphs 40-43:** The Centre notes with appreciation the comprehensive protection afforded to children under this sub-heading.

We would like to add that the role of children in the advertising ecosystem should be expanded far beyond children being viewed as mere consumers to a view that sees children also as rights holders who deserve an internet experience that is unencumbered by manipulative practices and which also respects their right to privacy. Such an understanding of children within the advertising ecosystem will help ensure that they can use digital technology and be active participants in the 4th Industrial Revolution without putting their personal information at risk.

The Centre for Child Law, acknowledges that there are likely to be a separate set of issues for advertisers and publishers who do not consider children to be their customer or site user. We would like to underscore that all actors in the advertising value-chain must respect children’s rights and this can be achieved if children are not treated merely as another consumer group to be exploited or avoided by industry. We support the view that ‘Advertisers, agencies, data brokers, publishers, and the providers of the technologies that link them have a responsibility to ensure that advertising practices afford children the enjoyment of their whole range of human rights.’[[1]](#footnote-1)

The role of parents in advertising and marketing is an important consideration for the Committee. Firstly, parents have both a right and a responsibility to provide their children with appropriate guidance in exercising their rights, and for older children parents must be cognisant of the child’s evolving capacities.. The Centre proposes that the Committee considers the role of parents beyond providing consent as stipulated in paragraph 43. Furthermore, we propose that the child’s consent must also be required in accordance with the age and maturity.

When it comes to younger children, parents need educational support from the State on how to ensure that their child enjoys his/her human rights in the digital environment. Parents need to be educated on how digital advertising, privacy and data protection affects their children as well as their children’s rights. Therefore State parties need to have resources designed to teach parents.

Educational materials also need to be designed to improve children’s digital literacy and critical consumption of online media. This factor would align with an approach that recognises children’s evolving capacities.

**C. Freedom of thought, conscience and religion (art. 14)**

**Paragraph 63:** We note with appreciation the Committee’s recognition of children’s freedom of thought, conscience and religion. In this regard, the Centre would like to bring to the attention of the Committee certain religious practices that are difficult to classify and may lead to adolescent girls, for instance, being in a difficult legal position. For example, girls from South Africa and Eswatini participate in an annual royal reed dance called Umkhosi Womhlanga. This annual ceremony sees young maidens take reeds and deposit in the palace where the ruler lives. The young virgin girls adorn traditional attires with elaborate beadwork and they sing and dance half naked wearing only a skirt.

Semi-nude images of the young maidens have landed on the internet with mixed reviews. However, for the Centre, our concern lies with what happens if one of the young maidens takes a selfie and posts it up on her Instagram, twitter or facebook account? The intersectionality between culture and online protection against ‘child pornography’ needs to be acknowledged. The approach to child protection in this regard needs to be not too conventional but must be sufficiently agile to keep up with children’s protection needs in ways that also respects their cultural practice.

**Protection of children’s privacy, identity and data processing.**

**Para 69-79:** A number of Articles gives credence to the issue of children’s privacy and the Centre notes with appreciation that the draft General Comment provides some kind of distinction between a child and an adult as data subjects.

The Centre proposes that, in cases where the data subject is a child, the child should be accorded the opportunity to have his/her data erased immediately unless consent is given for the data to be used or processed. This, in the Centre’s opinion, aligns with the child’s ***right to be forgotten*** in the digital environment in cases where the children’s privacy has been violated or their data has been used without their consent. Children are becoming increasingly aware of their privacy and often understand that not all personal information should be online. The Committee must therefore guide States on how they may render assistance to children who want certain personal data or information to be removed from the internet. Given the permanent nature of online content, a ‘right to be forgotten type of provision’ in the draft General Comment would prove beneficial and useful to child victims and survivors as well children who committed online offences in that data which identifies them may be removed online so as to ensure that their privacy is protected.

