



# Submission on the Review of the *Privacy Act 1988* (Cth)

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Thank you for the opportunity to provide a submission to the Review of the *Privacy Act 1988* (Cth).

As South Australia's Commissioner for Children and Young People, my mandate under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) is to promote and advocate for the rights, interests and wellbeing of all children and young people in South Australia.

Since 2017, I have engaged with thousands of children and young people about issues affecting their lives and what matters most to them.

Children and young people talk about privacy as an important part of how they learn, play, earn and interact with services and systems, including healthcare and the justice and child protection systems.

They discuss issues related to privacy in the context of their relationships with their peers, parents, teachers, health professionals and others across their family, school and social lives.

While young people may not necessarily use the word 'privacy', they focus on the importance of having access to information and having spaces of their 'own' – both physical and digital spaces – where they can feel a sense of belonging and ownership, express themselves and explore their identities free from adult supervision or judgement.

Children and young people often talk about privacy in terms of trust. They want to be able to trust adults, institutions, technology companies, service providers and websites to not take advantage of them and their personal information. They seek support and guidance from adults to inform and empower them to understand and to realise their rights.

*“Educate children and young people on what their rights are, what violations of those rights may look like, while encouraging them to have confidence in their autonomy and in their ability to identify when they feel uncomfortable.” – 18 year old, female*

Their trust – in the adults, institutions and online service providers around them – often depends on the extent to which their own rights are respected. Similar to adults, they want to feel trusted, valued, listened to, and have their rights respected.

However, many young people report feeling that the adults, institutions or services in their lives do not consistently listen to them or respect their perspectives or experiences.

Much of the discussion about children's privacy (including in this Discussion Paper) focuses on protecting children's privacy online, particularly threats from strangers, predators or companies.

Yet children and young people see risks to their privacy coming from both within their own 'sphere' (family members and schools) as well as from outside their 'sphere' (governments and commercial interests).<sup>i</sup>

Some of the most common breaches of children's privacy and trust can come from those who children should be able to trust the most: parents and schools. These are the people and institutions responsible for supporting the healthy development of children, including their growth of independence.

*“When people don't put 'value' into young people, our society, and how we feel, we soon lose faith in them... everyone has a different view onto things and that can change our trust levels.” – 12 year old, female*

## Background and summary of recommendations

The rights of every child as set out in the United Nations Convention on the Rights of the Child (the UNCRC) are universal, inalienable, interrelated and interdependent.

Article 16 of the UNCRC protects children's right to privacy and the right to protection of the law against arbitrary or unlawful interference with their 'privacy, family, home or correspondence'.

The right to privacy is recognised as critical to children's social, emotional, physical development, autonomy and positive participation in society. The right to privacy is also key to realising other fundamental human rights, including the rights to education, health, freedom of expression and participation.<sup>ii</sup>

Although the *Privacy Act 1988* (the Act) protects the privacy of people of all ages, the Act does not specifically address the needs of children. This submission highlights the inadequacy of adult-centred assumptions about privacy and the need for Australia's privacy legislation to adopt a child-centred and rights-based approach to privacy, both online and offline.

I note the draft Online Privacy Bill amendments seek to provide additional protections for children online. I make the following recommendations to ensure the Review of the Act more broadly gives due consideration to the particular rights, needs, wellbeing and interests of children both online and offline:

1. **That the Review adopts a child-centred and rights-based approach that acknowledges the limitations of applying adult-centred conceptions of privacy to children.**
2. **That the Act appropriately balances children's protection and participation rights, particularly in relation to:**
  - a. The proposals regarding prohibited practices or default settings; and
  - b. The proposals regarding consent requirements, including capacity to consent and parental consent requirements.
3. **That the Review consider the potential for the Act to promote and protect children's privacy in all school settings.**
4. **That the Review consider child-specific and child-friendly mechanisms for children to make complaints when their privacy is breached.**

If you would like to discuss anything further, please do not hesitate to contact my office.

Yours sincerely,



**Helen Connolly**  
Commissioner for Children and Young People SA

**1. That the Review adopts a child-centred and rights-based approach that acknowledges the limitations of applying adult-centred conceptions of privacy to children.**

Children growing up today are described as the ‘most watched-over generation in memory’.<sup>iii</sup> This raises many complex questions and issues about a child’s right to privacy.

