Dear Mr Hennessy

I am writing regarding the NSW Law Reform Commission’s Privacy Legislation in New South Wales Consultation Paper 3.

I am pleased to provide the following comments in response to the issues raised in the Consultation Paper. I have also enclosed a copy of the Commission’s submission made in 2007 to the Australian Law Reform Commission’s Review of Privacy Issues Paper for your information. The submission covers a number of broader privacy issues for children and young people.

**Information sharing**

The complexity of privacy legislation in NSW impacts on the effectiveness of service delivery by agencies, which particularly affects the vulnerable children and young people who regularly come into contact with these agencies. This difficulty is often compounded by differing views and misunderstandings that individual organisations have about the operation of the various Acts and their organisation’s ability to release information to other agencies.

In order to simplify NSW privacy legislation I support merging the Privacy and Personal Information Protection Act 1998 (NSW) and the Health Records and Information Privacy Act 2002 (NSW) into a single Act. I consider that this merged NSW privacy legislation should apply only to the handling of personal information by NSW public sector agencies, local councils and state owned corporations. Non-government and private sector organisations will then fall within the national privacy legislation, creating a clearer distinction than exists within the current system. However, this approach will require harmonisation of state and national privacy legislation. I strongly support the NSW and Australian Law Reform Commissions’ proposals for uniformity in this respect.

In the interests of better information sharing between agencies, I support the proposal to allow indirect collection of personal information where it is reasonably necessary to provides services, care, diagnosis or treatment to the person.
When accompanied by community education, I consider that these reforms will help organisations to better understand their obligations under privacy legislation. As a result, these reforms may lead to more appropriate information exchange that benefits vulnerable children and young people accessing agencies.

I consider that a Code of Practice in relation to information exchange on child protection matters is unnecessary. The numerous exemptions and Codes of Practice provided for under privacy legislation are already contributing to the difficulties for organisations in determining their obligations. In addition, Chapter Four of the *NSW Interagency Guidelines for Child Protection Intervention* provides sufficient guidance on the exchange of information in child protection matters.

Thank you for the opportunity to comment. If you require any further information, please contact the Commission’s Manager, Policy, Maj-Britt Engelhardt, on 9286 7205 or at maj-britt.engelhardt@kids.nsw.gov.au.

Yours sincerely

Gillian Calvert  
Commissioner  
15 October 2008  

Encl. Submission to ALRC *Review of Privacy*
SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

REVIEW OF PRIVACY ISSUES PAPER

JANUARY 2007

NSW Commission for Children and Young People
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1. THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE

1.1 The NSW Commission for Children and Young People (‘the Commission’) promotes the safety, welfare and well-being of children and young people in NSW.

1.2 The Commission was established by the Commission for Children and Young People Act 1998 (NSW) (‘the Act’). Section 10 of the Commission’s Act lays down three statutory principles which govern the work of the Commission:

   a) the safety, welfare and well-being of children are the paramount considerations;
   b) the views of children are to be given serious consideration and taken into account; and
   c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.

1.3 Section 12 of the Commission’s Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Act as all people under the age of 18 years.

1.4 Section 11(d) of the Act provides that one of the principal functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. GENERAL COMMENTS

2.1 The Commission is pleased to make a submission to the Australian Law Reform Commission’s (ALRC) Review of Privacy Issues Paper.

2.2 In preparing this submission the Commission has sought the views of children and young people. We have also drawn upon the views of
children and young people from previous Commission projects in which issues concerning privacy have been discussed.\(^1\)

2.3 This submission focuses on issues that are not already discussed in the ALRC’s *Review of Privacy* Issues Paper. The submission also suggests strategies for further discussion to address some of the issues that are relevant to children and young people raised in the Issues Paper.

3. **WHY PRIVACY IS AN IMPORTANT ISSUE FOR CHILDREN AND YOUNG PEOPLE**

3.1 The protection of their privacy is important to children and young people. Children and young people tell the Commission that they want to be involved in decisions about what information is collected about them, how it is collected and who it is released to.

> Loss of privacy can lead to danger. It worries me that people would use my personal information against me.

> Privacy matters because it is up to me whether or not I share information and who I share it with.

> It matters that your life isn’t being told to a complete stranger. If you wanted someone to know you would personally tell them.

3.2 In particular, children and young people are concerned about how their personal information is used online.

> You give your information to one website and it goes to a lot more.

3.3 Children and young people are also concerned about how images taken of them are used and distributed.

> [People taking photos] should ask, even if their intentions for the photo are good – it should be the same for everyone to prevent bad people taking photos.

