



Reset.
AUSTRALIA

*Prohibiting targeting to children
and children's best interests:
Can the two coexist?*

Reset.Tech Australia
October 2023

Summary

- There is widespread support for the introduction of the best interests principle into privacy law. This includes prohibiting targeting to children unless it is in their best interests. Proposal 20.6 of the *Privacy Act Review* presents opportunities to create a child-centric approach to targeting and it is welcome that the Government agrees in-principle that this should proceed.
- This is not straightforward or simple, as the Government themselves acknowledged when they agreed to the measure in-principle, which means it is subject to further engagement to ensure that the right balance can be struck. This paper explores and unpacks some of the complexity around striking this balance, by highlighting the impacts the measure could have on children's rights.
- Detailed guidance and assessments concerning what is in children's best interests need to be developed. This would entail considering a holistic approach to children's rights. Legislators and regulators need to develop guidelines and assessment tools.
- These guidelines and assessment tools need to consider the instance of targeting, as well as the data processing, profiling and automated decision-making that happen during the process of targeting.
- There would need to be a breadth of consultation and diversity of key stakeholders involved in developing these tools and defining how best interests need to be determined in practice. This includes not only a wide variety of professionals and children's advocates but also children and young people themselves.
- These tools need to emphasise that consent alone is not adequate for determining best interests, nor are broad declarations that there is 'no evidence of harm'. These tools need to require platforms to consider how to advance children's rights holistically, including their right to access the digital world.

Table Of Contents

Introduction	4
How do we make sense of the best interests principle in a digital context?	6
Targeting children in the <i>Privacy Act</i>: what does this mean?	7
European approaches to targeting children: are they in their best interests?	8
Discussion	9
What counts as Best Interests?	9
Best interests involves more than consent	9
Best interests involves more than harms	10
Need for broad engagement in defining best interests	10
Creating a 'best interests exemption' that advances children's rights	11
Need to move beyond content to see targeting as a process	13
Best interests assessments and guidelines	14
Recommendations	16
Acknowledgements	17
Appendix: Age assurance	18

Reset.Tech Australia is an independent, non-partisan policy research lab committed to driving public policy advocacy, research and civic engagement to strengthen our democracy within the context of technology. We are the Australian affiliate of Reset, a global initiative working to counter digital threats to democracy.

Images in this report sourced with thanks from Better Images of AI.

Introduction

Proposal 20.6 of the *Privacy Act Review*¹ ('the Review') proposes to prohibit targeting to a child, with an exception for targeting that is in the child's best interests. Proposal 20.1 creates a specific definition of targeting that would be prohibited except for instances of children's best interests:

Targeting – capture the collection, use or disclosure of information which relates to an individual including personal information, deidentified information, and unidentified information (internet history/tracking etc.) for tailoring services, content, information, advertisements or offers provided to or withheld from an individual (either on their own, or as a member of some group or class).

The Government has agreed in-principle to implement both of these proposals in their response to the Review in principle.² An in-principle agreement means that the Attorney-General's Department will lead another stage of engagement and discussion around how the proposals could be implemented 'so as to proportionately balance privacy safeguards with potential other consequences and additional regulatory burden'.³ This paper explores and unpacks some of the complexity around striking this balance, by highlighting the impacts the measure could have on children's rights.

Under this definition, targeting covers a range of common digital experiences that shape young people's experience of the digital world, including for example, the following:

1. Receiving targeted advertising.
2. Content recommender systems, such as:
 - Social media feeds, in both 'follower' mode and 'discovery' mode, because both feeds are algorithmically curated.
 - Recommendation systems on streaming platforms, such as Netflix and Spotify that recommend content users might want to consume.

3. Search engine responses, such as Google responses which algorithmically factor in personal information such as location and internet history when making responses.

4. Voice assistant services, like Alexa or Siri, that generate their responses to voice commands based on personalised preferences and information.

5. Consumer loyalty schemes – applicable here only where under 18-year-olds are allowed to join – which frequently target rewards based on personal information. This could include discounts or 'free cinema tickets' on birthdays or offers on purchases of favourite smoothies.

6. Generative AI programs such as ChatGPT and DALLe, that generate text or images based on a range of personalised input.

7. Automated Decision Making programs, such as those that generate targeted decisions or responses for individuals based on personal information.

The experience of targeting is widespread in children's digital lives. Prohibiting targeting has the ability to both advance children's rights and to violate them.

- Targeting itself can advance rights and function in children's best interests by, for example, improving young people's right to access information from search engines and to realise their right to play and enjoy leisure pursuits using content recommender systems. Prohibiting targeting would therefore violate their rights. Children and young people should not be denied access to the full and rich opportunities of the digital world because beneficial or neutral targeting is unnecessarily restricted. If the prohibition is poorly applied, it could curtail children's access to the digital world.

1. Attorney General's Department 2023 Privacy Act Review Report <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>

2. Attorney General's Department 2023 Government Response: Privacy Act Review Report <https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF>

3. Attorney General's Department 2023 Government Response: Privacy Act Review Report <https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF>

The relevant proposal in the *Privacy Act Review* is to prohibit targeting to a child, with an exception for targeting that is in the child's best interests.

