

Submission to the Government response to the Privacy Act Review Report

March 2023

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Executive Summary

UNICEF Australia welcomes the opportunity to provide a submission to inform the Government response to the Privacy Act Review Report (the Report).

The digital world was not originally designed for children but it undoubtedly plays a significant role in their lives.ⁱ Being able to connect online provides children valuable opportunities to learn, play and socialise with friends and peers, as well as to access information and support. However, spending time online also comes with risks for children such as being exposed to potentially harmful content or having their personal data compromised or exploited.

UNICEF Australia seeks digital environments that mitigate these risks and contribute to the healthy development and wellbeing of children. As children's lives become increasingly enmeshed with digital technologies, we envision a future in which these advancements are applied in the service of children, their families, and communities.ⁱⁱ

To make this vision a reality, we will need to strengthen the platforms, services, and governance frameworks that constitute and regulate digital environments. The decisions we make now will set the foundation for years to come, therefore as we move to make change in this space, we must carefully consider our choices. We do not want to introduce new risks into the fold and must ensure our decisions promote and not undermine children's healthy development and wellbeing.

The proposals outlined in the Report which relate to children are broadly in keeping with the above and will go some way to realising UNICEF Australia's vision for a digital environment that works for the betterment of all children. We offer our support and additional recommendations across the areas covered by the proposals including defining children and their data, ensuring their best interests are regarded in data collection and use, consent and their evolving capacities, and in the very welcome proposal to develop a Children's Online Privacy Code. UNICEF Australia is eager to work with all involved to turn these ideas into action and realise digital environments that enable every child to thrive.

Summary of Recommendations

1. Setting the scope – children and their data and information

- *We support the proposals to define a child as a person below the age of 18 and expand the definition of data to cover data related to individual, which will better protect and advance children's rights.*

2. Acting in the best interests of children

- *We support the proposals that require children's best interests be regarded when collecting, using or disclosing children's data, and in the context of prohibitions on direct marketing, targeting, and trading of personal information, which will help balance children's rights to be protected with their rights to privacy and information.*

3. Consent and the evolving capacities of children

- *We support the proposals that allow for children to provide consent based on their evolving capacities, and require collection notices and privacy policies to be child-appropriate, which will help children provide informed and freely given consent.*

4. Responsible data governance for children

- *We support the proposal to develop a Children's Online Privacy Code which should broadly advance the rights of Australian children in digital environments.*
- *Incorporate the Responsible Data For Children Principles or similar into the Children's Online Privacy Code, to help realise children's rights by governing their data in the best way possible.*
- *Ensure that a public authority directly accountable to the Australian people is closely involved in the development of the Children's Online Privacy Code, to ensure it meets community expectations.*

Detailed Recommendations

1. Setting the scope – children and their data and information

Data and information is the currency of the online world; by regulating how it is used in Australia, we can take an upstream approach to regulation which then flows down and sets the rules for how platforms are designed, how they operate, and how children interact with them.

Any foray into this regulatory environment naturally begins with the “rules of engagement” – how do we define a child, and how do we define their data and information? In this regard, the proposals¹ in the Report which establish a child as a person under 18 and expand the definition of data to cover data related to an individual are welcome and in keeping with the United Nations Convention on the Rights of the Child (CRC) as well as the Committee on the Rights of the Child’s General Comment 25 (GC25).

The CRC defines a child as a person below the age of 18ⁱⁱⁱ and as the Report notes, doing so allows for the development of child-specific protections and is consistent with comparable domestic and international standards.^{iv} As the Report also notes, children are being increasingly ‘datafied’ with a wealth of personal information collected about them which can be used in ways that affects their autonomy and capacity to freely develop their identity.^v The expanded scope for data to include personal information related to an individual is consistent with GC25’s interpretation of data which includes information about “children’s identities, activities, location, communication, emotions, health and relationships.”^{vi} This expanded scope will bring Australia into closer alignment with the CRC and GC25 and better protect and advance children’s rights.

