



Submission to the Tasmanian Law Reform Institute's *Review of Privacy Laws in Australia*

Acknowledgment of Country

Youth Law Australia acknowledges the Traditional Owners and Elders of the palawa people of lutruwita, the Bedegal People of the Eora Nation and all the other custodians of the land on which we work. We pay our respects to their Elders past, present and emerging, and commit ourselves to the ongoing journey of Reconciliation.

About us

1. Youth Law Australia (YLA) is an accredited national community legal service that is dedicated to helping young people understand their legal rights, and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time, and receive free and confidential legal advice and help. Youth Law Australia seeks to be as accessible as possible to children and young people, in particular through facilitating help-seeking through online means.
2. We are dedicated to addressing human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

Introduction

3. We welcome the Tasmanian Law Reform Institute's (TLRI) review of privacy laws in Australia, and its detailed and comprehensive issues paper.
4. While the *United Nations Convention on the Rights of the Child 1989* (the Convention) recognises that children and young people have a right to privacy,¹ under existing Australian law, children's rights to privacy are different from those of adults. In some situations, children and young people have less control over their personal information than adults.
5. We therefore welcome the recognition in the issues paper that there are particular considerations that pertain to children and young people, and we submit that holistic consideration of the rights and best interests of children and young people should inform any reform of privacy laws.

¹ *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16.



Youth Law Australia

Bedegal Land, Level 1, Law Centres Precinct
Law Building, UNSW Sydney 2052
T: (02) 9067 6510
W: yla.org.au

6. We have not sought to answer all the questions posed in the issues paper. Instead, in this submission we make two general observations which we submit should underpin the approach to privacy law reform:
 - a. Rights to privacy need to be balanced with other rights, particularly those relevant to the safety, wellbeing and best interests of children and young people.
 - b. There would be considerable benefits from simplified and consistent privacy laws in Australia.
7. We have also indicated some particular areas in which we would like to see the Tasmanian Law Reform Institute develop recommendations.

1. Privacy is an important right, but it needs to be balanced with other rights

8. Privacy is an important right. As the issues paper observes, protection of an individual's privacy has various personal, psychological and social benefits.
9. However, the right to privacy is not absolute, and it must be balanced with other rights. A sound legal and regulatory framework for children's privacy must clearly articulate the interconnectedness and interdependence of children's rights.² Protecting children's right to privacy cannot come at the expense of other Convention rights. For example, the Royal Commission into Institutional Responses to Child Sexual Abuse recognised the principle that children's rights to safety and wellbeing, and specifically to protection from sexual abuse, should be prioritised over other rights and concerns, including in some cases privacy.³
10. While the Preamble to the Convention recognises that childhood is a period of "special vulnerability during which children are in need of special protection",⁴ the substantive text requires that children are respected as "active participant[s] in the promotion, protection and monitoring" of their privacy rights.⁵ A children's rights-based approach to privacy reforms must be informed by the following rights under the Convention:
 - a. Article 5, which gives children the right to receive appropriate parental direction and guidance in the exercise of their rights, in a manner consistent with the child's **evolving capacities**;
 - b. Article 12(1), which gives children who are capable of forming a view the right to freely **express their views** in all matters affecting them, with those views being given due weight in accordance with the child's age and maturity;
 - c. Article 13(1), which provides for the child's right to **freedom of expression**, including "freedom to seek, receive and impart information and ideas of all kinds", through any media of the child's choice, subject to the restrictions in Article 13(2);⁶

² See John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23(1) *Harvard Human Rights Journal* 1, 37-9.

³ See Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 8 Recordkeeping and Information Sharing* (2017) 139.

⁴ See further Kirsten Sandberg, 'The Convention on the Rights of the Child and the Vulnerability of Children' (2015) 84(2) *Nordic Journal of International Law* 221.

⁵ CRC Committee, *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [14].

⁶ Article 13(2) of the CRC provides that these restrictions shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order, or of public health or morals.

- d. Article 17, which provides for the child’s **right to access “information** and material from a diversity of national and international sources”.
11. The CRC Committee has identified children’s rights under Articles 13 and 17 of the Convention as the two “crucial prerequisites for the effective exercise of the right to be heard” under Article 12.⁷
 12. In the context of the matters covered in the issues paper, it is important that a focus on privacy rights does not undermine or impair any other rights of children and young people, such as rights to access government services in Tasmania or services provided by organisations that contract with the Tasmanian government.
 13. In particular, we refer to the discussion of reform to notice and consent requirements in the issues paper (paragraphs 2.3.60-2.3.69 and question 2.9). We agree that in some circumstances it will not be practicable to obtain a child’s consent through their parent or guardian. We would add that in some circumstances it will not be safe, protective or in the child’s best interests to impose this requirement. A requirement that children obtain consent from a parent or guardian, or a high age for capacity assumption (for example 16), reflects an assumption that children lack the capacity to protect their own interests and are dependent on adults to make decisions in their own interests.⁸ It reinforces the persistent difficulties that children and young people experience in being recognised as having, and in exercising, their privacy rights.⁹ In our view, a focus on “scaffolding” and context, not age alone, better respects children’s distinct needs, lived experiences and evolving capacities for decision-making.
 14. We would also encourage the TLRI to recognise that, even where a child may not have capacity to consent to the collection, use and disclosure of their personal information, best practice is to ensure that their participation in these decisions is maximised.
 15. Our submission to the *Privacy Act Review Report 2022 consultation*, which discusses these issues in greater detail, is available on our website.¹⁰

