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**THE REVOLUTION WILL NOT BE TELEVISED, BUT IT  
WILL BE ON TIKTOK**

**A Child's Right to Protest Online**

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### *Abstract*

The internet and social media have drastically shaped modern political engagement. Rights of freedom of expression and freedom of assembly are being exercised online to bring grievances to the attention of those in power. Digitally literate youth are employing the tools available to them on the internet to engage in politics in ways which they would be unable to in physical public spaces.

This paper considers what duties are owed by the New Zealand Government under the United Nations Convention on the Rights of the Child (CRC) to children who seek to protest online. Articles 13 and 15 of this Convention, which establish a child's rights to freedom of expression and freedom of assembly, apply both online and offline and are crucial in this analysis. Other CRC articles should also be considered when sourcing and assessing the extent of the state's responsibilities.

Using the articles of the CRC, this paper discusses a framework which can be practically applied in New Zealand to manifest the State's positive obligations regarding a child's right to protest online. This paper highlights the importance of such measures, identifying the many risks and rights abuses which can occur to children on the internet. A child's engagement with protest online will likely occur with or without state or parental assistance. It is thus crucial that the state implements assistance to ensure that all children can exercise their rights in this sphere and are kept safe when they do so.

### *Key Words*

Children's Rights – Social Media – Protest – TikTok

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## *I Introduction*

Children have always been involved in protesting. While this is not generally recognised in academic or political discourse, children are participants and even instigators in many social movements.<sup>1</sup> The United Nations Convention on the Rights of the Child (CRC) has codified the rights of children which entitle them to this behaviour. Particularly important are the rights of freedom of expression and freedom of assembly, arts 13 and 15 of the CRC. These civil rights recognise children as political beings and democratic participants who can mobilise, respond to, and influence state action.<sup>2</sup> Protesting has increased over the twenty-first century, with the internet supplementing the public spaces of traditional civic demonstration.<sup>3</sup> Articles 13 and 15 apply online in much the same manner as they apply offline and children are putting them to use accordingly. Since the infancy of social media, young activists have used the internet to motivate and implement offline action and change.<sup>4</sup> Digitally literate youth are inhabiting the online sphere, harnessing the internet's communicative powers to create a new frontier of political engagement.<sup>5</sup> Political activity can occur through the internet by online self-expression, connecting with a group or a community, and motivating action; all hugely important civic behaviours worthy of protection. The accessibility of this tool allows a broad class of children to question and challenge the government decisions which impact their rights.<sup>6</sup>

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<sup>1</sup> Aoife Daly "Demonstrating Positive Obligations: Children's rights and Peaceful Protest in International Law" (2013) 45(4) the George Washington Intl LR 763 at 764.

<sup>2</sup> Aoife Daly *A Commentary on the United Nations Convention on the Rights of the Child, Article 15: The Right to Freedom of Association and to Freedom of Peaceful Assembly* (Martinus Nijhoff Publishers, The Hague, 2016) at 5.

<sup>3</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression* 35<sup>th</sup> sess, Agenda item 3, A/HRC/32/38 (30 March 2017) at [2].

<sup>4</sup> Mary Joyce *Digital Activism Decoded: The New Mechanics of Change* (international debate education association, New York, 2010) at 108.

<sup>5</sup> Rebecca Jennings "TikTok Never Wanted to Be Political: Too Late" *Vox* (22 January 2020) [www.vox.com](http://www.vox.com).

<sup>6</sup> Urs Gasser and Sandra C. Cortesi *Digitally Connected: Global Perspectives on Youth and Digital Media* (Berkman Center Research Publication, Cambridge, 2015) at 26.

Of the millions of internet users, an estimated one-in-three are under eighteen.<sup>7</sup> While the internet offers these children numerous opportunities to exercise their rights, it also subjects them to many risks.<sup>8</sup> The state must be aware of these risks and establish protective measures in response. Risks to a child's wellbeing and safety from behaviours like online bullying or grooming must be prevented, as well as other rights infringing activities. A child's need for protection must be balanced against their autonomy. Protection must not unjustifiably curb a child's ability to realise their CRC entitlements. Restricting children from using the internet without valid justification undermines their capacity and infringes their rights. Instead, the articles of the CRC should be looked to as frameworks on how a child can be guided by their parents and the state in the exercise of their rights. This paper will develop this framework and apply it to the New Zealand context.

By ratifying the CRC, the New Zealand Government acknowledged the positive and negative obligations it owes to fulfil the rights of children in its jurisdiction.<sup>9</sup> As children's rights exist online, the corresponding duties to protect these rights also exist online.<sup>10</sup> The fulfilment of these duties involves several activities. Firstly, the state must refrain from any action which would infringe the child's rights. Beyond this, they also owe a duty to protect these rights, especially against third parties who may infringe upon them.<sup>11</sup> As children are almost universally dependent on adults for internet access, they are vulnerable to rights-infringing actions by those who care for them.<sup>12</sup> This risk must be recognised and responded to. Parents must be educated on children's developing capacity to exercise their rights, under art 5 of the CRC, and the corresponding parental responsibilities. Additionally, in the context of protesting online, social media platforms and internet service providers have significant control over who accesses their sites and what content is shared.

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<sup>7</sup> United Nations Children's Fund (UNICEF) *Children's Rights and the Internet: Internet: From Guidelines to Practice* (UNICEF and the Guardian, London, 2016) at 9.

<sup>8</sup> At 10.

<sup>9</sup> Daly, above n 1, at 784.

<sup>10</sup> United Nations Children's Fund (UNICEF), above n 7, at 12.

<sup>11</sup> Sara Lembrechts, Gamze Erdem Turkelli, and Wouter Vandenhoele *Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols* (Edward Elgar Publishing Limited, Cheltenham, 2019) at [13.06].

<sup>12</sup> United Nations Children's Fund (UNICEF), above n 7, at 56.

The state must supervise them to ensure that no rights are being unjustifiably limited in these areas. Finally, the state's duties include the creation of space for the child's rights to be fulfilled.<sup>13</sup> Because children are so uniquely vulnerable, the state's duty of non-infringement means ensuring the child is provided with a way in which they can freely exercise their rights without impediment.<sup>14</sup> Children will only become more involved in online protest as politics become more "digitized."<sup>15</sup> As a signatory of the CRC, New Zealand must respond to this and recognise the child's right to do so.

## *II Protesting Online*

### *A What is a Protest?*

The term protest conjures images of marching crowds with banners and demands for political change. As the internet has shaped political engagement, the nature of protest activities has shifted to more casual and individual actions.<sup>16</sup> These are nonetheless still socially valuable and deserve to be recognised and protected.<sup>17</sup> This paper will include these online activities under the umbrella term of protesting, irrespective of the fact they fall outside the popular conception of it. 'Tweeting' under the hashtag of a social movement, 'liking' a Facebook page for a political cause or responding to comments under a video on a contentious issue can all be modern forms of protest. They allow people, especially the youth, to dispute the actions of those in power. The Arab Spring protests, an example discussed later, demonstrated the way a shared online space, where people connected and discussed matters of a political nature, facilitated a successful political revolution.<sup>18</sup> While online activism may fall outside the typical conceptions of protest, protecting such behaviour is nonetheless crucial to preserving modern political

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<sup>13</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [15.09].

<sup>14</sup> At [15.09].

<sup>15</sup> United Nations Children's Fund (UNICEF), above n 7, at 68.

<sup>16</sup> Ariadne Vroeman and others "Everyday Making through Facebook Engagement: Young Citizens' Political Interactions in Australia, the United Kingdom and the United States." (2016) 64(3) *Political Studies* 513 at 514.

<sup>17</sup> At 514.

<sup>18</sup> Paolo Gerbaudo *Tweets and the streets social media and contemporary activism* (Pluto, London, 2012) at 44.

engagement. Such protection is also demanded from the state, for a child who engages in this activity by the articles of the CRC.

'Protest' escapes a narrow, specified definition; it is broadly described by Aoife Daly as an activity that "aims to bring about change by peaceful means".<sup>19</sup> The exercise of freedom of expression and assembly are so entangled within protest that it defies efforts to specify the full range of practices the activity includes.<sup>20</sup> The pre-internet definition of protest encompassed a range of communication: from individually shouting on the street corner, participating in a public march, or organising a petition for a cause.<sup>21</sup> Some of these behaviours directly translate to online actions, such as petition signing or donation. Others must be more creatively considered to identify this transition. The Special Rapporteur on the rights of freedom of peaceful assembly and association is a role created by the UN to ensure that that right is protected and promoted.<sup>22</sup> The current holder of this position acknowledged the way social media posts under "#MeToo" created an assembly which transcended regional boundaries and amassed numbers which a march, a traditional 'protest', could never manage.<sup>23</sup> One definition of online protest: a "politically motivated movement relying on the internet," implies the involvement of multiple people through the term "movement".<sup>24</sup> In reality, the internet gives a single individual the tools to spread their opinion or highlight a cause. Protesting online should not be restrictively defined. If the internet facilitates a single person being able to protest, then their right to do so must be protected.

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<sup>19</sup> Daly, above n 1, at 768.

<sup>20</sup> David Mead *The New Law of Peaceful Protest: Rights and Regulations in the Human Rights Act Era* (Oxford, Portland, 2010) at 4.

<sup>21</sup> At 9.

<sup>22</sup> Officer of the High Commissioner "Special Rapporteur on the promotion and protection of freedom of opinion and expression" United Nations Human Rights [www.ohchr.org](http://www.ohchr.org).

<sup>23</sup> *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, 45<sup>th</sup> sess, Agenda Item 3, A/HRC/41/41 (17 May 2019) at [23].

<sup>24</sup> Sander Vegh "Classifying Forms of Online Activism" in Martha McCaughey and Michael D. Ayers *Cyberactivism: Online Activism in Theory and Practice* (Routledge, New York, 2003) 69 at 71.



Social media and the internet may be used to raise awareness or advocate for a cause, to organise an activity, or to carry out an action.<sup>25</sup> The internet has created abundant and diverse communication practices, changing the way people interact with politics.<sup>26</sup> Young people especially use the internet in unique ways to challenge political action. Often this is through casual and irreverent communications, which are still valuable despite appearing distant to traditional political criticism.<sup>27</sup> These behaviours are no less deserving of protection because they defy convention.

The conditions required for active citizenship are facilitated by the internet. These include the freedom to seek, receive, and impart informational resources; the existence of opportunities to take part in discursive spaces; and the capacity to organise. By keeping a broad definition of what constitutes protest online, we preserve the internet's ability to create these conditions and protect the individuals who use it to further the interests of democratic society.<sup>28</sup>

## ***B Examples of Online Protest***

The coordination of protest through social media is more than a theoretical possibility and has been carried out numerous times. Three diverse examples are included to demonstrate how the internet has facilitated both in-person and online protests. These examples frame the rest of this essay, identifying how a child's right to freedom of expression and assembly online should be interpreted, and what protections should be put in place to preserve these rights.

### *1 The Arab Spring*

One of the most startling examples of the way the internet has affected offline politics was the 2011 Egyptian revolution against the leadership of Hosni Mubarak. After the murder by police of young political activist Khaled Said, a Facebook page "Kullen Khaled Said"

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<sup>25</sup> At 74.

<sup>26</sup> Gerbaudo, above n 18, at 2.

<sup>27</sup> J. Uldam and A. Vestergaard *Civil Engagement and Social Media* (Palgrave Macmillan, London, 2015) at 8.

<sup>28</sup> James Dennis *Beyond Slacktivism: Political Participation on Social Media* (Palgrave Macmillan, London, 2019) at 18.

(We are all Khaled Said), was established and became an emotional rallying point for many young people.<sup>29</sup> Acquiring over 35,000 'likes' within the first twenty-four hours of its existence, the sheer size of the community inspired others to share their experiences with police brutality, posting stories, images and videos.<sup>30</sup> The online environment became a site of anti-authoritarianism. As people became more emboldened, they began to use the page's large network of supporters to coordinate in-person demonstrations.<sup>31</sup> In response, the Egyptian Government shut off all internet in the country to dissuade the organisation of these demonstrations, but by this time the protests had gained so much momentum that it had little effect.<sup>32</sup> What had begun as a single Facebook page, facilitated the stepping down of Mubarak.<sup>33</sup> The significance of social media in this movement was so prevalent that most news agencies, political figures, and academics, give credit to the "Shabab-al-Facebook (Facebook youths)" for instigating the revolution.<sup>34</sup>

## 2 *School Strike 4 Climate*

Like the Arab Spring protests, the 2019 School Strike 4 Climate used social media to mobilise in-person protests. Where it differed from the above example was that most of the organisers and participants were children. On March 14<sup>th</sup> and September 27<sup>th</sup> many New Zealand towns and cities participated in the worldwide strikes demanding policy response to climate change. They marched alongside people in 150 countries; gathering a total of one and a half million people in March and six million in September.<sup>35</sup> The New Zealand protests were coordinated by school students from ages eight to eighteen, almost all of whom lacked political experience.<sup>36</sup> Despite this, the organisers worked together, sharing a GoogleDoc, giving each other advice on group organisation and inspiration about what

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<sup>29</sup> Gerbaudo, above n 18, at 55.

<sup>30</sup> At 52.

<sup>31</sup> At 53.

<sup>32</sup> At 67.

<sup>33</sup> At 44.

<sup>34</sup> At 48.

<sup>35</sup> Bronwyn Hayward *Children, Citizenship, and Environment: #SchoolStrikeEdition* (2<sup>nd</sup> eds, Taylor & Francis, London, 2020) at 5.

