Australian Law Reform Commission Discussion Paper 72
Review of Australian Privacy Law

Submission from Obesity Policy Coalition

1. Introduction

The Obesity Policy Coalition ('Coalition') is a coalition between the Cancer Council Victoria, Diabetes Australia – Victoria, VicHealth and the World Health 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 Coalition thanks the Australian Law Reform Commission for the opportunity to comment on the ALRC's Discussion Paper 72 *Review of Australian Privacy Law* ('Discussion Paper').

As noted in the Coalition and Young Media Australia's submission on the ALRC's Issues Paper 31 *Review of Privacy* ('Issues Paper'), the Coalition's interest in the ALRC's Review of Australian Privacy Law is the extent to which the *Privacy Act 1988* (Cth) ('Privacy Act') provides effective protection for children and young people against interference with their privacy through use or disclosure of their personal information for direct marketing. Accordingly, the submission addresses the following proposals set out in the Discussion Paper as they relate to this issue: Proposals 23–1, 23–3, 23–4, 23–5, 23–6, 60–1, 60–3 and 60–4.

2. Age of presumption and consent by authorised representatives: Proposal 60–1

Proposal 60–1

The Privacy Act *should be amended to provide that:*

(a) an individual aged 15 or over is presumed to be capable of giving consent, making a request or exercising a right of access unless found to be incapable (in accordance with the criteria set out in Proposal 60–2) of giving that consent, making that request or exercising that right;

…

(c) where it is not practicable to make an assessment about the capacity of an individual aged 14 or under to give consent, make a request or exercise a right of access, then the consent, request or exercising of the right to access must be provided by an authorised representative of the individual.

The Coalition supports Proposal 60–1. As discussed in the Coalition and Young Media Australia's submission on the Issues Paper, we believe there is a need for the Privacy Act to prescribe a cut-off age below which private sector organisations must presume children are incapable of making decisions about their personal information in situations where individual assessment of a child's capacity is impossible or impracticable, as is the case when children's personal information is collected for direct marketing.

The Coalition considers 15 to be an appropriate age of presumption based on the research as to psychosocial factors affecting young people's decision-making capacity, and to reflect an appropriate balance between parental authority and the evolving capacities of young people to make their own decisions.

For reasons discussed in our submission on the Issues Paper, we also support the proposed requirement for consent to use of personal information to be provided by an authorised

representative of an individual aged 14 or under, and the proposed definition of authorised representative as being someone who has 'parental responsibility' for the individual.

However, the Coalition has some concerns in relation to the following issues:

- ALRC's recommendation that procedures for implementing the age of presumption should not be prescribed in the Privacy Act.
- ALRC's proposed exception to the liability of organisations which act on consent provided by children younger than 15.
- The application of the age of presumption to the ALRC's proposed new principle on direct marketing.

These concerns are discussed below.

3. Procedures for implementing age of presumption: Proposal 60–3

Proposal 60–3

The Office of the Privacy Commissioner should develop and publish guidance for applying the provisions relating to individuals under the age of 18, including on:

…

(b) situations where children and young people are capable of giving consent, making a request or exercising a right on their own behalf;

(c) practices and criteria to be used in determining whether a child or young person is incapable of giving consent, making a request or exercising a right on his or her own behalf;

…

(e) the requirements to obtain consent from an authorised representative of a child or young person in appropriate circumstances.

First, the Coalition has concerns about the ALRC's recommendation that requirements or procedures for implementing the provisions relating to individuals under the age of 18 be included in Office of the Privacy Commissioner ('OPC') guidance rather than in the Privacy Act, particularly requirements for ascertaining the age of young people and facilitating decision making by authorised representatives.

In our view, the efficacy of the proposed age of presumption requirement for protecting young people who are incapable of making decisions about their personal information would depend on organisations being required to establish and use effective mechanisms for verifying age of individuals and decision making by authorised representatives. Introduction of the age of presumption would have little effect if an organisation could escape liability by taking cursory steps to ascertain a young person's age or seek an authorised representative's consent, such as asking the young people to provide their dates of birth, and, if they admit to being younger than 15, asking them to indicate (e.g by ticking a box) that an authorised representative consents to the proposed use of their personal information. Some organisations currently use these types of practices when collecting children's personal information for direct marketing through competitions, website registrations and so on. For example, to register for the competitions and promotions section of the Cadbury website, people must agree to use of their personal information for direct marketing and enter their age range (<16, 16-17 or 18+). The registration page states that 'Children under 16 are advised to get permission from their parent or guardian before they submit any personal information to

Cadbury.'[1] In situations like this, many children would be likely to lie about their age or the fact that their parent has consented, or ignore advice to seek parental consent, if this would allow them to immediately enter a website or participate in a desired activity.

