AUSTRALIAN COUNCIL ON CHILDREN AND THE MEDIA

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The Hon Christian Porter
Attorney-General of Australia
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

By email PrivacyActReview@ag.gov.au

Dear Attorney-General

SUBMISSION TO THE REVIEW OF THE *PRIVACY ACT* 1988 BY THE AUSTRALIAN COUNCIL ON CHILDREN AND THE MEDIA (ACCM)

Thank you for the opportunity to provide a submission to the timely and important review into Australian privacy law.

ACCM is the national peak not-for profit body representing the interests of children as media consumers. Its mission is to support families, industry and decision makers in building and maintaining an enjoyable media environment that fosters the health, safety and wellbeing of Australian children. Its membership includes major national and state education, welfare and parent organisations and individuals.

ACCM's core business is to collect and review research and information related to children and the media; to provide information and advice on the impact on children of print, electronic and screen-based media; to provide reviews of current movies and apps from a child development perspective; to advocate for the needs and interests of children in relation to the media; and to conduct and act as a catalyst for relevant research.

The ACCM submission to the Issues Paper is provided with the hope that it will commence further dialogue with the review team concerning the need to explicitly address the special rights and needs of Australian children in relation to privacy law. This submission sets out below both ACCM's broad thematic responses to the Issues Paper, and some direct short-answer responses to the relevant questions raised, as requested.

ACCM's broad thematic responses to Issues Paper

Recognition of the international law on the rights of the child

We are concerned to note that the Issues Paper did not explicitly or adequately acknowledge children as a specific and vulnerable group of persons in relation to privacy law, as has been recognised internationally. The UN Convention on the Rights of the Child, Article 16 provides for a specific right to privacy for children. Children's privacy differs both in scope and application from adults' privacy and as a result, children under 15 should be offered even more robust protection by Australian privacy law. (See generally the body of work produced by Unicef)

Recognition of overwhelming community concern in Australia about privacy of children online

We are concerned that while noting the important findings of the OAIC's 2020 Australian Community Attitudes to Privacy Survey (ACAPS)(at p.14), the Issues Paper omitted to expressly acknowledge children's privacy as a *key theme,* as recognised by the Australian Information Commissioner and Privacy Commissioner Angelene Falk. The privacy of children online must be recognised as a central concern in the Australian community by the current review of privacy law.

ACCM's Key Concerns with Australian privacy law in relation to children

- The 'digital footprint' of children under 15.
  There is a great deal of international research into the importance of ensuring that children are not subject to data practices that enable a 'digital footprint' to be collated on their online life that carries beyond coming of age. To address this, privacy law must regulate what data may be collected, used and disseminated by entities that engage directly with children and also provide for a pro-consumer right to erasure of data. Using the APPs the OIC should develop a specific Code for Children's Right to Privacy that recognises the particular concerns inherent in a system that allows children to develop a permanent digital footprint.

- Reliance on 'consent' provisions for children under 15.
  Children under 15 are not able to consent to disclose information, in spite of a community understanding in Australia that many children from age 13 are regularly independently engaged online. There needs to be further examination into the protections provided for this vulnerable group of children aged 13-15 reflected in privacy law.

- Concern that enforcement of privacy law only responds to, but does not prevent, breaches of privacy.
  There must be explicit dissemination of information to community groups about exemptions to privacy law and transparency about information collected, used and disseminated. While these measures are useful deterrents, most people in the community will not have the means to pursue a direct right of action or a statutory tort but if the relevant information is available they will act to protect their children

from possible further breaches by avoiding entities that are known to be in breach of privacy law. In relation to the NDB Scheme, there should be direct dissemination of information to the community about data security practices of entities. Is important that parents/guardians be informed of cases of breach and issues arising affecting children, both domestic and international. OAIC should develop networks of reporting outcomes to community organisations. For example organisations like ACCM would be willing to assist by disseminating information to the community via networks and notices.