Despite this, there is a significant lack of understanding and research about children’s perceptions of privacy and their rights, needs and interests related to privacy. Where child-focused research does exist, the findings are rarely reflected in policy and legislation.

Dominant views of privacy treat it as an issue that is primarily relevant to adults. However, applying adult-centred views of privacy to children is problematic because:

- Adult-centred understandings of privacy often focus on divisions between the individual and others, which applies awkwardly (if at all) to children given that children are inherently connected to and dependent on others;
- Children’s experiences, needs and expectations differ from those of adults;
- The experiences, needs and expectations of younger children differ from those of older children and teenagers.

Further, adults tend to treat the online and offline worlds as separate. This is evident in discussions about children’s privacy, which are often primarily confined to online environments. Children and young people, by contrast, view their online and offline lives as inextricably linked; the digital world is simply another place they connect with others and with services, make and create, relax, and share and receive information.

Where applying principles of privacy protection is relatively straightforward for adults, this becomes more complex for children due to their evolving capacities and the State’s obligations to protect children’s best interests as well as the rights of parents in raising their children and freedom of expression.

This highlights the importance of child-centred definitions and approaches to privacy both online and offline that account for children’s views, evolving capacity, and status as rights holders.

**2. That the Act appropriately balances children’s protection and participation rights, particularly in relation to:**

- a. The proposals regarding prohibited practices or default settings; and**
- b. The proposals regarding consent requirements, including capacity to consent and parental consent requirements.**

The “three Ps” that underpin the UNCRC are provision, protection and participation.

When it comes to children’s privacy, particularly in online environments, there is a tendency to conflate children’s vulnerability with risk and disproportionately emphasise protection.

A focus almost exclusively on risks and protection can lead to responses that significantly restrict or monitor children’s behaviour. Such a focus can undermine a child’s right to privacy, but also their rights to freedom of expression and participation, access to information, education, healthcare and justice.

While children’s vulnerability can result in risk, research suggests that risk does not necessarily equate to harm. Rather, navigating some level of risk allows children to develop resilience, skills and independence.<sup>iv</sup>

This office broadly supports the proposed list of factors relevant to the ‘fair and reasonable’ test, including the requirement for entities to consider the ‘best interests of the child’. Such a ‘best interests’ approach should require adults to actively seek children’s views and treat them seriously in line with Article 12 of the UNCRC.

It is important that the Act appropriately protect children’s privacy in a way that does not limit other rights or access to opportunities or benefits either online or offline. This is likely to be particularly important as the Review considers proposals regarding prohibited practices and ‘privacy by default’ settings.

The United Nations General Comment no. 25 on children’s rights in the digital environment highlights the need to balance children’s protection and participation rights as follows:

“The content controls, including parental control tools and school filtering systems, restrictions on the operation of any internet-based, electronic or other information dissemination systems should not be used to restrict children’s access to the digital environment, but only to prevent the flow of harmful material to children. Such controls should balance protection against children’s rights, notably their rights to freedom of expression and privacy.”<sup>v</sup>

This office is concerned about the proposals regarding parental consent requirements. While these requirements depend on parents and carers having their child’s best interests at heart, this is not always the case. 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. Some young people report being simply ‘not ready’ to talk to their parents about certain things while others described their parents as ‘part of the problem’.

The UNCRC Committee has raised concerns about private individuals, particularly parents, violating their children’s right to informational privacy. For many parents, sharing information about their children online and monitoring their children’s behaviour online – sometimes without their child’s knowledge or consent – are standard practices.

While these actions are framed in terms of protection and hallmarks of ‘good parenting’, they can restrict children’s privacy and healthy development of trust and independence.

Further, child protection is not necessarily ‘an automatic trump card’ when dealing with the collection and disclosure of information that interferes with a child’s right to privacy.<sup>vi</sup> Where a child’s level of maturity and understanding is to a level expected of an adult in similar circumstances, there can be ‘no justification for disclosing otherwise confidential information to the parents of a child in the absence of the child’s consent’.<sup>vii</sup>

Rather, need to assess protection-related concerns with evidence rather than assumptions, and take children’s views into account in light of age and maturity. This requires professionals and service providers – whether online or offline - to be clear about their disclosure obligations with children and the extent to which what children share is confidential. This will allow children and young people greater ownership over their information and minimise situations where information, which a child had assumed would be confidential, is disclosed to other persons or authorities.