We are concerned that organisations could continue using these types of practices to comply with the proposed age of presumption requirement if, as proposed by the ALRC, age or consent verification procedures were merely set out in OPC guidance, rather than prescribed in the Privacy Act. If these procedures were not clear, enforceable legal requirements, they would be very unlikely to be complied with, particularly if they were not tied to any general obligation prescribed in the Privacy Act to take active steps to verify the age of an individual whose information is being used for direct marketing, or the consent of an authorised representative. As we interpret the ALRC's proposals, organisations would not be subject to such an obligation under the Privacy Act because an exemption to liability is proposed where an organisation did not *know*, and could not reasonably be expected to have *known from the information available* that an individual whose consent the organisation relied on was under 15. (This point is discussed further below in relation to Proposal 60-4.) Organisations would be very unlikely to comply with age and consent verification procedures suggested in OPC guidance if they were not under a clear legal obligation to do so.

In our view, the Privacy Act should impose a clear obligation on organisations to take all reasonable steps to verify age or consent where there is a reasonable likelihood personal information to be used for direct marketing belongs to an individual younger than 15. Organisations should only be allowed to engage in direct marketing if they have taken all such steps, and it is reasonable to rely on the information they have obtained.

Our preferred approach would be for the Privacy Act to set out the types of procedures which would be considered to constitute reasonable steps to verify age or consent – we think this would maximise the prospect of compliance with the procedures. However, we think potential compliance problems associated with inclusion of age and consent verification procedures in OPC guidance could be minimised if the Privacy Act imposed a general obligation as described, and age and consent verification procedures were described in OPC guidance as examples of reasonable steps that would be likely to satisfy the general obligation.

We suggest that procedures for verifying age set out in the Privacy Act or OPC guidance should include requiring young people who are 15 or older to send, fax or email a copy of identification indicating their age (such as a school enrolment form, proof of age card or passport) or a signed form from an authorised representative attesting to their age. Procedures for verifying consent by an authorised representative could include requiring the authorised representative to mail or fax a signed form, provide a credit card number, provide an electronic signature or call a toll-free number staffed by trained personnel. This would ensure organisations' legal obligations under the Privacy Act were certain, and would promote use of effective verification procedures.

We also suggest that the Privacy Act or OPC guidelines should provide guidance on the circumstances in which a reasonable likelihood that personal information belongs to an individual younger than 15 should be considered to exist. In general terms, we think this should be where the personal information was collected through a service or activity (such as a website, competition or promotion) aimed at a market or audience that was reasonably likely to include people younger than 15.

[1] (See registration page at http://www.cadbury.com.au/sites/cadbury/index.php?pageId=259&action=signup, accessed 14 December 2007).

4. Liability of organisations that act on consent provided by children under 15: Proposal 60–4

Proposal 60–4

The Privacy Act *should be amended to provide that an agency or organisation will not be considered to have acted without consent if it did not know, and could not reasonably be expected to have known from the information available, that an individual was aged 14 or under, and the agency or organisation acted upon the consent given by the individual.*

The Coalition considers that an exception to the liability of organisations that act on the consent of individuals younger than 15 is appropriate in certain circumstances, but believes the exception set out in Proposal 60-4 is too broad.

Under Proposal 60-4, organisations would be exempt from liability unless they knew that the individual was aged 14 or younger, or they should have known from the *information available*. We agree with the ALRC's comments that Proposal 60–1 should not be interpreted as allowing organisations to plead ignorance where they have failed to establish appropriate age verification mechanisms. However, we are concerned that Proposal 60-4 may be interpreted as absolving an organisation from liability in circumstances where organisations do not have actual knowledge that personal information belongs to an individual aged 14 or under but this is reasonably likely in the circumstances, and the organisation could not reasonably *know* this to be the case *from the information available*, even if the organisation does not take reasonable steps to ascertain or verify the individual's age, and/or it was not reasonable to rely on any claim by the individual to be 15 years of age or older. For example, organisations may be able to plead ignorance on the basis that they could not reasonably *know* from the information available that an individual was younger than 15, where personal information has been collected through a service (such as a website) aimed at young people, including people younger and older than 15, and organisations merely ask people to enter their date of birth without taking any further steps to verify this information (which is a common practice when private sector organisations collect children's personal information through websites). As discussed above, we think any exception to organisations' liability should make it clear that organisations are under an obligation to take positive steps to ascertain and verify the age of young people when, in the circumstances, it is reasonably likely that young people from whom personal information was collected included people younger than 15.

