

**Australian Law Reform Commission's Final report - [For Your Information:
Australian Privacy Law and Practice \(ALRC Final Report\)](#)**

Submission from the Obesity Policy Coalition

The Obesity Policy Coalition (Coalition) is a partnership between the 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.

We would like to express our on-going interest in the review of the *Privacy Act 1988* and thank the Department of Prime Minister and Cabinet (DPMC) for its invitation to provide a short final submission identifying any perceived problems or gaps with the Australian Law Reform Commission's (ALRC) recommendations in relation to the Unified Privacy Principles.¹

1. Background and overview

Our interest in the review of the *Privacy Act 1988* relates to the extent to which it provides effective protection for children and young people against interference with their privacy through use and disclosure of their personal information for direct marketing purposes. This interest has arisen from our concern about the tactics engaged in by some food and beverage companies to directly market 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 and young people consuming unhealthy diets, and the contribution this may make to them becoming overweight or obese.²

On 25 January 2007, we provided a submission to the ALRC's Issues Papers 31 & 32 'Review of Privacy' and on 20 December 2007, we provided a submission to the ALRC's Discussion Paper 72 'Review of Australian Privacy Law'. In these submissions we recommended that the use and disclosure of children's and young people's personal information for direct marketing purposes should be dealt with expressly in the *Privacy Act*. In particular, we recommended that private sector organisations should be prohibited from using the personal information of children or young people for direct marketing purposes unless a person with parental responsibility for the child has provided their express and verifiable consent. Among other things, we also suggested that in circumstances where parental consent has been provided, the parent should be permitted to retract their consent at any time and organisations should be required to inform them of how they may do so when they provide that consent, and each time information is communicated to the child or young person.

The purpose of this submission to the DPMC is to comment on the amended Direct Marketing principle proposed by the ALRC in its Final Report and to note some on-going concerns that we have in relation to it.³ The proposed Direct Marketing principle comprises Unified Privacy Principle 6 (UPP 6) and the associated recommendations contained in Chapters 26, 68 and 69 of the ALRC's Final Report.⁴

¹ Senator John Faulkner. Privacy Roundtable Consultations. Media Release 11 December 2008.

² For more detail about the Coalition's concerns about the effects of direct marketing on children and in particular, the direct marketing of unhealthy food and beverages to children, please see the Coalition's submission to the ALRC dated 20 January 2007.

³ The proposed Direct Marketing principle was amended by the ALRC following its consultation on its Discussion Paper 72.

⁴ The proposed UPP 6 and relevant associated recommendations in Chapters 26, 68, 69 of the ALRC's Final report are provided in Appendix 1 to this submission.

While generally we commend the proposed UPP 6 and associated recommendations contained in the ALRC's Final Report, we remain concerned that some organisations may seek to avoid their obligation to obtain parental consent (to use or disclose personal information of individuals under the age of 15 for direct marketing purposes) in circumstances where obtaining that consent is deemed "impracticable".⁵ We are also concerned that the proposed UPP 6 does not require a person with parental responsibility for the individual to be informed of the right to request the organisation not to make any further direct marketing communications to the individual.⁶ Furthermore, UPP 6 does not provide any mechanism for persons with parental responsibility to remain privy to the types or frequency of electronic direct marketing communications sent to children or young people, after their initial consent has been provided.

Finally, we are pleased to take this opportunity to provide the DPMC with new data obtained by the Centre for Behavioural Research in Cancer, Cancer Council Victoria for the Obesity Policy Coalition evidencing the high level of public support for a ban on direct marketing to children via e-mail or SMS, after children have provided their contact details.

2. Direct marketing to persons under 15 years of age

We welcome the ALRC's recognition in its proposed Direct Marketing principle, UPP 6, that specific provision is required for direct marketing to, and decision making by and for, persons under the age of 15.

In particular, we welcome the ALRC's recommended age based presumption which provides that where an assessment of capacity is not reasonable or practicable, an individual under the age of 15 must be presumed to be incapable of giving consent and the consent of a person with parental responsibility for the individual must be provided.⁷ Read in conjunction with the proposed UPP 6.2, this means that parental consent will generally be a pre-requisite for using or disclosing personal information about an individual, who is under 15 years of age, for the purpose of direct marketing (unless obtaining consent is "impracticable, see below).⁸

We would take this opportunity to note, however, that there must be very limited (if any) circumstances in which a person under the age of 15 could be individually assessed as having the capacity to consent to the use of their personal information for direct marketing purposes (thereby overriding the age based presumption). Accordingly, it will be important that very strict requirements are outlined in guidance to be developed and published by the Office of the Privacy Commissioner as to "appropriate practices for undertaking individual assessments"⁹, for the purpose of direct marketing. This will be vital to ensure that the presumption and general obligation to obtain parental consent is not undermined by organisations with a significant financial interest in direct marketing to children.¹⁰ Ideally, it should be stated in the Office of the Privacy Commissioner's guidelines that persons under the age of 15 do not have the capacity to consent to the use of their personal information for direct marketing purposes.