3.4 Children and young people tell the Commission that they are more likely to access services for assistance and support where they feel that their privacy will be protected. Providing children and young people with access to such services and supports is essential to their well-being.

3.5 It is recognised in international law that children and young people have a right to protection from interference with their privacy and a right to

\(^1\) *Report of an Inquiry into the best means of assisting children and young people with no-one to turn to* (2002) NSW Commission for Children and Young People, Sydney
participate in decisions affecting them. Providing children and young people with opportunities to participate in decisions about how their personal information is used provides them with some control over their own lives. This control gives children and young people a sense of agency that contributes to their well-being.

3.6 Increasing the involvement of children and young people in decisions about their privacy and personal information does not necessarily mean that parents are excluded. Many children and young people tell the Commission that they want their parents to be involved in their lives and to assist them when needed and so want to share their personal information with parents. However, as young people grow older and seek assistance with more intimate issues they want to choose if and when their parents are involved. Therefore, laws on how information is collected and disclosed need to reflect this need for flexibility.

4. COMPLEXITY AND CONSISTENCY OF PRIVACY LEGISLATION

4.1 The Commission considers that the importance children and young people attach to their right to privacy emphasises the need for clear and easy to understand privacy legislation.

4.2 It is the Commission’s view that the inconsistency between the Information Privacy Principles (IPPs) and National Privacy Principles (NPPs) in the Privacy Act 1988 contributes to national privacy legislation being unnecessarily complex. For example, while the NPPs contain provision for the protection of sensitive information, the IPPs do not, and there appears to be no apparent reason for the inconsistency. This inconsistency and complexity contributes to organisations being uncertain as to their obligations under the Act.

4.3 Apart from organisations being unaware, or uncertain, as to which privacy legislation applies to them, further confusion is created where organisations are contracted by government for some of their work, but which otherwise operate privately. The different principles under the Privacy Act 1988 which apply to public and private sectors contribute to this. In particular, complexities arise when services are delivered through a mix of private and public sector providers. For example, where public and private hospitals are co-located.

4.4 The Commission is supportive of the suggestion for a single set of principles, to be created by merging the IPPs and NPPs, with specific provisions for the public and private sector where required.

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2 Articles 12 and 16 United Nations Convention on the Rights of the Child
4.5 The existence of separate privacy legislation at national and state/territory levels, and in some states additional legislation relating to health information, can create confusion for organisations about their obligations. It can also cause confusion amongst children, young people and their parents about their rights and obligations. For example, the difference in state/territory legislation regarding health information can create inconsistency in situations where information regarding children and young people needs to be shared between services in different states/territories.

4.6 The Commission is of the view that improving the consistency of privacy legislation nationally will assist organisations to better understand, and comply with, their obligations under the law. It will also assist people whose information is being collected to better understand their privacy rights.

4.7 The Commission welcomes the commitment of the NSW and Australian Law Reform Commissions to work together in their respective reviews. We consider this an opportunity to improve consistency between the NSW and national legislation and may provide a model for other states and territories to follow.

5. RECOGNISING THE NEEDS OF CHILDREN AND YOUNG PEOPLE IN THE INFORMATION AND NATIONAL PRIVACY PRINCIPLES

5.1 The Commission has noticed a trend for increasing amounts of information to be collected by schools and services on children and young people in the interests of risk management. This information is being collected directly from children, young people and their parents or guardians or from other agencies with the permission of children, young people and their parents or guardians. The Commission is concerned that such information is at danger of being disclosed, either purposively or inadvertently, contrary to children and young people’s best interests.

5.2 The Commission supports the approach of the Privacy Act 1988 that allows an assessment of the capacity of each individual child or young person to make decisions and exercise rights on their own behalf. However, as identified in the ALRC’s Issues Paper, children and young people can only exercise their rights if the collector of personal information has the opportunity and knowledge to assess the young person’s capacity.

5.3 Legislation can not provide the entire solution to assisting collectors, although it can provide some assistance. The Commission suggests that consideration should be given to strengthening both the IPPs and NPPs to recognise the particular needs of children and young people. This may
assist to better focus collectors of personal information on the specific needs of children and young people.

5.4 It is suggested, for example, that Principle 2 of the IPPs could be strengthened by stating that where personal information is collected from children and young people under the age of 18 years, the collector may need to take additional steps so that the child or young person understands. Including specific principles in the Act reflects the recognition that the needs of children and young people have been given in state and territory jurisdictions through the establishment of legislation that provides for their participation in decisions about their lives.\(^3\)

5.5 Specific principles relating to children and young people can then be expanded upon in the Office of the Privacy Commissioner’s Guidelines to the National Privacy Principles, rather than relying on the Guidelines alone to provide protection for children and young people.

