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Proposed Position Paper on Privacy Law Reforms

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A MESSAGE FROM PROFESSOR SUSAN DANBY, CENTRE DIRECTOR

In 2021, the Australian Research Council (ARC) funded a Centre of Excellence devoted to studying and researching 'the digital child'. The focus of this Centre is on very young children from birth to age 8, and describes and examines their everyday lives with and through digital technologies, their learning and their health in the family, and various kinds of kindergarten, childcare and early primary education experiences.

The Centre brings together six universities across Australia, as well as partner investigators from North America, Asia and Europe and a range of public bodies and civil society stakeholders, to focus on a holistic understanding of what it might mean to 'grow up digital' today.

The Digital Child Working Paper Series reports on our work in progress. There are five series of papers aimed at different audiences:

A **'how to'** series offers instructional papers aimed at early career researchers or those new to the principles and practices of structured review.

A **'discussion'** series consisting of discussion papers aimed at the scholarly community, raising larger conceptual challenges faced by researchers at the Centre and drawing on forms of literature review.

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A **'methods and methodologies'** series consisting of digital research capacity building resource-rich discussion papers, offering more technical support for the research community and allied scholarship. These are more focused on methods and methodologies.

A **'policy'** series consisting of more public facing, policy-oriented papers produced for stakeholder engagement.

Each of the working papers has been authored by members of the Centre and has been subject to review as explained in each paper. The arguments in each paper represent the view of the authors.

We hope that readers find each of these papers stimulating and generative and that all sections of society can draw on the insights, arguments and ideas within the papers to create healthy, educated and connected futures for all and every child.

Professor Susan Danby

Director, Centre of Excellence for the Digital Child

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EXECUTIVE SUMMARY

This paper is part of a series consisting of public facing, policy-oriented papers produced for stakeholder engagement. This paper has been checked by the sub-series editorial team to ensure it meets basic standards around clarity of expression and acceptable and inclusive language and content.

The purpose of this paper is to set out some general principles in respect of the privacy law reforms proposed by the Australian Government in 2021. The paper also illustrates how these principles can shape a response to some of the issues raised in the ongoing reform process, where those issues have particular relevance to children.

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Background

In 2019 the Australian Competition and Consumer Commission (ACCC) released its Digital Platforms Inquiry Final Report. In that report the ACCC expressed its view that the *Privacy Act 1988* (Cth) ('Privacy Act') needed to be reformed to increase trust in the digital economy and ensure that "consumers are adequately informed, empowered and protected, as to how their data is being used and collected" (ACCC, 2019, p. 3). In response, the then federal government began a comprehensive review of Australia's privacy laws ('the Privacy Act Review').

At the same time, consultations commenced on a draft online privacy bill, known formally as the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 ('Online Privacy Bill'). The Online Privacy Bill was considered necessary to address the "unique and pressing privacy challenges posed by social media and large online platforms" (Australian Government, 2021, p. 9). It was hoped that the Bill would allow these challenges to be addressed in a shorter timeframe than any broader reforms that might be considered necessary following a more comprehensive review of the Privacy Act.[1]

The current federal government is likely to continue to progress changes to privacy laws[2] and may open up further consultation on the Privacy Act Review and the review of the Online Privacy Bill (collectively, the 'privacy law reforms').

The purpose of this paper is to set out some general principles in respect of the privacy law reforms. We also illustrate how these principles can shape a response to some of the issues raised in the reform process, where those issues have particular relevance to children. While these general principles should inform our position on *all* issues raised in the privacy law reforms that impact on children, this paper does not attempt to set out a position in respect of each issue raised in the reform process.

[1] More detail about the draft bill and submissions made in response to it can be viewed on the Attorney-General's Online Privacy Bill webpage: https://consultations.ag.gov.au/rights-and-protections/online-privacy-bill-exposure-draft.
[2] Note, these are in addition to privacy law changes introduced by the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth). These changes saw increased penalties for repeated or serious breaches of the Privacy Act, and provide greater powers to the Office of the Australian Information Commissioner.

Guiding Principles

The Centre's Strategic Plan 2021-2027 notes that: "At our heart sits the Rights of Children as expressed through the Australian Human Rights Commission" (ARC Centre of Excellence for the Digital Child [Digital Child], 2021a, 5). The Centre's approach to all of our work, including our research and our advocacy, is therefore guided by the rights of the child as set out in the United Nations Convention on the Rights of the Child ('UNCRC') (UNCRC, 1989).

