



22 September 2020

Dr Joseph Cannataci
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Dear Dr Cannataci,

Submission – Privacy and the child

Thank you for providing the Australian Human Rights Commission (the Commission) with an opportunity to submit information for your examination of the privacy rights of children, and how this right interacts with the interests of other actors as the child develops the capacity for autonomy.

The Commission is an 'A-Status' National Human Rights Institution, established and operating in full compliance with the Paris Principles.

The information in this letter draws primarily on the work undertaken by the National Children's Commissioner, Megan Mitchell, whose term of appointment at the Commission ended in March 2020. While an examination of the privacy rights of children in Australia has not been the focus of a major project conducted by the former Commissioner, her statutory reports on children's rights have touched on the following related issues: the need for better education on privacy rights; birth registration and identity documents; and the risks and opportunities provided by children's engagement with the digital world. The Children's Rights Reports are available at <https://humanrights.gov.au/our-work/childrens-rights/publications>.

In addition, the Human Rights Commissioner, Edward Santow, is currently conducting a project on the relationship between human rights and technology. The Discussion Paper for the project includes discussion on how new technologies can undermine privacy, freedom of expression and association, and foster online bullying and harassment of children, while at the same time presenting new opportunities. It can be accessed at

<https://tech.humanrights.gov.au/our-work>. A final report is due to be made public in early 2021 (which will be available on this same website).

Finally, the Human Rights Commissioner is leading a project examining the human rights of people born with variations in sex characteristics, and medical interventions conducted with respect to those variations, including in childhood.

Children’s rights and privacy — 2014 Children’s Rights Report

In 2014, the National Children’s Commissioner developed a set of resources designed to prompt children to think about privacy in both real and digital contexts. The resources included a privacy survey and a set of scenarios designed to initiate discussion. The materials set out what the *Convention on the Rights of the Child* states about children’s rights to privacy, noting, in some cases, these rights are so important that they should be protected by the law. The resources asked children to comment on laws, rules and protocols that would help protect their privacy.

Children who participated in lessons using these resources gave interesting feedback. Children, especially younger children, believe privacy is important, and most are certain about what it means in the physical world, for example not letting strangers interfere with your person or property. However, generally the views of children and young people showed that they were not clear about why and when it was important to protect their own privacy and to respect the privacy of others, what laws exist, and what action could be taken to enhance and safeguard privacy. This points to a much greater need to educate children and young people about what privacy looks like in a contemporary context that incorporates the digital world. Further information about this work is available in the 2014 Children’s Rights Report at <https://humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2014>.

Birth registration and identity documents

Low birth registration rates of Aboriginal and Torres Strait Islander babies

Not all babies in Australia are registered at birth, especially those born to Aboriginal and Torres Strait Islander parents. For example, Queensland Health reported in 2014 that 15–18% of births to Aboriginal and Torres Strait Islander mothers were not registered, compared with 1.8% of births to mothers who were non-Indigenous.¹

Reasons for this disparity include fees and penalties for late registration of a birth and obtaining a birth certificate, and a lack of culturally appropriate information and support for the birth registration process.²

Birth certificates play an important role in ensuring that a child has access to education and other resources. Currently, birth registration is free in all states and territories of Australia. However, fees are charged for birth certificates (which are required for school enrolment).

In its Concluding Observations on Australia (2019), the Committee on the Rights of the Child recommended that Australian governments ensure that all children, particularly Aboriginal and Torres Strait Islander children, children living in remote areas, and children in child protection services, are registered at birth and receive free birth certificates.³

Birth certificates for transgender children

There can be significant barriers for transgender children seeking legal recognition of their gender identity, with consequences for their health and wellbeing. The inability to change the sex marker on birth certificates, for example, can make the experience of attending school difficult for transgender children.

In Australia, the law on changing the sex marker on birth certificates varies by state and territory. In some states and territories, the requirements to change this marker are onerous and intrusive. For example, some jurisdictions require extensive medical evidence, such as evidence of a transgender person having undergone surgery, before permitting a change in the sex marker. Transgender young people and their parents have reported to us that such requirements can cause serious harm for transgender young people.

In 2019, the state of Tasmania introduced landmark legislation that enables transgender adults and children to change the sex marker on their birth certificates. Previously, this had only been available to adults who could demonstrate that they had undergone sex reassignment surgery or had met other strict evidentiary requirements. The new legislation also allows young people aged 16 years and over to change the sex marker on their birth certificates without parental consent. Applications to change the sex marker on a person's birth certificate must be supported by a statutory declaration that declares the person's identified gender and states that they wish to live as a

person of that gender. The parents of children aged under 16 can make an application on behalf of their child.

