

Submission to the consultation on the Draft Children's Online Privacy Code

Submission contributors



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Executive Summary

1. The contributors to this submission are legal academics within the Queensland University of Technology's law school with expertise in privacy, artificial intelligence and automated decision making, digital technologies and children's rights. [REDACTED] research is focused on children's rights and privacy in digital environments. [REDACTED] primary research interests are privacy, information privacy law and the regulation of information security. [REDACTED] research spans privacy law and theory, the regulation of digital platforms and artificial intelligence, and the laws of democracy and electoral politics. The views in this submission are our own, and do not represent those of the Queensland University of Technology.
2. We welcome progress on the development of the Children's Online Privacy Code ('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.
3. We are supportive of the current approach and intention of the draft of the Code. Strengthening children's privacy is essential to ensuring their development, building and maintaining their relationships, and enabling other rights and interests. This includes designing digital environments that are age-appropriate, transparent, and aligned with the evolving capacities of children.
4. We support that the Code takes a children's rights approach to the Australian Privacy Principles ('APPs') by embedding the concept of the best interests of the child in the Code¹ and uplifts the requirement to ensure that APP entities are only collecting, by default, personal information that is strictly necessary for their functions and activities.
5. There is potential for the Code to achieve significant enhancements to the operation of the *Privacy Act 1988* (Cth) (the 'Act') and its role in protecting personal information of children and young people, strengthening privacy practices and ensuring business take more consideration when engaging in practices related to children. For example, we see the benefits of proposed section 9 to not only achieve data minimisation, but also to drive a stronger respect for children as part of internal privacy culture. We also strongly support the right to deletion as part of a broader data minimisation strategy to decrease the amount of children's personal information which is retained by entities.
6. In addition, the application of best interests to core privacy principles including APPs 3, 5, 6 and 7, and the focus on addressing nudging and manipulative practices will seek to address key power imbalances between children and the online platforms and services with which they engage. We also support the additional requirement in relation to conducting PIAs. Ensuring that entities are conducting PIAs and embedding consideration of privacy issues relating to children within their processes, along with ongoing training requirements, will help shift internal capabilities and processes to strengthen protecting children's privacy.
7. In this submission, we have raised some matters for consideration as the drafting of the Code is refined to achieve its intended effect. These include:

¹ 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>.

- a. ensuring that the Code itself refers to the *United Nations Convention on the Rights of the Child* ('CRC'),²
- b. that further consideration is given to the specific wording in draft sections 11, 5, 13 and 14 of the Code to ensure they achieve the intended outcome, and,
- c. that the Code contain a prescribed review requirement, similar to that of the Credit Reporting Code.

Summary of Recommendations

Recommendation 1: The Code explicitly refers to the CRC to ensure that the concept of the “best interests of the child” is interpreted by reference to international law and scholarship on article 3 of the CRC.

Recommendation 2: To ensure the intended effect of draft subsections 11(1) and 11(2) of the Code is achieved, we recommend further consideration is given to the drafting, particularly to clarify the interaction between APP 6.2(a) and APP 6.1.

Recommendation 3: Further consideration is given to the drafting of section 5 of the Code to ensure that APP entities providing a non-essential health service are covered by the Code.

Recommendation 4: Further consideration is given to the drafting of section 13(4) of the Code to ensure it achieves its intended effect.

Recommendation 5: Clarifying changes to sections 14(2) and 14(3) of the Code to ensure it achieves its intended effect.

Recommendation 6: We recommend that there is a prescribed review mechanism within the Code itself, similar to that of the CR Code.

The best interests of the child

8. We support the additional requirements in the Code that the collection, use and disclosure of children’s personal information must be consistent with the best interests of the child to embed children’s rights concepts under the CRC.
9. While we acknowledge the careful consideration and explanation that has been given to this concept in the draft Explanatory Memorandum ('EM'), we would recommend that for clarity the CRC is specifically referred to in the text of the Code itself. For example, this could be by way of a definition of ‘best interests of the child’ in draft section 4 of the Code or an additional section in the Code which clarifies that the intention is to give effect to the CRC. While we acknowledge that the EM can assist in interpretation of the Code, referring to the CRC explicitly in the Code would provide additional certainty and clarity for regulated entities.