|  |
| --- |
| **Pending law reform: Protecting the identities of child victims and witnesses of crime in South Africa**  ***Centre for Child Law and Others v Media 24 Ltd &Others CC [2019] ZACC 46, 4 December 2019***  This case started with a story that, if told without fully considering the impact on the child victim, would have potentially shattering long-term consequences. In 2014, ‘Zephany Nurse’[[2]](#footnote-2) discovered, at the age of 17 years and 9 months old, that she had been kidnapped as a baby and raised by the woman who kidnapped her, thereby making her a witness in the criminal matter of kidnapping of which she was also the victim.  South Africa’s Criminal Procedure Act applied in this case and the applicable provision prohibited the publication of a witness’ identity in criminal proceedings if such witness was under the age of 18 years. However, Zephany noticed that the media intended to reveal her ‘true’ identity when she turned 18 years. Zephany did not want to have her identity revealed and she turned to the Centre for Child Law for assistance. An urgent High Court application resulted in an order, granted in April 2015, which protected her identity until a court had considered the constitutionality of the applicable provisions in Criminal Procedure Act.  In court, the Centre argued for the protection of Zephany’s constitutional right to privacy and relied on the right to have her best interests considered of paramount importance, as a self-standing basis upon which the publication of her identity would be unlawful. Based on these rights, the Centre requested that the media respect Zephany’s privacy and urged media houses not to publish any information that reveals or may reveal the identity of ‘Zephany’ without an order of court authorising it to do so.  In 2016 the Centre turned its focus to preparing for a strategic case which sought an order declaring that section 154(3) of the Criminal Procedure Act should be interpreted to mean that the protection of identity afforded to offenders and witnesses below 18 years does not fall away when they turn 18; and that the word “witness” should be read to also include “victim”.  The media respondents opposed the applications. The media asserted that the two extensions of section 154(3) were constitutionally impermissible, as they were in conflict with the rights to freedom of expression and the principle of open justice. They also argued that the statutory exceptions to the open justice principle sufficiently provide identity protection to children on a case-by-case basis; extending section 154(3) would breach the separation of powers principle and in turn contravene the will of the legislature to draw a line between child and adult offenders.  The matter was fought in all three tiers of the South African court system from the High Court all the way to the Constitutional Court. The Supreme Court of Appeal (SCA) found that the Criminal Procedure Act was constitutionally invalid to the extent that it does not protect the anonymity of children as victims of crimes. The SCA held that the South African legislature must remedy the constitutional invalidity within 24 months.  The Centre for Child Law appealed the part of the SCA judgment that found that the protection did not extend to after child victims, witnesses and offenders turn 18 years. In the Constitutional Court, the Centre argued that, in order to facilitate rehabilitation and minimize re-victimisation, a child’s protection from public identification should not stop when the child turns 18 years. The position of the Centre was that the default position should be the protection of the identities of child victims, witnesses and offenders – before and after they turn 18 years – and that where the media deems it in the public interest to publish the identity of the person involved, they should approach a court for an order allowing such publication.  On 4 December 2019, the Constitutional Court found that section 154(3) of the Criminal Procedure Act (CPA) was unconstitutional because it does not protect the identities of child victims of crime as well as witnesses and child offenders. The Court ruled that the Act should contain this much-needed protection for child victims, witnesses and offenders. The Court also held that the protection does not automatically fall away when the children turn 18 years. The Court acknowledged the long-lasting impact that stories told the wrong way have on children’s lived experiences. |

The judgment above is a strong endorsement of children’s rights and the need to protect their wellbeing through different stages of their lives. The Centre believes that the judgment acknowledges the need for children to fully benefit from having their identities protected when they are under 18 years and after they turn 18 years of age in order to prevent significant and life-long harms. The CCL will now focus its efforts on engaging with the Legislature on the necessary amendments to be made to the Criminal Procedure Act in order to remedy the constitutional defects in the impugned provision.

**VIII. Family Environment and alternative care**

**Paragraph 89:** In light of how abusive material is often widely shared on social media platforms such as WhatsApp, we propose that the Committee considers inserting a provision that allows for a reporting duty when harmful content is shared online. This would help to minimize risks of revictimization.

**XIII. International and regional cooperation**

**Paragraph 127:** We propose that State parties also be directed to cooperate with one another. In particular we would like to highlight the issue of jurisdictions where actors such as Facebook or Google may escape liability because the holding company is in another country. State parties must be guided on how to address limitations of application in a jurisdiction. In some countries there are offences where extra-territorial jurisdiction applies as a means to address violation of rights.

1. **Conclusion**

The Centre for Child Law appreciates the opportunity to make submissions and comment on this important matter and trust that our suggestions meets your highest consideration.

**The end**

**Centre for Child Law**

Faculty of Law,

Law Building (4-31)

University of Pretoria

Pretoria, 0002

South Africa

Contact details of persons making submissions:

**Ms. Karabo Ozah** [karabo.ozah@up.ac.za](mailto:karabo.ozah@up.ac.za)

**Ms Isabel Magaya** [isabel.magaya@up.ac.za](mailto:isabel.magaya@up.ac.za)

**Tel: +27 (0) 12 420 4502**

1. Children and Digital Marketing: Rights, risks and responsibilities was written by Carly Nyst (2018). [↑](#footnote-ref-1)
2. Not her real name. [↑](#footnote-ref-2)