Identity documents for children in care

Children in out-of-home care can experience difficulties in accessing identity documents, such as birth certificates, proof of Aboriginality, proof of Australian citizenship, and passports. A key strategy of the Third Three Year Action Plan, 2015–18⁴ under the National Framework for Protecting Australia’s Children 2009–2020 is to help children in out-of-home care thrive in adulthood. Under this framework, the National Children’s Commissioner was involved in leading the development of cross-jurisdictional protocols to support more streamlined identification requirements and fast-tracked access to identity documentation for children with an out-of-home care experience. However, this continues to be an issue of ongoing concern for children in out-of-home care.

Legal recognition for parents of children born through surrogacy

Children born overseas through surrogacy can be granted citizenship by the Australian Government. However, it is the responsibility of parents to seek parentage orders. These orders are determined according to different criteria and processes in each state and territory. Currently, these processes lack both consistency and certainty.

Lack of recognition of legal parentage can affect the ability of children to access a variety of other rights relating to citizenship, medical treatment and benefits, inheritance, passports, child support and workers’ compensation entitlements. Parents (biological or not) of children born through surrogacy arrangements should be given the opportunity to be legally recognised.⁵

In its Concluding Observations on Australia (2019), the Committee on the Rights of the Child asked Australia to ensure that children born through international surrogacy arrangements have access to a clear process with uniform rules throughout the country to obtain Australian nationality.⁶

The Committee further addresses the issue of children born through surrogacy by asking Australia to ensure that children born through assisted reproduction technologies, in particular through surrogacy, are able to access information about their origin, and that all involved are provided with appropriate counselling and support.⁷

Children's rights in the digital environment

Discrimination, harassment and bullying online

Australian children are active participants in online spaces and consider access to technology to be a basic right. They use it to socialise, to learn, to access information, to play, to get help, and to consume goods and services.

The 2018 *Children's Rights Poll* asked children to identify where they had learned about their rights. 20.6% of respondents indicated that they had learned about their rights online, with 26.4% of those aged 12 to 17 years reporting that they had learned about their rights online. In addition, many of the 'free space' comments focused on digital technology. Comments generally related to the two themes of cybersafety and access (in terms of connectivity or affordability).

However, digital environments, particularly those created by social media, have created new arenas for discrimination, harassment and bullying. Education is the most effective response to cyber-harassment and online safety for children. Research conducted by the Commission in 2012⁸ emphasises that the key driver of behavioural change in children is peer support and educative approaches. The need to educate children about how to deal with negative online behaviour needs to be balanced with the recognition that access to digital technology and information supports children to claim their basic rights in a range of areas.

In its Concluding Observations on Australia (2019), the Committee on the Rights of the Child recommended that the Australian Government ensure that children, their parents and other caregivers are taught appropriate online behaviour, including preventive strategies, against online abuse and/or exploitation.⁹

Exposure to harmful digital content

A common form of harm that can occur within the digital environment is exposure to pornographic and violent images. Intentional or unintentional exposure to pornography can result in children developing distorted ideas about sexuality and relationships.

A human rights-based approach to protecting children from harm online requires a balancing of rights, with children and young people themselves being included in discussions about the most appropriate protective measures. Current regulatory responses, such as the removal of prohibited content under the eSafety Commissioner's Online Content Scheme, and the requirement that

Internet Service Providers (ISPs) offer information and make available (at cost) filters that parents can install, can help to prevent some exposure.

However, the most effective strategy for protecting children and young people from the adverse effects of viewing pornographic content online is education. Such education includes providing children and young people with information and education about safety online, critical discussions about pornography as part of age-appropriate education about sex and respectful relationships, and human rights education. A package of educational measures covering these areas has the potential to empower children and young people and their families, and to provide them with the tools needed to minimise both exposure to and the impact of pornographic online content.

‘Sexting’ is the practice of sending or sharing intimate images. A 2017 survey of 1,424 young people aged 14–17 conducted by the Office of the eSafety Commissioner found that nearly one in three of the respondents had some experience with sexting in the 12 months prior to the date on which the survey was conducted. This included ‘sending, being asked and asking, sharing or showing nude or nearly nude images or videos.’¹⁰

Under Commonwealth law (section 474.27A(1) of the *Criminal Code Act 1995*), it is an offence for a person to transmit, access or solicit child sexual abuse material. There are also state and territory laws that operate to criminalise accessing, possessing, creating and sharing sexualised images of children.

These laws are designed to protect children from predatory adults. However, the laws can sometimes be used to prosecute children who have unknowingly engaged in criminal behaviour—even if the children involved have consented. A child or young person under the age of 18 who takes an intimate image of themselves and then shares it with another young person can be prosecuted for transmitting child sexual abuse material. The recipient of the image can also be prosecuted.¹¹

Children need to be provided with clear guidance about how to navigate healthy sexual relationships, the importance of consent and safe digital practices in the digital environment. Criminalising the behaviour of children who engage in the practice of ‘sexting’ is not an effective solution to this problem.