<sup>36</sup> "Meet the school students organising New Zealand's Climate Strikes" *The Spinoff* (July 30 2020) [www.thespinnoff.co.nz](http://www.thespinnoff.co.nz).

demands should be made.<sup>37</sup> Social media was used to advertise and coordinate the event across 40 locations in New Zealand; the communicative potential of the platform enabling children to invite their friends and discuss the strike.<sup>38</sup> Facebook pages were created to disperse location-specific information about the protests. Event pages were formed affiliated with the main School Strike cause but tailored for a certain town or city.<sup>39</sup>

Beyond organisation, social media was used on the day for important symbolic purposes. Photographing the event and sharing these photographs with hashtags used worldwide, such as “#schoolstrike” or “#Fridays4future”, enabled protesters to place themselves within the movement, overcoming geographic barriers and being empowered by the numerous others involved.<sup>40</sup> Protestors could use social media to share their opinions on climate change and the political failure to act, giving them a greater sense of agency than they would have had from physical presence alone.<sup>41</sup> By commenting on the protest online, further public discussion was generated.<sup>42</sup> The sheer mass of information spread, such as over 86,600 tweets shared on March 15<sup>th</sup> under #SchoolStrike4Climate, meant that it was almost impossible to use social media on that day without some exposure to the protest.<sup>43</sup> This kind of public engagement would be impossible without the facilitation of social media.

### 3 *American Politics and TikTok*

America is not unique in its residents' use of social media for political purposes. Many of the protests which occurred in Hong Kong throughout 2019 and 2020 were driven by online posts.<sup>44</sup> What differentiates America is the huge number of children who have become

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<sup>37</sup> Amanda Thomas, Raven Cretney, and Bronwyn Hayward “Student Strike 4 Climate: Justice, Emergency, and Citizenship” (2019) 75(2) *New Zealand Geographer* 96 at 97.

<sup>38</sup> At 96.

<sup>39</sup> See Tauranga Strike 4 Climate NZ <https://www.facebook.com/events/899178450451029/>

<sup>40</sup> Shelley Bouillaine ““School Strike for climate”: Social Media and the International Youth Protest on Climate Change” (2020) 8(2) *Media and Communications* 208 at 211.

<sup>41</sup> At 209.

<sup>42</sup> At 214.

<sup>43</sup> At 221.

<sup>44</sup> Grace Shao “Social media has become a battleground in the Hong Kong protests” *CNBC* (15 August 2020) [www.cnb.com](http://www.cnb.com).

widely followed through their use of social media to push for political change. Particularly, the social media application TikTok, on which users create and share videos, has become increasingly politicised over 2020.<sup>45</sup> Interestingly, most users on this site are children. Eighteen million daily users of the TikTok app in the United States are estimated to be under fourteen.<sup>46</sup> An estimated 320 million users worldwide are between fourteen and twenty-four.<sup>47</sup> The prevalence of child users on the app is fascinating when we consider the types of political discussion it generates.<sup>48</sup> Throughout 2020, an increasing amount of people, predominately politically disempowered teenagers, have used the communicative potential of TikTok to spread their political beliefs.<sup>49</sup> Creators use humour and conversational tones to spread their political opinions to a broad audience.<sup>50</sup> The app was described as “unintentionally becoming the best means of disseminating ideas on the internet” and “a power being used for better or for worse by minors.”<sup>51</sup> Digitally literate youth “know the algorithms and know how they can boost videos to get what they want”, and what they want has shifted from acquiring popularity and fans to enacting social and political change.<sup>52</sup>

An example of this platform's effectiveness was the “prank” pulled by thousands of teenagers dissatisfied with President Trump's leadership. Youth were encouraged by many viral TikTok videos to register for tickets to his political rally in Tulsa, Oklahoma, and then not attend.<sup>53</sup> As a result, thousands of seats throughout the stadium were left vacant on the day.<sup>54</sup> The significance of this action was not lost on political academics who noted the

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<sup>45</sup> Jennings, above n 5.

<sup>46</sup> Raymond Zhong and Sheera Frenkel “A Third of Tiktok's US Users May Be 14 or Under, Raising Safety Questions” *New York Times* (14 August 2020) [www.nytimes.com](http://www.nytimes.com).

<sup>47</sup> Johanna Neeson “The Dangers of Tiktok That Are Worth Your Attention” *Readers Digest* (17 August 2020) [www.rd.com](http://www.rd.com).

<sup>48</sup> Jennings, above n 5.

<sup>49</sup> Taylor Lorenz “The Political Pundits of TikTok” *New York Times* (29 April 2020) [www.nytimes.com](http://www.nytimes.com)

<sup>50</sup> Jennings, above n 5.

<sup>51</sup> Jennings, above n 5.

<sup>52</sup> Taylor Lorenz, Kellen Browning, and Sheera Frenkel “Tiktok Teens & K-Pop Stans Say They Sank Trump Rally” *New York Times* (11 July 2020) [www.nytimes.com](http://www.nytimes.com).

<sup>53</sup> Lorenz, Browning, and Frenkel, above n 52.

<sup>54</sup> Lorenz, Browning, and Frenkel, above n 52.

way American youth had successfully participated in a no-show protest; now empowered with the belief that even without the right to vote they could impact their political system.<sup>55</sup>

TikTok also served as an important hub for information dissemination during the Black Lives Matter Protests occurring in America throughout June to August. Users posting content under “#BlackLivesMatter”, shared videos collectively amassing 4.9 billion views in the first week of June alone.<sup>56</sup> Videos were shared with information about how to protest safely, educational resources about racism, and expressions of individual experiences with racial injustice.<sup>57</sup>

In the lead up to the presidential election the app has been used by adolescents to campaign, debate, and fact check political information, with some teenagers forming party-based coalitions under group accounts with multiple users who share the same beliefs.<sup>58</sup> One creator of such an account described TikTok as “cable news for young people”, with the largest and most influential political speakers receiving hundreds of thousands of views.<sup>59</sup> The casual nature of these videos, accessible to people regardless of their political comprehension and literacy, has facilitated the political engagement of many children. Social media is reshaping the way we define democratic engagement and redistributing who holds influence.

### *III The Right to Protest*

Several common themes emerge within the above examples. Firstly, all three engage with the communicative potential of the internet, available irrespective of the sharer's societal position. Secondly, the power of social media in facilitating the assembly of multiple people is also highlighted. Both are invaluable elements for children who seek to protest, given their “social disability” and the struggle they would face to communicate or assemble

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<sup>55</sup> Lorenz, Browning, and Frenkel, above n 52.

<sup>56</sup> Rachel Janfaza “TikTok Serves as hub for #blacklivesmatter activism” *CNN* (4 June 2020) [www.edition.cnn.com](http://www.edition.cnn.com).

<sup>57</sup> Janfaza, above n 56.

<sup>58</sup> Lorenz, above n 49.

<sup>59</sup> Lorenz, above n 49.

to such a degree offline.<sup>60</sup> Another emerging theme is the protestors' extreme reliance on the internet sites which they employ. However, this paper will consider this problem later.

Returning to the themes of communication and assembly, I will consider the rights mentioned in the CRC which underpin such action and where they are found in New Zealand's law.

### ***A The Relevant Articles and New Zealand's Law***

Understanding what protections currently exist over the child's right to protest is crucial before further protections can be advocated for. The legislation which recognises human rights in New Zealand is the Bill of Rights Act 1990 (BORA). BORA is not a supreme constitutional document, but it still serves an important symbolic role in recognising and articulating the rights of the people in this country. Although BORA was enacted one month before the CRC came into force, several articles in the CRC align with the BORA conferred rights; rights which apply to "everyone" including children.<sup>61</sup> This alignment is acknowledged in New Zealand's 2015 report to the Committee on the Rights of the Child which highlighted the country's compliance with the CRC through BORA. This report states that arts 13 and 15 of the CRC are affirmed by BORA ss 14 and 16.<sup>62</sup> As the CRC is not incorporated into New Zealand's law, children rely on these parallel legislative protections.

Children's rights commentators highlight the insufficiency of having rights affirmed for "everyone" and recommend legislation which specifically confers these rights to children.<sup>63</sup> While BORA is a good baseline to protect New Zealand children involved in protesting, Parliament should move beyond mere recognition and introduce mechanisms which satisfy the positive obligations demanded by the CRC. This is an urgent task as children are becoming increasingly involved in protest online and the limits of their rights

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<sup>60</sup> Daly, above n 2, at 5.

<sup>61</sup> Bill of Rights Act 1990, ss 14 and 16.

<sup>62</sup> *Consideration of reports submitted by States parties under article 44 of the Convention Fifth periodic reports of States parties due in 2015 New Zealand CRC/C/NZL/5* (14 December 2015) at 18.

<sup>63</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [13.03].

will be tested. These positive obligations can be found in the advice of the Committee on the Rights of the Child and other articles within the CRC. Unfortunately, the Committee has not elucidated in much detail what these positive obligations are, though they clearly highlight their existence.<sup>64</sup>

Article 4 of the CRC requires states to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.” This is amended with the qualifier that for “economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources.”<sup>65</sup> As freedom of expression and freedom of assembly are civil rights, insufficient resources cannot be used to justify failure to implement them.<sup>66</sup> This resultingly confers New Zealand with a hefty obligation to recognise the rights in arts 13 and 15.

### *1 Article 13*

Section 14 of BORA gives everyone the right of freedom of expression: “to seek, receive, and impart information and opinion of any kind in any form.” This aligns with art 13 of the CRC which gives the child that same right to “seek, receive and impart information and ideas of all kinds.” Freedom of expression is a broad right. The CRC states that it includes oral and written expression, as well as through art or any other media.<sup>67</sup> The “information and ideas of all kind” mentioned in art 13 are intended to be widely encompassing and includes political discussion.<sup>68</sup>

Even before the implementation of the CRC or BORA, the common law protected the right to protest under the right to free speech, as a crucial part of democracy.<sup>69</sup> The European

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<sup>64</sup> Daly, above n 1, at 804.

<sup>65</sup> *Convention on the Rights of the Child* GA Res 4425 (1989), art 4.

<sup>66</sup> Daly, above n 1, at 766.

<sup>67</sup> *Convention on the Rights of the Child* GA Res 4425 (1989), art 13.

<sup>68</sup> Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague, 1999) at 232.

<sup>69</sup> *Hubbard v Pitt* [1976] 1 QB 142 cited in Mead, above n 20, at 4.

Court of Human Rights highlights the magnitude of this activity, placing “the highest importance to freedom of expression in the context of political debate” and considers that restriction of political speech requires significant justification.<sup>70</sup> While the state has a duty under art 13 not to unduly restrict freedom of expression, it also has a corollary duty to facilitate appropriate conditions for such expression.<sup>71</sup> Creating this setting enables unrestricted exercise of the right.<sup>72</sup> This positive obligation is evidenced by the guidelines for reporting compliance on art 13 in a state's periodic reports to the Committee on the Rights of the Child. This guide asks states to include a list of “measures implemented to ensure that the right is recognised” and “implemented in practice.”<sup>73</sup> “Measures” indicates that for states to satisfy their CRC duties, action is required beyond not infringing the right.

## 2 Article 15

The right to protest is also underpinned by the right to peaceful assembly; a right with equally important implications for political engagement. The right to assembly allows people to come together and to express themselves in “a common will.”<sup>74</sup> Article 15 of the CRC prescribes the right to freedom of peaceful assembly, which is protected in New Zealand under s 16 of BORA. Article 15's scope includes a duty on the state to proactively prevent infringement of the child's right to assemble, by both its representatives,<sup>75</sup> and by third parties.<sup>76</sup>

A child's ability to protest relies on the protection and realisation of both arts 13 and 15 of the CRC, and thus ss 14 and 16 of BORA. Effective self-expression has historically been heavily dependent on the ability to call a public assembly.<sup>77</sup> Without assembly, the

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<sup>70</sup> Herdis Thorgeirsdottir *Article 13: the Right to Freedom of Expression* (Martinus Nijhoff Publishers, Leiden, 2006) at 47.

<sup>71</sup> Fiona Ang and others *Participation Right of Children* (Oxford: Intersentia, Antwerpen, 2006) at 15.

<sup>72</sup> At 15.

<sup>73</sup> Detrick, above n 68, at 236.

<sup>74</sup> At 259.

<sup>75</sup> Daly, above n 1, at 804.

<sup>76</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [13.03].

<sup>77</sup> Beth Gaze and Melinda Jones *Law, Liberty, and Australian Democracy* (Sydney, Law Book Company, 1990) at 115.



expression of an individual would generally have very little impact, and without expression, the assembly has little purpose.

### 3 *Articles Not Encoded in New Zealand's law*

A right conferred by the CRC which lacks full legislative protection in New Zealand is art 12. This article states that children must be able to express their views on all matters affecting them and that the state must give these views due weight. As protest may be one avenue through which a child gives their view, the state ought to protect and facilitate this activity. While some statutes in New Zealand do have inbuilt participation requirements, these refer to matters affecting a specific child.<sup>78</sup> There are no statutory duties to consider the views of groups of children, or children as a class; as is required by art 12.<sup>79</sup>

Under art 12, “all matters affecting the child” means “a whole range of issues and in various surroundings, such as the family setting, the local community level, and the national political level.”<sup>80</sup> Children's participation on issues affecting them is often difficult to obtain and the mechanisms which enable it often fail to consider the views of a diverse range of children.<sup>81</sup> Preserving and facilitating a child's right to protest creates an environment where a larger selection of children can express their views, unlike traditional methods of civic engagement like youth parliaments or school councils.<sup>82</sup> The strong positive obligation to encourage and ensure participation created by art 12, can easily extend to measures which facilitate the exercise of arts 13 and 15 online.<sup>83</sup> The internet simplifies and lowers barriers to participation, enabling the involvement of children who may be unable to attend an in-person protest.<sup>84</sup> This includes disabled children, children in

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<sup>78</sup> See Care of Children Act 2004, s 6; Oranga Tamariki Act 1989, s 11.

<sup>79</sup> Detrick, above n 68, at 90.

<sup>80</sup> Ang and others, above n 71, at 16.