We are also concerned that Proposal 60-4 would exempt organisations from liability in cases where it is reasonably likely that an individual is aged 14 or under, but it is not possible or practicable for the organisation to ascertain or verify the individual's age. In such cases, we believe organisations should be required to obtain the consent of the individual's authorised representative, or refrain from direct marketing to the individual. Given children's vulnerability to commercial influence and harm from direct marketing (as discussed in our submission on the ALRC's Issues Paper), we do not think there are policy grounds for allowing direct marketing to children who are reasonably likely to be younger than 15 and incapable of making decisions about such use of their personal information in the absence of consent by an authorised representative.

Accordingly, we recommend that the Privacy Act should provide an exception to the liability of an organisation that relies on the consent of an individual aged 14 or under, *only* where the organisation did not know that the individual was in this age group, and:

- it was reasonable in the circumstances for the organisation to presume that the individual was 15 or older (for example, because the individual's personal

information was collected through a service unlikely to be used by people younger than 15); or

- the individual informed the organisation that he or she was aged 15 or older, the organisation took reasonable steps to verify this information, and it was reasonable in the circumstances for the organisation to rely on the information.

5. Application of age of presumption to proposed 'Direct Marketing' principle: Proposals 23–1, 23–3, 23–4, 23–5 and 23–6

Proposal 23–1

The proposed Unified Privacy Principles should regulate direct marketing by organisations in a discrete privacy principle, separate from the 'Use and Disclosure' privacy principle. This principle should be called 'Direct Marketing' and it should apply irrespective of whether the organisation has collected the individual's personal information for the primary purpose or a secondary purpose of direct marketing.

Proposal 23–3

The proposed 'Direct Marketing' principle should require organisations to present individuals with a simple means to opt out of receiving direct marketing communications.

Proposal 23–4

The proposed 'Direct Marketing' principle should provide that an organisation involved in direct marketing must comply, within a reasonable time, with an individual's request not to receive direct marketing communications.

Proposal 23–5

The proposed 'Direct Marketing' principle should provide that an organisation involved in direct marketing must, when requested by an individual to whom it has sent direct marketing communications, take reasonable steps to advise the individual from where it acquired the individual's personal information.

Proposal 23–6

The Office of the Privacy Commissioner should issue guidance to organisations involved in direct marketing, which should:

…

(b) clarify their obligations under the Privacy Act in dealing with particularly vulnerable people, such as elderly individuals and individuals aged 14 and under.

UPP 6. Direct Marketing (only applicable to organisations)

6.1 An organisation must not use or disclose personal information about an individual for the primary purpose or a secondary purpose of direct marketing unless all of the following conditions are met:

(a) the individual has consented, or both of the following apply:

(i) the information is not sensitive information; and

(ii) it is impracticable for the organisation to seek the individual's consent before that particular use or disclosure; and

(b) the organisation will not charge the individual for giving effect to a request by the individual to the organisation not to receive direct marketing communications; and

(c) the individual has not made a request to the organisation not to receive direct marketing communications, and the individual has not withdrawn any consent he or she may have provided to the organisation to receive direct marketing communications;

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

(e) each written direct marketing communication by the organisation with the individual (up to and including the communication that involves the use) sets out the organisation's business address and telephone number and, if the communication with the individual is made by fax, telex or other electronic means, a number or address at which the organisation can be contacted directly electronically.

6.2 In the event that an individual makes a request of the organisation not to receive any further direct marketing communications, the organisation must comply with this requirement within a reasonable period of time.

6.3 An organisation must take reasonable steps, when requested by an individual to whom it has sent direct marketing communications, to advise the individual from where it acquired the individual's personal information.

5.1 Impracticability of seeking consent to direct marketing

The Coalition supports the ALRC's proposal for development of a single privacy principle for direct marketing that applies equally to primary and secondary purpose direct marketing.

However, we submit that consent of an authorised representative should be a requirement in *all* cases where, for the purpose of direct marketing, organisations use or disclose personal information of an individual younger than 15 (whose capacity to consent cannot practicably be assessed). We are concerned that under the ALRC's proposed UPP 6.1(a), organisations may be able to directly market to a child younger than 15 without an authorised representative's consent on the basis that the child's personal information is not sensitive and it is impracticable to seek an authorised representative's consent.

We believe the policy arguments in favour of unsolicited direct marketing in circumstances where it is impracticable to seek consent carry little weight in relation to directing marketing to children who lack capacity to make rational decisions about their personal information, and who are vulnerable to commercial influence and at risk of harm from direct marketing (as discussed in our submission to the Issues Paper). In addition, the proposed provisions in UPPs 6.1(c), (d), (e), 6.2 and 6.3 do not provide effective additional safeguards against interference with a child's privacy through direct marketing in cases where the child lacks capacity to make decisions about their personal information, and the child's authorised representative has not provided consent. (This point is explained further in section 5.2 of the submission.)