ACCM's direct short responses to relevant questions raised in the Issues Paper

These responses are set out in direct reference to the question numbers provided in the Issues Paper as follows:

1. The Objects of the Act outlined in section 2A should be amended to include a "rights-based" statement reflecting an approach that upholds the right to privacy, consistent with international human rights norms. In particular, the Objects should recognise the Australian government's obligations in relation to children's privacy under the Convention on the Rights of the Child.
3. The definition of personal information must be updated to expressly include inferred personal information, particularly in relation to persons under 15.

4. There should be additional protections ensuring that personal information that has been de-identified is not able to be re-identified and that all personal data must be anonymised, particularly in relation to persons under 15.

5. Where an APP entity supplies products or services to children under 15, triggering notices and consent requirements concerning the collection, use and disclosure of any and all personal information must be strengthened.

7. The small business exemption should not apply to any business that supplies products or services to children under 15. The small business exemption should not apply to the collection, use and disclosure of personal information in relation to a person under 15.

17. The journalism exception must not apply to a breach of the privacy of children under 15. This exception must not apply to any entity that collects, uses or discloses personal information in relation to a person under 15.

20. Notice does not help people understand and manage their personal information – particularly persons under 15 and their parents/guardians.

25. A standardised child-focussed notice system, that serves as the focus of a broad-scale education campaign (like for example the icons used by the Appcensus system), may be appropriate to alert young people and parents to risks of breach of privacy.

26. Generally speaking, consent is not an effective way for people to manage their personal information due to the fact that not everyone can lawfully consent, for example persons under 15 years.

30. There is not adequate information or explanation provided in the Issues Paper as to the intended definition of the term “consent fatigue” in this highly complex context. This is a very real and important issue and there needs to be much more research and analysis into what in fact “consent fatigue” is and what causes this specific phenomenon in diverse groups of people, for example parents of young children.

32. Pro-consumer defaults should be required for all entities that collect, use or disclose personal information relating to children under 15.

33. This question is highly problematic in its phrasing in that entities should not be able to seek consent from children under 13 at all, as they are not able to give consent. From 13-15 there must be specific requirements.

37. The Act does not currently strike the right balance between the use of personal information in relation to direct marketing, particularly in relation to direct marketing to children. The vulnerability of children to direct marketing needs to be acknowledged and fully weighted when redrawing this balance.

38. Entities collecting, using and disclosing personal information in relation to persons under 15 should be required to refresh any consent on a regular basis, with a maximum period of 12 months.

39. Entities collecting, using and disclosing personal information in relation to persons under 15 should be required to expressly provide an option of withdrawing consent.

40. The act or practice of entities collecting, using and disclosing personal information in relation to persons under 15 for the purpose of direct marketing should be prohibited, regardless of consent.

46. A ‘right of erasure’ should be introduced in the Act to allow persons under 15 and their parents/guardians to gain greater control of a child’s ongoing digital footprint, particularly as they transition to post-15 years old. Pro-consumer defaults prompting for erasure processes should be implemented by entities collecting, using and disclosing personal information in relation to persons under 15.

53. The current enforcement framework for interferences with privacy will not work effectively until they are proven to be preventative rather than responsive. There needs to a much stronger incentive on all entities to comply with APPs, and in particular not to collect, use or disclose personal information in relation to persons under 15.

66. The separate privacy protections afforded in the Act, as set out in the Issues Paper, must continue while there are specific privacy risks and concerns in these areas.

67. There is a greater need for harmony of privacy protection under Commonwealth law with all state law provisions in relating to children under 15. This should relate to all types of personal information and all sectors that collect, use and disclose information about children under 15 for example in the context of health, education, state care and criminal justice.

Overall, the submission of ACCM is that an explicit child-focussed, rights-based lens must be applied to the Review into Australian Privacy Law and we trust that this will be reflected in the upcoming Discussion Paper.

We look forward to reading the forthcoming Discussion Paper and to hearing from you in relation to further opportunities to consult on this important issue.

Yours sincerely

Professor Elizabeth Handsley
President