<sup>81</sup> Bronagh Byrne and Laura Lundy “Children's rights-based childhood policy: a six-P framework” (2019) 23(3) Intl J Hum Rts 357 at 363.

<sup>82</sup> Bouillaine, above n 40, at 209.

<sup>83</sup> Ang and others, above n 71, at 20-21.

<sup>84</sup> Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, New York, 2007) at 179.

rural communities, or children whose parents or guardians are unable or unwilling to accompany or transport them to protests.

Article 16 is another right which lacks BORA recognition but is fundamental to freedom of expression and assembly. This article protects children against arbitrary or unlawful attacks on their privacy. Children are unable to fully realise their art 13 and 15 rights if their parents are placing them under a level of supervision disproportionate to their capacity.<sup>85</sup> This is especially pertinent for the child engaged in online activity where software can be installed to supervise their behaviour.<sup>86</sup> A child will be unable to express themselves if they feel they are under scrutiny and could be punished for the views they express.<sup>87</sup> Although surveillance as a threat to the right to protest is not a recent development, it ordinarily comes from the state rather than from within the home.<sup>88</sup> Even where surveillance does not result in censorship, punishment, or other direct interference with one's right, its "chilling effect" over expression or assembly constitutes a rights violation.<sup>89</sup>

#### 4 *"Justified Limitations" and Section 5 of BORA*

The rights to freedom of expression and freedom of peaceful assembly in arts 13 and 15 are not absolute. The CRC specifies in these articles that they are subject to limitations of national security, public order or morals, as necessary and provided by law. The exercise of these rights must respect the rights of others, though a high threshold must be met before expression will be prohibited for infringing others' rights. Views are entitled to offend, shock or disturb, so long as doing so does not impede on others' rights.<sup>90</sup> New Zealand's

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<sup>85</sup> United Nations Children's Fund (UNICEF) "Children's Online Privacy and Freedom of Expression: Industry Toolkit" (UNICEF, 2018) at 10.

<sup>86</sup> United Nations Children's Fund (UNICEF), above n 7, at 60.

<sup>87</sup> Gerison Lansdown *Every Child's Right to be Heard: a resource guide on the UN Committee on the Rights of the Child General Comment no. 12* (Save the Children, London, 2011) at 35.

<sup>88</sup> Farrah Bara *From Memphis with Love: A model to protect protesters in the age of surveillance* (2019) 69(1) Duke LJ 197 at 211.

<sup>89</sup> At 211.

<sup>90</sup> *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users* CM/Rec(2014)6 (16 April 2014) at 3.

law qualifies the exercise of arts 13 and 15 with s 5 of BORA. This provision allows the limitation of BORA rights, including ss 14 and 16, freedom of expression and assembly, where these are “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” “Demonstrably justified” is slightly broader than the boundaries on expression and assembly as imposed by the CRC. This qualifier could lead to a child’s entitlements under the CRC not being upheld in New Zealand.

Another permitted limitation of a child’s rights is through parental involvement or oversight. While the contents of the CRC’s rights may not be altered, art 5 entitles a parent or caregiver to exercise “appropriate direction and guidance” over a child’s realisation of their rights, depending on the child’s capacity. A parent could carry out many potentially rights-infringing actions against the child, without that direction and guidance amounting to inappropriacy and demanding state intervention.<sup>91</sup> Given the vulnerability of the child’s rights to this parental interference, parents must be cautioned against such behaviour and educated upon a child’s capacity to exercise their rights. Both tasks form part of the state’s responsibility in facilitating a child’s entitlement to protest.

### ***B The Societal Benefits of Protest***

After establishing the legal basis of the child’s right to protest, I will now extol the importance of preserving these rights, explain why they mandate a high degree of protection, and stress why their contravention requires so much justification. The right to protest stems from the right to freedom of expression. Being free to express oneself is fundamental to any fair system of governance and enables public critique of the state.<sup>92</sup> Protest is an important way of attaching weight to that expressed opinion. It “is often the only means by which grievances can be brought to the knowledge of those in authority.”<sup>93</sup> Children need to be able to attract the attention of those in power given their lack of political representation. Almost all policy decisions will have some impact on children’s lives and

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<sup>91</sup> Garton Sandifolo Kamchedzera *Commentary on the United Nations Convention on the Rights of the Child: Article 5: The Child's Right to Appropriate Direction and Guidance* (Martinus Nijhoff Publishers, Leiden, 2012) at [58].

<sup>92</sup> Daly, above n 1, at 770.

<sup>93</sup> *Hubbard v Pitt* [1976] 1 QB 142 cited in Mead, above n 20, at 4.

rights, and they ought to be able to comment.<sup>94</sup> As children are unable to vote or proceed through the complaint channels accessible to adults, protests are one of the most accessible modes for them to have their views heard. Collective action gives children a way which they can express their views. The public nature of such events attaches a degree of accountability to the state, ensuring that these views are given due weight as mandated by art 12. While there are movements to lower the voting age, this would likely be no lower than sixteen, so younger children still need an avenue to challenge political action.<sup>95</sup>

Beyond the fundamental importance of giving children a voice, there are many other societal benefits created from children engaging in protest. Participating with others to secure a common goal establishes children with a sense of responsibility and increases their likelihood of engaging in other democratic behaviours.<sup>96</sup> A direct correlation has been shown between children demonstrating interest in political issues through protest, and an increase in the voting rate of young people.<sup>97</sup> As 18-29 year olds are the least enrolled category of New Zealanders, motivating young people to engage with politics should be a policy focus.<sup>98</sup> Principle 5 of the Declaration on the Rights of the Child 1924, a predecessor of the CRC, stated that a child “must be brought up in the consciousness that its talents must be devoted to the service of fellow men.” As well as making children aware of their responsibilities under the democratic system, protesting is an action where an individual looks beyond themselves and considers their beliefs and their impact on the people around them.<sup>99</sup> There are huge social and individual benefits from such action.

Protesting affects one's self development, which as demonstrated above, has broader implications in wider society. Protesting establishes children with life skills. It “educates them in group decision making, teaches them to formulate opinions and compels them to

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<sup>94</sup> Byrne and Lundy, above n 81, at 359.

<sup>95</sup> Make It 16 “Home” (July 2019) [www.makeit16.org.nz](http://www.makeit16.org.nz).

<sup>96</sup> Craig Carpenter *Born with a Spirit of Protest: Giving Children a Voice of Importance* (Rowman & Littlefield, Lanham, 2020) at 47.

<sup>97</sup> Daly, above n 1, at 783.

<sup>98</sup> Electoral Commission “Voter Turnout Statistics for the 2017 General Election” (October 2017) Elections NZ [www.elections.nz](http://www.elections.nz)

<sup>99</sup> Carpenter, above n 96, at 47.

adapt to conclusions opposite to their own perspectives.”<sup>100</sup> Protesting gives a child the ability to communicate their opinions and as a result “develop his mind and himself in society with others.”<sup>101</sup> Protesting can raise children’s confidence as well as giving them an awareness of their place in society. The political and civic rights in the CRC, such as arts 13 and 15, empower the child. They increase an individual’s belief that they are capable of enacting change and as an effect of this, establishes them with a greater perception of their responsibility towards others.<sup>102</sup> Participation is not only a means by which children can affect political activity. It is also an opportunity for developing a sense of autonomy, independence, heightened social competence and resilience.<sup>103</sup> In enabling a child to protest by protecting their rights under arts 13 and 15, states are fulfilling their obligations under art 6 of the CRC by ensuring the development of the child, empowering them to build their capacity and identity.<sup>104</sup>

#### *IV A Child’s Capacity and the CRC*

A child who seeks to engage in protest stands to gain multiple benefits but is also exposed to numerous dangers. The internet contains risks for all users, but for the child, naïve and susceptible to manipulation, these hazards are multiplied.<sup>105</sup> Parents and the state can intervene and act as facilitatory agents, ensuring children are able to safely use the internet and are exercising their rights in line with their capacities. Articles 3 and 5 of the CRC create a framework for assessing what is expected from both the parent and the child when the child seeks to protest online, and the corresponding role of the state.

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<sup>100</sup> Carpenter, above n 96, at 47.

<sup>101</sup> Sylvie Langlaude “On how to Build a Positive Understanding of a Child’s Right to Freedom of Expression” (2010) 10(1) Human Rights LR 33 at 35.

<sup>102</sup> Thorgeirsdottir, above n 70, at 20.

<sup>103</sup> Lansdown, above n 83, at 35.

<sup>104</sup> *General Comment No. 20 (2016) on the implementation on the rights of the child during Adolescence* CRC/C/GC/20 (6 December 2016) at 6.

<sup>105</sup> United Nations Children’s Fund (UNICEF), above n 7, at 12.

### *A Article 5 and the Role of Parents and Guardians*

Children's unique status means that they are hugely dependant on others to exercise their rights. Their need for facilitation does not diminish the value of these rights. It means that those who enable this exercise must be scrutinised to ensure that they are not violating any rights in this process. One group whose influence must be particularly supervised is a child's parents and caregivers.<sup>106</sup> As with the state, this group should not only refrain from infringing children's rights but should actively encourage and help children exercise these rights. Parents should provide children with the means for such exercise, educate them on how to realise their rights in a safe manner, and the boundaries of these rights. In the context of online protest this responsibility goes beyond merely providing the child with internet access but extends to ensuring that they can confidently and safely use it, knowing how to complain or seek redress if their rights are breached.<sup>107</sup>

Article 5 empowers children by recognising their developing capacity; highlighting that as a child develops, they receive greater independence from their parents and guardians. It is not intended to justify the orthodox conception of parental 'entitlement' to control the child.<sup>108</sup> Article 5 is based on parental guidance as a "function of parenthood, not a consequence of supposed ownership of the child."<sup>109</sup> The child's progressive acquisition of competence, understanding, and agency establishes caregivers with a corresponding responsibility to "continually adjust the levels of support and guidance they offer a child".<sup>110</sup> The right to appropriate direction and guidance exists amongst the other rights in the CRC. Therefore, direction provided under this article can and must be overridden if other rights are being harmed.<sup>111</sup>

Article 5 is essential to facilitating the child's exercise of their rights. It provides a framework under which a child's agency is respected, but simultaneously avoids

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<sup>106</sup> Hodgkin and Newell, above n 84, at 179.

<sup>107</sup> Gasser and Cortesi, above n 6, at 26.

<sup>108</sup> Kamchedzera, above n 91, at [68].

<sup>109</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [5.08]

<sup>110</sup> At [5.11].

<sup>111</sup> Kamchedzera, above n 91, at [34].

prematurely exposing the child to the full responsibilities associated with adulthood.<sup>112</sup> Article 5 cannot operate without interaction with the other CRC rights. Capacity will increase from experience as other rights such as participation are exercised.<sup>113</sup> This development of capacity then demands greater exercise of these other rights and further participation, which fuels the cycle.<sup>114</sup> Parental sensitivity to developing capacity is essential for the responsive facilitation of a child's entitlement to exercise their rights.

Under art 5, States are mandated to respect the “responsibilities, rights and duties of parents or, where applicable, the members of the extended family ... or other persons legally responsible for the child.” This parental duty is to provide “appropriate direction and guidance”, in line with the capacity of the child. Despite the misleading connotations of “right”: “parental rights to control a child do not exist for the benefit of the parent, they exist for the benefit of the child and they are justified only so far as they enable the parent to perform their duties towards the child.”<sup>115</sup> A child's capacity is crucial to measuring the extent of this duty and identifying where it is being inappropriately wielded. The Committee on the Rights of the Child has recognised art 5 as an “emancipatory” provision, creating a framework under which the presumption of a child's incompetence can be overcome.<sup>116</sup> The qualifier “appropriate” before “direction and guidance” emphasises that the parent is “a key participator in and not the determinator of the child's life.”<sup>117</sup> Article 5 does not establish a child's caregiver with “carte blanche” to make the child's decisions for them; they must give weight to the child's wishes in line with their capacity.<sup>118</sup>

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<sup>112</sup> At [68].

<sup>113</sup> At [67].

<sup>114</sup> At [68].

<sup>115</sup> Geraldine Van Bueran *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht, 1995) at 4.

<sup>116</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [5.14].

<sup>117</sup> Kamchedzera, above n 91, at [24].

<sup>118</sup> Detrick, above n 68, at 120.

Capacity inquiries are incredibly fact-specific, relating to both the qualities of the individual child and the action which they seek to carry out.<sup>119</sup> Protesting online encompasses a huge range of behaviour and frustrates the imposition of a single capacity standard, instead requiring deeply individualised analysis, dependant on the individual and the situation. Parents and guardians need to be equipped with adequate knowledge and understanding to carry out this inquiry, so they do not unduly restrict a child's rights for an assumed lack of capacity, or disproportionate fear of the internet.

Those who bear the responsibility of raising a child must constantly analyse the child's capacity so that they are aware of the extent of the rights the child can realise. This is a massively important exercise. If a capacity assessment is overly critical the child loses control over their life. However, if it is overly assumptive the child could suffer harm and would be blamed for it as their own choice.<sup>120</sup> Freedom of expression and assembly are some of the most crucial civic and political rights a person is entitled to and one should be very cautious about restricting them.<sup>121</sup> Simultaneously, some internet activities are hugely risky and will satisfy the threshold for restriction.<sup>122</sup> It is up to the parents to understand what these activities are and to moderate the child's internet use accordingly. This is a difficult task and the state has a duty to help facilitate it.

### ***B Article 3 and the Child's Best Interest***

A child's entitlement to protest arises from their right to participate; the general heading under which freedom of expression and assembly fall.<sup>123</sup> Participation is one of four underlying principles of the CRC.<sup>124</sup> Another is the child's best interests, which interacts closely with art 5. The best interest principle stems from art 3(1) of the CRC, conferring

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<sup>119</sup> *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14* (29 May 2013) at [32].