We note that the Discussion Paper states that guidance on the proposed 'Direct Marketing' principle should indicate that the need to establish age or parental consent verification mechanisms should not be considered impracticable (for the purposes of proposed UPP 6.1(a)(ii)) if the organisation is knowingly handling the personal information of individuals aged 14 and under.

However, we are concerned that this may be interpreted as allowing organisations to engage in direct marketing to children aged 14 or younger using non-sensitive personal information where it is impracticable to take other steps needed to seek consent of an authorised representative, for example, where it is difficult to identify, locate or communicate with an authorised representative.

In addition, the word 'knowingly' may imply that organisations would be entitled to rely on the impracticability of verifying the age of an individual or the consent of an authorised representative, as long as they did not have actual knowledge that they were handling the personal information of a child younger than 15, even if they should have known or suspected that this was the case in the circumstances.

We are also concerned that merely making this point in OPC guidance on the proposed 'Direct Marketing' principle, rather than establishing this as a clear legal principle in the Privacy Act, would lead to uncertainty and non-compliance with the principle, as it is not necessarily consistent with a literal construction of UPP 6.1(a) and Proposal 60-1 (as they are currently worded), but would significantly affect how the age of presumption operates in relation to direct marketing.

In our view, it should be made clear in the Privacy Act that in circumstances where the consent of an authorised representative to direct marketing using an individual's non-sensitive personal information is required, impracticability of seeking this consent cannot be relied upon as a basis for direct marketing under ALRC's proposed UPP 6.1(a)(ii). The same result could also be achieved by prescribing in the Privacy Act that the exception to the consent requirement in UPP 6.1(a)(i) and (ii) only applies in relation to individuals who are, or who can reasonably be presumed to be, capable of providing consent under the Privacy Act. We believe this would be necessary to ensure the age of presumption in relation to the 'Direct Marketing' principle operates effectively and meaningfully, so that organisations would not have free scope to engage in direct marketing to children younger than 15 in situations where it is difficult or onerous to communicate with children's authorised representatives.

5.2 Opportunity for authorised representatives to exercise 'opt out' and other rights on behalf of children

We agree with the ALRC's proposals 23– 3, 23– 4 and 23– 5. We believe these proposals would provide important enhancements to the ability of capable individuals to exercise control over how their personal information is used for direct marketing. However, clearly these proposals would be of little assistance to children who are incapable of making decisions under the Privacy Act.

Such children would lack the capacity to understand the implications of, and make rational decisions about, opting out of receiving further direct marketing. They would also be highly unlikely to be aware of organisations' obligation to advise them how they acquired their personal information, understand the significance of this information, or know how to use the information to exercise control over their personal information. As discussed in our submission on the Issues Paper, many children would not even understand what direct marketing is.

Therefore, we believe an authorised representative of a child younger than 15 (whose capacity has not been individually assessed) should be given the opportunity to exercise these rights on the child's behalf. This is recognised under ALRC's Proposal 60-1, which provides that where it is not practicable to assess the capacity of a child aged 14 or under to make a request or exercise a right of access under the Privacy Act, an authorised representative must make the request or exercise the right of access on the child's behalf.

However, we are concerned that once a child's authorised representative has provided consent to an organisation using the child's personal information for direct marketing, the authorised representative may not be aware of the occurrence or nature of each subsequent direct marketing communication the organisation makes with the child, or be privy to the notice provided with each communication setting out the child's right to opt out of receiving further communications and the organisation's contact details. Therefore, the authorised representative may lack the opportunity to make decisions as to whether to opt out of direct marketing based on the nature of the direct marketing communications the child receives. The authorised representative may also lack the ability to track how the child's personal information is being handled and disclosed.

To avoid these problems, we submit the Privacy Act should prescribe that where an organisation proposes to use or disclose personal information belonging to an individual younger than 15, the organisation must notify the individual's authorised representative of the following matters at the time the organisation seeks the authorised representative's consent:

- The authorised representative's right to request the organisation not to make any further direct marketing communications with the individual.
- The organisation's obligation to advise how it obtained the individual's personal information on request by the authorised representative.
- The organisation's contact details.

We also submit that the organisation, or any third party to whom the organisation discloses the individual's personal information, should be required to notify the authorised representative of these matters each time the organisation or third party makes a direct marketing communication with the individual.

In addition, the organisation should be required to notify the authorised representative if the organisation discloses the child's personal information to a third party, and provide the authorised representative with the contact details of the third party.

The Coalition thanks the ALRC for the opportunity to provide comments on the Discussion Paper, and asks the ALRC to consider the specific concerns we have raised, and the actions we have proposed to resolve these concerns.