

## **Submission to the Children’s Online Privacy Code Issues Paper**

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## Introduction

1. The contributors to this submission are legal academics with expertise in data protection, privacy, artificial intelligence, automated decision making, digital technologies and children's rights. [REDACTED] research is focused on children's rights and privacy in digital environments. [REDACTED] research focuses on data protection, privacy and the regulation of technology. [REDACTED] current research focuses on children, online harms, AI/emerging technologies, children's rights in criminal justice and in immigration law, children and climate action.
2. Children's privacy is central to their lives – it is fundamental to their development, building and maintaining their relationships, and enabling other rights and interests. Regulatory responses to children's privacy need to take a children's right's approach and enable children's participation and agency in digital spaces, while ensuring the appropriate protections are in place to deal with potential harms with these technologies.<sup>1</sup> This includes designing digital environments that are age-appropriate, transparent, and aligned with the evolving capacities of children. Meaningful consultation with children about their digital experiences is also vital to shaping policies and technologies that respect their rights and reflect their lived realities. Without such an approach, regulatory frameworks risk either overprotecting children in ways that restrict their autonomy or under protecting them in ways that expose them to undue risk.
3. We welcome progress on the development of the Children's Online Privacy Code, and in particular the approach the Office of the Australian Information Commission has taken to developing the Code by actively engaging children and young people in the consultation and development process.
4. This submission does not cover all the topics raised by the Issues Paper, but rather makes some specific comments and recommendations in relation to:
  - a. Alignment with the *United Nations Convention on the Rights of the Child* ('CRC')<sup>2</sup>;
  - b. Targeted Advertising;
  - c. Privacy Impact Assessments; and
  - d. Specifying APP edtech entities under the Code.

## Alignment with the UN Convention on the Rights of the Child

5. The original intention of the Code (as noted in the Government Response to the Privacy Act Review), was to build on the underlying proposed new fair and reasonable test and to 'clarify how the best interests of the child should be upheld in the design of online services...'<sup>3</sup>. We note that the Code will be bolstered by the further recommended reforms in the Privacy Act Review Report, which have been identified as being progressed with the next tranche of privacy reforms.<sup>4</sup> It is imperative that these further reforms are passed to ensure the Code meets its intended objectives.

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<sup>1</sup> Lisa Archbold, Damian Clifford, Moira Paterson, Megan Richardson and Normann Witzleb, 'Adtech and Children's Data Rights' (2021) 44(3) *UNSW Law Journal* 857 <https://doi.org/10.53637/PJPS3138>.

<sup>2</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577, UNTS 3 (entered into force 2 September 1990) ('CRC').

<sup>3</sup> Commonwealth of Australia, *Government Response: Privacy Act Review Report* (September 2023) 15 [www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF](http://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF).

<sup>4</sup> Attorney-General's Department, *Privacy Act Review Report* (Commonwealth of Australia, 2022) [www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report\\_0.pdf](http://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf).

6. That said, there is a clear indication that the intention is to take a children’s rights approach to the Code, and accordingly we recommend that the Code, where possible, aligns with children’s rights principles under the CRC and the in-depth guidance provided by the Committee on the Rights of the Child in the *General Comment No. 25 (2021) on Children’s Rights in Relation to the Digital Environment*.<sup>5</sup>
7. Taking a children’s rights approach must include aligning with the guiding principles of the CRC, including their right to be heard, their right to development, acting in accordance their best interests and ensuring that children are afforded their rights without discrimination.<sup>6</sup> In addition, the concept of children’s evolving capacities under article 5 of the CRC is fundamental to how children’s rights frameworks are understood and applied to acknowledge the growing and changing agency of children.
8. While we acknowledge the Code is being developed to comply with the current APPs, embedding these principles in the Code at the outset to the extent possible, will ensure that the Code aligns with international best practice, and ensure the Code is designed with the future proposed changes to the *Privacy Act 1998* (Cth) (*‘Privacy Act’*) in mind.

**Recommendation 1:** We recommend that the Code (both in terms of its development and its substantive principles) place the United Nations Convention on the Rights of the Child at its core, and in particular the guiding principles of children’s right to be heard, their right to development, non-discrimination, and acting in accordance with their best interests.