<sup>120</sup> Aoife Daly "Assessing Children's Capacity" (2020) 28(3) *Intl J Children's Rights* 471 at 473.

<sup>121</sup> Eva Lievens and others "Children's Rights and Digital Technology" in Ursula Kilkelly and Ton Liefaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) 487 at 490.

<sup>122</sup> United Nations Children's Fund (UNICEF), above n 7, at 42.

<sup>123</sup> Ang and others, above n 71, at 9.

<sup>124</sup> At 10.



the child with the right to have her or his best interests assessed and regarded as a primary consideration in all actions concerning her or him. All parts of the phrase “all actions concerning children” in art 3, are to be given a broad interpretation. “Actions” refers to more activities than just decisions. It includes acts, conduct, proposals, services, and even omissions and failure to take action.<sup>125</sup> “Concerning” is broader than actions that directly relate to the child, and includes measures which may not have targeted the child or children generally, but still affects them or their rights.<sup>126</sup> “Children” refers to individual children concerned, a group of children, or children as a class.<sup>127</sup> While parents or caregivers are not named as an undertaker of “actions concerning children” by art 3, the Committee has acknowledged that they fall within its scope.<sup>128</sup> Essentially, any activity which may interact with a child's rights ought to consider whether such activity is in the child's best interests.

The indeterminate nature of the phrase “best interests” enables paternalistic restriction of other CRC rights under the guise of protecting the child.<sup>129</sup> Such an approach is contrary to the drafters' intentions for this section.<sup>130</sup> We should be especially cautious about taking such an interpretation regarding a child's rights online where there is already a tendency to restrict children's access.<sup>131</sup> The CRC subscribes to concerns of both autonomy and the need for care.<sup>132</sup> The best interests principle was not written to disempower children but rather to recognise that “because of their youth, inexperience, and lack of political power, children are not well placed to protect their own interests or take care of themselves”; therefore, the state must ensure that this care and protection occurs.<sup>133</sup> A child is not

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<sup>125</sup> *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, above n 119, at [17].

<sup>126</sup> At [18].

<sup>127</sup> At [18].

<sup>128</sup> At [25].

<sup>129</sup> Detrick, above n 68, at 91.

<sup>130</sup> At 91.

<sup>131</sup> Gasser and Cortesi, above n 6, at 26.

<sup>132</sup> Lesley-Anne Barnes Macfarlane and Elaine Sutherland *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press, Cambridge, 2016) at 216.

<sup>133</sup> At 21.

prevented from enjoying the other rights of the CRC merely because they require and are entitled to protection under art 3.

Traditional perceptions of children as incapable, vulnerable, and in need of protection have led to many countries placing excessive emphasis on the best interests principle in children's rights discourse.<sup>134</sup> The provision is mistakenly emphasised to support the notion that the adult will always act in the child's best interest and their views may be entirely substituted for those of the child.<sup>135</sup> This is incorrect. While an adult often has a role in identifying what is best for the child's welfare, this perception cannot entirely override a child's agency.<sup>136</sup> The child's views must be considered during a best interests inquiry, as demanded by art 12.<sup>137</sup> The weight of this view will be made heavier by the evolving capacity of the child.<sup>138</sup> Although capacity will give a view more weight, a lack of capacity does not entitle the decisionmaker to totally ignore a child's views.<sup>139</sup> Consideration of age and maturity, along with the child's views, are necessary to balance the demands of protection and the recognition of autonomy in a best interests assessment.<sup>140</sup> The importance of protection, which encourages limitation or restraint of rights, needs to be assessed against measures of empowerment, which imply full exercise of rights.<sup>141</sup> Neither should be an assumed approach, instead, best interests assessments must be uniquely calibrated for the circumstances at hand. This inquiry is incredibly fact-specific and "should be adjusted and defined on an individual basis according to the specific situation of the child or children concerned, taking into consideration their personal context, situation, and needs."<sup>142</sup>

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<sup>134</sup> Aisling Parks *Children and International Human Rights Law: The Right of the Child to be Heard* (Taylor & Francis Ltd, London, 2013) at 58.

<sup>135</sup> At 58.

<sup>136</sup> Barnes Macfarlane and Sutherland, above n 132, at 34.

<sup>137</sup> *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, above n 119, at [43].

<sup>138</sup> At [44].

<sup>139</sup> At [54].

<sup>140</sup> At [83].

<sup>141</sup> At [83].

<sup>142</sup> At [32].

All rights recorded in the CRC are provided for the “child’s best interest.”<sup>143</sup> While art 3 may be a main principle of the CRC, it does not receive hierarchy over the rest of the rights contained.<sup>144</sup> A child’s entitlements under arts 13 and 15 are contrary to assumptions that children should be protected to the utmost degree from all risks.<sup>145</sup> A greater understanding of art 3 can help the state and parents understand that a child’s exercise of their rights, even when it may expose them to risks of harm, is in the child’s best interest. Article 3 provides another framework to help assess the fine balance between a child’s need for autonomy and protection.

### *C New Zealand’s Law on Capacity*

While it is undeniable that children have rights, their ability to exercise these rights is often dependent on the approval or aid by those around them, or by the state.<sup>146</sup> This next section will analyse New Zealand’s treatment of children’s CRC entitlements; using this as a starting point to develop how the state should respond to the child’s exercise of arts 13 and 15 online. I will consider the judiciary’s willingness, or unwillingness, to uphold the child’s exercise of their rights, as evidence of a wider societal mood regarding children’s rights and capacity. While no cases have tested a child’s rights to freedom of expression and freedom of assembly in the context of protest, cases which consider the CRC in other areas can be used to speculate on the state’s willingness to uphold the child’s rights in such a scenario.

In *Moore v Moore*, the High Court analysed whether the six and eight-year-old children who were the subjects of a custody dispute could exercise their freedom to religion under s 15 of BORA and art 14 of the CRC. Brown J concluded that to enjoy any rights under BORA, a child must reach “*Gillick* competence”,<sup>147</sup> a standard which demands the child has sufficient understanding and intelligence to comprehend the consequences of the right

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<sup>143</sup> Barnes Macfarlane and Sutherland, above n 132, at 35.

<sup>144</sup> *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, above n 119, at [4].

<sup>145</sup> Ang and others, above n 71, at 27.

<sup>146</sup> Langlaude, above n 101, at 37.

<sup>147</sup> *Moore v Moore* [2015] 2 NZLR 787 at [137].

sought to be exercised.<sup>148</sup> Once this standard is reached the court will be prepared to uphold the child's rights and defend them against anyone who attempts to restrict their exercise.<sup>149</sup> Although an age limit was not set on when a child may reach *Gillick* competence for freedom of religion, it was suggested that this standard might be reached at adolescence, around age 12.<sup>150</sup>

In the case of *Child, Youth and Family Services v Television New Zealand* it was held that the court has a responsibility to consider a child's right to freedom of expression under the CRC when it is engaged on the facts of the case.<sup>151</sup> Interestingly though, no capacity assessment was made. Instead, the facts were used to quickly dismiss the potential exercise of the right. The judge assumed that "even a gifted ten-year-old child" would lack sufficient intelligence and emotional maturity to understand the consequences of this case's proposed action: the broadcasting of a controversial interview the child was involved in.<sup>152</sup> Although such an assumption can hopefully be confined to the facts of *CYFS v TVNZ*, it does suggest the court may prefer to cut corners to avoid capacity assessments and preserving a child's rights. Relying on assumptions about a child's capacity has the potential to significantly sterilize the child's ability to exercise their rights especially in the context of protest. Research has indicated children as young as eleven have an increased awareness of social issues and are capable of logically thinking about these issues,<sup>153</sup> yet under an assumptive approach to their capacity they may be restricted from protesting. If an overly onerous capacity standard was imposed before a child could exercise their freedom of expression and assembly, especially regarding controversial issues, this would likely have a chilling effect on children's involvement in protesting.

The *Gillick* standard does not easily fit into the context of freedom of assembly or expression. Rather than having a harsh cut off point under which a child is deemed

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<sup>148</sup> At [118].

<sup>149</sup> At [125].

<sup>150</sup> At [126].

<sup>151</sup> *Child, Youth and Family Services v Television New Zealand Ltd* [2006] NZAR 328 at [42].

<sup>152</sup> At [32].

<sup>153</sup> Daly, above n 1, at 770.

incapable of exercising these rights, most critics focus on the facilitatory role of the state and parents in overcoming a child's deficiencies. Although children may need direction and guidance on the exercise of their rights, "this does not affect the contents of the rights themselves."<sup>154</sup> Using *Gillick* to question a child's competence to engage in protest is especially problematic when we consider if the test was applied to adults. Under this threshold, many people would fail to have adequate capacity and would be excluded from such rights exercise.<sup>155</sup> By imposing a capacity standard with a difficult test, we risk placing a premium on a child's autonomy and excluding children who are disabled or otherwise unable to independently exercise their rights. Such a division would contribute to "the emancipation and the individual development of some but certainly not all children."<sup>156</sup> Capacity as a concept should be used to empower the exercise of rights, as opposed to acting as an obstacle to it.<sup>157</sup>

The participatory rights of children, the category in which freedom of expression and assembly fall, were placed in the CRC by drafters attempting to overcome the social conception that children do not have "the necessary capacity or competence to exercise" such rights.<sup>158</sup> The inclusion of arts 12 to 15 is "an undeniable statement... made as to [the child's] entitlements and ability to fully enjoy such fundamental freedoms".<sup>159</sup> Given such intention, the state should be very cautious adding tests or standards like *Gillick* which go beyond what is included in the CRC and may prevent children from enjoying their rights. The *Gillick* test could also allow states to avoid implementing their obligations. Excluding children from assembling or expressing themselves based on capacity is much easier than having to implement support and protection for children unable to exercise their art 13 and 15 rights on their own.

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<sup>154</sup> Detrick, above n 68, at 233.

<sup>155</sup> Daly, above n 1, at 774.

<sup>156</sup> Ang and others, above n 71, at 219.

<sup>157</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [5.12]

<sup>158</sup> Hodgkin and Newell, above n 84, at 178.

<sup>159</sup> At 178.

## *V Protesting Online*

### *A The Application of Articles 13 and 15 Online*

Assuming a child is capable of exercising their rights to freedom of expression and freedom of assembly, these rights apply equally online and offline; necessitating the same protections and entitling the child to the same potential realisation.<sup>160</sup> While the internet offers exciting opportunities for civic engagement, it also enables rights violations to easily occur.<sup>161</sup> The state has an onerous task in protecting and facilitating rights-holders engaged in online activity. This is especially complex with social media platforms where commercial bodies wield significant control over users' ability to express themselves or assemble.

Article 13 of the CRC gives the child the right to freedom of expression, meaning they may express themselves and access information, opinions, and expression from others, both in-person and online.<sup>162</sup> Expression may only be limited in line with the encoded exceptions of the CRC such as national security or the infringement of others' rights. This applies to the restrictions enforced by states, and by third parties such as internet service providers and social media companies.<sup>163</sup> Not only must the limitation comply with the CRC, but its scope must not be broader or maintained for any length of time longer than is strictly necessary for a legitimate aim.<sup>164</sup> For a restriction to be deemed "necessary" the European Court of Human Rights has demanded a higher threshold than "merely useful, reasonable

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<sup>160</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [6]; *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, above n 23, at [10].

<sup>161</sup> United Nations Children's Fund (UNICEF), above n 7, at 12.

<sup>162</sup> *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users*, above n 90, at 3.

<sup>163</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [36].

<sup>164</sup> *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users*, above n 90, At 4.

or desirable.”<sup>165</sup> The fundamental nature of the right to freedom of expression means that its restriction should not be taken lightly, in-person or online.

Under art 15 entitlements, a child is entitled, with appropriate direction and guidance provided by their parents based on their capacity, to join any website, application, or other service to form, join, mobilise and participate in any social group or assembly.<sup>166</sup> According to the Council of Europe's *Guide to Human Rights for Internet Users*, the right to peaceful assembly covers the ability to use all available online tools to participate and scrutinise all local, national, and international policy, legislative initiatives, and decision making processes.<sup>167</sup> This includes the right to sign petitions.<sup>168</sup> While the right to peaceful protest exists online, an individual can still be subject to criminal sanctions if they breach the law while carrying out such activities.<sup>169</sup> This includes blockages, disruption of services or damage to the property of others.<sup>170</sup> The *Guide to Human Rights for Internet Users* clarifies that children are also entitled to these freedoms.<sup>171</sup> Despite this declaration, there are practical limitations which the *Guide* fails to address. Many of the services necessary to realise these rights, such as social media platforms or online petitioning sites, have age limits which restrict children from using them.<sup>172</sup> The *Guide* also fails to describe how to assess when a child can safely join these websites, applications, or other services or how they can avoid being exposed to age-inappropriate content.

### ***B How Protest Can Occur Online***

Social media and the internet have transformed political engagement. These tools can be used “to question, contest and/or support decisions or actions of media, political, private,

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<sup>165</sup> *Report of the Special Rapportuer on the promotion and protection of freedom of opinion and expression*, above n 3, at [7].

<sup>166</sup> *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users*, above n 90, at 4.

<sup>167</sup> At 5.

<sup>168</sup> At 5.

<sup>169</sup> At 4.

<sup>170</sup> At 4.

<sup>171</sup> At 5.