Recommendation 1: The Code explicitly refers to the CRC to ensure that the concept of the “best interests of the child” is interpreted by reference to international law and scholarship on article 3 of the CRC.

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

Drafting clarity

Draft section 11 - Use or disclosure of personal information about a child must be consistent with best interests of the child

10. In relation to draft section 11 (use or disclosure of personal information about a child), we broadly support the intention and the proposed additional requirement that the use and disclosure of personal information about a child must be consistent with the best interests of the child. We recommend further consideration is given to the drafting to ensure that the intended effect is achieved.
11. The EM states that the intention of draft subsection 11(1) is that entities will not be able to rely on APP 6.1(b) as a basis for the use and disclosure of a child's personal information. APP 6.1(b) effectively permits an APP entity to use or disclose personal information if one of the exceptions in APP 6.2 and APP 6.3, thereby including the secondary purpose exception in APP 6.2(a). APP 6.2(a) permits use and disclosure for a secondary purpose when the individual would reasonably expect the APP entity use or disclose the information for a secondary purpose, and that secondary purpose is either related to the primary purpose (in the case of personal information) or directly related to the primary purpose (in the case of sensitive information).
12. Draft subsection 11(2) then states that subsection 11(1) does not apply to APPs 6.2(b), (c), (d), (e), 6.3 or 6.7. Therefore, there may be some inconsistency with the intention as stated in the EM and the current wording of section 11 in the Code. To avoid unintended consequences and increase clarity of the section, we recommend that the Code specifically refers to secondary use exception in APP 6.2(a).

Recommendation 2: To ensure the intended effect of draft subsections 11(1) and 11(2) of the Code is achieved, we recommend further consideration is given to the drafting, particularly to clarify the interaction between APP 6.2(a) and APP 6.1.

Draft section 5 - Additional entities bound by the Code

13. We support including entities that are primarily concerned with the activities of children to be bound by the Code under the proposed draft section 5. It is important that the additional obligations under the Code apply not only to entities that are providing services which children are likely to access, but other entities which collect, use and disclose personal information about children.
14. We have some queries about the interaction between the definition of 'health service' under the Act³ and the proposed drafting of section 5. 'Health service' is defined broadly in the Act, and has been interpreted widely to include services such as fitness providers such as gyms, child care centres and private schools.⁴
15. We understand that the legislative intention to exclude health services from the Code was to align with the UK's Age Appropriate Design Code and to ensure that the Code is not a barrier to providing essential services to children.⁵ However, additionally, the Explanatory Memorandum to *the Privacy*

³ *Privacy Act 1988* (Cth) s 6FB.

⁴ Office of the Australian Information Commissioner, *Guide to Health Privacy* (May 2025) 1.

⁵ Explanatory Memorandum, Privacy and Other Legislation Amendment Bill 2024 (Cth) 41.

and Other Legislation Amendment Act 2024 (Cth) makes it clear that ‘more general health, fitness or wellbeing apps or services may be covered by the COP Code.’⁶

16. Accordingly, we agree that it is within the legislative intention to include APP entities listed in draft section 5 such as ‘applications that track early childhood development, family photo sharing applications, online school management systems that monitor student performance and internet-connected baby monitors.’ However, given the potential that these kinds of applications (particularly applications that track early childhood development and baby monitors) could also be health services within the definition of s 6FB of the Act, we recommend that further refinement of draft section 5 to ensure that these kinds of APPs entities are not unintentionally excluded by the operation of subsection 5(c) of the Code.

Recommendation 3: Further consideration is given to the drafting of section 5 of the Code to ensure that APP entities providing a non-essential health service are covered by the Code.