This is consistent with an emerging trend to apply the best interests principle to digital regulation to advance children's rights, which is reinforced in the *Privacy Act Review* by proposal 16.5 (to develop a Children's Privacy Code to reinforce how the best interests of children should be supported in the design of an online service) and proposal 16.4 (to include considerations of children's best interests when deciding if the collection, use and disclosure of information is fair and reasonable).

Government has agreed to the proposal to develop a Code. The proposal to consider children's best interests in fair and reasonable assessments has been agreed to in-principle.⁶ This response suggests that over time, understanding what is in children's best interests within the privacy framework will become increasingly important for regulators, industry and children themselves.

Against this backdrop, Reset.Tech Australia convened a policy roundtable of 17 experts, with expertise across child rights, privacy, and academic research, to explore the proposals for a prohibition of targeting children except where it is in children's best interests. Three key questions about the proposal provoked the discussion. These and the discussions are summarised on the next page.

- Targeting can also violate children's rights and function against their best interests when, for example, recommender systems promote content, connections or creators that harm children. For example, search algorithms routinely promote extremist material to young people,⁴ and friend recommender systems regularly recommend adult strangers to children, creating grooming risks.⁵ Targeting must not harm a child; this is never in their best interests. Prohibiting targeting could therefore advance rights by protecting children from harmful targeting.

4. Ralph Housego & Rys Farthing 2022 'Social Grooming' AQ Magazine <https://www.jstor.org/stable/27161413>

5. Australian Child Rights Taskforce 2023 Letter to the eSafety Commissioner https://childrightstaskforce.org.au/wp-content/uploads/2023/01/Online-Safety-Codes_-ACRT-letter-to-eSafety.pdf

6. Attorney General's Department 2023 Government Response: Privacy Act Review Report <https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF>

1. How do we make sense of the best interests principle in a digital context?

The *Privacy Act Review* would allow targeting only where it is in children's best interests. However, it is often unclear when this might be. The Review presents a curious example:

If a person under 18 provides their contact details to an activewear brand when making a purchase, it would likely be in that child's best interests to receive communication from that company about new products or discounts, provided the child can opt-out of receiving this communication. However, if the activewear brand expanded their range of products to include diet supplements, it would likely not be in the child's best interests to receive direct marketing communication advertising these products.⁷

In this example, it is not explained why the marketing of activewear is in the child's best interests and why that of dietary supplements is not. There are two possible explanations for the distinction, both of which are based on implicit assumptions that should be made explicit so that they can be scrutinised:

- A harm-based paradigm. One potential reason why activewear updates are in a child's best interests is that there is no risk of harm to children from wearing activewear, but there may be a risk of harm from diet supplements.
- A consent-based paradigm. It may be deemed to be in the child's best interest to receive communications about activewear because the child signed up for these updates and hence consented, while they did not consent to receiving updates about diet supplements.

Harm is an often-overused term and cannot be persuasively determined without reference to credible evidence. Even where the question of what is harmful may seem to be a matter of 'common sense' on the surface, there are layers of complexity. Take, for example, an ad for a harmful product. Before a conclusion can be reached that

the ad itself is harmful, it is necessary to assess the actual risk that the child will ultimately consume the product, and this requires an evidence base.

Regarding consent, this is often used to justify targeting, but children, especially younger children, are not sovereign consumers, and it is often unclear whether they can meaningfully consent to commercial interactions. To the extent that this capacity is attenuated, it is unclear how consent could support the conclusion that such communication is in their best interests.

To give meaningful content to the concept of children's best interests, it is important to consider context and content. One of the most important factors of context is children's evolving capacities. Although the *Convention on the Rights of the Child* covers all children under 18 years old,⁸ children also have a right to development and to have their evolving capacities respected. Therefore, any analysis of their best interests needs to bear in mind their developmental needs. This means designing a policy that considers the fact that a 10-year-old, for example, has capacities different from those of a 17-year-old.

Another part of the context is that children's overall experiences online include targeting by multiple actors multiple times in any given period. The cumulative effect of these experiences is not captured by a regulatory regime that focuses on individual instances.

Finally, content is at risk of being overlooked in the development of an online privacy policy. There is a need to determine which kinds of content serve and do not serve the children's best interests (in given contexts). Australia has one regulatory regime that attempts to address the question of content, namely, the National Classification Scheme. While this scheme is defective in numerous ways (most notably its failure to use an evidence base or respect ages and stages of development), it might form a precedent for a structure that could analyse content and determine its bearing on children's best interests.

⁷. Attorney General's Department 2023 Privacy Act Review Report <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>, pp 215. Note that this example relates to Proposal 20.5 on direct marketing to children, but there is no reason to think that the best interests analysis would be different in Proposal 20.6.

⁸. UN General Assembly 1989 Convention on the Rights of the Child <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>



2. Targeting children in the Privacy Act: what does this mean?

Proposal 20.1 of the Review would create a broad definition of targeting within Australia's privacy framework:

.... the collection, use or disclosure of information which relates to an individual including personal information, deidentified information, and unidentified information (internet history/tracking etc.) for tailoring services, content, information, advertisements or offers provided to or withheld from an individual (either on their own, or as a member of some group or class).