6. **APPLICATION OF THE PRIVACY ACT TO SMALL BUSINESSES PROVIDING COMMUNITY SERVICES**

6.1 The Commission is concerned that as some small businesses are exempt under section 6D of the Privacy Act 1988, services such as child care centres, family counselling or dispute resolution services which often keep records of children and young people’s sensitive personal information, may be exempt from the privacy obligations under the Act.

6.2 The Commission understands that some small businesses may fall within the exemptions under section 6D of the Privacy Act 1988. However, this does not apply to all services which provide supports and assistance for children, young people and their families. It is suggested that consideration be given to amending the Privacy Act 1988 to specifically include any business which provides services to children and young people. The Commission is also of the view that the privacy obligations of the private sector could be reinforced by extending the power of the Office of the Privacy Commissioner to conduct audits of the private sector.

7. **PUBLIC BROADCASTING OF CHILDREN AND YOUNG PEOPLE’S IMAGES**

7.1 The Commission is concerned about a number of recent instances in NSW where children allegedly involved in criminal behaviour have been named, or publicly identified, by the media. For example, following incidents at Redfern in February 2004 and Cronulla beach in December 2005 young people’s images were broadcasted and names of some alleged perpetrators released.

\(^3\) For example, the Children and Young Persons (Care and Protection) Act 1998 (NSW)
Children’s right to privacy throughout criminal proceedings is an inherent part of the juvenile justice system and is well established in state and territory law. There is no evidence that naming young offenders acts as a deterrent to others or reduces the rates of recidivism. There is also no evidence that it assists victims in their recovery.

The industry privacy standards and principles, which often value public interest over children and young people’s right to privacy, or rely on parent’s consent alone, are insufficient to protect the privacy of children and young people in such instances. The Commission considers that any standards or principles should recognise that if a parent refuses consent a broadcaster cannot over-ride this consent. However, where a parent does consent, the broadcaster should be subject to a further test of the best interests of the child.

It is the Commission’s view that by exempting the acts and practices of media organisations in section 7B(4) the Privacy Act does not adequately protect the privacy of children and young people. The Commission suggests the Privacy Act 1988 be amended to include a provision that requires broadcasters to include a standard within the industry standard and principles that relates specifically to children and young people.

It should be made clear that such a standard requires broadcasters to consider the best interests of children, even when informed consent has been obtained from the child or their parent. Including this provision sends a clear message to broadcasters about their responsibilities towards children and young people, while still allowing them to set their own standards based on their expertise and industry needs.

The Commission also supports suggestions to establish criteria in the Privacy Act 1988 by which the Office of the Privacy Commissioner could determine if the standards or principles applicable to broadcasters are adequate. In addition, the Commission is also supportive of making any code developed by the broadcasting industry mandatory on that industry.

8. COMPLAINTS ABOUT PRIVACY BREACHES

If a person considers that their privacy has been breached currently they can complain to the Office of the Privacy Commissioner. For many children and young people making a formal complaint can be difficult as they often are not aware of their entitlement to complain or lack the

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4 For example, section 11 of the Children (Criminal Proceedings) Act 1987 (NSW)
5 For example, section 4.3.5.1 of the Commercial Television Industry Code of Practice which states that the consent of a parent or guardian should be obtained before naming or identifying a child under 16 years unless there is an identifiable public interest not to do so
confidence to make a complaint. In addition, the outcome of such a complaint, i.e. an apology, may not be a sufficient incentive for a child or young person to pursue such action.

8.2 The Commission suggests that to make the complaints mechanisms under the Privacy Act 1988 more accessible, the Act should be amended to allow people to make complaints over the telephone. Other complaints bodies, such as the NSW Ombudsman, have taken this approach in order to make their services more accessible.

8.3 It is also suggested that consideration be given to allowing an interested third party, such as a service or advocacy body, to make a complaint on behalf of a child or young person. This may better assist children and young people to make privacy complaints, particularly if a complaint related to a group or if a best interests test were to apply as suggested above in paragraph 7.3.

8.4 The Commission supports extending the power of the Office of the Privacy Commissioner to serve a compliance notice where a breach of privacy has been found. In particular, such a right would be useful to children and young people where criminal proceedings are not taken against broadcasters.

9. CONCLUSION

9.1 The Commission welcomes the ALRC’s review of privacy. In light of changes in technology and an increased focus on risk management since the Privacy Act 1988 was introduced, the Commission considers it is an opportune time to consider how well the Act is working.

9.2 The Commission is pleased that the ALRC is consulting directly with children and young people as part of the review. The participation of children and young people in this ALRC review provides a best practice example to other agencies undertaking legislative reviews.