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Our ref: [KS:PDTIPS]

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By email: [REDACTED]

Dear Dr Popple

**Office of the Australian Information Commissioner (the OAIC) consultation on the
*Privacy (Children's Online Privacy Code) 2026***

Thank you for the opportunity to provide feedback on the Office of the Australian Information Commissioner (the **OAIC**) consultation on the Exposure draft *Privacy (Children's Online Privacy Code) 2026* (the **draft Code**).

This response has been compiled by the QLS Privacy, Data, Technology and Intellectual Property Committee, whose members have substantial expertise in this area.

Key recommendations:

QLS recommends that strengthening the draft Code requires a clear and operable regulatory framework centred on the following priorities:

1. development of structured guidance and tools to support consistent application of the 'best interests of the child' test, as a cohort (i.e. age level) test;
2. a shift toward more prescriptive, safety-based guardrails—particularly in relation to the interaction between the best interests and "strictly necessary" tests;
3. clearer articulation of scope and core concepts, including who is bound, what constitutes personal information of a child, and how consent and capacity operate;
4. targeted safeguards for artificial intelligence, including transparency obligations and a risk-based approach;
5. enhanced individual rights and lifecycle protections, particularly in relation to erasure, set as default and allow for opt-out mechanisms and transition to adulthood; and
6. consideration of the Code's future scope, including the role of small business operators.

Collectively, these reforms are necessary to move from high-level principle to practical, enforceable protections that can be consistently implemented and deliver meaningful outcomes to protect children's online privacy.

Introduction

Privacy Commissioner Carly Kind recently observed that an estimated 72 million pieces of data will have been collected about children by the time they turn 13.

QLS welcomes the OAIC's progress towards registration of a Children's Online Privacy Code to strengthen privacy protections for children online.

However, our members have expressed reservation with the extent to which the draft Code sufficiently clarifies obligations for private entities who will be bound by Code requirements. Without a clear regulatory framework, determining best interests of the child will, for many organisations, be a nebulous concept.

Further, the risks of a fundamental tension between the best interests of the child and commercial interests and in certain circumstances between parent/carer and child interests, also necessitates a plainly articulated regulatory approach.

We strongly support further development of a clear framework to enhance implementation of the draft Code so organisations can operationalise its requirements in practice.

Such a framework should be informed by relevant legal, academic, technical expertise and the views of children and young people with the best interests test underlying this process. It would also mitigate the real risk associated with ambiguity in the draft Code in respect of organisational level decision-making regarding the best interests test.

We recommend the OAIC continue to work with stakeholders including the Law Council and constituent bodies to develop a governance model which identifies children as requiring particular protection with regard to their personal information as a group.

Recognising that children are not a homogenous group, vulnerabilities of certain groups and diverse needs could be reflected in such a framework alongside recognition of the particular service being provided, such as a health or charitable purpose, where the best interests test would similarly need to align with the cohort of service users.

Our members are firmly of the view that it would be of considerable assistance for the OAIC to develop such a framework.

If the OAIC is not minded to revise its proposed approach, we strongly recommend concurrent regulatory guidance to assist entities in embedding the Code requirements into the design, development, and management of online services.

Our submission addresses the complexity associated with the best interests test (as applicable under the draft Code), and the need for further clarification to be provided on key concepts below.

Best interests test

The requirement to act consistently with the 'best interests of the child' is an obligation assumed by governments under the United Nations Convention on the Rights of the Child.

The QLS submission in response to the Children's Online Privacy Code: Issues Paper, expressed support for best interest as a primary consideration of online services designed and developed for (and likely to be accessed by) children but suggested that a clear framework was necessary so the best interests test could be applied in business decision-making.

Internationally, businesses (including large corporate entities) are increasingly grappling with child rights risk assessments.¹ We echo commentary regarding the lack of guidance on how organisations can and should assess the full spectrum of child rights in the digital environment.²

As part of its Children's Best Interests in a Digital World Project, UNICEF's working paper identified that "while upholding the best interests of the child principle is increasingly found in policies and regulations in relation to the digital environment, there is little guidance on how to implement this in practice".³

In April 2026, UNICEF published its 'Children's Best Interests in Digital Policy and Practice' report with key recommendations including:

Governments should retain primary responsibility for assessing, determining and upholding the Principle through legislation, regulatory guidance, oversight and enforcement mechanisms. They should establish – or assign responsibility to existing – oversight or regulatory bodies to assess and determine children's best interests, offering a framework for how to do this...