Draft section 13 - Consent given by child or person with parental responsibility

17. We broadly support the intention and purpose behind draft Division 2 in the Code in relation to uplifting the consent requirements.
18. We also support the intention and the need for an exception to parental consent requirements in certain situations where it may be problematic or a child to involve a person with parental responsibility.
19. We recommend that further consideration is given to the current drafting of the exception contained in draft subsection 13(4) to ensure it achieves its intention and does not have any unintended consequences. The EM explains this exception could apply “if a child is seeking legal advice in connection with an issue that the person with parental responsibility caused.” However, a textual interpretation of the draft subsection 13(4) could be read to mean “a child under the age of 15 years may consent... in connection with a person with parental responsibility,” which would be a very different interpretation from the stated intention. It may also be beneficial to further articulate the purpose of the section in the EM, with additional examples of situations where the section may apply.
20. We therefore recommend that the drafting is refined further to make it clear that the intention is that the three aspects to the exception are separate grounds for consideration, for example:
 - a. Legal information; or
 - b. Health-related information; or
 - c. Support in connection with *an issue in relation to* a person with parental responsibility of the child.

Recommendation 4: Further consideration is given to the drafting of section 13(4) of the Code to ensure it achieves its intended effect.

⁶ Ibid 42.

Draft section 14 - Consent must be voluntary

21. We broadly support the position reflected in the current draft of section 14. However, we suggest that further guidance would help avoid uncertainty about the effect of certain common practices on the voluntary nature of consent. In particular:
- a. *Alternative choices*: Current section 14(2)(a) provides that, in determining whether consent is voluntary, an entity must consider “the alternatives open to the individual if the individual does not consent”. As recent decisions regarding ‘pay or consent’ models in the European Union acknowledge, the existence of an alternative service of significantly lower quality or higher fee does not constitute meaningful choice.⁷ With that in mind, the OAIC may wish to consider clarifying that the existence of *equivalent* alternatives, rather mere alternatives, is a positive indicator of voluntary consent.
 - b. *Conditionality*: Current section 14(3)(c) provides that consent is not voluntary if: “unless the information is strictly necessary to provide the entity’s service— the individual will be unable to access the entity’s service unless the individual consents to the collection, use or disclosure of personal information about a child.” Industry interpretations of what is “strictly necessary” may diverge from regulatory expectations. For example, social media platforms have argued that processing personal data for behavioural advertising is necessary to perform contracts for social media services, a view treated sceptically by the European Data Protection Board and the Court of Justice of the European Union.⁸ As such, the OAIC may wish to include non-exhaustive examples of when personal information processing will not be strictly necessary to provide a service to a child, with a particular focus on known and concerning practices.
22. Accordingly, we suggest that clarifying changes to sections 14(2) and 14(3) of the Code would help to avoid interpretations that undermine its intent.

Recommendation 5: Clarifying changes to sections 14(2) and 14(3) of the Code to ensure it achieves its intended effect.

Review of the Code

23. We acknowledge that the Commissioner has the power to review the operation of a registered APP Code;⁹ however, there is no requirement to conduct a review.

⁷ See, eg, *Summary of Commission Decision of 23 April 2025 Relating to a Decision Pursuant to Articles 29(1), Point (a), 30(1), Point (a), and 31(1), Point (h), of Regulation (EU) 2022/1925 (Case DMA.100055 – Meta – Article 5(2)) (Notified under Document Number C(2025) 2091) [2025] OJ C/2025/3466*, 3.

⁸ See European Data Protection Board, *Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects* (8 October 2019), 14-15; *Meta Platforms Inc v Bundeskartellamt* (C-252/21) EU:C:2023:537 (Grand Chamber, 4 July 2023). See also Data Protection Commission (Ireland), *Decision in the matter of TSA, a complainant, concerning a complaint directed against Meta Platforms Ireland Limited (formerly Facebook Ireland Limited) in respect of the Instagram Service*, DPC Inquiry Reference: IN-18-5-7 (31 December 2022).

⁹ *Privacy Act 1998* (Cth) s26W.

24. In contrast, for example, we note that under the Credit Reporting Code (CR Code), there is an additional requirement that the Commissioner initiates an independent review of the CR Code every four years.¹⁰
25. Review mechanisms are important governance mechanisms to ensure that codes are subject to regular review and provides opportunities for affected stakeholders to comment on their experiences. In the case of the Code, given this is a novel area of regulatory activity and given the importance of continued and ongoing consultation with children, we recommend that it is important to include a prescribed regular review mechanism within the Code itself.

Recommendation 6: We recommend that there is a prescribed review mechanism within the Code itself, similar to that of the CR Code.

¹⁰ Paragraph 24.3 of the CR Code.