The UNCRC affords children numerous rights through its provisions (or articles). However, there is sometimes tension between different rights which, in practice, require a balance to be struck. For example, laws that aim to *protect* children from harmful online content should not unjustifiably interfere with children's right to access information online, which is an important component of their *participation* in the digital environment (Committee on the Rights of the Child [CRC], 2021).

It is important, also, to bear in mind that the UNCRC is indivisible and its articles interdependent, and that no article of the UNCRC should be considered in isolation (Hodgkin & Newell, 2007). Therefore, although we suggest that the following general principles should guide the Centre's approach to privacy law reforms, these principles must be considered very much within the broader context of children's rights.

1. **Protection *within* the digital environment:** Children should be protected within the digital environment not from it (Information Commissioner's Office [ICO], 2020). In the words of Australia's eSafety Commissioner: "It is imperative that we balance the rights of children to participation, inclusion and privacy with their right to protection and safety in digital environments" (Office of the eSafety Commissioner ['eSafety'], 2021, foreword). This is consistent with eSafety's principles of Safety by Design (n.d.).

2. **Evolving capacities:** Respect for children's evolving capacities is central to achieving the appropriate balance between protection from harm within the digital environment and participation within it. The UNCRC introduces the concept of evolving capacities.[3] Crucially, the concept requires us to recognise that children "progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realised" (CRC, 2005, para. 17). As the CRC has recognised (2021), this process of progressive acquisition of knowledge, competencies and understanding has "particular significance in the digital environment, where children can engage more independently from

[3] CRC, specifically art 5. However, Varadan argues that the concept of evolving capacities has itself evolved, not least through commentary issued by the Committee on the Rights of the Child. Varadan suggests that, as a result, evolving capacities can be understood as an enabling principle, an interpretative principle and a policy principle: Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 306.

supervision by parents and caregivers" (para. 19). However, it is also important to bear in mind that while understanding and therefore competence to make autonomous-decisions generally increases as children age, each child is different, and it is impossible to specify a fixed age at which children are considered competent to make autonomous-decisions (CRC, 2009).

3. **Privacy by Design:** The Privacy Act sets out 13 Australian Privacy Principles ('APPs'). These regulate the collection, use, sharing and security of personal information, and provide individuals with certain other rights (such as the right to access their personal information and correct inaccurate information). The APPs follow a notice and consent model which places the onus on individuals to manage their own personal information. This is sometimes referred to as the theory of privacy self-management (Australian Government, 2021). The idea is that individuals should be notified about an entity's information privacy practices, and in some cases their consent should be sought to the collection or use of their information.[4] Theoretically, this then allows individuals to decide whether or not to deal with a particular entity on its terms. However, in light of the complexity and opacity of many entities' information handling practices and privacy policies, it is unfair and unrealistic, particularly in the case of children and their personal information, to place the onus of managing information privacy entirely upon individuals. Ensuring that privacy considerations are taken into account from the early stages of the design of systems and practices (i.e., a 'privacy by design' approach) should therefore be a key goal of privacy law reform and is especially important in the case of the design of systems and platforms intended for children or likely to be accessed by children.[5] An approach that considers privacy by design in the context of systems and products intended for or likely to be accessed by children, or practices (such as data collection and use) that are likely to affect children, is sometimes referred to as 'age-appropriate design' (ICO, 2020; Californian Age Appropriate Design Code Act 2022), although that term often takes account of factors other than privacy (such as safety).

4. **Involvement of Children:** The UNCRC (art.12) affords to children capable of forming their own views the right to express those views freely in matters concerning them and for those views to be given due weight in accordance with the age and maturity of the child. Children and young people should therefore be involved in privacy law reforms. They should be consulted about the proposed reforms (CRC, 2009, paras. 19 & 73). However, meaningful involvement in the reform process requires more than just giving children a chance to have their say. Children must be facilitated to express their views and these views must be listened to and acted upon, as appropriate (CRC, 2009; Lundy. 2007).

[4] For example, where personal information is 'sensitive' (defined in the Privacy Act s. 6(1)) or where an entity intends to use personal information for a purpose beyond that for which it was collected and is not otherwise permitted by law to use that information: Privacy Act, Sch. 1 (Australian Privacy Principles) APP 6(1).
[5] For more on privacy by design see, eg, Office of the Australian Information Commissioner (n.d.) and Information and Privacy Commission New South Wales (2020).