Evidence suggests parental surveillance increases rather than decreases with age – that is, when young people should be becoming more independent.<sup>viii</sup> It is important that approaches to

consent requirements and parental controls be proportionate to children’s evolving capacity and age, including their priorities, needs and expectations at different stages of development.

Where young children may not consider parental monitoring of their activities as breaches of privacy, teenagers are often concerned about privacy at school and at home, seeking safe spaces to explore ideas and their identities free from adult supervision.

This office also has some reservations about one-size-fits-all approach to age-verification measures. A range of factors beyond a child’s chronological age determine a child’s, including the context, level of maturity and support available. Further, many measures used to verify age are inherently privacy-intrusive, requiring services to collect more information about their users. The Review should therefore take a cautious and evidence-based approach to legislating age-verification measures.

### **3. That the Review consider the potential for the Act to promote and protect children’s privacy in all school settings.**

Schools play a significant role in children’s daily lives, including their experiences of privacy. Researchers have noted that there are often lowered expectations of privacy at school given the responsibility of schools to provide children with a safe environment.<sup>ix</sup>

Yet schools appear to have increasingly become sites of surveillance, with significant implications for student privacy and safety. This Office is concerned that children’s data in education settings is significantly less protected than in other settings, such as health data.

Currently, the Act only covers private schools. In South Australia, a child’s right to privacy at a government school is not legally protected. As such, this office recommends that the Review consider the potential for the Act to promote and protect children’s privacy in all school settings, including government schools.

Such a review may consider the need for consistent policy and guidance across schools and sectors that embed a children’s rights-based approach.<sup>x</sup> This might include more robust privacy impact assessments that encompass:

- Contracts with ‘EdTech’ platforms;
- Selection of web-based learning tools, software or applications;
- Children’s rights to privacy, protection and participation;
- Accountability and responsibility;
- The purpose of data collection;
- Meaningful consent;
- Data minimisation;
- Data transparency; and
- Privacy by design and privacy by default principles.

Education technology companies (commonly referred to as EdTech) collect a significant amount of data about children – including children’s names, home addresses, classroom details, location, behaviour, and learning and engagement ‘scores’ – that may be shared with third parties.

Studies show that schools select applications based on curriculum and financial considerations rather than privacy considerations.<sup>xi</sup> It is difficult for governments to hold EdTech accountable for how they collect, share, store data related to children, and families do not have capacity or power

to challenge a company's privacy arrangement as it is an expected and compulsory part of education.

The increased uptake of EdTech and surveillance software, including in the context of the COVID-19 pandemic, requires attention to ensure that their enjoyment of their right to education does not come at the expense of their right to privacy.

More broadly, young people have raised concerns about seeking help from counsellors in a school environment. When they fear that counsellors will disclose private information to their parents or teachers, this is a barrier to reaching out and accessing the support they need. This is particularly difficult in regional areas, where 'everyone knows everyone' and there are fewer support services available.

Sexually and gender diverse young people (LGBTQI+ young people) describe facing particular barriers to their rights to privacy and safety at school. Some LGBTQI+ young people report being 'publicly outed' by teachers or other staff in schools. They describe how this jeopardises their safety, privacy, and wellbeing, heightening the risk of bullying and harassment from peers and rejection from family. School policy – particularly related to gendered uniforms or bathrooms – often exacerbates this.

Children with incarcerated parents are another group who face challenges in enjoying human rights, including their right to privacy. When this group of children are identified by law enforcement or media, this can lead to stigmatisation, discrimination, with impacts on healthy development of this group of children. This can have particularly negative impacts when schools are not equipped to respond and there is a lack of specific support services.

