



Office of the Australian Information Commissioner
Via Email Only

05 June 2026

Submission concerning Exposure Draft of Privacy (Children's Online Privacy) Code 2026

Dear Sir/Madam,

The Free Speech Union of Australia (FSU) welcomes the opportunity to make a submission on the Exposure Draft of the Privacy (Children's Online Privacy) Code 2026 (the Code). We are a non-partisan organization whose focus is on the protection of Free Speech in Australia.

The FSU supports robust privacy protections for children in digital environments. However, this proposal undermines privacy and with this online anonymity for adults, especially in respect of age assurance. **Our specific proposals are highlighted in bold below.**

1. Age assurance: scope, breadth and civil liberties implications

Section 8 of the Code requires entities to take steps "reasonable in the circumstances" to ascertain the age of end-users before collecting personal information. This obligation applies to any social media service, relevant electronic service or designated internet service that is "likely to be accessed by children". That is a materially broader class of services than the (highly controversial) social media minimum age regime under Part 4A of the *Online Safety Act 2021* (Cth), which targets social media services specifically.

The Explanatory Statement confirms that entities wishing to avoid the two-tier consent structure may instead apply all of the Code's child protections to every user regardless of age. The practical effect of this provision is therefore to present entities with a binary: conduct age assurance on all users or treat all users as children. Neither option is without cost. Age assurance entails collection of sensitive data as a precondition to service use. Applying child-level protections universally denies adult users a service calibrated to adult capacity.

The FSU notes that the Explanatory Statement expressly identifies biometric estimation and digital government ID as examples of age assurance methods. These methods carry civil liberties implications that go well beyond the Code's privacy

focus, what is more, the Age Assurance Technology Trial is not adequate evidence (especially given the failure to assess privacy risks).¹

The FSU proposes that Section 8 of the code be removed en-toto. A service can already tell if content likely contains a child (e.g. in photos) from the content itself. Whether the content is posted by a child or an adult is neither here nor there. It follows that this is no more than seeking to include Age Assurance for other reasons, which risks bringing the *Privacy Act 1988* (Cth) into disrepute. If such a provision is genuinely needed, then it should be pursued through a proper democratic process and be provided in primary legislation.

2. The "best interests of the child" standard: indeterminacy and ideological exposure

Sections 10 and 11 of the Code impose a requirement that the collection, use and disclosure of children's personal information be "consistent with the best interests of the child". This standard is drawn from Article 3 of the United Nations Convention on the Rights of the Child. The Explanatory Statement sets out a list of factors relevant to the standard, including "the extent to which the child's ability to develop and express their views and identities may be affected".

The FSU does not oppose child-centred regulatory frameworks. However, the "best interests" standard as defined in the Code is insufficiently constrained. It is not anchored to any medical, scientific or evidence standard. The relevant assessment is left to the entity itself, reviewed by the Commissioner, with no obligation to have regard to peer-reviewed clinical evidence on child development, psychology or health outcomes.

The Family Court of Australia has recognised, in *Re Devin (No 2)* [2025] FedCFamC1F 368 the dangers of a clinical environment in which one view of a contested medical question is treated as settled. The Code's "best interests" standard, as currently drafted, replicates that environment at a regulatory level.

This concern is not abstract. The Explanatory Statement's factor list includes language about identity development that mirrors the affirmation model rather than the evidence-neutral approach endorsed by the Cass Review. If an entity providing information services to children applies a "best interests" assessment using that framework, it may conclude that restricting access to dissenting clinical perspectives is consistent with the standard. That would be a content restriction imposed through a privacy mechanism. To put it another way, this so-called privacy mechanism is just a chilling effect on freedom of expression that also risks undermining real-world child safety for ideological reasons.

¹ See our technical report demonstrating many of the serious issues:
<https://freespeechunion.au/AAATTReview/>. A summary was published in Quadrant:
<https://quadrant.org.au/news-opinions/free-speech/the-pseudoscience-of-age-assurance/>

A PIA regime that operates as a gateway to silence dissenting information is a burden on constitutionally protected communication. We consider that this cannot be justified or sustained and thus this is likely to be unlawful. **At the least, we propose adding a provision that is equivalent to Section 233 of the *Online Safety Act 2021* (Cth) to address this concern.**

3. Privacy impact assessments: scientific neutrality and free speech

Sections 38 and 39 require entities to conduct privacy impact assessments (PIAs) before deploying new services or changing existing ones. The PIA must include, among other things, an assessment of whether handling children's personal information is "consistent with the best interests of the child" including assessment of the risk of harm arising from that handling.