Human rights and technology project

The Commission is in the final stages of a major project, led by the Human Rights Commissioner, examining the human rights implications of new and emerging technologies. This work is particularly focused on the ways human rights may be affected by the use of artificial intelligence (AI) in decision making, and on the need to ensure products and services that rely on these technologies are accessible for all. The Commission released a detailed discussion paper in December 2019, outlining our areas of focus, work to date, and tentative findings and proposals for change.¹² The Commission has undertaken a final round of public consultation on the discussion paper, and is in the process of drafting the final report.

Like adults, children can both benefit and suffer harm from the use of AI. Children are particularly likely to have their personal information used to make decisions that affect their privacy in circumstances where they are unable to provide fully informed consent. For instance, proposed legislation currently before the Australian parliament, the Identity-matching Services Bill 2019 (Cth), would, if passed, empower the Australian Government to create a central database of state and territory identity documents, link these to databases of federally-held identity information, and allow biometric searches of these databases. As currently drafted, the Bill would allow identity documents for children to be included and accessed by a range of government agencies, as well as some corporations and others, to use facial recognition systems to identify children. There is no requirement that those who apply for those identity documents, including parents who apply on behalf of children, consent to the information they provide being used in this way.

Children born with variations in sex characteristics

People born with variations in sex characteristics in Australia (sometimes referred to as intersex people) have increasingly raised concerns about human rights violations with the Commission, the Australian Government and United Nations mechanisms, especially in relation to medical interventions conducted without the full and informed consent of the person involved. Many of these interventions have involved children. These interventions impose significant limitations on affected children's right to privacy.

Following an inquiry in 2013 by the Senate Community Affairs References Committee into the involuntary or coerced sterilisation of intersex people in

Australia,¹³ and the release of a joint consensus statement in 2017 by the Australian and Aotearoa/New Zealand intersex organisations and independent advocates (known as the Darlington Statement), the Human Rights Commissioner launched a project in 2018 to further explore this issue. The Commission has consulted with diverse stakeholders including people with lived experience, advocates, medical practitioners, regulators, academics, and civil society organisations. The findings of these consultations will be documented in a report which is currently in preparation.

Yours sincerely



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¹ Queensland Ombudsman, The Indigenous Birth Registration Report: An investigation into the under-registration of Indigenous births in Queensland (June 2018) vii <www.ombudsman.qld.gov.au/improve-public-administration/reports-and-case-studies/investigative-reports/the-indigenous-birth-registration-report>.

² Queensland Ombudsman, The Indigenous Birth Registration Report: An investigation into the under-registration of Indigenous births in Queensland (June 2018) vii <www.ombudsman.qld.gov.au/improve-public-administration/reports-and-case-studies/investigative-reports/the-indigenous-birth-registration-report>.

³ United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 23(a).

4 Department of Social Services (Cth), Third Three-Year Action Plan 2015–2018, Driving Change: Intervening Early, National Framework for Protecting Australia’s Children 2009–2020 (2011).

5 Australian Human Rights Commission, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements, 17 February 2016, 11 <<https://humanrights.gov.au/our-work/legal/submission/submission-inquiry-regulatory-and-legislative-aspects-surrogacy>>.

6 United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 23(c).

7 United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) 6.

8 Australian Human Rights Commission, Cyberbullying and the Bystander (Report, 2012) <www.humanrights.gov.au/our-work/childrens-rights/publications/cyberbullying-and-bystander>.

9 United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 27(c).

10 Office of the eSafety Commissioner, Young People and Sexting - Attitudes and Behaviours (Report, 14 December 2017) 14 <<https://www.esafety.gov.au/about-us/research/young-people-sexting>>.

11 Youth Advocacy Centre, Submission No 73 to Australian Human Rights Commission, Report under article 44, paragraph 1(b), on the Convention on the Rights of the Child, 30 May 2018, 14 https://humanrights.gov.au/our-work/publications/submissions-childrens-rights-report-2019/submissions-childrens-rights-report?_ga=2.147176306.491631721.1600734148-2022835427.1584576377.

12 Australian Human Rights Commission, Human Rights and Technology: Discussion Paper, (2019), <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-and-technology-discussion-paper-2019>>.

13 Senate Community Affairs References Committee, Parliament of Australia, Involuntary or coerced sterilisation of intersex people in Australia (2013). <[http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/~media/Committees/Senate/committee/clac_ctte/involuntary_sterilisation/second_report/report.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/~/media/Committees/Senate/committee/clac_ctte/involuntary_sterilisation/second_report/report.ashx)>.