How these General Principles Might Shape the Centre's Response to Particular Privacy Law Reform Issues

The general principles outlined above should guide the Centre's response to proposed privacy law reforms. Below, we provide an illustration of how these general principles should shape our response to just some of the issues that have arisen from the most recent round of consultation on privacy law reforms.

Consent to the Collection, Use and Disclosure of Personal Information

The APPs require that entities bound by the Privacy Act should gain the consent of an individual before collecting their sensitive personal information and before some uses of personal information (situations which the Office of the Australian Information Commissioner (OAIC) refers to as "higher risk situations" (OAIC, 2021, p. 123)). However, the APPs do not specify an age at which a person is presumed to be able to give consent to the collection or use of their own information. Current guidance from the OAIC provides that where assessment of capacity on an individualised basis is not practicable, organisations can presume that a child of 15 or over has capacity to consent to the collection of their personal information, unless there is reason to suspect otherwise (OAIC, 2019). Conversely, in such circumstances, they can also presume that a child under 15 does not have such capacity.

Some of the privacy law reforms being canvassed would, if enacted, change this position.

1. Under the current draft of the Online Privacy Bill, social media organisations would be required to verify the age of users and obtain the consent of a parent or guardian of a child under 16 years of age before collecting, using or disclosing personal information of the child (Online Privacy Bill, cl 26KC(6)).

2. The Discussion Paper on the Privacy Act ('Discussion Paper') raised the possibility that entities bound by the Privacy Act might be required to seek parental or guardian consent before collecting *any* personal information from a child (rather than requiring consent to be obtained only to the collection of sensitive personal information or before certain uses of information) (Australian Government, 2021). It also recommended that where consent is required, that consent should be sought from a parent or guardian where an individual is under the age of 16 (Australian Government, 2021).

3. The Discussion Paper posed a question as to whether, in situations where an individual's consent is required by virtue of the APPs, entities bound by the Privacy Act should be permitted to assess capacity to consent on an individualised basis where appropriate. The alternative is to fix an age limit (age 16 is recommended in the Discussion Paper) below which consent of a parent or guardian must be obtained (Australian Government, 2021).

In response to these proposals or questions, we should be particularly mindful of the first two of our general principles. That is, children should be protected within the digital environment, not from it, and respect should be accorded for children's developing capacities.

Setting an age under which parental or guardian consent is required before collecting personal information from children, and broadening the situations in which consent is required, can be seen as useful ways to protect children's informational privacy by adding "some friction to a system that currently is relatively easy for children and young people to access" (UNICEF Australia, 2021, p. 3).

However, we must also bear in mind that age limits can interfere with children's participation in the digital environment. As South Australia's Commissioner for Children and Young People observed in her response to the Privacy Act Discussion Paper (2022): "Young people often describe how parental consent requirements can be a barrier to their access to information, support and services, including mental health and sexual health services" (p. 4). Similar concerns have been raised by others (eSafety, 2021, p. 7).

Fixing an age limit under which parent or guardian consent is required, especially if that is relatively high (such as 16, as proposed in the Online Privacy Bill) arguably fails "to allow for flexibility depending on the levels of risk involved and the degree of protection needed" (Landsdown, 2005, p. 50) and therefore may fail to respect children's evolving capacities.

This is even more the case if there is no opportunity for entities to make individualised assessment of an individual's capacity. As Witzleb and Paterson (2020) have remarked:

> a model for individualised assessment of capacity is consistent with the available research on development psychology, which suggests that the age at which children attain maturity may vary significantly between individuals, making the use of bright line approaches based on age for determining capacity problematic (p. 82).

In fact, the eSafety Commissioner has observed that there "has not been an independent evaluation of the capacity of children at various ages to make an informed decision to provide personal data to an online service provider" (eSafety, 2021, p. 7).

Nevertheless, in the online context there is often little opportunity for providers to make an individualised assessment of a child's capacity. Even where an individualised assessment is possible and practicable, there are complexities and risks in making this assessment (Witzleb & Paterson, 2020). For this reason, the current approach to assessing capacity to consent to the collection and use of personal information under the Privacy Act, where consent is required, is dealt with through guidelines issued by the OAIC. These guidelines provide that "if it is not practicable or reasonable for an APP entity to assess the capacity of an individual under 18 on a case-by-case basis, the entity may presume that an individual aged 15 or over has capacity to consent, unless there is something to suggest otherwise" (OAIC, 2019, p. 6). Conversely, an entity may presume in these circumstances that an individual aged under 15 does not have capacity to consent. The guidelines therefore steer a "middle ground between individualised assessment and practicability" (Witzleb & Paterson, 2021, p. 83).