The FSU raises two concerns about this regime:

Value judgments on contested issues. For services that provide access to information on contested questions including questions in gender medicine, public health and child psychology, an entity will be required to assess whether the information it provides is in the best interests of the children who access it. That assessment will not be technically neutral. It will require the entity to take a position on contested scientific and medical questions, or to restrict its services to avoid taking one. Neither outcome is desirable from a free speech perspective, and both outcomes may be contrary to the actual interest of children in accessing a range of perspectives.

The PIA register is required to be published online. This means that an entity's assessment of the best interests implications of its services, including its conclusions about the health or developmental effects of the content it provides, becomes a public document. For entities providing information that dissent from dominant institutional positions, this creates a compliance trap: either endorse the dominant position in the PIA, restrict the service, or publish a document that will be used to argue the service may be harmful.

The implied freedom of political communication protects the free flow of information on matters of public and political concern, as well as preventing compelled speech. Questions of child health policy, gender medicine and the appropriate regulatory framework for children's online environments are all within that protection. A PIA regime that operates as a gateway to silence dissenting information is a burden on constitutionally protected communication. We consider that this cannot be justified or sustained and thus this is likely to be unlawful. **At the least, we propose adding a provision that is equivalent to Section 233 of the *Online Safety Act 2021* (Cth) to address this. We also propose removing the requirement that the PIA register be published online by deleting Section 39(2) of the Code.**

4. Compliance burden and the silencing of smaller platforms

The Code imposes a comprehensive compliance architecture: age assurance, privacy by default, child-appropriate privacy policies, privacy impact assessments, a public PIA register, annual internal reviews, annual staff training, and multi-layered consent obligations with 30-day response windows. In practice, these obligations apply without any de minimis threshold.²

The practical effect is to concentrate the provision of children's digital services among entities with sufficient legal and compliance resources to absorb the burden (given that the small business exemption is unlikely to apply). Large platforms will not find this a burden, being part and parcel of their existing operations. By contrast, independent publishers, community organisations, health information services and specialist educational providers will face barriers to continued operation.

From a free speech perspective, this concentration is not neutral. Large platforms have well-documented tendencies to align with dominant institutional positions on contested questions. Smaller platforms are often the site of dissenting, specialist or emerging perspectives. A compliance architecture that systematically advantages the former over the latter affects the information environment for children as well as adults.

It is also somewhat ironic that Big Tech is favoured by this regime. Realistically, this will discourage Australian startups and shifting them to jurisdictions that have no safeguards whatsoever. This is also the opposite of privacy protection and thus reinforces our concerns about the implied freedom of political communication.

We would propose adding a small organisation exemption to this Code, which applies generally and with a higher income threshold (e.g. \$100 million). This would ensure that only Big Tech is targeted by this and protect Australian innovations (which may include systems designed to protect children).

5. Conclusion

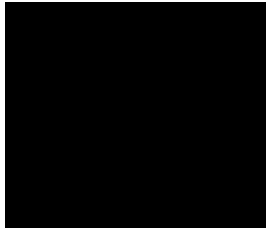
The FSU has no objection to strengthening children's privacy protections online. However, there are specific mechanisms in the Exposure Draft that, as currently drafted, risk producing outcomes that are contrary to children's genuine interests: including by restricting their access to information and silencing smaller and dissenting voices in children's digital environments. We are also concerned these practices risk undermining children's privacy.

² We note the small business exemption in Section 6D of the *Privacy Act 1988* (Cth). However, even a small bulletin board would 'disclose personal information about another individual to anyone else for a benefit, service or advantage' (e.g. via operating a private messaging service). This would presumably even include one being operated by a volunteer organisation.



The FSU is available to discuss any aspect of this submission with the Office of the Australian Information Commissioner and would welcome the opportunity to appear in any further consultation process.

Yours sincerely,



Free Speech Union of Australia