

2 December 2021

Online Privacy Consultation
Attorney General's Department, Australian Government
4 National Circuit, Barton ACT 2600

Email: OnlinePrivacyBill@ag.gov.au

Enhancing Online Privacy Bill – Australian Government

Thank you for the opportunity for the Australian Catholic University's Institute of Child Protection Studies to make a submission to this consultation process.

The Institute seeks to enhance outcomes for children, young people and families through quality research, program evaluation, training and community education, advocacy, and policy development. We are recognised for our expertise in child protection and the prevention of the abuse and neglect of children. We promote children's participation, the strengthening of service systems and practice, and support the development of child-safe communities.

The key messages which the Institute offers to this Review are that:

- The work of creating child safe environments is challenging and requires ongoing and shared commitment. This work extends to online environments. The protection of personal information and privacy is an important feature of a safe online environment for children as well as adults. Responsibility for this work should be shared by government, industry, families, and civil society.
- Involving children and supporting their involvement in creating and maintaining safe environments is essential. This must include recognition of their rights and views and involving them in setting and maintaining regulatory settings for access, use and privacy.
- Given ongoing developments in online environments, evolving and ongoing scrutiny should be given to the effectiveness of proposed regulatory reforms including in protecting children, their data and privacy and in creating child safe environments.
- We encourage and support the alignment of this Bill with international child rights principles and best practice; and with existing national policies including the National Strategy to Prevent and Respond to Child Sexual Abuse, and the ongoing implementation of the recommendations of the Royal Commission into Institutional Response to Child Sexual Abuse.

A more detailed explanation of our position is set in the attached paper.

Yours sincerely



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**Framing online privacy
within the United Nations Child Rights Committee’s [General Comment 25](#)
(Rights in a Digital World)**

Paragraph 12

“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. States 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.**”

Paragraph 13

“States parties should involve the national and local bodies that oversee the fulfilment of the rights of children in such actions. In considering the best interests of the child, they should **have regard for all children’s rights, including their rights to seek, receive and impart information, to be protected from harm and to have their views given due weight**, and ensure transparency in the assessment of the best interests of the child and the criteria that have been applied.”

Introduction

The Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the Online Privacy Bill or the Bill) proposes to strengthen the *Privacy Act 1988* by providing for the introduction of a binding online privacy code for social media and other online platforms.

The Australian Government has invited submissions on the Online Privacy Bill. This consultation is being held at the same time as the Privacy Act Review (the Review). The Bill and the Review are seeking to ensure that Australia's privacy law framework empowers consumers, protects their data, and serves the Australian economy.

The Bill proposes to provide the Office of the Australian Information Commissioner with the instructions to develop a binding code around how all Australian's personal data can be used, but with specific provisions for children. The Bill does not write the Code but sets out some requirements around what the Code must include.

The Institute's Views and Experience

The Institute supports the development of regulatory frameworks (such as Child Safe Standards¹) which are intended to support, monitor, and enforce the responsibilities of industry and civil society organisations including those that provide services and access to information to children and young people.

Our experience indicates that child safety and protection from abusive conduct and content are best addressed when they become imbedded in governance, service delivery and practice in organisational cultures and environments for children.

Across the nation, governments are working to strengthen monitoring and regulation of organisational behaviour and the development of sound preventative practice. This includes the work of creating the culture change necessary to imbed and support respect for children, their experiences and voices, and their rights. We believe that this work should include and be consistent with measures to regulate and protect online privacy.

Our experience suggests that most communities and families around the country are not aware of the development of the online privacy code. While we support the development and introduction of an appropriate code, we believe that this work will require further commitment of resources to awareness raising and, in some circumstances, capacity building.

A further challenge is to ensure the effectiveness of the reforms proposed by the introduction of the Code. Ideally this would include evidence of the prevention of abusive conduct and even the creation of child-safe environments. Building the tools and the data in order to identify and measure such evidence has not necessarily begun. We recommend that the issue of measurement is given attention to develop and introduce measures of safety.

¹ The establishment and implementation of the Standards was a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse. It was endorsed by the Council of Australian Governments (as the National Principles for Child Safe Organisations) in February 2019.

The Bill and Children's Rights

The Bill provides an excellent opportunity to align monitoring and regulation to promote and protect children's rights in the digital world. This could be achieved by shifting the focus from identifying and addressing harms to prevention and to creating child-safe environments.

We endorse and support the recommendations of Reset Tech and a number of other civil society organisations working on online safety for children and young people that the 'best interests' principle set out in the United Nations Convention on the Rights of the Child provides an excellent framework for regulation in online environments.

The child rights approach reflects international best practice in supporting children and their rights including to guide and support their online experiences. A child rights approach would offer a consistent and recognised framework to guide privacy protection and data processing for children while enabling mechanisms to assess and balance the impact on all aspects of a child's life and experience.

The application of the 'best interests' principle (as set out In the Convention) calls for consideration of the full circumstances of a child's experience and circumstances and calls for ongoing assessment and attention to the most effective protection for each child. It would allow for balancing the rights of access to information, learning and expression with the protections for safety and privacy. It recognises the evolving development of a child across the ages and stages of development in childhood and adolescence and calls for guidelines and restrictions to allow for exceptions and special circumstances to address issues of disadvantage and discrimination.

We note that Reset Tech's submission offers a suggested set of essential requirements that would form part of the incorporation of the use of the 'best interests' principle into the Code.

We endorse these suggestions and that the Code should require the consideration of the 'best interests' in:

- Recommender systems and algorithms for children, which train on and process their data
- Automated decision making and profiling, where it processes children's data
- Digital marketing and commercial profiling, such as surveillance advertising which processes their data
- Testing for 'persuasive' design, where children's data is processed.