This definition is broad in three ways:

1. The nature of services that will be included is wide and include the following:
 - Tailored services, like online games or Google Suite
 - Tailored content, including the use of recommender systems on social media platforms and streaming services
 - Tailored information, such as search engines and voice assistants
 - Tailored offers, such as rewards cards
2. The 'process' of targeting is extensive. The process will consider not only the delivery of content or services as targeting, but also the collection and disclosure of information associated with that delivery. This includes direct collection, the use of cookies and other data acquired from monitoring digital

behaviours, and the use of third-party data. It will also cover disclosures such as the sale and forward use of this data.

3. The nature of the information covered is comprehensive. The definition of targeting will cover identifying personal information, as currently covered by the *Privacy Act*, but if other proposals in the *Privacy Act Review* are accepted, will also include deidentified information that is de-linked from a person, and unidentified information such as metadata associated with people's digital behaviours.

Taken as a whole, this means that targeting covers virtually all products, services or content that present differently to different users, irrespective of whether the service provider knows the identity of the user. Targeting will also cover the collection or disclosure (including sharing or trading) of data if it is conducted for the purpose of tailoring services and content.

The breadth of this definition will cover multiple experiences and user journeys for children online. Ensuring that children's best interests are advanced will require considering their rights across the whole process, from data collection and device scraping through to potential sales to data brokers. It is far more complex than simply preventing harmful advertising from reaching them.

3. European approaches to targeting children: are they in their best interests?

By way of comparison, in the EU, there are three main regulations that might cover targeting children as proposed in Australia.

- The *Digital Services Act (DSA)*⁹ has full entry into force by February 2024. The DSA deals explicitly with child protection within a broader, more comprehensive system of requirements and covers requirements regarding targeting children. Under the DSA, targeted advertising to children – that is, targeting them to deliver commercial advertising and offers – is prohibited. Beyond advertising, platforms must put in place measures to achieve a high level of safety and security for minors in general, which would include both the process of targeting and the nature of the tailored services, information and content offered to children. For very large online platforms, this is advanced through risk-assessment frameworks. Under this framework, very large platforms are required to assess the systemic risks their platforms pose to their users in general and children in particular, stemming from the design and function of systems. This includes algorithmic systems, content recommender systems and use of services and content. This risk-based approach means that, for example, targeting news content would be permitted, but targeting to introduce minors to adult strangers would not.

These risk assessments are extremely broad and will create a great deal of information for regulators and researchers to use to

identify exactly how to deal with the risks that children face online. Alongside creating obligations to share data with researchers, this creates transparency, which is an innovative idea and a work in progress.

- The *Audio Visual and Media Services Directive (AVMSD)*¹⁰ which covers video-sharing platforms such as YouTube. Under the AVMSD, these services must protect children from content that would impair their physical, psychological and moral development. Unlike the DSA, the AVMSD's rules are limited to online content rather than risks stemming from children's interactions with other users (e.g. cyberbullying).
- The *General Data Protection Regulation (GDPR)*¹¹ which includes broad privacy rules and specific rules for children, such as parental consent and other particular issues. These cover the types of data processing associated with targeting and require them to meet one of six justification tests to be legal.¹²

The result is a series of measures to protect children that are both highly specific regarding targeting and privacy and extremely broad regarding other kinds of risks. Platforms have to identify and assess the risks their users face, but they have carte blanche when it comes to how to deal with those risks.

8. European Commission 2022 *Digital Services Act* <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

10. European Commission 2018 *Audiovisual and Media Services* <https://digital-strategy.ec.europa.eu/en/policies/audiovisual-and-media-services>

11. European Commission 2018 *General Data Protection Regulation* <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

12. See for example, Ireland Data Protection Commission 2018 *Guidance on Legal Bases for Processing Personal Data* <https://www.dataprotection.ie/en/dpc-guidance/guidance-legal-bases-processing-personal-data>

Discussion

What counts as Best Interests?

- Proposal 20.6 places much stock in using the best interests principle to create exemptions ('best interests exemptions'), to ensure that children maintain meaningful access to the digital world. This raises questions about what 'best interests' means in this context.
- There is utility in 'best interests' being flexibly defined and open ended; this allows regulation to be somewhat future proofed and to deal with unknown risks that often arise from emerging technologies or trends, as well as to meaningfully evolve as new risks and research emerges.
- However, guidance and clarity are needed to ensure that the term 'best interests' is impactfully interpreted and not just assumed.
- The discussion noted three key considerations around defining best interests before progressing on to contextualising it within a broader child rights-based approach.

1. Best interests involves more than consent

- The consent model assumes children are sovereign consumers and that if they consent to targeting (or the data processing associated with the instance of targeting), targeting falls under children's best interests. More thought needs to be given to young people's rights, not only as consumers but as citizens with evolving capacities and rights to access information online.
- The consent model is questionable for a range

of reasons, especially the following:¹³

- Consent models can overlook children's evolving capacities to consent, especially where younger children might not have evolved the necessary capacities for meaningful consent.
- Consent models can overlook the issue of whether consent is meaningful or the product of coercion. Research suggests that having access to digital platforms is essential for children and young people to enjoy a range of rights,¹⁴ such as the right to access information, the right to education and the right to leisure and play. Where children and young people must use digital platforms to enjoy these rights, it is unclear whether a meaningful option to decline exists. In this sense, consent mechanisms are more coercive than meaningful.
- Consent models overlook both the complexity involved with current consent mechanisms,¹⁵ and consent and objection fatigue. There is a need for greater child-focused education and explainers to ensure meaningful consent.
- Children and young people are concerned about their data and privacy in both commercial and government settings. They express the desire for digital spaces and environments that respect their privacy but do not feel that these are currently available. Both Australian¹⁶ and Indian¹⁷ research has highlighted this.