In its Final Report, the ALRC has determined that the Direct Marketing principle should distinguish between individuals who are existing customers and direct marketing to

⁵ ALRC Final Report. Chapter 26: Proposed UPP 6.2(ii)(b)

⁶ ALRC Final Report. Chapter 26: Proposed UPP 6.2(b)

⁷ ALRC Final Report Chapter 68: Recommendation 68-1

⁸ ALRC Final Report. Chapter 26: Proposed UPP 6.2 and Chapter 68: Recommendation 68-2.

⁹ ALRC Final Report. Chapter 68. Paragraph 68-113.

¹⁰ For further information about the lack of capacity of children and young people to make informed and voluntary decisions about the use and disclosure of their personal information for direct marketing purposes, please refer to our submission to the ALRC's Issues paper, pages 4 – 5.

individuals who are not existing customers (with more onerous requirements applying to direct marketing to individuals who are not existing customers).¹¹ We welcome the recommendation that an individuals under 15 years of age should never be treated as an “existing customer”, thereby requiring that the opportunity to “opt out” of receiving future direct marketing communications be provided in each direct marketing communication to that individual.¹²

We are also pleased that the ALRC has recommended that the *Privacy Act 1988* require that, in order to rely on the age-based presumption, an agency or organisation must take such steps, if any, as are reasonable in the circumstances to verify that the individual is aged 15 or over (with the Office of the Privacy Commissioner to provide guidance on the reasonable steps required to verify the age of an individual).¹³

We remain concerned, however, that the objective of protecting children from interference with the use of their personal information for the purpose of direct marketing, may continue to be undermined by:

1. The exception contained in recommended UPP 6.2(a)(b), that personal information of persons under 15 years of age may be used or disclosed for direct marketing if the information is not sensitive information and it is impracticable for the organisation to seek the individual’s consent before that particular use or disclosure; and
2. The recommendation contained in UPP 6.2(b), that only the person under 15 years of age should be required to be advised of the opportunity to opt-out of receiving further direct marketing communications.

2.1 Impracticability of seeking consent to direct marketing

We remain concerned that under the revised UPP 6.2(a)(ii), organisations will remain able to use or disclose information about individual’s under the age of 15 for the purpose of direct marketing, without the consent of a person with parental responsibility for that individual, if the individual’s personal information is not sensitive information and it is *impracticable* [emphasis added] for the organisation to seek the person’s consent before that particular use.

For the reasons expressed in sections 3 and 5.1 of our submission to the ALRC’s Discussion Paper, we maintain the view that the impracticability of consent should not be permitted to be relied upon as a basis for engaging in direct marketing to individuals under the age of 15. While this recommendation was considered by the ALRC in its Final Report¹⁴, it determined only that the Office of the Privacy Commissioner should provide guidance on the kinds of circumstances in which it will be impracticable for an organisation to seek consent. Given the ALRC’s recognition of the important need to protect children from interference with the use or disclosure of their personal information for direct marketing purposes we are disappointed that the decision was not made by the ALRC to remove this exemption.

Under no circumstances should the commercial interests of organisations seeking to market their goods and services to children be permitted to outweigh the need to protect children from the misuse of their personal information. Difficulties identifying, locating or communicating with persons with parental responsibility should not provide an organisation with free scope to engage in direct marketing to individuals under the age of 15.

¹¹ ALRC Final Report. Chapter 26: Recommendation 26-1.

¹² ALRC Final Report. Chapter 26: Proposed UPP 6.2(b).

¹³ ALRC Final Report. Chapter 68: Recommendations 68-3 and 68-4.

¹⁴ ALRC Final Report. Chapter 69: Paragraphs 69.29 – 69.30.

If parental consent is unable to be obtained, the use and disclosure of personal information for direct marketing purposes should not be permitted. Accordingly, we urge the government not to adopt the exemption contained in the proposed UPP 6.2(a)(ii).

