

## Briefing to the Senate Standing Committee on Legal and Constitutional Affairs:

### Privacy and Other Legislation Amendment Bill 2024

The Alannah & Madeline Foundation is grateful for the opportunity to comment on the Privacy and Other Legislation Amendment Bill 2024.

As a leading national not-for-profit charity dedicated to keeping children and young people free from violence and trauma, we have a strong focus on upholding the rights of young Australians in the digital environment.

We are proud to work with the Australian Government to make our eSmart products available for free to all Australian schools, to help empower students to become positive digital citizens. But educating students, while vital, is not enough. Changes to legislation and regulation are also needed.

The Bill represents the 'first tranche' of reforms in response to the review of the Privacy Act 1988. With regard to the items covered by the Bill, we make the following recommendations:

1. As proposed in the Bill, introduce into the Privacy Act a definition of a child as an individual who has not reached 18 years.
2. As proposed in the Bill, make provision for the creation of a Children's Online Privacy Code, to be led by the Office of the Australian Information Commissioner (OAIC).
3. As proposed in the Bill, ensure the Code applies to services 'likely to be accessed by children' – not just services aimed specifically at children.
4. In line with the aims articulated in the Explanatory Memorandum, ensure the Code's parameters have sufficient flexibility that the Code *can*, where appropriate, apply to health services (eg. commercial fitness apps) and to digital products and services which are not social media, relevant electronic or designated internet services. Children's personal information must be protected appropriately in all digital environments.
5. As proposed in the Bill, require that the Code be drafted following a period of public consultation involving the eSafety Commissioner, the Children's Commissioner, child welfare organisations and children themselves.
6. Extend the minimum consultation period beyond the 40 days proposed in the Bill, recognising the logistical difficulties of ensuring meaningful community engagement, especially with children. We suggest a minimum of 60 days would be preferable.



### Much of the digital environment is 'risky by design'

Digital technologies are part of children's everyday lives. By the ages of 10 to 13, more than half of Australian children have their own phones, almost half have gaming accounts, and one-third have social media accounts (to their parents' knowledge).<sup>i</sup> Children use 'edtech' products in school, watch streaming services, wear smart watches, and use smart devices at home.

While these technologies offer many benefits and opportunities, they are accompanied by risks and problems.

The visible concerns of the digital environment include bullying, 'sexting', scams, pornography, misinformation, violent content, and harm to children's attention, relationships and wellbeing. These are the immediate threats which affect Australian families and which have led to a national push for change.

However, public debates often miss the greater part of picture: the issue of personal information and how digital technology providers access and use it.

When children go online, they enter a 'data economy,' where many digital providers make their profits by handling individuals' personal data eg. by collecting highly specific and intimate information about individuals and sharing it with other parties such as advertising companies.

Historically, children and their parents have had almost no real control over the handling of their personal information online. Data-handling is often maximised by default and privacy policies tend to be very difficult for the average adult to understand – plus terms and conditions tend to be presented as 'take it or leave it', negating meaningful choice.<sup>ii</sup>

Moreover, in order to maximise the commercial handling of personal information, many digital providers have developed products which are highly attractive, distracting, provocative and hard to stop using, and which encourage and reward individuals for active engagement eg. for having lots of 'friends' and sharing lots of content.

Heavy user engagement is encouraged through algorithms and recommender systems, predictive analytics and individual profiling, and by design features such as frequent notifications, autoplay, low default privacy settings, weak age-gating for adult products, and the 'infinite scroll'.<sup>iii</sup>

These high-risk features can lead to harmful consequences, such as disruptions to children's concentration, mood and sleep, contact with strangers, and exposure to inappropriate content.

To address these issues, we need to change the design and functioning of digital products. This requires age-appropriate design and 'safety by design', as well as reforming what platforms may do with children's personal information.

### The Privacy and Other Legislation Amendment Bill 2024

We welcomed the arrival of the 'first tranche' of reforms recommended by the review of the Privacy Act 1988 and urge that the reforms proceed promptly.

In particular, we strongly support the Bill's provision for a Children's Online Privacy Code.