¹³. For further information about this see: Reset.Tech 2023 Capacity of the consent model <https://au.reset.tech/news/capacity-of-the-consent-model-online/>

¹⁴. Amanda Third & Lily Moody 2021 Our rights in the digital world: A report on the children's consultations to inform UNCRC General Comment 25 Western Sydney University <https://5rightsfoundation.com/uploads/OurRightsinaDigitalWorld-FullReport.pdf>

¹⁵. See for example Reset.Tech 2021 Did we really consent to this? <https://au.reset.tech/news/did-we-really-consent-to-this-terms-and-conditions-young-people-s-data/>

¹⁶. Reset.Tech Australia 2023 Young people and online privacy <https://au.reset.tech/news/report-realising-young-people-s-rights-in-the-digital-environment/>

¹⁷. Pathak-Shelat, Manisha et al. 2022 Indian Kids Online: Negotiating the Global and the Digital Flows. A pilot research project in Ahmedabad City, India in partnership with the Global Kids Online Network. http://globalkidsonline.net/wp-content/uploads/2019/05/India_Global-Kids-Online_Final-report_April-2022.pdf

2. Best interests involves more than harms

- A harm-based approach can be useful but is potentially limited. Currently, harm is an overused term that lacks clarity, which obscures both its capacity and its limitations.
- A harm-based approach requires a clear evidence base of risks. This adds rigour to the approach, but the development of this evidence base is often overlooked. Evidence bases are often slow to emerge and somewhat patchy, reflecting resourcing issues in the research community.
- German regulation offers a three-tier system for identifying harm online, including identifying obvious risks of child endangerment, simple risks of child endangerment and risks to the healthy development of children.¹⁸ Despite potentially being the most advanced typology in online legislation, this still leaves gaps.

3. Need for broad engagement in defining best interests

- How policymakers access information, expertise, and insights to begin to shape and refine the definition of children's best interests is key. The discussion identified several actors who might be helpful in developing definitions:
 1. **Professionals.** Experts, and a breadth of professionals who would need to be involved in properly developing and defining the notion of children's best interests include the following:
 - Children's health and mental health professionals

- Social scientists
- Psychiatrists
- Behavioural and social psychologists
- Child development specialists

Care would need to be taken when including professional expertise for ethical reasons and to avoid conflicts of interest. Many academic institutions and practitioners may also be funded by tech platforms, which may create conflicts.

The use of expertise in Australian family law also requires consideration. The best interests approach taken in Australian family law is not helpful. It lacks a broad interdisciplinary approach, is embedded in an adversarial system and has, over several decades, failed to provide clear and transparent guidance on making decisions that involve and support children. The formula of best interests under the *Family Law Act* is not consistent with the international understanding set out in the *Convention on the Rights of the Child*. In general, recent research suggests that child rights principles are poorly understood and rarely used in the Family Court.¹⁹

2. Children and young people. Children and young people should be granted the opportunity to participate in decision-making processes since they frequently possess valuable experiences and insights to be considered by policymakers. Nevertheless, it is crucial to acknowledge that children may not always make decisions solely in their own best interests. In this context, it is essential to recognise both their right to participate and the significance of expert knowledge, while considering their evolving capacities.

¹⁸. Germany 2016 Jugendschutzgesetz <https://www.gesetze-im-internet.de/juschg/BJNR273000002.html>

¹⁹. Georgina Dimopoulos 2023 'The right time for rights? Judicial engagement with the UN Convention on the Rights of the Child in Part VII proceedings - 36' *Australian Journal of Family Law*, 63.

Creating a ‘best interests exemption’ that advances children’s rights

The Committee on the Rights of the Child explains in their *General Comment on Children’s Rights in Relation to the Digital Environment* that the best interests principle both applies in the digital world and requires assessments:

“The best interests of the child is a dynamic concept that requires an assessment appropriate to the specific context. The digital environment was not originally designed for children, yet it plays a significant role in children’s lives. State parties should ensure that, in all actions regarding the provision, regulation, design, management and use of the digital environment, the best interests of every child is a primary consideration.”²⁰

Children’s rights are indivisible and interdependent. The best interests principle is one of the core implementation principles in a child rights based approach, alongside non-discrimination, the right to life, survival and development, and the right to participation.²¹ Implementing the best interests principle effectively would require ensuring that digital decision making respects children’s rights holistically. Children’s best interests should be interpreted in light of each of the other three core implementation principles. These principles emerged across the discussion in several places, including the following:

- Children’s right to participate. Respecting children’s right to participate by engaging them in defining best interests and developing any best interests assessment tools and guidelines would be essential. Moreover, in assessing children’s best interests in any given case, the extent to which their participatory rights were upheld would be relevant, including through being adequately informed and able to make meaningful choices.
- Children’s right to life, survival and

development. The need to consider children’s rights to access the digital world for leisure, education and play were discussed as critical, as was respecting their evolving capacity. This would also ensure that their right to protection was respected, including online privacy and protection.