<sup>172</sup> At 5.

or government organisations.”<sup>173</sup> The significance of this cannot be overstated for marginalized groups like children who are faced with restrictions should they try to exercise such dissent in physical spaces.<sup>174</sup> The modern exercise of freedom of expression is predominately carried out online, with the internet being used to share one's opinion and access information.<sup>175</sup> Social media facilitates the dissemination of information specifically tailored for those receiving it. This is in direct contrast with traditional information channels like news media which cater to the interests of the majority.<sup>176</sup> The distribution networks on social media can also be used for organization and mobilisation purposes, for online or offline action.<sup>177</sup> The speed in which information can be disseminated online and the numbers of people that can be reached has a huge effect on the ability to communicate and to organize an assembly. The internet enables offline meetings and demonstrations but also creates virtual spaces where assembly rights can be exercised.<sup>178</sup> Online communities, e-petitioning sites, and crowd-funding platforms can raise money, find new audiences, spread information and attract members. Thus, overcoming the financial, temporal, and geographic constraints which hinder such activity offline.<sup>179</sup>

Synthesising the vast ways which the internet can be used to facilitate protest elucidates three main purposes: expression, identification, and organisation. “One danger when approaching the field of social media is the possibility of being overwhelmed by the sheer abundance and diversity of the communicative practices.”<sup>180</sup> Recognising this, this paper uses these three purposes to broadly outline the way the internet can facilitate protests,

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<sup>173</sup> Bouillaine, above n 40, at 209.

<sup>174</sup> *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, above n 23, at [11].

<sup>175</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [2].

<sup>176</sup> McCaughy and Ayers, above n 24, at 72.

<sup>177</sup> At 72.

<sup>178</sup> *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, above n 23, at [11].

<sup>179</sup> At [25].

<sup>180</sup> Gerbaudo, above n 18, at 2.



rather than exhaustively listing all possible actions. The distinction between these purposes is rather academic as most online protest activity will involve an intermingling of them all.

### *1 Expression*

Social media is designed to encourage communication and expression. Its development has prioritised user ease, so people can “focus on content instead of having to concentrate on code.”<sup>181</sup> On its face, it appears the perfect venue for anyone, no matter how technologically skilled, to share their experiences and opinions on a huge score of things, including politics. As described by one commentator: the internet “drops the transaction cost of dissent.”<sup>182</sup> Its seemingly unregulated nature gives people the perception that they are operating in “a space of autonomy beyond the control of the government and the corporations that had monopolized the channels of communication.”<sup>183</sup> The dawn of the internet completely shifted the power dynamics of expression, with its communicative potential disproportionately in the hands of the “digitally savvy” youth.<sup>184</sup>

The internet and social media has facilitated a democratization of expertise; enabling individuals to tell their own stories and attract their own audiences rather than being dependant on conventional media.<sup>185</sup> The intermingling of personal and political, of humour and cause, has enabled political sentiment to reach broader audiences than on any other medium. Commentators have highlighted young people's use of humour, irony, and satire as a type of civic engagement.<sup>186</sup> The conversational tone of this content is supplemented with the personal nature of social media, giving information shared by one's peers an aura of verification and trustworthiness.<sup>187</sup>

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<sup>181</sup> Joyce, above n 4, at 30.

<sup>182</sup> Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (IP27, 2011) at 22.

<sup>183</sup> Manuel Castells *Networks of Outrage and Hope: Social Movements in the Internet Age* (2<sup>nd</sup> eds, Wiley, Cambridge, 2015) at 2.

<sup>184</sup> At 223.

<sup>185</sup> Christian Crumlish *The Power of Many: How the Living Web is Transforming Politics, Business, and Everyday Life* (Sybex, San Francisco, 2004) at 222.

<sup>186</sup> Uldam and Vestergaard, above n 27, at 6.

<sup>187</sup> Joyce, above n 4, at 108.

Alongside the communication of individual experiences and opinions, social media has facilitated citizen reporting. An ordinary person with a camera on their phone and access to the internet can become a journalist and an eyewitness news reporter.<sup>188</sup> Videos and photos can be directly shared and reshared to the public without first being shaped by media channels.<sup>189</sup> As a result of greater reporting, others are given access to information which they may not see elsewhere. This gives individuals the ability to counter disinformation in the context of protest and current events where they have seen footage of what actually happened.<sup>190</sup> The live “real time” nature of social media also facilitates its ability to motivate.<sup>191</sup> People witness what is occurring and resultingly have a greater sense of investment and urgency. Images can transcend language or literacy barriers and elicit a more significant emotional response than political writing or speeches.<sup>192</sup>

## 2 *Identification*

The internet is “a victory of affinity over geography”, a tool which means “the like-minded can now gather from all corners and bask in the warmth of knowing [they] are not alone.”<sup>193</sup> The significance of this for marginalised communities cannot be overstated. The online sphere enables heightened visibility of these groups and the reaching of new sympathetic audiences and allies.<sup>194</sup> On social media, interest in a movement or issue can transcend location, class, and race.<sup>195</sup> People who may not ordinarily interact because of social dispersion can assemble.<sup>196</sup> The shared interest or motivation of a group can help create a sense of community and togetherness.<sup>197</sup> Even something as minor as a shared hashtag can become a symbol of unity; a “direct affirmation of a common program or

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<sup>188</sup> At 218.

<sup>189</sup> Crumlish, above n 185, at 53.

<sup>190</sup> Gerbaudo, above n 18, at 7.

<sup>191</sup> Joyce, above n 4, at 17.

<sup>192</sup> At 107.

<sup>193</sup> Crumlish, above n 185, at 12.

<sup>194</sup> Vroeman and others, above n 16, at 520.

<sup>195</sup> Crumlish, above n 185, at 120.

<sup>196</sup> Gerbaudo, above n 18, at 32.

<sup>197</sup> Joyce, above n 4, at 161.

identity.”<sup>198</sup> This construction of personal or group identity is a crucial and direct antecedent of political activity.<sup>199</sup>

### 3 *Organisation*

Social media platforms make it incredibly easy for one motivated person to affect many around them. A single individual is given inexpensive tools to effectively call upon those who share their outlook,<sup>200</sup> and can create “astonishingly rapid and sometimes subtle community consciousness and actions”.<sup>201</sup> This organisation can be through the dissemination of a personal story or the creation of a movement or collective identity under a group or a hashtag.<sup>202</sup> It can also be a call to mobilisation, demanding action either in-person or online.<sup>203</sup> The organiser is only as limited as they seek to be; they can “improve a neighbourhood or change the world.”<sup>204</sup> Furthermore, the nature of these platforms facilitates horizontal leadership, giving the powerless in society more agency than they would have in-person.<sup>205</sup>

The internet has simplified and made efficient the process ordinarily required to create civic engagement. The requisite steps for such engagement are: an issue or cause powerful enough for people to seek out how to participate; a facilitative tool to help people identify the activity, location, or event to participate in; and a way of enabling people to perform the task that needs doing.<sup>206</sup> On social media, all those elements can be incorporated in a thirty-second video and then dispersed to thousands. The vast number of users on these

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<sup>198</sup> Deen Freelon, Charlton McIlwain, and Meredith Clark “Quantifying the Power and Consequences of Social Media Protest” (2018) 20(3) *New Media and Society* 990 at 994.

<sup>199</sup> Sebastián Valenzuela, Zeynep Tufekci, and Deen Freelon “Unpacking the Use of Social Media for Protest Behaviour: The Roles of Information, Opinion Expression, and Activism” (2013) 57(7) *American Behavioural Scientist* 920 at 922.

<sup>200</sup> Castells, above n 183, at 223.

<sup>201</sup> Crumlish, above n 185, at 74

<sup>202</sup> McCaughy and Ayers, above n 24, at 75.

<sup>203</sup> At 75.

<sup>204</sup> Crumlish, above n 185, at xiii.

<sup>205</sup> At 15.

<sup>206</sup> At 65.

sites and the sheer range of people a communication can access, makes it hugely attractive and valuable for a person with a cause.<sup>207</sup>

## *VI Threats to the Right to Protest Online*

### *A From the State and Private Industry*

The online environment offers numerous ways in which people can express themselves, comment upon political decisions, and find like-minded communities. However, it also invites several ways in which a person's rights can be breached. The Special Rapporteur on the promotion and protection of freedom of expression and assembly acknowledged that "the contemporary exercise of freedom of expression owes much of its strength to private industry, which wields enormous power over digital space"<sup>208</sup> While large platforms like Facebook and Twitter have allowed a greater exercise of this right, they also can greatly impinge on it and shape the way online expression occurs.

A specific example of how rights infringement can occur online is the encouragement of self-censorship. Ambiguous restrictions over what subjects and material are permitted on a site can cause individuals to cautiously use these services for fear of their shared material being taken down.<sup>209</sup> Because of the uncertainty around what is prohibited, people will avoid controversial discussions or joining groups that discuss such matters.<sup>210</sup> Internet platforms also have a massive amount of control over the content seen by their users. As social media becomes more politicised, there is concern that the platforms may shape the accessible or disseminated content to align with the political beliefs of their parent companies.<sup>211</sup> The state is under positive obligations to preserve the rights of expression and assembly and protect individuals from the actions of private parties which infringe

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<sup>207</sup> Joyce, above n 4, at 28.

<sup>208</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [1].

<sup>209</sup> At [39].

<sup>210</sup> At [57].

<sup>211</sup> Charlie Meyer "On the Dangers of the Meteoric Rise and Ban of Tiktok" *BPN* (23 July 2020) [www.bpntoday.com](http://www.bpntoday.com).

these rights, including these large companies.<sup>212</sup> States have the responsibility to ensure social media sites are developed and controlled in a rights compliant manner.<sup>213</sup> As these platforms grow, this will become both increasingly onerous and important.

Self-censorship can be caused by private actors or by the state. States can enact legislation which criminalises dissident speech or communication through vaguely worded prohibitions. Resultingly, citizens are unsure of what topics are off bounds and err away from any controversial discussion.<sup>214</sup> Modern examples of this are the Chinese Cybersecurity Law, which prohibits the use of the internet to “upset social order”<sup>215</sup> or the Philippines Anti-Terrorism Act, which defines terrorism as intending to “cause serious risk to public safety.”<sup>216</sup> Both pieces of legislation impose significant sanctions for the contravention of incredibly broad and indeterminate phrases. Similarly, from the private sector, vaguely worded terms of service can have an equivalent effect.<sup>217</sup> TikTok’s community guidelines in 2019 (which have since been updated) included a ban on discussion of what they defined as “highly controversial topics” including “the ethnic conflict between black and white.”<sup>218</sup> The ability to control the topics discussed on their platforms gives these companies huge power, but unlike states who can be criticised for rights infringing action, these companies avoid oversight or the need for transparency.

Another way that internet service providers (ISPs) and social media platforms can infringe rights is through sporadic enforcement of their guidelines. Regulating these sites involves

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<sup>212</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [8].

<sup>213</sup> At [8].

<sup>214</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [39]. *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, above n 23, at [32].

<sup>215</sup> Article 9, Chinese Cybersecurity Act 2015 cited in *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [39].

<sup>216</sup> Section 4(a).

<sup>217</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [44].

<sup>218</sup> Alex Hern “Revealed: how Tiktok censors videos that do not please Beijing” *The Guardian* (25 September 2019) [www.theguardian.com](http://www.theguardian.com)

discretion over what content is removed or permitted. It was noted by the Special Rapporteur on expression that these sites may refuse to take down material clearly prohibited by their guidelines which are made by powerful or socially dominant groups against more vulnerable members; yet may take down minority groups' legitimate expression.<sup>219</sup> Returning to the example of TikTok, there have been multiple cases of "shadowbanning" on the app.<sup>220</sup> This term is used on the internet to describe where a platform clandestinely diverts viewers away from content without removing it or notifying the creator that such an action has been taken.<sup>221</sup> This allows the platform to say they facilitate diversity or are supportive of minority voices while simultaneously silencing them. Many Māori and Indigenous Australian content creators have expressed concern at this action being taken against them on videos where they speak out about racism and the failure of the app to respond when they reach out for answers.<sup>222</sup>

Social media sites and ISPs may act in a rights infringing way because of the will of their controlling directors or due to the threat of state-imposed sanctions.<sup>223</sup> As a means of controlling its citizens, the state may place significant liability on internet or telecommunication companies if any content it deems illegal is shared on them.<sup>224</sup> Resultingly, the platform will draft incredibly restrictive terms and conditions as a way of avoiding such liability.<sup>225</sup> Alternatively, the company may choose to cease its operations in the jurisdiction, as was recently seen with TikTok in Hong Kong, where the owners of the application chose to make it unavailable in the region after a new security law was passed.<sup>226</sup> This law empowered police to arrest and detain social media company

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<sup>219</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [52].

<sup>220</sup> Natasha Gillezeau "TikTok accused of Black Lives Matter Hypocrisy" *Australian Financial Review* (7 July 2020) [www.afr.com](http://www.afr.com)

<sup>221</sup> Gillezeau, above n 220.

<sup>222</sup> Gillezeau, above n 220.

<sup>223</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [39].

<sup>224</sup> At [43].

<sup>225</sup> At [44].

<sup>226</sup> Paul Mozer "TikTok to Withdraw From Hong Kong as Tech Giants Halt Data Requests" *New York Times* (6 July 2020) [www.nytimes.com](http://www.nytimes.com)

employees for up to six months if the company failed to comply with data demands from China.<sup>227</sup> Removing access to such a huge social media platform affects people's ability to communicate and express themselves, which is even less ideal than restrictive terms and conditions.

When states implement legislation that restricts permitted content online, it is often accompanied by laws that stock their powers of surveillance over online activity.<sup>228</sup> For example, the Philippines' Anti-Terror Act, which criminalised certain forms of expression also conferred hugely broad powers on the authorities to "wiretap, overhear and listen to, intercept, screen, read, surveil, record or collect" a broad range of information and communication offline and online.<sup>229</sup> Surveillance has a direct chilling effect, reducing the exercise of both assembly and expression. While it does not directly interfere with rights exercise, it leads to unease for internet users who resultingly act with more restraint.<sup>230</sup> In extreme cases, the state may shut down services or websites, invoking the qualifiers to the rights of expression and assembly: preservation of "national security, maintenance of public order or protection of a public interest."<sup>231</sup> In reality, this action is not for protective purposes but is carried out to seize control of the online space and to stifle dissent.<sup>232</sup>

Barring access to social media on an individual level has been found by the Supreme Court of the United States to be a breach of a person's freedom of speech. While this finding was in response to the First Amendment of the United States Constitution, the case's analysis is still relevant to the right conferred by art 13 of the CRC. *Packingham v North Carolina* found that a person cannot be restricted from accessing social media, as today it is "one of

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<sup>227</sup> Mozer, above n 226.