2. Consistent and simplified privacy laws

16. As highlighted in the issues paper and by the Australian Law Reform Commission, the privacy law landscape is complex and fragmented. Such complexity makes it difficult for organisations to understand their obligations, and for children and young people (among others) to understand their rights and access remedies.
17. We endorse comments in the issues paper about the desirability of consistency between Tasmanian and Commonwealth privacy laws, and we submit that this should be a goal underpinning any law reform proposals in this area. We refer specifically to questions 2.7, 2.4 and 2.2.
18. We note that the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) heard evidence that it can be difficult for institutions to navigate the privacy environment, and that this can inhibit the sharing of information relating to the safety and wellbeing of children.¹¹ In some cases, even when privacy laws do not legally prevent

⁷ CRC Committee, *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [80].

⁸ See for example Georgina Dimopoulos, *Decisional Privacy and the Rights of the Child* (Routledge, 2022) 4.

⁹ *Ibid.*

¹⁰ [Submission to the Privacy Act Review Report 2023 - Youth Law Au \(yja.org.au\)](https://yja.org.au/submission-to-the-privacy-act-review-report-2023-youth-law-au).

¹¹ See Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 8 Recordkeeping and Information Sharing* (2017), 158-160.

information sharing, concerns about privacy can act as a practical barrier to information sharing. This underscores the importance of clear, consistent and simple privacy laws.

19. We note that Tasmania has recently enacted an information sharing scheme in the *Child and Youth Safe Organisations Act 2023* in partial implementation of the Royal Commission's recommendations. In other submissions we have emphasised the importance of consultation with children and young people, where appropriate, before information about them is shared under these schemes.

3. Areas for reform

20. We are pleased to see the breadth of areas covered in the issues paper that may be addressed by the TLRI in its inquiry. We would particularly like to see recommendations in the following areas:

- **Appeal options for complaints and remedies for breaches of privacy rights** (questions 2.11, 2.12) – as the United Nations Committee on the Rights of the Child has observed, 'For rights to have meaning, effective remedies must be available to redress violations ... states need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation...'¹²
- **Data breach notifications** (question 2.15) – we note the importance of data breach notification laws was highlighted by a recent announcement of a possible theft of data from the Tasmanian Department for Education, Children and Young People.
- **Image-based abuse offences** (question 4.6) – we discuss this in more detail below.

3A. Image-based abuse offences

21. We refer to paragraphs 4.2.34 to 4.2.42 of the issues paper that addresses the unauthorised sharing of intimate images. We emphasise that Tasmania has not introduced specific offences concerning the distribution of intimate images without consent, and is the only jurisdiction not to have done so.
22. The sharing of intimate images is not only a privacy concern, it can be a harmful form of sexual violence. Non-consensual sharing of intimate images is sometimes referred to as "revenge pornography" and it can have devastating effects on victims.¹³ Non-consensual distribution of intimate images can humiliate, distress, and intimidate victims, even when the image was created consensually at the outset.¹⁴ Due to this power imbalance, children and young people can be particularly vulnerable and there is often very little that a victim can do to negate the damage, particularly if intimate images are shared over the internet and social media.¹⁵ Technology has provided new opportunities for intimate images to be distributed and often

¹² United Nations Committee on the Rights of the Child, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child.

¹³ Michelle Evans, 'Regulating the non-consensual sharing of intimate images ('revenge pornography') via a civil penalty regime: A sex equality analysis' (2018) 44(3) *Monash University Law Review* 602, 602.

¹⁴ Alexa Dodge and Dale Spencer 'Online Sexual Violence, Child Pornography or Something Else Entirely? Police Responses to Non-Consensual Intimate Image Sharing among Youth' (2018) 27(5) *Social & Legal Studies* 636, 637.

¹⁵ *Ibid.*

once an image is shared online, it can be difficult to remove, and can continue to reappear in multiple places.¹⁶

23. We submit that Tasmania should have specific offences that:

- a. clearly apply to threatened and actual sharing of intimate images without consent to reflect the gravity of this conduct and to bring Tasmania into line with other states and territories;
- b. make it clear that young people below a certain age (for example, 16), cannot consent to the sharing of an intimate image that involves them.¹⁷

Conclusion

24. We thank the TLRI for the opportunity to respond to the issues paper. We look forward to the TLRI's recommendations in this important area.

25. We also thank the University of Tasmania law students who assisted us with the preparation of this submission.

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¹⁶ Kathryn Branch et al, 'Revenge Porn Victimization of College Students in the United States: An Exploratory Analysis' (2017) 11(1) 128, 128.

¹⁷ See for example *Crimes Act 1900* (NSW) s 91O(7)(a).