

**SENATE STANDING COMMITTEE ON  
FINANCE AND PUBLIC  
ADMINISTRATION**

**LEGISLATION COMMITTEE**

**Exposure Drafts of Australian Privacy  
Amendment Legislation**

**SUBMISSION**

**SUBMISSION NUMBER: 40**

**SUBMITTER**

**Obesity Policy Coalition**



## **Senate Finance and Public Administration Legislation Committee Inquiry into Exposure Drafts of Australian Privacy Amendment Legislation**

### **Submission from Obesity Policy Coalition**

#### **Obesity Policy Coalition**

The Obesity Policy Coalition (OPC) is a coalition between Cancer Council Victoria, Diabetes Australia – Victoria, VicHealth and the World Health Organization Collaborating Centre for Obesity Prevention at Deakin University. The Coalition is concerned about the escalating rates of overweight and obesity in Australia, particularly in children.

The OPC is pleased to have the opportunity to participate in the Senate Finance and Public Administration Legislation Committee's inquiry into exposure drafts of Australian privacy amendment legislation.

#### **Recommendation**

We recommend that the exposure draft of Australian Privacy Principle 7 (direct marketing) be amended to prohibit a private sector entity from using personal information of an individual younger than 15 for the purpose of direct marketing without parental consent.

Specifically we recommend that a private sector entity, for the purpose of direct marketing, be prohibited from using or disclosing personal information that is reasonably likely to belong to a child younger than 15, unless a parent of the child has provided express and verifiable consent to this use or disclosure, or unless the entity is able to verify that the personal information belongs to a person aged 15 or older.

#### **Background**

Our main interest in the Inquiry is the extent to which the exposure draft of this legislation would provide effective protection for children and young people against interference with their privacy through use and disclosure of their personal information for direct postal marketing. This interest has arisen from our concern about some food and beverage companies' practices of directly marketing unhealthy food and beverages to children and young people, using personal information a child or young person has often provided for the purposes of a promotion, entering a competition or other activities. We are concerned about the influence direct marketing may have on children consuming unhealthy diets, and the contribution this may make to them becoming overweight or obese.

We provided three submissions to the Australian Law Reform Commission's (ALRC) review of Australian privacy law, in which we recommended that the use and disclosure of children's personal information for direct marketing purposes should be dealt with expressly in privacy legislation. In particular, we recommended that private sector entities should be prohibited from using the personal information of children for direct marketing purposes unless a person with parental responsibility for the child has provided their express and verifiable consent. (These submissions are attached.)

As you would be aware, the ALRC recommended that a discrete 'Direct Marketing' principle should be included in the Uniform Privacy Principles (referred to in the exposure drafts as Australian Privacy Principles), which should make specific provision for seeking consent for direct marketing to children younger than 15 years of age (and new customers). The ALRC recommended that the 'Direct Marketing' principle should provide that an entity may use or disclose information about an individual who is under 15 years of age (or who is not an existing customer) for the purpose of direct marketing only where (a) the individual has

consented; or (b) the information is not sensitive information and it is impracticable for the entity to seek the individual's consent before the use or disclosure (recommendation 26-4).<sup>1</sup>

The Government did not accept the ALRC's recommendation that an age-based distinction be incorporated in the 'Direct Marketing' principle, noting that direct marketing via email and SMS is regulated by the *Spam Act 2003*, and that the provisions of the Privacy Act 'in effect, primarily relate to postal direct marketing'. The Government said that there was 'insufficient evidence that postal direct marketing to young people has resulted in substantial adverse consequences' and that it was 'not convinced that there is sufficient justification for distinguishing direct marketing obligations on the basis of an individual's age'.<sup>2</sup>

### **Direct postal marketing to children**

The OPC is concerned that exposure draft of the Australian Privacy Principles does not include any protections in relation to direct marketing to children.

We acknowledge that direct electronic marketing is regulated under the Spam Act, and is therefore not dealt with under the exposure draft of the Australian Privacy Principles; however, we believe that there is a need for specific regulation of direct marketing to children via post. We are concerned that direct postal marketing to children is widespread, and does have adverse consequences on children.

We are aware of several examples of food companies collecting children's personal information and using this to post promotional material directly to them. For example, Hungry Jack's posts promotion material to children who register with the Hungry Jack's Kid's Club on the Hungry Jack's website. This material includes a voucher for a free Kids Club Meal on their birthday and vouchers entitling them to a free or discounted food item or beverage every month for the year ahead. Hungry Jack's recently sent children a postcard promoting collectable 'AFL finger puppets' free with Kid's Club Meals and including a voucher for a free ice-cream sundae. Taco Bill also posts marketing material directly to children, recently sending children a voucher for a free birthday meal. (Copies of this promotional material are attached to this submission.)

As outlined in our submissions to the ALRC, we are concerned that use or disclosure of children's and young people's personal information for direct marketing causes harm to children and young people by interfering with their privacy and subjecting them to inappropriate commercial influence.

Children's susceptibility to commercial influence means that use of their personal information for direct marketing unfairly manipulates them, and is likely to harm them in other ways. For example, direct marketing of unhealthy food and beverages to children may influence them to consume unhealthy diets, and contribute to them becoming overweight or obese.