Recommendation

We support the proposals to define a child as a person below the age of 18 and expand the definition of data to cover data related to individual, which will better protect and advance children’s rights.

2. Acting in the best interests of children

The CRC is the most ratified treaty in the world and its forward-looking principles remain deeply relevant today including for the role that government and industry can play in considering the best interests of children.^{vii} UNICEF Australia believes the CRC’s principles should be reflected in our online governance frameworks to ensure the respect, protection and fulfilment of all children’s rights.

The best interests principle is a dynamic one which always requires an assessment appropriate to the specific context.^{viii} In considering the best interests of children we should ‘have regard for all children’s rights, including their rights to seek, receive and impart information, to be protected from harm and to have their views given due weight, and ensure transparency in the assessment of the best interests of the child and the criteria that have been applied.’^{ix} The Committee on the Rights of the Child’s General Comment 14^x provides an even more detailed examination of the best interests principle and how it should be applied in practice. For industry, in practice this may mean making decisions in relation to children which seemingly clash with the interests of companies, such as not capturing and processing children’s data in ways that are detrimental to them, for example, in persuasive design, behavioural advertising, and biometrics collection.^{xi} Meta has developed a [best interests of the child framework](#) to help apply the principle to their products and experiences.^{xii}

Given this, the Report’s proposal² to require entities to have regard to children’s best interests when evaluating whether data collection, use or disclosure is fair and reasonable, is welcome. It should help in the balancing of children’s rights to be protected and free from harm, with others such as the right to privacy and access to information. The proposals³ to ensure that children’s best interests are also considered in the context of prohibitions on direct marketing, targeting and profiling, and trading of personal information, are also welcome. Techniques designed to influence children’s behaviours carry risk given children’s cognitive capacities and critical thinking skills are still developing.^{xiii} This use of data to influence, when done in harmful ways, affects children’s freedom and agency, and opaque algorithms and non-transparent nudge techniques may limit diversity of experiences and positive developmental opportunities.^{xiv}

¹ Proposals 4.1 and 16.1

² Proposal 16.4

³ Proposals 20.5, 20.6 and 20.7

Recommendation

We support the proposals that require children’s best interests be regarded when collecting, using or disclosing children’s data, and in the context of prohibitions on direct marketing, targeting, and trading of personal information, which will help balance children’s rights to be protected with their rights to privacy and information.

3. Consent and the evolving capacities of children

Another helpful guiding CRC principle is that of the evolving capacities of children, which acknowledges that as children develop and grow, so to do their competencies, and in turn they need less direction and have an increased capacity to make decisions that affect their lives.^{xv} For younger children, this agency is lower, presenting unique challenges when it comes to their online activities, say through parental controls.^{xvi}

Just as children grow and change, so to must our governance frameworks, to ensure they balance the need for legal certainty with the diverse and evolving capacities of children.^{xvii} In this regard, the proposal⁴ relating to children and their capacity to consent in the Report is a welcome one. It allows for the flexibility to conduct individualised assessments of capacity which is in keeping with guidance in GC25.^{xviii} We particularly welcome the exceptions in the proposal which will prevent friction when providing consent for those instances where a frictionless approach is preferred, for example, websites providing crucial mental health support where access for vulnerable children should be as easy as possible.

Following on from this, the proposal⁵ to require that collection notices and privacy policies be clear and understandable for children is also welcome. Children are generally less able to understand the long-term implications of consenting to their data collection, often presented in notices and policies that even adults struggle to comprehend.^{xix} If collection notices and privacy policies are presented in child and age-appropriate formats, this proposal should help realise GC25’s recommendation that children be able to provide informed and freely given consent^{xx}.

Recommendation

We support the proposals that allow for children to provide consent based on their evolving capacities, and require collection notices and privacy policies to be child-appropriate, which will help children provide informed and freely given consent.