If the exception contained in the proposed UPP 6.2(a)(ii) is to be adopted, very strict circumstances in which it will be deemed “impracticable” for an organisation to seek parental consent will need to be prescribed in the guidelines to be developed and published by the Office of the Privacy Commissioner.¹⁵ It will be vital that the circumstances prescribed in the guidelines are considerably more limited than the circumstances currently identified in the Office of the Privacy Commissioner’s guidelines to National Privacy Principle 2.1(c), as to when it is impracticable to seek an individual’s consent to use their personal information for direct marketing purposes.¹⁶ This means that the cost of obtaining consent, the number of people on a proposed direct marketing list, how often the organisation is in contact with the individual(s) and the way the organisation communicates with the individual(s) should not be relevant to whether obtaining consent is “impracticable”.¹⁷ We also question the ability of organisations to measure the consequences for the individual of receiving the information without having consented and do not believe this should be a relevant consideration for organisations when determining whether the obtaining of consent is “impracticable”. Very strict procedures for obtaining or verifying the consent of persons with parental responsibility will be also required in the Office of the Privacy Commissioner’s guidelines.¹⁸

2.2 Providing the opportunity to “opt-out” to persons with parental responsibility

We welcome the ALRC’s recommendation that a person under the age of 15 should always be treated as an “existing customer”, thereby requiring that the organisation provide the individual with an opportunity to “opt out” of receiving any further direct marketing communications each time information is communicated to them.¹⁹ We are concerned, however, that the proposed UPP 6 does not require an organisation to inform a person with parental responsibility for an individual, either when their initial consent is provided or in direct marketing communications to the individual, that they may request the organisation make no further direct marketing communications to the individual.²⁰ We are also concerned that UPP 6 does not provide any mechanism for persons with parental responsibility to remain privy to the types or frequency of electronic communications sent to individuals after their initial consent has been provided.

At the time the person with parental responsibility provides their initial consent, they will be unable to predict the precise nature and/or frequency of direct marketing communications that will be sent to the individual. To ensure that a person with parental responsibility is able to protect the individual from inappropriate or damaging communications in an on-going way, it is vital that they retain the right to retract their consent, and that organisations adequately inform them of their right to do so. As recognised by the ALRC in its Final Report, children are very unlikely to have the capacity to understand the potential impact of

¹⁵ ALRC Final Report Chapter 26: Recommendation 26-7. In its submission to the Discussion Paper, the Coalition urged the ALRC to recommend that any circumstances in which it may be impracticable to obtain consent be prescribed in the Privacy Act. After detailed consideration, the ALRC took the view that these circumstances should be prescribed in guidelines developed and published by the Office of the Privacy Commissioner.

¹⁶ Office of the Federal Privacy Commissioner. Guidelines to the National Privacy Principles. September 2001. p.38

¹⁷ See Office of the Federal Privacy Commissioner. Guidelines to the National Privacy Principles. September 2001. p.39

¹⁸ ALRC Final Report. Chapter 19: Recommendation 19-1. See Coalition’s submission to the ALRC’s Issues Paper for suggested methods of obtaining and verifying parental consent.

¹⁹ ALRC Final Report. Chapter 26: UPP 6.2(b) – (d).

²⁰ In our submission to the ALRC Discussion Paper, the Coalition recommended that organisations should be required to notify a person with parental responsibility for the individual that they may retract their consent at any time. We recommended that organisations should be required to inform the person of this right at the time they provide their initial consent, and each time the organisation makes a direct marketing communication to the individual. While the ALRC noted this recommendation in its Final Report at paragraph 26.105²⁰, no further consideration appears to have been given to it.

direct marketing communications and why it may not be in their best interests to continue to receive them.²¹

Accordingly, and for the reasons outlined in our submission to the ALRC's Discussion Paper (p.7-8), we urge the government to require under UPP 6 that where an organisation proposes to use or disclose personal information belonging to an individual under the age of 15, the organisation must notify the person with parental responsibility of the following matters *at the time* the organisation seeks their consent:

1. The right of the person with parental responsibility to request the organisation not to make any further direct marketing communications with the individual.
2. The organisation's obligation to advise the person with parental responsibility how it obtained the individual's personal information on request by the person with parental responsibility.
3. The organisation's obligation to notify the person with parental responsibility if the organisation discloses the individual's personal information to a third party, and provide the person with parental responsibility with the contact details of the third party.
4. The organisation's contact details.