*Technology companies should align their practices with applicable guidance and legal standards rather than defining the Principle unilaterally...*⁴

Unlike judicial decision-making or decisions of government agencies, it is not realistic to ask businesses to make a decision about what is in the best interests of a child (or children generally). The inherent difficulty in doing so is highlighted by clauses 11(3) and 11(4) of the draft Code, which permit the use and disclosure of a child's personal information (in the case of clause 11(4), including sensitive information), for the purpose of 'direct marketing'.

Privacy compliance should instead be approached more akin to product safety, with clear guardrails, rather than leaving it to corporations to decide what is in the best interests of their consumers and particularly children.

If the OAIC's approach is to be adopted, clearer guidance is needed as to what the 'best interests of the child' means in this context, rather than leaving commercial providers to draw their own conclusions. This should encompass additional guidance within the draft Code including examples as well as resources and assessments tools.

International learnings remain a critical element of effectively regulating the digital environment. We note for example the UK Code does at least provide this kind of additional detail and, unlike

¹ <https://www.digital-futures-for-children.net/digitalfutures-assets/digitalfutures-documents/Best-Interests-of-the-Child-FINAL.pdf>.

² [Child Rights Impact Assessments in Relation to the Digital Environment.pdf](#) at p 4. A child rights audit of GenAI in EdTech: Learning from five UK case studies, <[here](#)>;

³ [The evolving digital landscape and best interests of the child | Office of Strategy and Evidence Innocenti](#).

⁴ [UNICEF-Innocenti-Children's-Best-Interests-Digital-Policy-Practice-report-2026.pdf](#) at p 70.

the draft Code, states that the best interests of the child should be a 'primary consideration'.⁵ We reiterate our recommendation that the OAIC should publish its assessment of learnings from the UK, particularly in the context of recent UK legislative changes aimed at requiring online services to consider children's needs when determining how their personal information is used.⁶

Considerations similar to the above regarding the best interests of the child test should be addressed regarding the draft Code's clause 9 "strictly necessary" test as the required default for an entity's technical and organisational measures concerning the collection, use and disclosure of personal information about a child.

Artificial intelligence

QLS has previously outlined that artificial intelligence (AI) and data brokering within educational technology (**EdTech**) for example and other online service platforms presents additional risks for children.

By way of example, recent analysis of GenAI and EdTech identified a lack of transparency as a critical issue for children's rights in educational settings.⁷ It is unworkable for schools and families to navigate these technologies without a clear child-rights respecting framework, to which technology providers are accountable, and schools and children/families have effective choice, and can make informed decisions and provide meaningful consent.⁸

QLS recommends that the OAIC consider adopting similar risk-based responses to address the potential harms children may face when using these technologies.

In addition, we suggest an additional disclosure requirement in the draft Code with respect to the use of personal information of a child in connection with (including to train) artificial intelligence models, whether or not such personal information use could be expected to significantly affect the rights or interests of the child.

Transitional elements

Another key aspect of the proposed reform is that once children turn 18 years of age, the previous protections which existed, under the draft Code no longer apply. From a policy perspective it would be useful to consider the appropriateness of retaining transitional elements for this cohort, for example, with respect to withdrawing previously provided consent and rights to erasure where personal information was provided when the child was under 15.

Consultation with young people is a critical element of ensuring transitional provisions are appropriate and responsive to evolving views and needs as children mature.

Code elements which require further clarity or guidance

Our members with expertise in this area have broadly suggested that further clarification is needed from the OAIC on fundamental draft Code concepts.

⁵ <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/1-best-interests-of-the-child/>.

⁶ [What should our general approach be to handling children's personal information? | ICO](#).

⁷ A child rights audit of GenAI in EdTech: Learning from five UK case studies, August 2025.

⁸ A child rights audit of GenAI in EdTech: Learning from five UK case studies, August 2025.

Extra-territorial application

The extra-territorial operation of the *Privacy Act 1988* (Cth) (**Privacy Act**), in section 5B, focuses on the information recipient rather than the relevant individual.

Some committee members suggest that collection, use and disclosure of a child's personal information by an organisation should be prohibited if the organisation:

- does not have an Australian link under the criteria of ss 5B(2) or 5B(3) of the Privacy Act;
- collects, uses, holds or discloses a child's personal information in circumstances where it knows or should reasonably know that the child is located in Australia; and
- is not legally bound by laws which provide equivalent or better protection, enforceable by the child, than those provided by the draft Code.

However, we recognise that this may present challenges in the Australian market. We suggest this issue could be put to the OAIC for further consultation.

Who is bound by the draft Code?

As currently drafted, the answer to the question "*who would be bound by the Code*" is split between section 26GC of the Privacy Act and Part 2 of the draft Code, making it difficult for those with no statutory interpretation skills to determine the Code's application.