4. Responsible data governance for children

Given children’s greater cognitive, emotional, and physical vulnerabilities, privacy concerns that exist for adults are amplified for children.^{xxi} With the digital ecosystem intertwined with every part of a child’s life, it demands a reassessment of how their data is governed.^{xxii}

There is a near global recognition of the need to improve data governance but few reforms have included adequate protection for children and their rights.^{xxiii} Better data governance for children is critical to ensure that children are protected and that their data is used as a force for good for generations to come.^{xxiv} This is why UNICEF Australia and others in the child rights sector have been calling for the creation of a Children’s Online Privacy Code for some time and we very much welcome the proposal⁶ in the Report to do just this. Within the specific initiatives in the proposal, we highlight:

- **the requirement to consult with children, experts and advocates** – this is most welcome as every child under 18 has the right to participate and have their opinions included in decision-making processes that relate to their lives, according to Article 12 of the CRC.^{xxv} Including the voices of children in the development of policy isn’t just the right thing to do, it’s the smart thing to do – policies co-designed with children are better placed to respond to their needs and deliver better outcomes. UNICEF Australia would like to see children be directly consulted in both the development of the Code as well as in any reviews of it and in its ongoing operation;

⁴ Proposal 16.2

⁵ Proposal 16.3

⁶ Proposal 16.5

- **the question of age assurance and verification** – we look forward to the delivery of the eSafety Commission’s report on age assurance to provide guidance in this regard. In principle, UNICEF Australia encourages an approach to age assurance which provides a range of solutions that are accessible, inclusive, and privacy-preserving;⁷
- **the balancing of children’s rights** - balancing children’s right to be protected and free from harm, with others such as the right to privacy and access to information, can be a difficult one.^{xxvi} Parental consent frameworks may be in place to protect children but can at times lead to the overriding of a child’s right to freedom of expression and participation.^{xxvii} However, fundamental to a rights-based approach is an understanding that all rights are interdependent, indivisible, and non-hierarchical.^{xxviii} When balancing children’s rights, children’s voices, the right to non-discrimination, and the best interests and evolving capacities principles, are essential in helping to ensure our decisions promote not undermine them. Embedding these rights in our online governance frameworks will give government and industry alike the tools they need to do so.

Recommendation

We support the proposal to develop a Children’s Online Privacy Code which should broadly advance the rights of Australian children in digital environments.

As the scope of the Children’s Online Privacy Code is determined, incorporating a set of principles for governing children’s data into the Code may help provide guidance, tools and leadership to support the responsible handling of data for and about children. UNICEF in partnership with The GovLab at New York University has developed the Responsible Data For Children (RD4C) Principles which can help do just this. The R4DC Principles are:

1. **PARTICIPATORY** - Engaging and informing individuals and groups affected by the use of data for and about children.
2. **PROFESSIONALLY ACCOUNTABLE** - Operationalizing responsible data practices and principles by establishing institutional processes, roles, and responsibilities.
3. **PEOPLE-CENTRIC** - Ensuring the needs and expectations of children, their caregivers, and their communities are prioritized by actors handling data for and about them.
4. **PREVENTION OF HARMS ACROSS THE DATA LIFE CYCLE** - Establishing end-to-end data responsibility by assessing risks during the collecting, storing, preparing, sharing, analysing, and using stages of the data life cycle.
5. **PROPORTIONAL** - Aligning the breadth of data collection and duration of data retention with the intended purpose.
6. **PROTECTIVE OF CHILDREN’S RIGHTS** - Recognizing the distinct rights and requirements for helping children develop to their full potential.
7. **PURPOSE-DRIVEN** - Identifying and specifying why the data is needed and how the intended or potential benefits relate to improving children’s lives. If there is no clearly articulated benefit for children, actors should not collect data, store, share or analyse it.^{xxix}

The RD4C Principles articulate a vision for a better approach to governing children’s data and should serve as a foundation for embedding similar principles in Australia’s privacy and data governance frameworks. They may aid both in the development of the Children’s Online Privacy Code, and in the implementation of the Code itself.