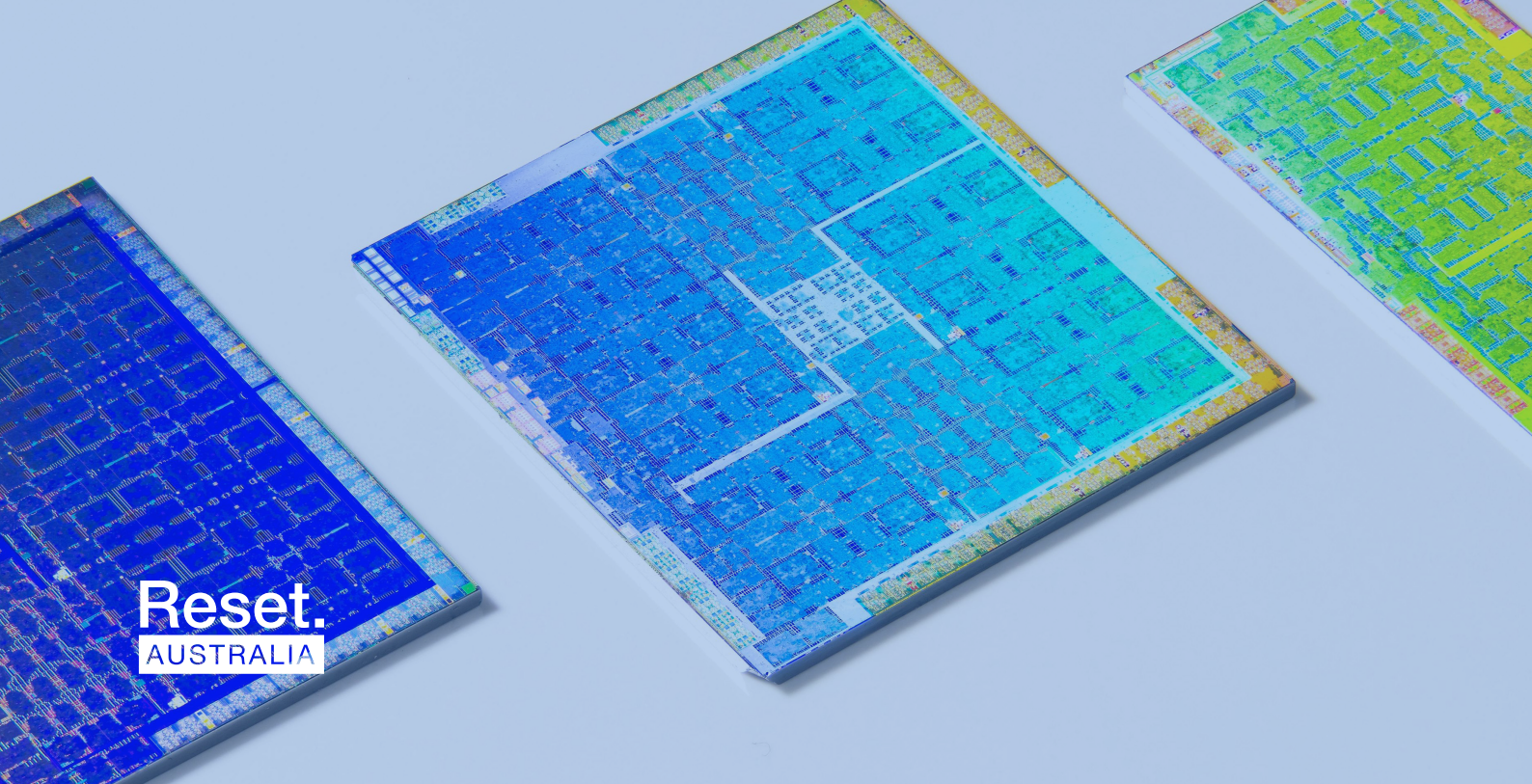
Developmental differences and context are also important to recognise from a rights-based framing. The assumption that best interests is simple or straightforward will not help us realise the nuance and complexity of the issue, nor to advance children’s rights more broadly. From a rights-based perspective, the proposal to prohibit targeting is blunt and will require a great deal of work from the best interests exemption to create a rights-advancing framework.

Under a children’s rights-based approach, the ultimate responsibility for ensuring children’s best interests are met rests with governments, and they bear the responsibility for ensuring the underlying conditions are in place to enable this, be they regulatory or otherwise. Governments are often uniquely placed to adopt a systemic approach that provides for and upholds rights, and prevents harm in the first instance.

- For example, the best interests principle is often deployed in family law, educational and healthcare settings or child protective services in ways that fail to acknowledge the government’s obligation to realise children’s best interests in systemic ways. For instance, governments can create contexts and provide additional support to families, carers or educators to help children flourish and realise their best interests.
- In the digital context, this systemic approach

20. Paragraph 12 & 13, Committee on the Rights of the Child (2021) General comment No. 25 (2021) on children’s rights in relation to the digital environment. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation>

21. See, for example, Committee on the Rights of the Child 2021 General comment No. 25 (2021) on children’s rights in relation to the digital environment. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation>



Reset.
AUSTRALIA

would require developing a digital world that is child centric and adopts a child-rights-by-design approach rather than removing children from the digital world. A child-rights-by-design approach adopts and embraces a safety-by-design approach but extends beyond this to support the realisation of other rights in the digital context.²² The government's responsibility here would be to legislate, regulate and promote the implementation of this across Australia's digital architecture with a focus on creating systemic solutions.