<sup>228</sup> *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, above n 23, at [35].

<sup>229</sup> Section 16.

<sup>230</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [57].

<sup>231</sup> *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, above n 23, at [40].

<sup>232</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [48].

the most important places to exchange views.”<sup>233</sup> The case also described online expression as “integral to the fabric of our modern society and culture.”<sup>234</sup> Only an enormous risk to state safety could proportionately justify the blocking of all citizens’ access to the internet or a social media site. In New Zealand, s 42 of the Human Rights Act 1993 prohibits the restriction of any person to any place which the public is “entitled or allowed to enter or use” on the basis of one of the prohibited grounds of discrimination in the Act. One such ground is discrimination based on age where a person is above sixteen years.<sup>235</sup> The finding of many academics and the New Zealand Law Commission of the importance of the internet as a “public place”, means blocking access to the internet on certain grounds like age would probably be prohibited under s 42, drawing on the same reasons as *Packingham*.<sup>236</sup> This demonstrates the hesitancy to which limiting access to the internet based on age should be approached with.

### ***B Rights infringement by Parents and Caregivers***

While the threats from the state and private actors listed above apply to every internet user, as a class, children are subject to more ways which their rights can be infringed online. The child’s parents or guardians, depending on what input they provide, can either have an empowering or abrogating effect on a child’s rights. While under art 5 parents ought to have a guiding role in the child’s exercise of their rights, this is not always fulfilled when the child exercises their rights online. Children rely on their caregivers for the provision of tools to access the internet, as well as technical direction on how to use it and guidance to mitigate dangers.<sup>237</sup> As more opportunities for civic engagement arise online, children who are not digitally literate will be unable to participate in the online world and will be disadvantaged. Many offline social functions have now become “digitized”, such as the signing of petitions, supporting political candidates, or accessing health, educational, or

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<sup>233</sup> *Packingham v North Carolina* 15 US 1194(2017) at 5.

<sup>234</sup> At 10.

<sup>235</sup> Human Rights Act 1993, s 21(1)(i).

<sup>236</sup> Law Commission, above n 182, at 13.

<sup>237</sup> United Nations Children’s Fund (UNICEF), above n 7, at 68.



cultural material.<sup>238</sup> To access these tools children must be able to confidently and safely navigate the online sphere.

While the internet creates new risks for child users, active parental “mediation” of children’s usage lessens these risks, without restricting the opportunities offered to them online.<sup>239</sup> Active mediation involves talking to children about the internet, allowing them appropriately supervised access, developing the child’s skills, and discussing safe practices.<sup>240</sup> For parents and caregivers to instigate this kind of behaviour, a change in adult views is needed. We need to shift societal perceptions of children as requiring protection, to viewing them as rights-holders who need assistance to exercise those rights. Parents and guardians must also have the skills to carry out active mediation, as often children are more competent internet users than their parents.<sup>241</sup> This imbalance can lead parents to cease offering their children any support beyond providing internet access.<sup>242</sup> Alternatively, they may feel so disempowered and ignorant of the child’s experiences online that they restrict the child’s access completely.<sup>243</sup> Research has indicated that a parent’s lack of digital literacy will lower a child’s likelihood of consulting their parent about their experiences online, even where they have been exposed to harmful content.<sup>244</sup> Social media and internet access are so incredibly important to the lives of young people, restricting their access does not guarantee that they are safe from its harms, but rather guarantees the child will use it in a covert and secretive way.<sup>245</sup> A restrictive approach is often taken by parents with less education and from poorer communities, leading to an extension of the disadvantages their children face in-person to online.<sup>246</sup>

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<sup>238</sup> At 68.

<sup>239</sup> Gasser and Cortesi, above n 6, at 26.

<sup>240</sup> At 26.

<sup>241</sup> At 26.

<sup>242</sup> At 26.

<sup>243</sup> At 26.

<sup>244</sup> At 26.

<sup>245</sup> At 26.

<sup>246</sup> At 26.

This finding raises some important issues regarding the state's burden of protecting a child's rights. While the state has an obligation to "undertake all appropriate legislative, administrative, and other measures" to implement the CRC's rights, the majority of the strain in empowering a child's right to freedom of expression and freedom of assembly online falls onto the parent.<sup>247</sup> This gives an automatic advantage to children from well-resourced two-parent homes. For children with a single parent, two parents who work full time, or a child with multiple siblings, the parent is less able to carry out "active mediation" due to time restrictions.<sup>248</sup> For them, it may be easier to restrict access to keep the child safe. This may lead to only a certain class of children being able to confidently use the internet. This has repercussions for online civic engagement which may end up reflecting a limited viewpoint. This would be a missed opportunity considering the way the internet can give a platform to so many marginalised people if they know how to employ it. By the State's facilitatory responsibility, including the provision of education, being shifted onto parents and caregivers, offline inequalities risk being duplicated online.

Conversely, there is a risk of over-supervision by the child's guardian, which can have a rights-infringing effect on a child's online activity. Parental controls, such as monitoring or filtering software, can detrimentally affect a child's right to access information or carry out certain activities online; including exercising their art 15 right to assembly.<sup>249</sup> UNICEF has recognized that protection of a child's privacy, in line with their evolving capacity, is a crucial accompaniment of the right to freedom of expression.<sup>250</sup> While parents and caregivers have a role in facilitating children's engagement with their rights online, they are required to consider an older or more mature child's rights and abilities to make their own decisions before employing such supervisory software over the child's device.<sup>251</sup> A child who feels as though they are being monitored online may restrict themselves in what they search or post.<sup>252</sup> This could lead to a cessation of healthy practices, including seeking

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<sup>247</sup> *Convention on the Rights of the Child* GA Res 4425 (1989), art 4.

<sup>248</sup> Gasser and Cortesi, above n 6, at 26.

<sup>249</sup> United Nations Children's Fund (UNICEF), above n 7, at 60.

<sup>250</sup> United Nations Children's Fund (UNICEF), above n 81, at 7.

<sup>251</sup> At 10.

<sup>252</sup> United Nations Children's Fund (UNICEF), above n 7, at 60.

information or support for topics they are uncomfortable speaking about with their parents.<sup>253</sup> Additionally, a child who shares different political views to their parents or guardian may be able to use the online space to express themselves in ways they could not in person. This could not happen if the child's online activity was under surveillance and they felt that they could be punished for their expressed opinions. While children have the right to be protected, they have numerous other rights which should not necessarily be sacrificed just to ensure their utmost safety.<sup>254</sup>

### ***C Risks Online***

Understanding the risks posed by the internet is incredibly important in defining the state's obligation to protect the child's ability to safely exercise her or his rights. The internet's potential dangers also have implications for capacity assessments and gauging the balance between a child's need for protection and autonomy. Without a full grasp on how a child may be negatively affected in the online environment, parents may be more likely to succumb to moral panics about the dangers of the internet and restrict a child's access.<sup>255</sup> Simultaneously, the state must ensure parents and caregivers are warned against giving children full and unlimited access to the internet before they have the capacity to manage its risks. Under the CRC the state also has a capacity building and educatory duty to the child. Article 3's requirements mean that a state must take active steps to facilitate the child's safety.<sup>256</sup> As so many children are using the internet to realise their rights, the state must respond by ensuring these activities are carried out safely. While the state will be unable to render the entire internet a safe place, a child who is educated on how to use it will be more able to manoeuvre these risks while still receiving its benefits.<sup>257</sup> For the same reasons that an in-person protest may not be prohibited because "absolute safety to persons, or property cannot be guaranteed",<sup>258</sup> children should not be restricted from using the

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<sup>253</sup> At 60.

<sup>254</sup> At 9.

<sup>255</sup> Gasser and Cortesi, above n 6, at 26.

<sup>256</sup> Barnes Macfarlane and Sutherland, above n 132, at 42.

<sup>257</sup> Gasser and Cortesi, above n 6, at 26.

<sup>258</sup> Daniel McGlone "The Right to Protest" (2005) 30(6) *Alternative LJ* 274 at 275.

internet to exercise their rights of freedom of expression and assembly because some degree of risk is involved.<sup>259</sup>

While the internet and digital technologies provide many new opportunities for political engagement and discourse, they also create several more opportunities for children to be harmed when engaged in such activity. There are three main types of risks which a child can be subject to on the internet: inappropriate content, conduct and contact.<sup>260</sup> Inappropriate content refers to material which a child may accidentally access, or seek out and share without fully understanding its implications.<sup>261</sup> It is a fine balance to protect the child from such content while simultaneously preserving their ability to access informational resources, which they are entitled to under art 13.<sup>262</sup>

The second risk online is inappropriate conduct, referring to an individual's use of the internet to harass or exploit others.<sup>263</sup> The articles which empower children's right to protest are limited by the qualifiers that the freedoms they contain must be exercised in a way which respects the rights of others. People engaged in online discussions, especially on political topics, are known to get more aggressive than they would in a face to face conversation.<sup>264</sup> If these discussions get to such a level of abuse they may violate others' rights, as such interaction "may inhibit others from participating freely in this vital new public domain."<sup>265</sup> A child who is active in online protest must understand the scope of permitted behaviour within the rights of the CRC. Education is needed to ensure that children do not use the tools given to them by the internet to inflict harm on others.

The final risk relates to inappropriate contact. This is the typical harm imagined by parents and amplified by the media to create moral panics about the dangers of children on the

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<sup>259</sup> United Nations Children's Fund (UNICEF), above n 7, at 9.

<sup>260</sup> At 42.

<sup>261</sup> At 42.

<sup>262</sup> Dennis, above n 28, at 6.

<sup>263</sup> United Nations Children's Fund (UNICEF), above n 7, at 42.

<sup>264</sup> Crumlish, above n 185, at 13.

<sup>265</sup> Law Commission, above n 182, at 151.

internet.<sup>266</sup> This harm relates to other individuals online seeking out children to exploit their vulnerability, often for sexually motivated purposes.<sup>267</sup> While online child-centred spaces give children opportunities to exercise their rights of expression and assembly, these spaces can also become targets for perpetrators of this harm.<sup>268</sup> Children are more vulnerable to this risk due to their lack of life experience and developing capacities. Resultingly, they are easier to manipulate and may fail to adequately assess the consequences of their actions.<sup>269</sup> Adults can also manipulate and exploit children to push their own political agenda.<sup>270</sup> The Special Rapporteur on assembly has listed these factors as a consideration for states when looking at how to respect and protect a child's right to protest.<sup>271</sup>

There is a very fine balance between protecting children from such targeting and restricting their freedom of assembly and ability to find likeminded individuals and form communities online. In current responses to online threats, a very protective approach is taken, often at the cost of participation, which should also be an important consideration.<sup>272</sup>

There are more abstract consequences to online rights exercise which the child and even the parent may be unable to grasp. These relate to the permanence of internet content. The digital traces of online expression are automatically kept by companies and can be demanded by the state.<sup>273</sup> This perpetuity can lead to self-censorship. Young people interviewed about their reasons for refraining from using social media to express their political views cited the permanence of their shared content.<sup>274</sup> One boy stated that he did not want future friends or employers to view his profile and think of him as “the person

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<sup>266</sup> Gasser and Cortesi, above n 6, at 26.

<sup>267</sup> United Nations Children's Fund (UNICEF), above n 7, at 42.

<sup>268</sup> At 48.

<sup>269</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [15.11].

<sup>270</sup> Daly, above n 1, at 779.

<sup>271</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [15.11].

<sup>272</sup> Lievens and others, above n 121, at 507.

<sup>273</sup> At 496.

<sup>274</sup> Vroeman and others, above n 16, at 524.

that joined that campaign”.<sup>275</sup> Uncertainty about the privacy of the sphere in which one expresses their views may prevent children from posting their political opinions for fear of negative reactions or future repercussions.<sup>276</sup> Compared to attending an in-person protest where one will only be subject to consequences after the day in extraordinary circumstances, involving oneself in online political commentary leaves a lasting imprint on someone's online and potentially offline identity. Significant effort is also needed to attend an in-person protest compared to the ease it takes to share something on social media, yet the consequences of the latter action may be much more long-lasting.

The Council of Europe's *Guide to Human Rights for Internet Users* attempts to mitigate this risk for children, stating that they are entitled to special guidance and protection; which requires content shared by the child or others to be quickly taken down on request if it “could compromise [the child's] dignity, security and privacy or be otherwise detrimental to [the child] or [their] rights now or at a later stage in [their] life.”<sup>277</sup> Although this is an incredibly worthwhile measure, it is ultimately up to the cooperation of large and powerful hosting platforms who are subject to very little oversight. Europe has also begun to develop a “right to be forgotten”, an extension of privacy law which enables individuals to request that the data about them is removed by the sites which control that data.<sup>278</sup> This “right” does not currently exist in New Zealand which instead relies on the general protections under the Privacy Act.<sup>279</sup>

## *VII Preserving a Child's Right to Protest*

Although there are risks associated with a child's use of the internet, total restriction of their access would breach their rights and sacrifice too many benefits. The internet is most

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<sup>275</sup> At 524.

<sup>276</sup> Bouillaine, above n 40, at 209.

<sup>277</sup> *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users*, above n 90, at 5.

<sup>278</sup> Jeffrey Rosen “The Right to be Forgotten” (2011) 64 *Stan L. Rev. Online* 88 at 89.