A Children's Online Privacy Code – if well designed, enforceable, and appropriately resourced – would provide a strong foundation for change. For example, it could prohibit trading in children's personal information and prohibit direct marketing and targeting to children unless it is in the child's best interests. These approaches were proposed in the report of the Privacy Act review and were agreed to in principle by the Australian Government.<sup>iv</sup>



A Code could also require industry to set children's accounts to 'private' by default, in line with the precedent set by the UK Children's Code, the scope of which was recommended by the Privacy Act review report as a model for Australia.<sup>v</sup>

In their Community Attitudes to Privacy Survey (2023) the OAIC found strong public support for better protections for children's personal information. For example, 89% of Australians felt online tracking, profiling and targeting of advertising to children was not fair and reasonable.<sup>vi</sup>

We were pleased by the Bill's provision that the Code's development would be led by the OAIC, and by the Australian Government's commitment that the Code would be supported by a meaningful investment of \$3 million over three years.<sup>vii</sup>

It is important that Code development, promotion and enforcement is led by this trusted, expert and independent regulator. This is a much more appropriate approach than 'co-regulation' with industry. A regulatory body such as the OAIC, which is accountable to the public, is much better placed than industry to create codes with the highest standards of ethics, privacy and protection for children. Such an approach would align with good practice overseas eg. the highly-regarded UK Children's Code was drafted by their Information Commissioner's Office (ICO) – as well as with the usual Australian approach to children's toys, clothing, schools and services, all of which have safety standards created and overseen by publicly-funded agencies.

The Bill includes a very welcome provision that the Commissioner draft the Code following consultation with children, child welfare organisations, the eSafety Commissioner and the Children's Commissioner. However, we submit that a consultation period of at least 60 days would be preferable to the 40 days specified in the Bill, given the challenges of engaging children meaningfully, especially about a non-traditional subject like privacy.

The Bill specifies the Code will apply to services 'likely to be accessed by children'. We strongly support this approach; a focus merely on child-specific services would have been wholly inadequate. Children access a vast array of digital products and services not marketed as child-specific.

The UK ICO's experience was that many services required guidance about whether they were in scope of their Children's Code.<sup>viii</sup> To this end, we support the Bill's provision that the Commissioner may make written guidelines to assist entities to determine if a service is likely to be in scope.

The Bill indicates that the Code will focus on social media services, relevant electronic services, and designated internet services, with an exemption for health services. These parameters appear to have been adopted in order to align with the Online Safety (Basic Online Safety Expectations) Determination and to ensure that children do not risk losing access to counselling or telehealth – two priorities we support.

However, given these parameters, we stress the importance of maintaining the Bill's other provision: that an entity will also be bound by the Code if 'the entity is an APP entity, or an APP entity in a class of entities, specified in the code for the purposes of this paragraph'. The Australian Government explained that this measure was intended to provide flexibility ie. to ensure that the Code *could*, under some circumstances, apply to a health service or to a service which is not a social media, relevant electronic or designated internet service. For example, the Code may cover 'general health, fitness or wellbeing apps or services'.<sup>ix</sup>

We support the aim of ensuring appropriate flexibility for the Code's parameters. It is vital that the final version of the Bill captures this intent. The Privacy Act review report proposed a code with very broad scope: for 'online services likely to be accessed by children' (a proposal agreed to by the Australian Government).<sup>x</sup> Meanwhile, the UK Children's Code, which the Australian Government aims to align with,<sup>xi</sup> covers a very wide range of digital products and services, including many health, fitness and wellbeing apps.<sup>xii</sup>

The community is only just beginning to realise the many different ways children's rights are threatened online – witness recent revelations about the shocking misuse of children's personal information by 'edtech' providers



and companies training AI tools.<sup>xiii</sup> Appropriate, clear protections must be in place for children's personal information in all digital environments where that information is handled.

Lastly, but importantly, we support the Bill's provision for introducing into the Privacy Act a definition of a child as an individual who has not reached 18 years. This would bring the Act in line with the Online Safety Act 2021 and the U.N. Convention on the Rights of the Child.

This definition is especially important in light of recent efforts by the digital technology industry to restrict minimum mandatory protections to younger age cohorts. For example, the first round of industry codes under the Online Safety Act only required social media companies to provide high privacy settings by default to under-16s.<sup>xiv</sup>

Therefore, it is vital for privacy protection measures to be guided by a clear, enforced definition of childhood as the full period from birth to the age of 18.

The proposed introduction of a Children's Online Privacy Code represents a powerful, positive turning point in how Australia protects the rights of children online. We see this as a once-in-a-generation opportunity to reduce the risks to children in the digital environment, protect them from exploitation of their personal information and other intrusive and manipulative practices, and start to reshape the digital world into a place where children can thrive.