Accordingly, our view is that the use and disclosure of children's personal information for direct marketing by private sector entities should be dealt with expressly in the Australian Privacy Principles.

### **Recommended amendment to exposure draft - Australian Privacy Principle 7**

Specifically, we recommend that the exposure draft of Australian Privacy Principle 7 (direct marketing) be amended to prohibit a private sector entity, for the purpose of direct marketing, from using or disclosing personal information that the entity knows belongs, or that in the

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<sup>1</sup> Australian Law Reform Commission. For your information: Australian privacy law and practice (ALRC Report 108), 2008, <<http://www.alrc.gov.au/publications/report-108>>.

<sup>2</sup> Australian Government. Enhancing national privacy protection: Australian Government first stage response to the Australian Law Reform Commission Report 108, 2009, <[http://www.dpvc.gov.au/privacy/alrc\\_docs/stage1\\_au\\_govt\\_response.pdf](http://www.dpvc.gov.au/privacy/alrc_docs/stage1_au_govt_response.pdf)>.

circumstances is reasonably likely to belong, to a child younger than 15, unless a parent of the child has provided express and verifiable consent to this use or disclosure, or unless the entity is able to verify that the personal information belongs to a person aged 15 or older.

The reasons for this recommendation are discussed in detail in our three submissions to the ALRC review of Australian privacy law.

In summary, these reasons are as follows:

- The right to privacy has also been recognised in article 16 of the *United Nations Convention on the Rights of the Child* (to which Australia is a signatory) as a fundamental right of children.
- One aspect of the right to privacy is the right to maintain the privacy of one's personal information. It is widely accepted that this should involve being able to access one's personal information and exercise a substantial degree of control over how it is used and handled.
- Most children younger than 15 would not have the capacity to make informed and voluntary decisions about the use and disclosure of their personal information for direct marketing.
- Use of personal information belonging to a child who lacks decision-making capacity for direct marketing without parental consent, denies the parent's right and duty to exercise guidance over their child's decisions, and interferes with the child's right to privacy.
- Private sector entities that collect personal information for direct marketing do not have the opportunity to assess children's decision-making capacity on a case-by-case basis; therefore, there is a need for the Australian Privacy Principles to prescribe a cut-off age below which private sector entities must assume that children are incapable of making decisions about such use of their personal information, and consequently, that children's parents are responsible for making these decisions.
- Children are more susceptible to commercial influence than adults, and may lack the experience and cognitive ability necessary to assess marketing messages critically. Children are likely to find it very difficult to resist offers or promotions that are conditional upon provision of their personal information
- Direct marketing of to children may be detrimental to their healthy development. There is substantial evidence that food and beverage marketing influences children's product preferences and product consumption, and is a probable causal factor in weight gain and obesity in children.<sup>3</sup>
- Under the United Nations *Convention on the Rights of Children*, countries have a responsibility to protect children from all forms of exploitation prejudicial to any aspects of their welfare (article 36), and to encourage guidelines to be developed to ensure children are protected from information that may be injurious to their wellbeing (article 17).

Please refer to our attached submissions to the ALRC for further information about the problems with direct marketing to children, and the need for reform of privacy law to address this issue.

The OPC thanks the Senate Finance and Public Administration Legislation Committee for the opportunity to make a submission to its inquiry into the exposure drafts of Australian privacy amendment legislation, and asks the Committee to consider the issues we have raised and the reform to the exposure draft of the Australian Privacy Principles we have recommended.

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<sup>3</sup> Report of a Joint WHO/FAO Consultation. *Diet, Nutrition and the Prevention of Chronic Diseases*, WHO Technical Report Series 916, World Health Organisation: Geneva, 2003, available at: [http://www.who.int/hpr/NPH/docs/who\\_fao\\_expert\\_report.pdf](http://www.who.int/hpr/NPH/docs/who_fao_expert_report.pdf), accessed 19 July 2006; Hastings, G., Stead, M., McDermott, L., Forsyth, A., MacKintosh, A.M., Rayner, M., Godfrey, C., Caraher, M. & Angus, K. (2003), *Review of Research on the Effects of Food Promotion to Children*. Final Report to the UK Food Standards Agency. University of Strathclyde Centre for Social Marketing: Strathclyde, available at: <http://www.food.gov.uk/multimedia/pdfs/foodpromotiontochildren1>, accessed 19 July 2006; Committee on Food Marketing and the Diets of Children and Youth, Institute of Medicine of the National Academies, Overview of the IOM Report on *Food Marketing to Children and Youth: Threat or Opportunity?* Institute of Medicine, 2005, available at: <http://www.iom.edu/CMS/3788/21939/31330/31337.aspx>, accessed 19 July 2006.

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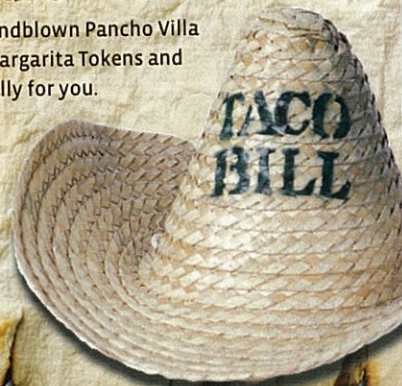
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