UPP 6.2(b) should also require that where a person with parental responsibility for the individual has provided consent to the organisation to use or disclose the individual's personal information for the purpose of direct marketing, each direct marketing communication to the individual must prominently display a notice advising that the individual *or a person with parental responsibility for the individual* may express a wish that the individual not receive any further direct marketing communications. UPP 6.2(c) should also require the organization to provide a simple and functional means by which the individual *or a person with parental responsibility for the individual* may advise the organization that the individual does not wish to receive any further direct marketing communications.

2.2.1 Direct marketing communications sent electronically or via telecommunications

In the case of direct marketing communications sent electronically or via telecommunications (i.e. by e-mail, telephone or SMS), or via any new technologies, further measures may be required to ensure that individuals under the age of 15 continue to be protected from interference with their personal information, after the initial consent of a person with parental responsibility has been provided.

While parents may be aware of the nature, frequency and appropriateness of direct marketing communications received through the post (and any opt-out information contained therein) they are unlikely to have any way of monitoring the nature, frequency or appropriateness of direct marketing communications received by the individual via their private e-mail address or mobile phone. Organisations should be required to take adequate steps to ensure a person with parental responsibility remains privy to the types and frequency of direct marketing communications sent electronically or via telecommunications to the individual.

In our view, UPP 6 should require that an organisation provide to the person with parental responsibility, a copy of all direct marketing communications sent electronically or via telecommunications to the individual. As suggested above, each direct marketing communication should be required to contain information about the right of the individual,

²¹ ALRC Final Report. Chapter 26: paragraph 26.107.

and the person with parental responsibility for the individual, to request that the organisation make no further direct marketing communications to the individual.

These steps would not only enable the person with parental responsibility to protect the individual from electronic communications that they may consider inappropriate or damaging, it would also assist the person to be aware of whether the individual's personal information has been misused in any way or inappropriately provided to another organisation. Furthermore, it could provide a valuable way for organisations to ensure that any parental consent purported to have been given is in fact genuine.

For these reasons, we encourage the government to include under UPP 6, a requirement that organisations must provide the person with parental responsibility a copy of all direct marketing communications sent electronically or via telecommunications to the individual under the age of 15.

3. Public support

We are pleased to take this opportunity to inform the DPMC of the overwhelming public support in Australia for much stricter regulations and bans on direct marketing to children.

A very recent survey of 800 consumers across Australia conducted in late 2008, by the Centre for Behavioural Research in Cancer, Cancer Council Victoria for the Obesity Policy Coalition, found that 96% of consumers supported the regulation of unhealthy food marketing via e-mail or SMS, after children have provided their contact details. 81% thought the practice should be stopped completely.²²

These results are not surprising given the overwhelming support found amongst consumers, particularly parents, for the regulation of unhealthy food marketing to children in Australia.

4. Conclusion

The ALRC should be commended on the recommendations contained in its Final Report that will, if implemented, provide significant protection to children and young people from interference with their privacy, through the use or disclosure of their personal information for direct marketing purposes. These protections clearly constitute very positive steps forward to protect children and young people from the adverse effects of direct marketing of unhealthy foods, and other goods and services that may be adverse to their health and best interests.

However, to ensure that the objective of protecting children from direct marketing is not undermined, we encourage the government to consider the issues raised above and take the action necessary to resolve these issues.

We again thank the DPC for this opportunity to continue to be engaged in the review of the *Privacy Act* and would be pleased to provide any further information you may require.

3 February 2009

²² Unpublished top-line data provided by Centre for Behavioural Research in Cancer, Cancer Council Victoria to the Obesity Policy Coalition. December 2008.

Appendix 1 – Extract of relevant Recommendations from ALRC Final Report for the purpose of the Obesity Policy Coalition’s submission to the DPC.

Chapter 26. Direct Marketing

Recommendation 26–3 The ‘Direct Marketing’ principle should provide that an organisation may use or disclose personal information about an individual who is an existing customer aged 15 years or over for the purpose of direct marketing only where the:

- (a) individual would reasonably expect the organisation to use or disclose the information for the purpose of direct marketing; and
- (b) organisation provides a simple and functional means by which the individual may advise the organisation that he or she does not wish to receive any direct marketing communications.