While ensuring that the legality of targeting rested on a best interests assessment would go some way to embedding child rights into the digital world, it will not be a silver bullet, and the government also has additional responsibilities to advance children's rights online.

A best interests test around targeting may harmonise with and best interests requirements developed in a Children's Privacy Code (proposal 16.5) and in consideration of whether the collection, use and

disclosure of information is fair and reasonable (proposal 16.4), which may help advance the principle more broadly across Australia's digital architecture.

A focus on content alone, or making claims about how various types of content impact children, will not help tackle the complexity of the issue from a rights-based perspective. A content focus would simply see a privacy framework that creates an extremely 'big basket' of content types restricted or prohibited (or in US policy language, it will create a 'Christmas tree bill').²³ Inevitably, determining what is in or out of this basket is going to be a 'whack-a-mole' process and inevitably leave gaps.

²². UNICEF 2020 Children's rights-by-design <https://www.unicef.org/globalinsight/reports/childrens-rights-design-new-standard-data-use-tech-companies>

²³. A Christmas tree bill is characterised as a policy that attracts a wide number of amendments or addresses a diversity of issues. The name refers to the way different policy makers and advocates hang their issues onto the bill, like baubles on a Christmas tree. The critique is that they become incoherent, heavy and overly complicated.

Need to move beyond content to see targeting as a process

- Understanding what is in children's best interests requires considering children's overall experiences online and the cumulative impact of various instances of targeting.
- Addressing individual pieces or types of content alone is inadequate for the scale of the problem.
- Targeting is a 'process' that encompasses more than individual instances of targeting, such as when a child receives a targeted ad or social media post. Targeting also involves a range of data processing practices, profiling and automated decision-making.
- Focusing on prohibiting specific instances of targeting, such as the delivery of gambling-related social media posts, will not address the data processing, profiling or automated decision-making in recommender systems that 'flagged' that child as an ideal candidate for receiving that post. New content harms, in terms of not only types of harm but also types of content, will continually emerge if the process that creates vulnerability is not addressed.
- Under EU law, for example, although alcohol advertising to children is prohibited on audiovisual platforms (e.g. YouTube), beyond this,²⁴ there are no special considerations or obligations placed on industries seen to be particularly harmful, such as alcohol or junk food. They are not mentioned in the DSA,²⁵ but are considered in the risks. There are no specific rules on the advertising of these particular types of products applicable to all websites, apps and platforms (other than video-sharing platforms) at the EU level, but targeting children with advertising overall is prohibited.
- The Audio-Visual Media Services Directive encourages state-by-state regulations enforced by member state regulators. That is, member states have laws about banning certain types of ads.
- At the EU level, if Ireland, as the chief regulator in the one-stop-shop model, were to ban junk food ads on video-sharing platforms, a platform such as YouTube would be unable to host junk food ads anywhere in the EU. However, Ireland has already outlined that targeting advertising to children overall, from junk food to activewear, is unacceptable.²⁶
- In general, alcohol companies do not want their ads to be shown to children, and the alcohol industry is one of the industries most in favour of age verification.
- The DSA is a new framework, meaning there is less evidence for evaluation of how this is working.

²⁴. European Commission 2018 Audiovisual Media Services Directive <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>

²⁵. European Commission 2022 The Digital Services Act <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

²⁶. Ireland Data Protection Commission 2021 Fundamentals For A Child-Oriented Approach To Data Processing [Fhttps://www.dataprotection.ie/sites/default/files/uploads/2021-12/Fundamentals%20for%20a%20Child-Oriented%20Approach%20to%20Data%20Processing_FINAL_EN.pdf](https://www.dataprotection.ie/sites/default/files/uploads/2021-12/Fundamentals%20for%20a%20Child-Oriented%20Approach%20to%20Data%20Processing_FINAL_EN.pdf)

Best interests assessments and guidelines

- Given the complexity of considerations around best interests, there will be a need for some form of best interests assessment under proposal 20.6, which would require guidance and clarity from regulators.
- Subsequent to the discussion, the Attorney General's Department noted the imperative to “provide appropriate guidance and other supports which could be developed to help entities understand their compliance requirements”.²⁷
- There is a great deal of international experience to draw from.
 - The discussion compared a best interests assessment for targeting children – in the broader sense of targeting, including the data processing, profiling and automated decision-making – to the EU’s existing risk assessments necessary under the DSA. The EU’s DSA assessments include many transparency provisions. We will not see the results until Q3 or Q4 2024 and multiple internal audits of the provisions are conducted.
 - There are also new guidelines in India for targeting children with advertising,²⁸ and new privacy laws that protect children.²⁹
 - There are also broader examples of data protection impact assessments that consider children’s best interests in the UK and Ireland.³⁰
- Standard two of the UK’s *Age Appropriate Design Code* requires entities to “undertake a (Data Protection Impact Assessment) to assess and mitigate risks to the rights and freedoms of children who are likely to access your service, which arise from your data processing. Take into account differing ages, capacities and development needs and ensure that your (assessment) builds in compliance with this code”. While the requirement to carry out assessments here comes from the GDPR, the *Age Appropriate Design Code* requires entities to process data only in ways that are in their best interests, introducing a best interests test to these assessments.
- Section 7.1 of Ireland’s *Fundamentals For A Child-Oriented Approach To Data Processing* notes that “Article 35 of the GDPR states that a Data Protection Impact Assessment (“DPIA”) must be conducted by a controller” where they process children’s data. They explain that the best interests principle must underpin these assessments.
- Given the complexity of considerations around best interests, there will be a need for some form of best interests assessment under proposal 20.6, which would require guidance and clarity from regulators.