Consideration should be given to comprehensively stating or restating in either or both provisions, the relevant entities which will need to comply with the Code.

In this way it would provide greater certainty that services likely to be accessed by children and services primarily concerned with the activities of children would both be within the Code's ambit. Harmonisation and clarity is critically important in circumstances where the draft Code is intended to sit alongside the Australian Privacy Principles (**APPs**) and other codes/instruments such as the social media ban.

Personal information about a child

There is legislative uncertainty regarding when information will be 'about' a person.

This issue was dealt with in *Telstra Corporation Limited and Privacy Commissioner* [2015] AATA 991. The Full Court on appeal considered a narrow question of statutory construction concerning the meaning of the words "about an individual" and was not asked to consider when it could be said that metadata would be *about* an individual⁹.

QLS considers an expansive concept is appropriate to promote the protection of children's personal information. We recommend the draft Code be amended to reference "*personal information of a child*".

"Collect"

For APP 3 purposes, collection does not include receipt of unsolicited personal information (APP 3.7).

⁹ [Privacy Commissioner v Telstra Corporation Ltd](#) [2017] FCAFC 4; [Legal update no. 253 | AGS](#).

Clarity is needed as to whether the age verification requirements of the draft Code (clause 8) apply to collections of personal information not involving any solicitation.

Such an approach would, in our view, be consistent with recommendation 4.3 of the 2022 Privacy Act Review (accepted by the Government in principle), that "collection" should be clarified in the Privacy Act to cover information obtained from any source and by any means, including inferred or generated information.¹⁰

"Person with parental responsibility"

Consideration should be given to adding, to the clause 4 definition, elements of section 196 of the *Information Privacy Act 2009 (IP Act)* for consistency and harmonisation with Queensland based entities. Critically the IP Act clarifies that parent includes a parent of an Aboriginal or Torres Strait Islander child who under traditional custom is regarded as a parent of the child.

Small business operations

QLS notes there are recommendations from the Privacy Act Review which have not yet been progressed including eventual removal of the small business exemption.

As it currently stands, small business operators would not be bound by the draft Code pursuant to sections 6C and 6D of the Privacy Act.

To inform the potential application of the draft Code at a future date, it would be useful for the OAIC to ascertain relative information about the extent to which Australian small business operators collect, use and disclose children's personal information, proportionately to entities which would be bound by the Code. Such information would best inform the appropriateness of extending the Code to small business operators, and any impact assessments.

Who can opt out (withdraw consent) and when? [Draft Code clauses 9, 13 and 20]

Draft Code clause 9 refers to a "strictly necessary" test as the required default for an entity's technical and organisational measures concerning the collection, use and disclosure of personal information about a child. This is a separate notion to the "best interests of the child" requirements for collection (clause 10) and use and disclosure (clause 11). Draft Code clause 9(2)(a) requires the technical and organisational measures to enable an end-user of the entity's service who is a child to control whether personal information about the child is collected, used or disclosed if that information is not strictly necessary for the provision of the entity's service.

QLS considers further detail is needed regarding:

- whether opt outs which override parental consent are available to a child under 15; and
- when the entity must act on opt outs (withdrawals of consent) under clauses 15(3) and 20(5)(b)(v).

Lastly, the concept of "a child under 15 years *enabling* the entity" in clause 20(1) of the draft Code is unclear. We suggest this be clarified given that clause 13(2) is to the effect that an entity cannot accept that a child under 15 has capacity to consent to the collection, use and disclosure of their personal information.

¹⁰ [Privacy Act Review Report 2022](#).

Right to be forgotten [Clause 32] (Request to destroy personal information about a child)

Proposal 18.3 of the Privacy Act review recommended introduction of a right to erasure which included an onus on the collecting entity to convey erasure requests to third parties to who the collecting entity has disclosed the relevant personal information. This recommendation was accepted by the Government in principle.

QLS supports that recommendation. Given the criticality of the erasure right in respect of personal information about children, QLS considers the destruction right in clause 32 of the draft Code should be drafted to reflect the Privacy Act review proposal.

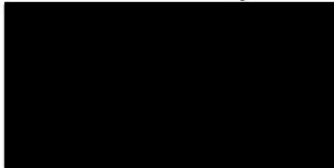
Typographical errors

Finally, there are minor typographical errors for correction;

- in clause 11(6), the 11(6)(ii) numbering should be 11(6)(b) and
- in clause 20(6), the reference to subparagraph 5(b)(ii) should be to subparagraph 5(b)(iii).

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [REDACTED] [REDACTED]

Yours faithfully



Peter Jolly
President