## Targeted Advertising

9. Children engage frequently with digital environments, and accordingly are exposed to digital advertising practices. In this ecosystem, personal information is said to be essential to the current adtech industry as it ‘enables one of the key features of the open display channel, the targeting of ads to specific consumers.’<sup>7</sup>
10. As Gordon’s 2021 report highlights, children and young people are increasingly aware of how platforms collect and use their data—often without clear consent or explanation.<sup>8</sup> Young people reported that “we’re just agreeing to stuff because we want to get on to that app”, a statement that underscores both the complexity of digital consent mechanisms and the asymmetrical power dynamics at play.<sup>9</sup>

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<sup>5</sup> Committee on the Rights of the Child, *General Comment No 25 (2021) on Children’s Rights in Relation to the Digital Environment*, UN Doc CRC/C/GC/25 (2 March 2021) (*‘General Comment No 25’*).

<sup>6</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577, UNTS 3 (entered into force 2 September 1990) (*‘CRC’*). The four guiding principles of the CRC are the right to be heard (article 12(1)), acting in children’s best interests (article 3(1)), their right to development (article 6(2)), and ensuring that children are afforded their rights without discrimination (article 2).

<sup>7</sup> Australian Competition and Consumer Commission, *Digital Advertising Services Inquiry – Final Report* (August 2021) 24 <[www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf](http://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf)>.

<sup>8</sup> Faith Gordon, *Online Harms Experienced by Children and Young People: ‘Acceptable Use’ and Regulation* (London: Catch22 2021).

<sup>9</sup> *Ibid.*

11. The collection, use and disclosure of information under the Privacy Act for the purpose of targeting and direct marketing has received much attention throughout the Privacy Act Review process, especially as it relates to children. For example, proposal 20.5 recommended the prohibition of direct marketing to a child unless the personal information used for direct marketing was collected directly from the child and the direct marketing is in the child's best interests. Proposal 20.6 recommended prohibiting targeting to a child, with an exception for targeting that is in the child's best interests.
12. These proposals reflect the growing consensus domestically and internationally that there should be restrictions on the ability to profile children using their personal information for advertising purposes. For example, the UN General Comment No 25. takes a strong stance on profiling children for advertising and calls for States parties to prohibit profiling of children for commercial advertising and marketing.<sup>10</sup>
13. As two of the authors of this submission have argued elsewhere previously, profiling for the purpose of targeted advertising to children should be prohibited, unless organisations can demonstrate how it is in line with the best interests of the child.<sup>11</sup>
14. However, even without the specific proposals and changes mentioned above recommended in the Privacy Act Review (while welcome), there is scope for additional requirements embedding children's rights principles in relation to targeted advertising which would not be inconsistent with the current APPs. For example, the Code may consider the following:
  - a. APP 3.2 (a) specifies that an organisation must only collect information that is "reasonably necessary" for one or more of the entity's functions or activities. Under the current APP Guidelines, the "reasonably necessary" test is an objective test and should be determined by whether a reasonable person who is properly informed would agree that the collection is necessary. It is the responsibility of an APP entity to be able to justify that the collection is necessary. We recommend that the Code should develop specifications regarding the "reasonably necessary" test, when applied to collection of children's personal information, with reference to whether it is in the best interest of the child, and other children's rights principles. The Code should specify that it is unlikely to be "reasonably necessary" to collect children's personal information for the purpose of targeted advertising, unless the entity can clearly demonstrate why it is in the best interests of the child.
  - b. APP 3.5 further specifies that collection must be fair. We similarly recommend that the test of fairness under APP 3.5, when it applies to children, should be determined by whether it is in the best interests of the child and other children's rights principles, and the Code should develop criteria along these lines.
  - c. Further, under APP 6, an entity must not use or disclose information for a secondary purpose unless either the individual has consented or an exception applies. One such exception (under 6.2(a)) includes a consideration of whether the individual would "reasonably expect" the APP entity to use or disclose the information for a secondary purpose. We recommend

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<sup>10</sup> *General Comment No. 25 (2021 (n 5) [42]:*

'States parties should prohibit by law the profiling or targeting of children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics, including group or collective data, targeting by association or affinity profiling. Practices that rely on neuromarketing, emotional analytics, immersive advertising and advertising in virtual and augmented reality environments to promote products, applications and services should also be prohibited from engagement directly or indirectly with children.'

<sup>11</sup> Archbold et al (n 1) 876.

that the Code could specify that a “reasonable expectation” under 6.2(a) should again be determined by children’s rights principles. In other words, children have a reasonable expectation that decisions would be made in their best interests, and that the starting position should be that using or disclosing personal information for a secondary purpose of targeted advertising is unlikely to be in their best interests.

- d. Similarly, the concept of “reasonable expectations” is found under APP 7 in relation to direct marketing. We submit that the concept of reasonable expectations here should again be that APP entities will act in accordance with children’s right principles, that children would not reasonably expect their information to be used or disclosed for marketing purposes, unless that APP entity can show that it is in the best interests of the child.