²⁷. Attorney General's Department 2023 Government Response: Privacy Act Review Report <https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF>

²⁸. Government of India, 2022 The Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 <https://consumeraffairs.nic.in/theconsumerprotection/guidelines-prevention-misleading-advertisements-and-endorsements-misleading>

²⁹. Cyril Shroff, Arjun Goswami, Arun Prabhu, Anirban Mohapatra, Arpita Sengupta, Mahim Sharma, Anoushka Soni, Sabreen Hussain & Soumya Tiwari 2023 Children and Consent under the Data Protection Act: A Study in Evolution <https://corporate.cyrilamarchandblogs.com/2023/08/children-and-consent-under-the-data-protection-act-a-study-in-evolution/>

³⁰. UK Information Commissioner Office 2020 Age appropriate design: a code of practice for online services <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/age-appropriate-design-a-code-of-practice-for-online-services/> and Ireland Data Protection Commission 2021 Fundamentals For A Child-Oriented Approach To Data Processing https://www.dataprotection.ie/sites/default/files/uploads/2021-12/Fundamentals%20for%20a%20Child-Oriented%20Approach%20to%20Data%20Processing_FINAL_EN.pdf

- We would expect that Australia's Children's Privacy Code (developed under proposal 16.5 of the *Privacy Act Review*, and agreed to in the Government's response) will consider international examples of similar codes and their impacts,³¹ and include requirements to proactively assess practices.
 - Requiring best interests assessments in Australia would harmonise with international regulations and reduce friction for Australian platforms looking to operate in overseas markets and international platforms looking to operate in Australia.
 - Guidance regarding risk assessments can vary in clarity and specificity depending on the purpose in question. For certain objectives, such as targeted commercial advertising, the guidance can be straightforward, stating that targeting should not be employed. However, when addressing other purposes, a more nuanced and detailed approach may be necessary. Take, for instance, targeting within recommender systems, which entails intricate risks and necessitates a balance between potential benefits and the safeguarding of children's rights. In such cases, any assessment must be tailored to address the particular risks inherent to recommender systems, recognising the unique challenges they pose.
 - Broader engagement of expertise, including professionals, children and young people, could be included in the process of establishing assessment tools and guidelines.
 - There are multiple examples of best interests assessments and guidelines that regulators could draw from, for example:
 - The national classification system, albeit with deficits, provides a good model. Having an expert standing panel generates new findings and insights and creates systems for improvement.
 - The Netherlands has a system known as *Kijkwijzer* for classifying content for children, which uses a multidisciplinary panel of experts to provide classifications for all media sectors.³²
 - The Australian court system and family law also have some experience in developing processes, albeit with the need for caution around the outcomes of the process as described above.
 - Assessments and guidelines can also improve transparency, if users, including children and young people, are able to access and understand assessments. There is a need for an examination of what a transparent process guided by regulators might look like.
 - As a final thought regarding the complexity of assessing best interests, organisations are frequently asked to make assessments of practice against more nebulous concepts such as fairness, reasonableness and unconscionability. This is not an unusual process, and the process of doing this should be made easier with clear guidance and assessment tools.
- While it was not the focus of this discussion, issues around age assurance, age estimation and age verification emerged throughout the discussion, and we have summarised them in the appendix in case they are of interest.

31. For example, the impact in the UK has been widely documented. See for example, 5Rights Foundation 2022 'Letter to the ICO: Breaches of the Age Appropriate Design Code,' <https://5rightsfoundation.com/in-action/letter-to-the-ico-breaches-of-the-age-appropriate-design-code.html>; UK Information Commissioners Office 2022 Children are better protected online in 2022 than they were in 2021 <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/09/children-are-better-protected-online-in-2022-than-they-were-in-2021/>; Virginia Franqueira, Jessica Annor & Ozgur Kafali 2022 'Age Appropriate Design: Assessment of TikTok, Twitch, and YouTube Kids' Psychology, https://www.researchgate.net/publication/362489352_Age_Appropriate_Design_Assessment_of_TikTok_Twitch_and_YouTube_Kids; Digital Futures Commissioner and 5Rights Foundation 2022 Problems with data governance in UK schools: the cases of Google Classroom and ClassDojo <https://digitalfuturescommission.org.uk/wp-content/uploads/2022/08/Problems-with-data-governance-in-UK-schools.pdf>; Emma Day, Kruakae Pothong, Ayca Atabey & Sonia Livingstone 2022 'Who controls children's education data? A socio-legal analysis of the UK governance regimes for schools and EdTech' Learning, Media and Technology <https://www.tandfonline.com/doi/full/10.1080/17439884.2022.2152838>