We note that there are additional measures that the Bill proposes for incorporation into the Code including procedures for age assurance and parental consent. While these procedures can provide useful guidance in the regulation of online environments for children, they lack the comprehensiveness of a child rights approach. The inflexible application of these measures has the potential to cause considerable injustice in themselves and, in some circumstances, infringe the rights of children who should be protected and supported.

We do not support the inclusion of these measures unless they are subject to the broader application of the 'best interests' principle in order to minimise rights infringements and offer recourse for review of the application of the measures.

Age Assurance and Parental Consent

The Institute does not support the inclusion of requirements for platforms to apply inflexible mechanisms for age assurance and parental consent. The introduction of such measures must be within the context of a broad and comprehensive commitment to respect and compliance with child rights principles. The use of arbitrary age access requirements without flexibility and justification is not supported.

We note that the use of mechanisms to discourage access to inappropriate platforms can be useful in particular circumstances. This can include systems that create ‘friction’ to limit or constrain access to particular platforms (such as gambling or adult entertainment for young children).

There should be transparency and review of any minimum age requirements for or by the platforms.

Wherever reasonable, there should be a commensurate commitment to researching and understanding the impact of access (and restrictions to access) particularly for platforms that offer risk of exploitation and harm.

There must remain an onus on platforms to make genuine assessments of the risks of harm and take reasonable steps to prevent harm (in terms of content and access). If age assurance is introduced, there must be systems of review to ensure that access is not excluded for legitimate users who cannot meet the technical requirements of assurance.

Any mechanism for assurance or parental consent must continue to meet all necessary protections for personal information and privacy.

These would be necessary and expected measures to demonstrate compliance with the application of the ‘best interest’ principle as incorporated into the Code.

The application of the Code must be consistent with the ‘best interests’ principle, and through the application of this principle, provide stronger commitment than existing frameworks to enhance and support the online experiences of children and young people.

Scope of Industry Coverage

The Institute supports the recommendations of Reset Tech that the scope of digital services and platforms that are covered by the Code should be expanded. In particular, the current definition of “large online platform” is too restrictive and would not include many platforms that currently use children’s data in Australia today.

We support the view that the Code’s protections for children should cover all online platforms that are used by children and particularly those that target children. We also support the extension of coverage by these protections and provisions to data brokers, social media platforms available to children and those that offer education services to children using online platforms.

Development and Implementation of the Code

Involving children and supporting their involvement in creating and maintaining safe environments is essential. This must include recognition of their rights and views and involving them in setting and maintaining regulatory settings for access, use and privacy.

In these circumstances, both the development and the ongoing implementation of the Code require meaningful engagement with children and young people, parents, and the wider community. This in turn calls for careful and skilled support from experienced facilitators. This support and the required opportunities for contribution should be imbedded into the drafting and implementation process.

We recommend that these requirements could be met by coordinated involvement and support from the national Offices of the Information Commissioner, the eSafety Commissioner and the Children's Commissioner.

Awareness and Education

The work of creating child-safe environments is challenging and requires ongoing and shared commitment. This work extends to online environments. The protection of personal information and privacy is an important feature of a safe online environment for children as well as adults. Responsibility for this work should be shared by government, industry, families, and civil society.

Our experience suggests that most communities and families around the country are not aware of the development of the online privacy code. While we support the development and introduction of an appropriate code, we believe that this work will require further commitment of resources to awareness raising and education and, in some circumstances, capacity building.

Evaluation and Research

A further challenge is to ensure the effectiveness of the reforms proposed by the introduction of the Code. Ideally this would include evidence of the prevention of abusive conduct and even the creation of child-safe environments. Building the tools and the data in order to identify and measure such evidence has not quite begun. We recommend that the issue of measurement is given attention to develop and introduce measures of safety.

Alignment with Child Rights and Policy Development

We encourage and support the alignment of this Bill with international child rights principles and best practice; and with existing national policies such as the National Children's Mental Health and Wellbeing Strategy; the successor plan to the National Framework for Protecting Australia's Children; the National Strategy to Prevent and Respond to Child Sexual Abuse, and the ongoing implementation of the recommendations of the Royal Commission into Institutional Response to Child Sexual Abuse.

The applicable developing body of knowledge in international child rights principles includes:

- The United Nations Child Rights Committee's [General Comment 14](#) (Best Interests)
- The UN Child Rights Committee's [General Comment 25](#) (Rights in a Digital World)

Additional References and Resources

The work on the development of this submission has been informed and supported by the initial work by the coalition of civil society organisations coordinated by Reset Tech in calling for a Children’s Data Code:

<https://www.childrensdatacode.org.au/policy-asks/>

In understanding and acknowledging the role of social media and technology platforms in supporting the participation of children, we also note the need for ongoing scrutiny and reform. We note Reset Tech’s reporting and research:

“[In] 2019, the [US Federal Trade Commission] settled cases with both TikTok and YouTube for processing children’s data without necessary parental consent, for \$5.7m USD and \$170m USD respectively. TikTok and YouTube are still facing ongoing legal challenges around the collection and use of children’s data in the UK. TikTok are currently facing a £1b collective action suit for collecting and using children’s location data and biometric data without consent, and; YouTube are also facing a £2b collective action suit for processing children’s data without proper parental consent.” [Reset Tech Briefing Notes]

We also note the following valuable contributions to the public discussion:

- Dylan Williams, Alex MacIntosh & Rys Farthing, 2021: [Did We Really Consent to This?](#)
- Leah Nylén opinion piece in Politico, 2021: [Google sought fellow tech giants' help in stalling kids' privacy protections, states allege](#)
- the work of [5Rights on age assurance](#)
- the [initial work undertaken by Reset Tech](#) to involve young people in developing effective and appropriate regulation.

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