In its General Comment No. 25 on children's rights in relation to the digital environment, the CRC (2021) noted that: "Parents' and caregivers' monitoring of a child's digital activity should be proportionate and in accordance with the child's evolving capacities" (para. 76). A requirement to gain parental or guardian consent to the collection of a child's personal information in *all* situations (not only higher risk situations) could be considered to involve disproportionate monitoring of a child's online activity, particularly if the definition of personal information in the Privacy Act is amended to clarify that it includes technical and inferred personal information, as has been recommended in the Privacy Act Discussion Paper (Australian Government, 2021).

The guiding principles outlined above therefore urge caution in setting any fixed age-limit in law which, while intended to protect privacy, would impact on children's participation in and access to the digital environment. The higher the age limit, and the broader the scope of consent requirements, the greater the impact on children's participation and access. Respect for a child's evolving capacities suggests that a better balance may be struck if a privacy by design approach is adopted in relation to systems and platforms intended for children or likely to be accessed by children. In addition, young people should be provided with the tools to make informed decisions about their own personal information wherever possible (for example, through well-resourced media literacy education (Digital Child, 2021b)). Rather than enshrining fixed age-limits into law, we therefore believe that the current position should be maintained: that is, where individualised assessment of capacity is not practicable, entities may presume that a child at and above a certain age (currently 15) does have capacity to consent to the collection of their personal information (and, where necessary, to its use and disclosure) unless there is reason to suspect otherwise (OAIC, 2019).

Capacity to Exercise Rights under the Privacy Act

The Privacy Act Discussion Paper also suggested that setting a fixed-age limit at which a child is considered to have capacity to consent to the collection of their personal information "would also determine when a child could exercise privacy requests independently of their parents, including access correction, objection or erasure requests" (Australian Government, 2021, Recommendation 13.1).

A justification for setting a fixed-age limit for consent to the collection of personal information is to enhance privacy protection for children. There is no similar justification for setting age limits that restrict access to other privacy rights. This is an example of arbitrarily applying the same age-limit in quite different contexts and is contrary to the concept of evolving capacities which requires us to recognise that children "require varying degrees of protection, participation and opportunity for autonomous decision-making in different contexts and across different areas of decision-making" (Landsdown, 2005, p. ix).

In fact, entities should provide mechanisms that make it easier for children to access these rights. For example, where a child or young person does not wish their personal information to continue to be used or disclosed, organisations should provide the means to facilitate and resolve such requests.

In line with our guiding principles, it is our view that setting an age below which children are presumed not to have capacity to exercise their rights under the Privacy Act independently of their parents should not be supported.

Calls for a Privacy by Design Approach

It is unfair and unrealistic to place the onus of managing information privacy entirely upon individuals. This is particularly the case in relation to children and their personal information. As UNICEF has observed, children are "more vulnerable than adults, and less able to understand the long-term implications of consenting to their data collection" (UNICEF, 2021, p. 4). Moreover, privacy policies are notoriously complex and vague and privacy practices are often opaque, so even adults frequently struggle to access or understand them (ACCC, 2019).

The Online Privacy Bill would see the introduction of an Online Privacy Code (OP Code) which would provide certain protections for children, particularly in relation to their use of social media. It would require social media organisations to ensure that the collection, use and disclosure of a child's information is reasonable in the circumstances and would require the best interests of the child to be the primary consideration in determining what is fair and reasonable (Online Privacy Bill, cl. 26KC(6)).

The best interests principle is a key principle in the interpretation of the UNCRC (Freeman, 2009). The principle itself is set out in the UNCRC and provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (art. 3(1)).

Among other things, the best interests principle can help mediate conflicts between the interests of a particular child and the interests of others. However, as Tobin (2009) has noted, resolution of this conflict does not presuppose a finding that advances the child's interests ahead of others. That is, a child's interests are not paramount, but should be a *primary* consideration. The draft Online Privacy Bill, however, would place a requirement on social media organisations to ensure that the collection, use and disclosure of a child's information is reasonable in the circumstances, and to ensure that the best interests of the child is *the* primary consideration in determining what is fair and reasonable (Online Privacy Bill, cl. 26KC(6)). This goes further than requiring the best interests of the child to be a primary consideration, and arguably places the child's best interests above those of the organisation itself, or of third parties. The requirement is welcome, but we are of the view that the Online Privacy Bill needs to go much further and set out some minimum standards that ensure that any code developed as a result of the Bill is "compatible with the rights of the child" (Digital Child, 2021b, p. 4). In essence, those minimum standards should broadly reflect the standards included in the UK's Age Appropriate Design Code (colloquially known as, and subsequently referred to in this paper as, the 'Children's Code').