Recommendation 26–4 The ‘Direct Marketing’ principle should provide that an organisation may use or disclose personal information about an individual who is not an existing customer or is under 15 years of age for the purpose of direct marketing only in the following circumstances:

- (a) either:
 - (i) the individual has consented; or
 - (ii) the information is not sensitive information and it is impracticable for the organisation to seek the individual’s consent before that particular use or disclosure;
- (b) in each direct marketing communication, the organisation draws to the individual’s attention, or prominently displays, a notice advising the individual that he or she may express a wish not to receive any direct marketing communications; and
- (c) the organisation provides a simple and functional means by which the individual may advise the organisation that he or she does not wish to receive any direct marketing communications.

Recommendation 26-7(c) The Office of the Privacy Commissioner should develop and publish guidance to assist organisations in complying with the ‘Direct marketing’ principle, including.....the kinds of circumstances in which it will be impracticable for an organisation to seek consent in relation to direct marketing to an individual who is not an existing customer or is under the age of 15 years.

UPP 6. Direct Marketing (only applicable to organisations):

6.1 An organisation may use or disclose personal information about an individual who is an existing customer aged 15 years or over for the purpose of direct marketing only where the:

- (a) individual would reasonably expect the organisation to use or disclose the information for the purpose of direct marketing; and
- (b) organisation provides a simple and functional means by which the individual may advise the organisation that he or she does not wish to receive any further direct marketing communications.

6.2 An organisation may use or disclose personal information about an individual who is not an existing customer or is under 15 years of age for the purpose of direct marketing only in the following circumstances:

- (a) either the:
 - (i) individual has consented; or

(ii) information is not sensitive information and it is impracticable for the organisation to seek the individual's consent before that particular use or disclosure;

(b) in each direct marketing communication, the organisation draws to the individual's attention, or prominently displays a notice advising the individual, that he or she may express a wish not to receive any further direct marketing communications;

(c) the organisation provides a simple and functional means by which the individual may advise the organisation that he or she does not wish to receive any further direct marketing communications; and

(d) if requested by the individual, the organisation must, where reasonable and practicable, advise the individual of the source from which it acquired the individual's personal information.

6.3 In the event that an individual makes a request of an organisation not to receive any further direct marketing communications, the organisation must:

(a) comply with this requirement within a reasonable period of time; and

(b) not charge the individual for giving effect to the request.

Chapter 68. Decision making by and for individuals under the age of 18

Recommendation 68–1 The *Privacy Act* should be amended to provide that where it is reasonable and practicable to make an assessment about the capacity of an individual under the age of 18 to give consent, make a request or exercise a right of access under the Act, an assessment about the individual's capacity should be undertaken. Where an assessment of capacity is not reasonable or practicable, then an individual:

(a) aged 15 or over is presumed to be capable of giving consent, making a request or exercising a right of access; and

(b) under the age of 15 is presumed to be incapable of giving consent, making a request or exercising a right of access.

Recommendation 68–2 The *Privacy Act* should be amended to provide that where an individual under the age of 18 is assessed or presumed to not have capacity under the Act, any consent, request or exercise of a right in relation to that individual must be provided or made by a person with parental responsibility for the individual.

Recommendation 68–3 The *Privacy Act* should be amended to provide that, in order to rely on the age-based presumption, an agency or organisation is required to take such steps, if any, as are reasonable in the circumstances to verify that the individual is aged 15 or over.

Recommendation 68–4 The Office of the Privacy Commissioner should develop and publish guidance for applying the new provisions of the *Privacy Act* relating to individuals under the age of 18, including on:

(a) the involvement of children, young people and persons with parental responsibility in decision-making processes;

(b) situations in which it is reasonable and practicable to make an assessment regarding capacity of children and young people;

(c) practices and criteria to be used in determining whether a child or young person is capable of giving consent, making a request or exercising a right on his or her own behalf, including reasonable steps required to verify the age of an individual;

(d) the provision of reasonable assistance to children and young people to understand and communicate decisions; and

(e) the requirements to obtain consent from a person with parental responsibility for the child or young person in appropriate circumstances.

Chapter 19. Consent

Recommendation 19–1 The Office of the Privacy Commissioner should develop and publish further guidance about what is required of agencies and organisations to obtain an individual’s consent for the purposes of the *Privacy Act*. This guidance should:

(a) address the factors to be taken into account by agencies and organisations in assessing whether consent has been obtained;

(b) cover express and implied consent as it applies in various contexts; and

(c) include advice on when it is and is not appropriate to use the mechanism of ‘bundled consent’.