15. Accordingly, given the above and the consensus internationally that children’s personal information should not be used for targeted advertising to children, we recommend that the Code impose additional obligations on APP entities covered by the Code that targeted advertising is prohibited, unless they can clearly demonstrate how and why it is in the best interest of children to do so.

**Recommendation 2:** We recommend that collection, use or disclosure of personal information for targeted advertising to children should be prohibited by the Code, unless the relevant APP entity can clearly demonstrate how and why it is in the best interest of children to do so.

## Privacy Impact Assessments and best practice processes

16. Developing specific baseline protections as outlined above is an important part of regulating data privacy for children, however, equally as important are ensuring there are the systemic processes in place to ensure any risks to those protections are identified and mitigated.
17. Children, or their parents, should not have the sole burden of managing their privacy in an already complex digital ecosystem. Accordingly, we support the objective of privacy by design and embedding good privacy practices into the processes, systems and practices of entities to ensure that privacy risks are proactively managed.
18. For this reason, we would recommend that the Code mandate a range of measures that APP entities covered by the Code must comply with (including for example privacy impact assessments) as measures to identify and mitigate risks and increase transparency of entities activities.
19. We recommend that the Code could look to the Australian Government Agencies Privacy Code 2017 for examples of requirements that would represent best practice, for example having a privacy management plan, privacy officers, review of privacy practices, and conducting privacy impact assessments.
20. At a minimum, we recommend that the Code specifies that privacy impact assessments should be conducted by APP entities covered by the Code in relation to personal information handling practices that have an impact on the privacy of children.
21. In conducting assessments, however, care needs to be taken to ensure that tests for privacy risks are not based on reasonable expectations of privacy which is objectively determined by adults, but by asking what is required to enable the development of children and to ensure that their best interests are upheld. The design of privacy impact assessments conducted in relation to children’s privacy should involve consultation with children and young people.

**Recommendation 3:** We recommend that the Code specifies best practices, procedures and systems which APP entities covered by the Code are required to comply with, and at a minimum this should include that they are required to undertake privacy impact assessments to comply with APP 1. The design of privacy impact assessments conducted in relation to children’s privacy should involve consultation with children and young people.

## Specifying Edtech APP entities to be covered by the Code

22. The burgeoning data driven educational technology (edtech) industry includes software or technologies which collect, use or record personal information about students (including behavioural insights and inferences), or edtech that monitor or subject students to surveillance, such as cameras and recording devices used within schooling.
23. These range from purpose-built edtech (which may be subscribed to by a school or department) to other free applications which may require parents or students to sign up directly.<sup>12</sup> These systems are designed to collect personal data from students, analyse that data, and then ‘identify individuals’ learning needs and steer their learning activities.<sup>13</sup> Australian schools and educators have been increasingly using edtech.
24. Educational technology, or ‘edtech’, poses significant risks to children’s privacy. In 2022, a Human Rights Watch analysis of 164 education technology products found ‘the majority of these online learning platforms put at risk or directly violated children’s privacy and other children’s rights, for purposes unrelated to their education’.<sup>14</sup>
25. Given there is the ability to specify a further class of APP entities in the Code under s26GC(5)(b), we recommend that educational technologies should clearly be specified as being covered by the Code. While it is possible some APP entities which provide educational technologies may potentially already be subject to the Code under the current definition, many may fall outside the scope. Specifying that APP entities which provide educational technologies are bound by the Code is imperative to ensuring children’s privacy is protected in one of the most significant domains of their lives.

**Recommendation 4:** We recommend specifying under section 26GC(5)(b) of the *Privacy Act* that APP entities which provide educational technologies (edtech) likely to be accessed by children are bound by the Code.

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<sup>12</sup> Ellie Rennie et al, ‘Privacy and App Use in Australian Primary Schools: Insights into School-Based Internet Governance’ (2019) 170(1) *Media International Australia* 78, 79.

<sup>13</sup> Priscilla M Regan and Valerie Steeves, ‘Education, Privacy, and Big Data Algorithms: Taking the Persons out of Personalized Learning’ (2019) 24(11) *First Monday* <<https://doi.org/10.5210/fm.v24i11.10094>>.

<sup>14</sup> Hye Jung Han, ‘“How Dare They Peep into My Private Life?”: Children’s Rights Violations by Governments that Endorsed Online Learning During the Covid-19 Pandemic’ (Report, Human Rights Watch, 25 May 2022) 1 <[www.hrw.org/report/2022/05/25/how-dare-they-peep-my-private-life/childrens-rights-violations-governments](https://www.hrw.org/report/2022/05/25/how-dare-they-peep-my-private-life/childrens-rights-violations-governments)>.