It is important for teenagers to be able to make decisions regarding their wellbeing and bodies and to safely and privately explore their identity as they mature, whether offline or online. Yet governments, schools, health professionals and parents often interfere with young people's rights to information and bodily autonomy and integrity via:

- Denial of comprehensive relationships and sexual health education;
- Mandatory parental consent or other barriers to access sexual or reproductive healthcare; and
- The criminalisation of consensual sexual activity between peers, including sexting.

This has impacts on many of young people's rights beyond a right to privacy, including rights to education, participation, non-discrimination and best interests.

#### **4. That the Review consider the potential for child-specific and child-friendly mechanisms for children to make complaints when their privacy is breached.**

The right to protection of the law under Article 16(2) of the UNCRC also includes a right to an effective remedy for recognised violations of privacy. The United Nations Committee on the Rights of the Child has recommended states 'establish child-specific and child-friendly mechanisms for children to complain against breaches of their privacy'.<sup>xii</sup>

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- <sup>i</sup> This is discussed further in my Submission to the United Nations Special Rapporteur on Children’s Right to Privacy, dated September 2020. Available at <https://www.ccyp.com.au/wp-content/uploads/2020/10/2020-09-28-Submission-to-the-UN-re-Childs-Right-to-Privacy.pdf>.
- <sup>ii</sup> United Nations Human Rights Council, January 2021. Report of the Special Rapporteur on the right to privacy: Artificial Intelligence and privacy, and Children’s privacy. A/HRC/46/37. Available at <https://undocs.org/A/HRC/46/37>.
- <sup>iii</sup> Gabriels, Katleen. “I keep a close watch on this child of mine’: A Moral Critique of Other-Tracking Apps.” *Ethics and Information Technology* 18, no. 3, 2016, pp. 175-184.
- <sup>iv</sup> Livingstone, S and Stoilova, M. 2021. The 4 Cs: Classifying Online Risk to Children (CO:RE Short Report Series on Key Topics). Available at [https://www.ssoar.info/ssoar/bitstream/handle/document/71817/ssoar-2021-livingstone\\_et\\_al-The\\_4Cs\\_Classifying\\_Online\\_Risk.pdf?sequence=4&isAllowed=y&lnkname=ssoar-2021-livingstone\\_et\\_al-The\\_4Cs\\_Classifying\\_Online\\_Risk.pdf](https://www.ssoar.info/ssoar/bitstream/handle/document/71817/ssoar-2021-livingstone_et_al-The_4Cs_Classifying_Online_Risk.pdf?sequence=4&isAllowed=y&lnkname=ssoar-2021-livingstone_et_al-The_4Cs_Classifying_Online_Risk.pdf).
- <sup>v</sup> United Nations Committee on the Rights of the Child, General Comment No. 25 (2021) on children’s rights in relation to the digital environment. Available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en).
- <sup>vi</sup> John Tobin and Sarah Field, 2019. ‘Art. 16 The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation’, in *The UN Convention on the Rights of the Child: A Commentary*, ed. John Tobin.
- <sup>vii</sup> John Tobin and Sarah Field, 2019. ‘Art. 16 The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation’, in *The UN Convention on the Rights of the Child: A Commentary*, ed. John Tobin.
- <sup>viii</sup> Blecher-Prigat, Ayelet. 2019. “Children’s Right to Privacy”, *The Oxford Handbook of Children and the Law*, p. 373.
- <sup>ix</sup> Blecher-Prigat, Ayelet. 2019. “Children’s Right to Privacy”, *The Oxford Handbook of Children and the Law*, p. 373.
- <sup>x</sup> Lisa Archbold et al. 2021. ‘Children’s Privacy in Lockdown: Intersections between Privacy, Participation and Protection Rights in a Pandemic.’ *Law, Technology and Humans*, volume 3 (1), pp. 18-34. Available at <https://lthj.gut.edu.au/article/download/1803/1078>.
- <sup>xi</sup> United Nations Human Rights Council, January 2021. Report of the Special Rapporteur on the right to privacy: Artificial Intelligence and privacy, and Children’s privacy. A/HRC/46/37. Available at <https://undocs.org/A/HRC/46/37>.
- <sup>xii</sup> John Tobin and Sarah Field, 2019. ‘Art. 16 The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation’, in *The UN Convention on the Rights of the Child: A Commentary*, ed. John Tobin.