<sup>279</sup> Joy Liddicoat, Office of the Privacy Commissioner “The Right to be Forgotten” (New Zealand Law Society CyberLaw Conference, Wellington, 5 July 2015).

children's primary source of information and means of expression.<sup>280</sup> We should be highly cautious about excluding them from this tool. Instead, measures should be implemented to facilitate their use of it and ensure they are safe online. Sociologists have acknowledged that the nature of childhood is changing "from an age of innocence and dependence to one of action and participation."<sup>281</sup> This participation should be encouraged and protected by the state. One structure which can be used to do this is the "Respect, Protect and Fulfil" model, a tool adapted by Aoife Daly for the context of a child's right to protest.<sup>282</sup> It recognises the state's multiple and varied duties, both positive and negative, owed to the child as a rights-holder, and enables practical and specific advice to be offered.<sup>283</sup>

### *A      Respect*

Daly describes the range of obligations under "respect" as the prohibition on the state from doing anything which would violate the integrity of the individual's rights or infringe on her or his freedom.<sup>284</sup> Unfortunately, as demonstrated earlier, there are numerous ways in which a state can easily interfere with an individual's rights online. To avoid infringing a child's right to protest, a state must refrain from passing legislation which may have a censoring effect on online activity. This refers to both direct restriction on what an individual may say; and intermediary liability policies for internet platforms. The chilling effect of surveillance also means that states should be very cautious as to what powers they give to the authorities and should ensure surveillance measures are justified and proportionate. Though the involvement of children in protest has increased in the global north, the amount of controversial and violent policing practices, and legislation that empowers such practices, has increased as well.<sup>285</sup> As the internet is currently a safe space for children to engage in civic action without being exposed to these threats, we must closely scrutinise legislation interacting with these rights to ensure that these tactics do not move online.

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<sup>280</sup> Lievens and others, above n 121, at 497.

<sup>281</sup> Alan Prout *The future of childhood* (Routledge, London, 2005) at 7.

<sup>282</sup> Daly, above n 1, at 798.

<sup>283</sup> At 798.

<sup>284</sup> At 798.

<sup>285</sup> At 785.

Another way in which the state can infringe a child's rights is taking an overly protective approach to their safety at the expense of their other rights. In New Zealand, the case of *CYFS* indicated a judicial attitude of assuming a child's capacity. There is a risk that this attitude could be problematically combined with the "demonstrably justified" limitation of BORA rights, to limit the exercise of a child's rights. When assessing a child's capacity, there must be conscious refrain from "imposing a paternalist vision of what would be good for them."<sup>286</sup> As stated by Korczak, one of the earliest advocates for the participation of children: they "should not be deprived of the possibility to gain experiences, even if these experiences sometimes turn out painful and distressing."<sup>287</sup> The focus must be shifted from viewing children as vulnerable individuals in need of protection to treating them as citizens. This would affect the way we assess capacity, and on a broader level how we societally define what is best for the child. Article 13 which "itself is not affected by the fact that children may not have the same capacities as adults", risks being withheld from children through demanding a high standard of their capacity. Because of this imposed threshold, the child may never be able to enjoy that right until adulthood.<sup>288</sup> A child should be entitled to express themselves if they are capable of doing so, regardless of whether they fully comprehend the consequences. It is up to adults to help mitigate these consequences, should they be harmful to the child. This is where notions such as the right to be forgotten can act, to ensure a child's digital footprint is not harmed should they share content which they later regret or did not fully gauge the consequences of. A child's developing capacity is a concept which the state should keep in mind as it makes decisions regarding a child's right to protest online. Whether that is regarding court decisions, strategies to educate parents and caregivers on children's rights, or the drafting of legislation which empowers or restricts the exercise of a child's rights.

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<sup>286</sup> Ang and others, above n 71, at 35.

<sup>287</sup> At 27.

<sup>288</sup> Lievens and others, above n 121, at 494.



## ***B Protect***

The “Protect” limb of obligations demands that the state implements measures which prevent other individuals or groups from violating a child’s rights.<sup>289</sup> In the context of in-person protests, this would generally refer to keeping children involved in demonstrations safe from violence from counter-protestors or police.<sup>290</sup> Online threats to the rights of freedom of expression and assembly are significantly more nuanced but must be equally prevented. While recognising the numerous actors who could detrimentally influence a child’s right to protest online, this paper will focus on two groups who have the most sway on this exercise: parents and caregivers, and social media platforms.

### *1 Parental Interference*

As established by art 5, parents and caregivers have a significant role to play in enabling the child to exercise their rights. Unfortunately, this may result in a cauterisation of the child’s rights where a parent restricts access to the internet, removes a child’s device, or implements overly intrusive supervision.<sup>291</sup> The state must recognise and respond to the fact parents are one of the most likely parties to interfere with a child’s freedom of expression and assembly.<sup>292</sup> This stems from the duties of arts 13 and 15 which confer positive obligations on the state to facilitate the rights they contain.<sup>293</sup> Article 5 gives the child the right to receive appropriate direction and guidance from their parents or legal caregiver, meaning that the state must ensure that the parents and other primary care providers have the requisite capacity to provide appropriate direction and guidance.<sup>294</sup>

The New Zealand Law Commission has found that most internet users are unaware of their entitlements and the boundaries of their rights online.<sup>295</sup> This must be rectified if a parent is to be able to properly guide their child. The education provided by the state should

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<sup>289</sup> Daly, above n 1, at 779.

<sup>290</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [15.11].

<sup>291</sup> Gasser and Cortesi, above n 6, at 26.

<sup>292</sup> Hodgkin and Newell, above n 84, at 179.

<sup>293</sup> At 152.

<sup>294</sup> Kamchedzera, above n 91, at [58].

<sup>295</sup> Law Commission, above n 182, at 174.

include what a child is entitled to do on the internet and how their developing capacity should affect a parent's response. As discussed earlier in this analysis, parents who are internet literate and can educate their children on these skills tend to be well educated and from wealthier backgrounds.<sup>296</sup> Offline societal disadvantages are resultingly translated onto the online sphere, where parents who lack this literacy are unable, either from time or skill constraints, to prepare their children for safe and effective internet usage. The state must be sensitive and responsive to this in the targeting of the education it provides. Access to digital services should not be dependent on parental wealth or education but, as a tool necessary for the modern exercise of one's rights, should be as universal as these rights.

Beyond digital literacy, parents and caregivers must be educated about a child's rights online. In New Zealand, the state has created the website Netsafe, an excellent resource for people to learn how to keep their children safe on the internet. Unfortunately, the primacy accorded to the protection of children online means that these resources have a minimal focus on a child's entitlements using the internet. To facilitate the effective participation of children in society, radical change is needed in the way adults think. Parents and guardians must be reminded that a child's right to use the internet is not something to be charitably bestowed to the child, but a right which they are entitled to.<sup>297</sup> Netsafe was created by the New Zealand Ministry of Justice and Ministry of Education, to contain many educational tools including the "Online Safety Parent Toolkit."<sup>298</sup> This is a hugely valuable and important resource especially in terms of parental digital literacy, discussed in the above paragraph. However, to educate parents about children's rights online this guide could be supplemented with information about how a child's capacity should shape the guidance and direction a parent provides over their online activity.

Additionally, while protection is hugely important, the child also has the right to privacy. While Netsafe advises people with children on implementation of online safety software, it fails to explain the significance of making such a decision. This is concerning given that

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<sup>296</sup> Gasser and Cortesi, above n 6, at 26.

<sup>297</sup> Ang and others, above n 71, at 36.

<sup>298</sup> "Online Safety Parent Toolkit" (April 2020) Netsafe [www.netsafe.org.nz](http://www.netsafe.org.nz).

such software has been found to have an intrusive and harmful effect on a number of children's rights.<sup>299</sup> This resource would be the perfect place for the state to satisfy their obligation in ensuring that children do not refrain from sharing their opinions online due to surveillance or a lack of privacy.<sup>300</sup>

It is also well established that if a state is to protect children from having their rights infringed by others, there must be adequate and accessible reporting mechanisms for the child.<sup>301</sup> Given the significant sway a parent has over the child's internet usage and the potential restrictions they can impose, a child should be able to report this so that the state can respond with appropriate dialogue with the parents and caregivers.<sup>302</sup> This grievance mechanism must be "legitimate, accessible, predictable, equitable, transparent, rights compatible, a source of continuous learning and based on engagement and dialogue."<sup>303</sup> In New Zealand, Netsafe is the current space for the reporting of online incidents and is geared towards young people. It could be easily adapted to accommodate reporting of this kind thus fulfilling the above requirements. The service currently enables reporting of "fraud, privacy breaches, online trading complaints or online harassment, bullying and abuse."<sup>304</sup> The ability to complain of interference with online rights to freedom of expression and assembly could easily be added into this service, and allowing the reporting of actions of schools or online intermediaries like social media companies as well as parents.

## 2 Social Media Companies

As this essay has established, modern freedom of expression and assembly relies on the use of social media platforms for individuals to reach audiences, create dissemination networks and seek out likeminded people.<sup>305</sup> This also means that these social media

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<sup>299</sup> United Nations Children's Fund (UNICEF), above n 7, at 60.

<sup>300</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [13.06].

<sup>301</sup> Lievens and others, above n 121, at 504; Hodgkin and Newell, above n 84, at 178;

<sup>302</sup> Hodgkin and Newell, above n 84, at 178.

<sup>303</sup> United Nations Children's Fund (UNICEF), above n 7, at 8.

<sup>304</sup> "Report" Netsafe [www.netsafe.org.nz](http://www.netsafe.org.nz).

<sup>305</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [2].

companies have the potential to hugely shape the types of content which are disseminated or prohibited.<sup>306</sup> The state must be responsive to this potential infringement on the exercise of rights.<sup>307</sup> While a reporting mechanism as mentioned above would be a beneficial start, active steps from the state such as audits of internet, mobile, and telecommunication companies' policies and practises are also important. Such activities could be modelled from what is carried out by independent auditing services such as Ranking Digital Rights. Alternatively, the state could disseminate or highlight the findings of these accountability organisations.<sup>308</sup> Measures like this would create some degree of transparency for these large companies and would hopefully cause reflection and the minimisation of any rights infringing practices.

Another way in which the state could exercise scrutiny over social media companies or other internet tools is supervising the age limits these platforms impose on their services. Despite the significant effect this has on many children's rights to freedom of expression and freedom of assembly, many internet services impose age limits for their users.<sup>309</sup> For example change.org, one of the world's largest online petitioning sites, with 265 million users, has a minimum age limit of sixteen years old.<sup>310</sup> The website provides no explanation or basis for setting such a threshold, despite interfering with children's right to protest. Scholars have acknowledged that such restriction should be taken very seriously and should be "justified, evidence based and rooted in scientific theory."<sup>311</sup> The state should exercise a degree of supervision over such restrictions to ensure that children are not having their rights arbitrarily interfered with.

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<sup>306</sup> *Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression*, above n 3, at [21]; *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, above n 23, at [11].

<sup>307</sup> *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users*, above n 90, at 4.

<sup>308</sup> United Nations Children's Fund (UNICEF), above n 7, at 12.

<sup>309</sup> Lievens and others, above n 103, at 488.

<sup>310</sup> "Terms of Service" Change.org (28 August 2019) [www.change.org](http://www.change.org).

<sup>311</sup> Lievens and others, above n 103, at 490.

### *C Fulfil*

There is tension between New Zealand's obligations under the CRC and the protections it has installed in place for arts 13 and 15. It has long been acknowledged that merely recognising that "everyone" has the right to do something is insufficient to deal with the vulnerability of children and their position in society.<sup>312</sup> The CRC requires that "constitutional and/or legal protection should further indicate how these rights specifically apply to children, which mechanisms have been established to protect them in an effective manner, and which remedies are provided in case of their violation."<sup>313</sup> No such measures or protections appear to exist in New Zealand. The application of BORA is too general to sufficiently protect a child's rights, and no legislation exists which directly protects a child's, or indeed a person's, rights online.

Implementation of a similar document to the Council of Europe *Guide to Human Rights for Internet Users* in clear and child-friendly language could help meet the state's CRC requirements. That document not only explains the scope of a person's rights of freedom of expression and assembly online.<sup>314</sup> It specifically recognises a child's entitlements to these rights.<sup>315</sup> It also discusses how the state's obligations under art 12 of the CRC operate online.<sup>316</sup> Additionally, by virtue of their age, under this guide children are "entitled to special protection and guidance"<sup>317</sup> including an expectation "to receive information in language appropriate for [their] age and training from teachers, educators and parents or guardians about safe use of the internet."<sup>318</sup> This guide recognises the positive obligations associated with the rights it contains. It focuses on digital education and knowledge, highlighting that only through capacity building "internet users -including, indeed

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<sup>312</sup> Lembrechts, Turkelli, and Vandenhole, above n 11, at [13.03].

<sup>313</sup> Hodgkin and Newell, above n 84, at 178.

<sup>314</sup> *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users*, above n 90, at 4.

<sup>315</sup> At 5.

<sup>316</sup> At 5.

<sup>317</sup> At 5.

<sup>318</sup> At 5.

especially, children- are empowered to understand and exercise their rights and freedoms online.”<sup>319</sup>

Providing children with education is crucial to the state's fulfilment of the child's right to protest.<sup>320</sup> Obviously, a child is unable to exercise a right of which they are unaware.<sup>321</sup> Without understanding the significance of being conferred these rights, a child will not understand the gravity of any infringement. They need to know that expression and assembly are rights they are entitled to, rather than just seeing such exercise as a “mere possibility.” Education is also important to empower a child with digital literacy. Having a greater understanding of how to safely and confidently use the internet, prevents harm and will allow children to navigate the risks they encounter online.<sup>322</sup> The state must take steps to provide this education, rather than shifting this burden onto the child's parents. Not only is doing so a failure to meet the obligations of the CRC, but it also risks exacerbating social inequality in access to participatory tools.

