

Information Commissioner's Office

6 December 2021

Dear Stephen Bonner

Re: the best interests of children

Congratulations on the arrival and implementation of the AADC. We recognise that it is a ground-breaking piece of legislation and commend the ICO for its efforts. The signatories of this letter have been central to drafting General Comment 25 on Children's Rights in Relation to the Digital Environment, another huge milestone for children online, and/or in working with the Digital Futures Commission, which also seeks positive systemic changes to benefit children online.

We have read your blog of 25 August 2021 and wish to raise some additional points which we hope you will take on board as you continue your important work in developing the best interests framework.

The "best interests" principle is one of the four general principles of the UN Convention on the Rights of the Child, stating that

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." (art 3(1))

We set out below four recommendations for your consideration.

1. Include the right to education

The first recommendation is the most straightforward – to include the child's right to education (UNCRC art 28) in the framework. General Comment 25 (para 103) explicitly links education to data protection here:

"States parties should develop evidence-based policies, standards and guidelines for schools and other relevant bodies responsible for procuring and using educational technologies... to enhance the provision of valuable educational benefits. Standards for digital educational technologies should ensure that the use of those technologies is ethical and appropriate for educational purposes and does not expose children to violence, discrimination, misuse of their personal data, commercial exploitation or other infringements of their rights."

In our work, we are finding that stakeholders – schools and those advising them as well as providers of digital products and services are not always clear about how data protection can support children's best interests in relation to education data and EdTech.

2. Clarify that the best interests concept must be applied holistically

"The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the

child... It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the “child’s best interests” and no right could be compromised by a negative interpretation of the child’s best interests.” (General Comment 14, para 4)

We are concerned that the excel format of the best interests framework could be taken to imply that each included right can be separately considered in turn and those missing do not need to be considered. Further, the framework does not appear to highlight how rights are interconnected (indivisible, in UN language) in the life of each child.

While there is merit in treating each right separately and additively, at the heart of the best interests principle is the recognition that, given the contingencies of children’s lives, at times rights may appear to clash. The importance of the principle is to provide a means of resolving such situations in the “best interests of the child.” This requires a holistic judgement reached through careful consideration (for instance, by a professional whose role is that of a “best interests assessor”) so that, on balance, and taking all things into account, the best interests of the child prevail.

3. Advise providers on how to assess best interests in practice

The Committee on the Rights of the Child has emphasised on many occasions, including in its Concluding Observations to states, for while a best interests decision may not always be that called for by a child, it cannot be made without taking the child’s voice into consideration on matters that affect them (UNCRC art 12). Moreover, there must be transparency in the assessment procedure regarding how children’s views, among other relevant factors, have been considered and weighed.

At present, the ICO’s best interests framework does not discuss the necessary procedure for assessing children’s best interests, including processes for child consultation and ensuring transparency. We do not in the least advocate for best interests as a procedural over a substantive right, a concern expressed recently by Defenddigitalme, for of course both matter. But we do recommend that the ICO pays careful attention to the detail of General Comment 14 (UN Committee on the Rights of the Child, 2003). In brief:

“A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned... In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.” (General Comment 14, para 6(c))

The step-by-step procedure laid down by General Comment 14 should be followed especially when rights appear to clash or need to be balanced. As regard the outcome, the best interests of the child should prevail or, if they do not, the countermending factors leading to overriding a child (or children’s) best interests should be documented for audit and possible challenge.

Those responsible for the best interests of a child – government, schools, businesses – should document what considerations they took into account and how, what conclusions they reached, and why the outcome is indeed optimal for the child or children concerned. If not included in a Child Rights Impact Assessment (which would be preferable) then at least this should be detailed in the

DPIA. To this end, the ICO might usefully revise its DPIA template to explain how the best interests procedure should be documented and reassessed at different points in a products use and lifecycle.

4. Require provision of remedy

Finally, in developing the framework further, it will be important to include remedy. General Comment 14, para 15(c) (see General Comment 25 (para 44) requires governments to establish

“mechanisms and procedures for complaints, remedy or redress in order to fully realize the right of the child to have his or her best interests appropriately integrated and consistently applied in all implementation measures, administrative and judicial proceedings relevant to and with an impact on him or her.”

It appears to us that at present it is very difficult for children to exercise effective recourse to remedy regarding their rights and best interests in relation to digital providers.

We are delighted with the work the ICO is doing and would be happy to discuss any of the above with you, and hope that you find it helpful.

Yours sincerely,

A handwritten signature in cursive script that reads "Sonia Livingstone".

Professor Sonia Livingstone

Baroness Beeban Kidron

Dr Kruakae Pothong

Gerison Lansdown

Louise Hooper