32. NICAM 2022 Annual Report <https://nicam.nl/>

Recommendations

- There is widespread support for the introduction of the best interests principle into privacy law. This includes prohibiting targeting unless it is in children's best interests. Proposal 20.6 of the *Privacy Act Review* presents opportunities to create a child-centric approach to targeting and it is welcome that the Government has agreed in-principle that this should proceed.
- However, to meaningfully realise this will require clear guidance and assessments regarding what best interests mean in practice. As privacy reforms advance, legislators and regulators need to develop guidelines and assessment tools.
- These guidelines and assessments need to consider the instance of targeting, as well as the data processing, profiling and automated decision-making that happens during the process of targeting.
- The development of these tools should occur in consultation with experts, including professionals and children.
- These tools need to outline that consent alone is not adequate for determining best interests, nor are broad declarations about not causing evidenced harm. These tools need to require platforms to consider how to advance children's rights holistically, including their right to access the digital world.

Acknowledgements

This briefing paper reflects the expertise of those who contributed to the roundtable and paper. Contributing does not necessarily mean endorsement. This includes:

- Aruna Anderson, Reset.Tech
- Nick Botton, AWO
- Howard Choo, Save the Children Australia and 54 Reasons
- Alice Dawkins, Reset.Tech
- Sarah Davies, Alannah Madeline Foundation
- Dr Rys Farthing, Reset.Tech
- Prof Elizabeth Handsley, Children and Media Australia
- Amy Lamoin, ChildFund Australia
- John Livingstone, Australian Child Rights Taskforce
- James McDougall, Australian Child Rights Taskforce
- Jacqui McKenzie, ChildFund Australia
- Jessie Mitchell, Alannah Madeline Foundation
- Matt Nguyen, Reset.Tech
- Prof Manisha Pathak-Shelat, Communication & Digital Platforms and Strategies, MICA, India
- Kate Richardson, Youth Law Australia
- Chloe Shorten, Centre for Digital Wellbeing
- Prof Amanda Third, Young & Resilient Centre, University of Western Sydney
- Jordan Wilson-Otton, elevenM Consulting

All errors and omissions rest with Reset.Tech Australia.

Appendix: Age assurance

While it was not the focus of this discussion, issues around age assurance, age estimation and age verification emerged throughout the discussion, and we have summarised these below.

It is important to note that privacy protections, such as best interests assessments and children's privacy codes, could be implemented without age verification. Instead, age assurance methods would be proportional measures for the purposes of turning on privacy protections. The Attorney General's Department notes that entities "will need to take reasonable steps to establish an individual's age with a level of certainty that is appropriate to the risks".³³

- Age assurance in Europe. There is significant variation in the need to age assure on platforms, including Very Large Online Platforms, but as most have minimum age requirements there is some need to determine age. The most common mechanism is self-declaration, and hard identifiers are not needed on a widespread basis. Platforms are establishing new ways to age assure in privacy protective manners. The EU is aware of the issues and is working on a large scale research project with EU Consent,³⁴ and is developing an EU-wide Age Appropriate Design Code under their Better Internet for Kids + strategy.³⁵ This is also a gap in the General Data Protection Regulations as well. This area is certainly a work in progress.
- In Australia, the eSafety Commissioner has recently released the Roadmap to Age Verification, following in-depth research and engagement efforts. The report highlights gaps and underscores the current inadequacies in technology, processes, and legislation; there is no simple solution to the issue in the Australian context.³⁶
- There are a range of current options, but none thus far entirely resolve the problem. Platforms can either ask users to self-declare their age, ask for some form of credentials or IDs, offer some kind of AI driven biometrics test, use data and analytic tests to estimate age, or they can use digital identity solutions—or a combination of these. All of these options can be provided by platforms or third-party providers.
- The eSafety Commissioner's Road Map to Age Verification recommends pilots and trialling potential solutions focussed on pornographic content, as the first step towards developing comprehensive solutions.
- There was some discussion about age-gating happening at the app store level, as a proxy for or in combination with age verification. This can be useful but runs into several problems:
 - It only works on a 'whole of app' level, which does not allow the age gating necessary within apps or websites. Where each app or website requires users to prove their age, app stores do not provide 'age tokens' meaning this will not prevent the need for age assurance. For example, if a 15-year-old user is downloading TikTok from the app store, TikTok still needs to know if the user is 15 so they turn on safety and privacy features for minors. Or if a 14-year-old downloads the Google Chrome app to browse the web, age-restricted websites will still need to check their age.
 - There are also questions about if app stores are best placed to decide what is or is not age appropriate content for children. For example, an educational app targeted at 10-year-olds may have unnecessary data collection practices, and it is unclear whether Google Play is best placed to determine its age appropriateness of this. Likewise, the App Store is probably not best placed to tackle the complicated and politically charged issue of the age appropriateness of apps or websites providing sexual health information.
 - Age-gating needs to happen in a balanced and proportional way in order to respect rights.

³³. Attorney General's Department 2023 Government Response: Privacy Act Review Report <https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.pdf>

³⁴. EU Consent 2023 Homepage <https://euconsent.eu/>

³⁵. European Commission 2022 A European strategy for a better internet for kids (BIK+) <https://digital-strategy.ec.europa.eu/en/policies/strategy-better-internet-kids>

³⁶. eSafety Commission 2023 Roadmap to Age Verification <https://www.esafety.gov.au/about-us/consultation-cooperation/age-verification>