Dr Jessie Mitchell  
Advocacy Manager  
Alannah & Madeline Foundation

Ari Kurzeme  
Director, Policy & Prevention  
Alannah & Madeline Foundation



- <sup>i</sup> Office of the Australian Information Commissioner (OAIC), 'Australian Community Attitudes to Privacy Survey,' 2023, <https://www.oaic.gov.au/engage-with-us/research-and-training-resources/research/australian-community-attitudes-to-privacy-survey>
- <sup>ii</sup> For example, Consumer Policy Research Centre, 'Singled Out: consumer understanding — and misunderstanding — of data broking, data privacy, and what it means for them,' 2024, <https://cprc.org.au/report/singled-out> and 'Not a fair trade: consumer views on how businesses use their data,' 2023, <https://cprc.org.au/report/not-a-fair-trade-consumer-views-on-how-businesses-use-their-data/>
- <sup>iii</sup> See for example 5Rights Foundation, 'Risky By Design', <https://www.riskyby.design/> ; 5Rights Foundation, 'Updated Disrupted Childhood: The cost of persuasive design,' 2023, <https://5rightsfoundation.com/resource/updated-report-disrupted-childhood-the-cost-of-persuasive-design/> ; 5Rights Foundation, 'Pathways: How digital design puts children at risk,' 2021, <https://5rightsfoundation.com/resource/pathways-how-digital-design-puts-children-at-risk/> ; Consumer Policy Research Centre, 'Duped by design: Manipulative online design: Dark patterns in Australia,' 2022, <https://cprc.org.au/dupedbydesign/> ; eSafety, 'Recommender systems and algorithms: position statement,' 2022, <https://www.esafety.gov.au/industry/tech-trends-and-challenges>
- <sup>iv</sup> Australian Government, 'Government Response: Privacy Act Review Report,' 2023, <https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF>
- <sup>v</sup> Australian Government, 'Privacy Act Review Report 2022,' proposal 16.5, <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>
- <sup>vi</sup> OAIC, 'Australian Community Attitudes to Privacy Survey', pp.10, 51
- <sup>vii</sup> Australian Government, Attorney-General's Department, Media Centre, 'Better protection of Australians' privacy,' 12 September 2024, <https://ministers.ag.gov.au/media-centre/better-protection-australians-privacy-12-09-2024>
- <sup>viii</sup> UK Information Commissioner's Office (ICO), 'Children's code evaluation', March 2023, <https://ico.org.uk/media/about-the-ico/documents/childrens-code/4025494/childrens-code-evaluation-report.pdf>
- <sup>ix</sup> Parliament of the Commonwealth of Australia, House of Representatives, 'Privacy and Other Legislation Amendment Bill 2024,' Explanatory Memorandum, pp.41-42 [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r7249](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r7249)
- <sup>x</sup> Australian Government, 'Government Response: Privacy Act Review Report', proposal 16.5
- <sup>xi</sup> Parliament of the Commonwealth of Australia, 'Privacy and Other Legislation Amendment Bill 2024,' Explanatory Memorandum, pp.41-42
- <sup>xii</sup> ICO, 'Services covered by this code,' accessed 2024, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/age-appropriate-design-a-code-of-practice-for-online-services/services-covered-by-this-code/>
- <sup>xiii</sup> Emma Day, Kruakae Pothong, Ayca Atabey, Sonia Livingstone, 'Who controls children's education data? A socio-legal analysis of the UK governance regimes for schools and EdTech', Learning, Media and Technology, December 2022, <https://www.tandfonline.com/doi/full/10.1080/17439884.2022.2152838> ; Digital Futures Commission, 'Problems with data governance in UK schools: the cases of Google Classroom and ClassDojo', 2022, <https://digitalfuturescommission.org.uk/wp-content/uploads/2022/08/Problems-with-data-governance-in-UK-schools.pdf> ; Digital Futures Commission, 'Education Data Reality,' June 2022, <https://digitalfuturescommission.org.uk/wp-content/uploads/2022/06/Education-data-reality-report.pdf> ; Human Rights Watch, 'Australia: Children's Personal Photos Misused to Power AI Tools,' 2 July 2024, <https://www.hrw.org/news/2024/07/03/australia-childrens-personal-photos-misused-power-ai-tools>; Human Rights Watch, ' "How dare they peep into my private life?" Children's Rights Violations by Governments that Endorsed Online Learning During the Covid-19 Pandemic,' 2022, [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/HRW\\_Report\\_Covid19\\_Technology\\_Education\\_Privacy\\_May2022\\_EN.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/HRW_Report_Covid19_Technology_Education_Privacy_May2022_EN.pdf)
- <sup>xiv</sup> Onlinesafety.org.au, 'Industry codes: social media,' reregistered 2023, <https://onlinesafety.org.au/codes/>