Recommendation

Incorporate the Responsible Data For Children Principles or similar into the Children’s Online Privacy Code, to help realise children’s rights by governing their data in the best way possible.

There is currently a welcome focus on the impact of digital environments on the lives and children and young people in Australia, and the sheer number of concurrent digital reforms currently in train are evidence of this. These reforms, which stand to have significant impact on the lives of children and young people, are being undertaken using a variety of regulatory methods, some developed primarily by government, and others using co- or self-regulatory methods with industry. In a fast-evolving policy landscape as complex as this, there will likely be both benefit and at times necessity to rely on each of these methods.

⁷ For further detail, see our [submission](#) to the Inquiry into the influence of international digital platforms

However, for those reforms that stand to have significant impact on children and young people, and for which community expectations will be high and need to be met, public authorities directly accountable to the Australian people should be closely involved. This could be the government of the day, or independent bodies such as the eSafety Commission and Information Commission. In taking this approach, we can help ensure that the influential laws, codes and policies governing the online world, reflect the desires of the Australian populace who place a high value on the protection and wellbeing of our children.

Recommendation

Ensure that a public authority directly accountable to the Australian people is closely involved in the development of the Children's Online Privacy Code, to ensure it meets community expectations.

About UNICEF Australia

UNICEF believes in a fair chance for every child and we are the world's leading organisation working to protect and improve the lives of children in over 190 countries. At UNICEF Australia we work to protect and promote children's rights by advocating for the rights of children in Australia and overseas.

UNICEF Australia would welcome the opportunity to expand further on the measures we have outlined in this submission.

ⁱ Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021)

ⁱⁱ UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>

ⁱⁱⁱ *Convention on the Rights of the Child*, opened for signature 20 November 1989, Treaty Series Vol. 1577 (entered into force 2 September 1990)

^{iv} Commonwealth of Australia (2023), *Privacy Act Review Report 2022*, https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf

^v Commonwealth of Australia (2023), *Privacy Act Review Report 2022*, https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf

^{vi} Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021)

^{vii} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.

^{viii} Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021).

^{ix} Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021).

^x Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 62nd sess, CRC/C/GC/14 (29 May 2013).

^{xi} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>

^{xii} Elaine Montgomery and Elaina Koros (2022), *Meta's Best Interests of the Child Framework*, <https://www.ttclabs.net/news/metas-best-interests-of-the-child-framework>

^{xiii} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>

^{xiv} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>

^{xv} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.

^{xvi} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.

^{xvii} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.

^{xviii} Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021)

^{xix} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/media/1771/file/UNICEF%20Global%20Insight%20Data%20Governance%20Summary.pdf>

^{xx} Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021)

^{xxi} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/media/1771/file/UNICEF%20Global%20Insight%20Data%20Governance%20Summary.pdf>

^{xxii} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/media/1771/file/UNICEF%20Global%20Insight%20Data%20Governance%20Summary.pdf>

^{xxiii} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/media/1771/file/UNICEF%20Global%20Insight%20Data%20Governance%20Summary.pdf>

^{xxiv} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/media/1771/file/UNICEF%20Global%20Insight%20Data%20Governance%20Summary.pdf>

^{xxv} *Convention on the Rights of the Child*, opened for signature 20 November 1989, Treaty Series Vol. 1577 (entered into force 2 September 1990) art 12

^{xxvi} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.

^{xxvii} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.

^{xxviii} UNICEF (2021), *The Case for Better Governance of Children's Data: A Manifesto*, <https://www.unicef.org/globalinsight/reports/better-governance-childrens-data-manifesto>.

^{xxix} UNICEF and the GovLab (2023), *Responsible Data For Children Principles*, <https://rd4c.org/principles/>