A potential framework which could help guide the state's facilitation of a child's online literacy is the “UBER GEM” model of “knowledgeable and engaged internet citizenry.”<sup>323</sup> A person who fulfils this model's requirements will have the skills to:<sup>324</sup>

- “[U]nderstand what's possible”;
- “[B]eing able to perform the function”;
- “[E]ngaging effectively and efficiently”;
- “[R]ecognising privacy, security and legal issues”;
- “[G]etting assistance”;
- “[E]valuating credibility of material”;
- “[M]anaging material.”

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<sup>319</sup> Lievens and others, above n 103, at 401.

<sup>320</sup> Daly, above n 1, at 795.

<sup>321</sup> Lievens and others, above n 103, at 501.

<sup>322</sup> United Nations Children's Fund (UNICEF), above n 7, at 60.

<sup>323</sup> Joyce, above n 4, at 78.

<sup>324</sup> At 78.

This list of skills could shape the education of children and highlight areas they are lacking. It could also have an interesting application regarding capacity assessments, acting as the standard under which children are deemed capable. Those who meet the skill standards proposed under the UBER GEM model should be entitled to full realisation of their rights online without interference.

While this is not a complete guide to how the state can facilitate a child's right to protest online, it is a base upon which greater structures can be continuously added. Once children are aware of their rights, they can help set the basis of how the state can best facilitate the realisation of these rights. By the government recognising a child's entitlements to politically engage online, an important statement is made acknowledging children as democratic participants. As children are involved in protest irrespective of whether this is recognised by their government, any facilitation of their right to do so is important, no matter how small.<sup>325</sup>

### *VIII Conclusion*

It is not disputed that children are becoming increasingly involved in protest, especially online, but because of their vulnerability this remains controversial.<sup>326</sup> A societal shift in appreciating a child's entitlements under their rights will help mitigate this controversy and will positively affect the perception of children involved in civic action. The Convention on the Rights of the Child provides an incredibly helpful framework under which a child's autonomy and need for protection can be balanced as they seek to exercise their rights. As a greater number of children seek to exercise their rights online more understanding is needed, by both state and parents and guardians, as to how this is done, the risks this involves, and what a child is entitled to do. Only after this understanding is obtained can we carry out the appropriate regulation or facilitation of a child's online activity.

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<sup>325</sup> Daly, above n 1, at 764.

<sup>326</sup> At 764.

The digital environment creates new and exciting opportunities for political engagement. As many events have indicated, movements instigated on social media can have real tangible benefits on a political system. For children who do not have access to many other tools to challenge political activity, the internet is an invaluable resource. However, state intervention is necessary to ensure that access to these opportunities is equitably dispersed to all children regardless of their education opportunities, socioeconomic background, or abilities. The New Zealand Government also must recognise and protect the child's rights to freedom of expression and assembly beyond their mere incorporation of them in the Bill of Rights Act. There are positive obligations which the CRC mandates, which our country has fallen short of carrying out.

There are many threats to the rights of freedom of expression and assembly online even for adult internet users, but more so for children. The magnitude of risks for children does lead to a temptation to restrict the child's internet access. However, taking such an overly protective approach will only cause them harm later and amounts to a significant rights violation. Instead, the state must ensure that the child is safe online and that their rights are protected. This involves scrutiny over the actions of social media companies, of the child's parents or guardians, and of the state themselves. Online civic engagement by children is only going to increase. New Zealand needs to respond to it now; sending an important message to the other signatories of the CRC as to our respect of the child's rights and our recognition of the child as an important participant in our political system.



## *I Bibliography*

### *A Cases*

#### *1 New Zealand*

*Child, Youth and Family Services v Television New Zealand Ltd* [2006] NZAR.

*Moore v Moore* [2015] 2 NZLR 787.

#### *2 United States of America*

*Packingham v North Carolina* 15 US 1194(2017).

### *B Legislation*

#### *1 New Zealand*

Bill of Rights Act 1990.

Care of Children Act 2004.

Human Rights Act 1993.

Oranga Tamariki Act 1989.

#### *2 International*

Chinese Cybersecurity Act 2015.

Anti-Terrorism Act of 2020.

### *C International Material*

*Consideration of reports submitted by States parties under article 44 of the Convention Fifth periodic reports of States parties due in 2015 New Zealand CRC/C/NZL/5 (14 December 2015).*

*Convention on the Rights of the Child GA Res 4425 (1989).*

*General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14 (29 May 2013).*

*General Comment No. 20 (2016) on the implementation on the rights of the child during Adolescence CRC/C/GC/20 (6 December 2016).*

*Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression 35<sup>th</sup> sess, Agenda item 3, A/HRC/32/38 (30 March 2017)*

*Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 45<sup>th</sup> sess, Agenda Item 3, A/HRC/41/41 (17 May 2019).*

#### **D Books and Chapters**

Fiona Ang and others *Participation Right of Children* (Oxford: Intersentia, Antwerpen, 2006).

Lesley-Anne Barnes Macfarlane and Elaine Sutherland *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press, Cambridge, 2016).

Craig Carpenter *Born with a Spirit of Protest: Giving Children a Voice of Importance* (Rowman & Littlefield, Lanham, 2020).

Manuel Castells *Networks of Outrage and Hope: Social Movements in the Internet Age* (2<sup>nd</sup> eds, Wiley, Cambridge, 2015).

Christian Crumlish *The Power of Many: How the Living Web is Transforming Politics, Business, and Everyday Life* (Sybex, San Francisco, 2004).

Aoife Daly *A Commentary on the United Nations Convention on the Rights of the Child, Article 15: The Right to Freedom of Association and to Freedom of Peaceful Assembly* (Martinus Nijhoff Publishers, The Hague, 2016).

James Dennis *Beyond Slacktivism: Political Participation on Social Media* (Palgrave Macmillan, London, 2019).

Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague, 1999).

Urs Gasser and Sandra C. Cortesi *Digitally Connected: Global Perspectives on Youth and Digital Media* (Berkman Center Research Publication, Cambridge, 2015).

Beth Gaze and Melinda Jones *Law, Liberty, and Australian Democracy* (Sydney, Law Book Company, 1990).

Paolo Gerbaudo *Tweets and the streets social media and contemporary activism* (Pluto, London, 2012).

Bronwyn Hayward *Children, Citizenship, and Environment: #SchoolStrikeEdition* (2<sup>nd</sup> eds, Taylor & Francis, London, 2020).

Rachel Hodgkin and Peter Newell *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, New York, 2007).

Mary Joyce *Digital Activism Decoded: The New Mechanics of Change* (international debate education association, New York, 2010).

Gerison Lansdown *Every Child's Right to be Heard: a resource guide on the UN Committee on the Rights of the Child General Comment no. 12* (Save the Children, London, 2011).

Sara Lembrechts, Gamze Erdem Turkelli, and Wouter Vandenhole *Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols* (Edward Elgar Publishing Limited, Cheltenham, 2019).

Eva Lievens and others "Children's Rights and Digital Technology" in Ursula Kilkelly and Ton Liefwaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) 487.

Martha McCaughey and Michael D. Ayers *Cyberactivism: Online Activism in Theory and Practice* (Routledge, New York, 2003).

David Mead *The New Law of Peaceful Protest: Rights and Regulations in the Human Rights Act Era* (Oxford, Portland, 2010).

Aisling Parks *Children and International Human Rights Law: The Right of the Child to be Heard* (Taylor & Francis Ltd, London, 2013).

Alan Prout *The future of childhood* (Routledge, London, 2005).

Garton Sandifolo Kamchedzera *Commentary on the United Nations Convention on the Rights of the Child: Article 5: The Child's Right to Appropriate Direction and Guidance* (Martinus Nijhoff Publishers, Leiden, 2012).

Herdis Thorgeirsdottir *Article 13: the Right to Freedom of Expression* (Martinus Nijhoff Publishers, Leiden, 2006).

J. Uldam and A. Vestergaard *Civil Engagement and Social Media* (Palgrave Macmillan, London, 2015).

United Nations Children's Fund (UNICEF) "Children's Online Privacy and Freedom of Expression: Industry Toolkit" (UNICEF, 2018).

United Nations Children's Fund (UNICEF) *Children's Rights and the Internet: Internet: From Guidelines to Practice* (UNICEF and the Guardian, London, 2016).

Geraldine Van Bueran *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht, 1995).

Sander Vegh "Classifying Forms of Online Activism" in Martha McCaughy and Michael D. Ayers *Cyberactivism: Online Activism in Theory and Practice* (Routledge, New York, 2003) 69.

### ***E Journal Articles***

Farrah Bara *From Memphis with Love: A model to protect protesters in the age of surveillance* (2019) 69(1) *Duke LJ* 197

Shelley Bouillaine "'School Strike for climate': Social Media and the International Youth Protest on Climate Change" (2020) 8(2) *Media and Communications* 208.

Bronagh Byrne and Laura Lundy "Children's rights-based childhood policy: a six-P framework" (2019) 23(3) *Intl J Hum Rts* 357.

Aoife Daly "Assessing Children's Capacity" (2020) 28(3) *Intl J Children's Rights* 471.

Aoife Daly "Demonstrating Positive Obligations: Children's rights and Peaceful Protest in International Law" (2013) 45(4) *the George Washington Intl LR* 763.

Deen Freelon, Charlton McIlwain, and Meredith Clark "Quantifying the Power and Consequences of Social Media Protest" (2018) 20(3) *New Media and Society* 990.

Sylvie Langlaude "On how to Build a Positive Understanding of a Child's Right to Freedom of Expression" (2010) 10(1) *Human Rights LR* 33.

Daniel McGlone "The Right to Protest" (2005) 30(6) *Alternative LJ* 274

Jeffrey Rosen "The Right to be Forgotten" (2011) 64 *Stan L. Rev. Online* 88.

Amanda Thomas, Raven Cretney, and Bronwyn Hayward "Student Strike 4 Climate: Justice, Emergency, and Citizenship" (2019) 75(2) *New Zealand Geographer* 96.

Sebastián Valenzuela, Zeynep Tufekci, and Deen Freelon "Unpacking the Use of Social Media for Protest Behaviour: The Roles of Information, Opinion Expression, and Activism" (2013) 57(7) *American Behavioural Scientist* 920.

Ariadne Vroeman and others "Everyday Making through Facebook Engagement: Young Citizens' Political Interactions in Australia, the United Kingdom and the United States." (2016) 64(3) *Political Studies* 513.

### ***F Newspaper Articles***

Georgia Forrester "Climate change strike: This is why Kiwi kids are 'bunking' school" *Stuff* (14 March 2019) [www.stuff.co.nz](http://www.stuff.co.nz).

Natasha Gillezeau "TikTok accused of Black Lives Matter Hypocrisy" *Australian Financial Review* (7 July 2020) [www.afr.com](http://www.afr.com).

Alex Hern "Revealed: how TikTok censors videos that do not please Beijing" *The Guardian* (25 September 2019) [www.theguardian.com](http://www.theguardian.com).

Rachel Janfaza "TikTok Serves as hub for #blacklivesmatter activism" *CNN* (4 June 2020) [www.edition.cnn.com](http://www.edition.cnn.com).

Rebecca Jennings "TikTok Never Wanted to Be Political: Too Late" *Vox* (22 January 2020) [www.vox.com](http://www.vox.com).

Taylor Lorenz "The Political Pundits of TikTok" *New York Times* (29 April 2020) [www.nytimes.com](http://www.nytimes.com).

Taylor Lorenz, Kellen Browning, and Sheera Frenkel "TikTok Teens & K-Pop Stans Say They Sank Trump Rally" *New York Times* (11 July 2020) [www.nytimes.com](http://www.nytimes.com).

Paul Mozer "TikTok to Withdraw From Hong Kong as Tech Giants Halt Data Requests" *New York Times* (6 July 2020) [www.nytimes.com](http://www.nytimes.com).

Johanna Neeson "The Dangers of TikTok That Are Worth Your Attention" *Readers Digest* (17 August 2020) [www.rd.com](http://www.rd.com).

Grace Shao "Social media has become a battleground in the Hong Kong protests" *CNBC* (15 August 2020) [www.cnn.com](http://www.cnn.com).

Raymond Zhong and Sheera Frenkel "A Third of TikTok's US Users May Be 14 or Under, Raising Safety Questions" *New York Times* (14 August 2020) [www.nytimes.com](http://www.nytimes.com).

“Meet the school students organising New Zealand’s Climate Strikes” *The Spinoff* (30 July 2020) [www.thespinnoff.co.nz](http://www.thespinnoff.co.nz).

### **G Internet Materials**

Electoral Commission “Voter Turnout Statistics for the 2017 General Election” (October 2017) Elections NZ [www.elections.nz](http://www.elections.nz).

Charlie Meyer “On the Dangers of the Meteoric Rise and Ban of Tiktok” *BPN* (23 July 2020) [www.bpntoday.com](http://www.bpntoday.com).

Make It 16 “Home” (July 2019) [www.makeit16.org.nz](http://www.makeit16.org.nz).

Officer of the High Commissioner “Special Rapporteur on the promotion and protection of freedom of opinion and expression” United Nations Human Rights [www.ohchr.org](http://www.ohchr.org).

“Online Safety Parent Toolkit” (April 2020) Netsafe [www.netsafe.org.nz](http://www.netsafe.org.nz).

“Report” Netsafe [www.netsafe.org.nz](http://www.netsafe.org.nz).

Tauranga Strike 4 Climate NZ *Facebook*  
<https://www.facebook.com/events/899178450451029/>

“Terms of Service” Change.org (28 August 2019) [www.change.org](http://www.change.org).

### **H Other Resources**

Joy Liddicoat, Office of the Privacy Commissioner “The Right to be Forgotten” (New Zealand Law Society CyberLaw Conference, Wellington, 5 July 2015).

Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (IP27, 2011).

*Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users* CM/Rec(2014)6 (16 April 2014).

***IX Word count***

The text of this paper (excluding the title page, table of contents, abstract, footnotes, and bibliography) comprises approximately 14,957 words.