The Privacy Act Discussion Paper sought feedback on whether standards in the OP Code should apply more broadly (eg beyond social media organisations), and poses the following question: "Are there other contexts aside from children's use of social media services that pose privacy risks to children, which would

warrant similar privacy protections to those proposed by the OP code?" (Australian Government, 2021, p. 108).

In response, we observe there are indeed other contexts that pose privacy risks. For example, it is well known that EdTech platforms and apps often collect vast amounts of information about children which can interfere with or threaten to interfere with their privacy (Human Rights Watch, 2022). Yet, while some EdTech platforms would be considered 'social media' platforms, within the definition set out in the draft Online Privacy Bill, not all would be.

By contrast, we point to the Children's Code which sets out standards that apply to all information society platforms likely to be accessed by children (ICO, 2020). This includes a broad range of platforms, apps, devices and websites. We suggest that the protections proposed by the OP code (and in fact the broader range of protections we have submitted should be included) should likewise be given broader application. As well, children should be afforded additional rights similar to those enshrined within the EU's General Data Protection Regulation: namely, the right to object to the processing of information, and the right to call for the erasure of personal information (sometimes called the Right to be Forgotten). However, we also note that it is not only online or digital services that pose privacy risks to children. The Irish Data Commission's 'Fundamentals for a Child-Oriented Approach to Data Processing' contain principles and guidance, some of which apply to *all* organisations that process children's data (2021).

We believe that enhanced privacy protection for Australian children should be considered in relation to the collection and processing of children's data by a wide range of entities and in both online and offline contexts. Central to this enhanced protection should be the concept of privacy by design — that is, designing privacy protections into systems and practices from the outset — informed by taking into account children's best interests as a primary consideration or even, in the case of collecting, using and disclosing children's personal information, as *the* primary consideration. However, this enhanced protection must always balance children's rights to protection with their rights to participation.

How these General Principles Might Shape the Centre's response to the Privacy Law Reform Process

We will always advocate that children are consulted on matters that concern them and this includes the privacy law reforms. We have already advocated that children should be consulted in the development of any OP Code introduced pursuant to the Online Privacy Bill. Children should also be consulted on changes to the Privacy Act.

In order for consultation to be meaningful, it may be necessary to provide assistance to some children to enable them to form a view, including through provision of information (Lundy, 2007). The Centre is well-placed to facilitate and support consultation processes with children, and to ensure that children are given the tools to understand and talk about their rights, including their rights to privacy, participation and protection.

Summary

In summary, we have suggested four general principles which should guide the Centre's responses to privacy law reforms:

1. Children should be protected within the digital environment, not from it.
2. There should always be respect for children's evolving capacities.
3. A privacy by design approach should be a key goal of privacy law reform.
4. Children should be involved in the privacy law reform process.

We have illustrated how these guiding principles would shape our responses in relation to some but not all of the issues and questions that have risen thus far in the reform process.

ABOUT THE AUTHORS

Dr Anna Bunn

Anna is a senior lecturer with Curtin Law School, Curtin University and an Associate Investigator with the ARC Centre of Excellence for the Digital Child. Anna has worked with educators and school students to increase understanding of legal rights and issues in relation to the use of technology. She has written on the impact of technology on children's development and their rights, and has analysed some of the regulatory frameworks governing the use of children's data. Coming from a legal background, but having researched children's issues and rights, Anna aims to bring both a legal and a child right's focus to many of the Centre's projects and contribute to demonstrating how adequate regulation of technology is able both to protect and to empower children.

Professor Tama Leaver

Tama is a Professor of Internet Studies at Curtin University, a Chief Investigator with the Centre of Excellence for the Digital Child, and President of the Association of Internet Researchers. He is a recognised expert in online communication and media, with specific research interests in social media, big data, privacy, surveillance and agency, mobile gaming, and the changing landscape of media distribution. As Chief Investigator in the Centre's Connected and Educated Child programs, Tama focusses on the ways data on children are generated, captured, shared, aggregated, analysed and turned into various forms of value. Tama hopes that his work in the Centre raises awareness of the amount of data out there about children and help shape a better environment for responsibly managing that data for everyone, from parents to policymakers.

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