

Friday 3 December 2021

UNICEF Australia submission to the Online Privacy Bill Exposure Draft

Summary Statement

UNICEF Australia supports the intention of the Online Privacy Bill to strengthen the regulatory environment in ways which prioritise helping to safeguard children from harm online. Australia has the opportunity to embed the principle of the 'best interests of the child' into the development of the online privacy code in ways which would be world leading.

We commend the intent of this action to protect children online, whilst also noting the need to carefully consider and mitigate the risk of some potentially negative consequences that may result through restricting young people's access to vital support and opportunities online. We note that consultation to date with young Australians appears to have been limited and encourage much greater priority be given to this. We also believe the scope of the Bill could be expanded to cover more platforms that children use, and that a publicly accountable authority should be closely involved in the drafting of the online privacy code. Taken together, UNICEF Australia believes these practical suggestions will further strengthen the Bill and help create an online environment that allows children and young people to thrive.

Introduction

UNICEF Australia welcomes the opportunity to provide a submission to the consultation on the *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021* (the Online Privacy Bill).

UNICEF is the world's leading organisation working to protect and improve the lives of every child in over 190 countries. At UNICEF Australia we work to protect and promote children's rights by advocating for the rights of children in Australia and overseas. Given our role as a child-focused organisation, our submission will accordingly focus on the specific provisions of the Online Privacy Bill that relate to children.

In order to create a digital environment that works for children, it is critical we strengthen the laws that govern their data. Data is the currency of the online world; by regulating how it is used in Australia, we can take an upstream approach to regulation which then flows down and sets the rules for how platforms are designed, how they operate, and how we interact with them. In this regard, by setting out the instructions for the development of an online privacy code (the Code) to govern children's data, the Online Privacy Bill is a welcome move in the right direction to introduce regulation that advances children's rights in the digital world.

The Online Privacy Bill's upstream focus moves beyond addressing and remedying harms once they have happened and attempts to create a better digital world for children in the first instance by proactively preventing harm. The digital world was not originally designed for children but it undoubtedly plays a significant role in their lives.¹ Being able to connect online provides children valuable opportunities to learn, play and socialise with friends and peers, as well as to access information and support. However, spending time online also comes with risks for children such as being exposed to potentially harmful content or having their personal data compromised or exploited.

UNICEF Australia envisions an online world that mitigates these risks and contributes to the healthy development and wellbeing of children, and as we move to regulate this space we must carefully consider our choices so as not to introduce new risks into the fold. Accordingly, we welcome the opportunity to provide practical suggestions to further strengthen the Online Privacy Bill and our submission provides these under five key areas:

1. The best interests of children
2. Child and youth participation
3. Age verification and consent

Australian Committee for UNICEF Limited

Suite 4.02 Building B, 33-35 Saunders Street PYRMONT NSW 2009

P: +61 2 9261 2811 F: +61 2 9261 2844 E: unicef@unicef.org.au

PO Box 488, Queen Victoria Building, NSW 1230 | ABN 35 060 581 437

www.unicef.org.au | Donation Hotline: 1300 884 233

4. The scope of the Online Privacy Bill
5. The drafting of the Code

1. The best interests of children

UNICEF Australia welcomes the requirement in the Online Privacy Bill that the Code must require that platforms consider children's best interests in the collection, use and disclosure of their data. If implemented correctly, this has the capacity to hugely improve children's online experiences and advance their rights and is in keeping with a rights-based approach, specifically Article 3 of the Convention on the Rights of the Child (CRC).ⁱⁱ

Although the Bill does not outline what best interests means, we can turn to international treaty bodies for guidance, particularly the Committee on the Rights of the Child's General Comment 25 on children's rights in relation to the digital environment.ⁱⁱⁱ The Committee explains that the best interests principle is a dynamic one which always requires an assessment appropriate to the specific context.^{iv} In considering the best interests of children we 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.'^v

The Committee on the Rights of the Child's General Comment 14^{vi} provides an even more detailed examination of the best interests principle and how it should be applied in practice. Accordingly, UNICEF Australia recommends General Comment 14 be consulted and used as a guide in determining how the best interests principle should be incorporated into the Code to provide clarity on measures that will ensure the best interests of children are realised.

Further to this, in introducing this legislation Australia has the opportunity to implement the best interests principle in a way that would make us a world leader, by ensuring the Code requires the best interests principle be considered 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, and
- testing for 'persuasive' design, where for instance children's data is processed in A/B tests.

Doing so will allow us to realise a digital world for children that truly works in their best interests.

2. Child and youth participation

Every child and young person under 18 has the right to participate and have their opinions included in decision-making processes that relate to their lives, according to Article 12 of the CRC.^{vii} Including the voices of children and young people in the development of policy isn't just the right thing to do, it's the smart thing to do – policies co-designed with children and young people are better placed to respond to their needs and deliver better outcomes.

Children and young people have also displayed a strong interest in how the digital world is designed and treats them. UNICEF Australia's own research has shown that children and young people have a keen understanding of the profound and growing impact of social media on their lives and want support to safely navigate online spaces and strengthened protections to keep them safe.^{viii}

In keeping with this, UNICEF Australia would like to see requirements for children and young people to be directly consulted in the development of the Code, as well as in any reviews of it and in its ongoing operation. Given the importance of the online world to children and young people and the benefits it brings in terms of learning, socialising, and accessing crucial information and support, we must create a Code that is responsive to their needs and views and delivers the best possible outcomes for Australian children. Involving children and young people directly in its development gives us the best chance to do this.

3. Age verification and consent

Those measures in the Bill that would encourage platforms to better police minimum age requirements and seek consent for data processing (including age verification/assurance and parental consent for processing data of under

16s) have the potential to add some friction to a system that currently is relatively easy for children and young people to access. However, while the *intent* of these measures to add friction is welcome, we must carefully consider their design and implementation to ensure we avoid introducing additional risks for children.

There are a variety of approaches for how these measures could be implemented, an analysis of which falls outside the scope of this submission. Regardless of the approach pursued, UNICEF Australia recommends that several guiding principles should govern their implementation. Firstly, as with all measures aimed at children, we should take a rights-based approach and ensure they are designed in-line with the best interests of the child. Secondly, they must be evidence-based to ensure they will actually achieve their intended purpose. Thirdly, we must also ensure that any introduced measures are privacy preserving and do not require the sharing of unnecessary information or details, backed by safe and secure data storage where information is provided.

Finally, we must ensure that any measures avoid creating additional access barriers for children in situations where they genuinely require it, particularly for vulnerable, disadvantaged or marginalised children. An example of this could be websites providing crucial mental health support where access should be as frictionless as possible, or requiring passports or birth certificates for age verification which adds an additional barrier for those children and their families who may not be able to easily provide them. Every child should have an equal opportunity to access the many benefits that digital platforms can provide.

4. Scope of the Online Privacy Bill

In its current form as outlined by the Bill, the Code will be binding on three sectors: 1) social media platforms; 2) other large online platforms; and 3) data brokers. Ideally the Code also needs to be expanded to ensure all services used extensively by Australian children are covered. Currently, educational technology providers, most games and commercial health apps (who collect sensitive biometric data) would not be covered.

Similarly, the definition of large online platforms in the Bill is 2.5million end-users in Australia (or 10% of the population). At June 2019, Australia had just under 2.9million residents aged under 18.^{ix} This means that it would take 86% of Australian children to use a service specifically targeted at children before it was covered by the Code, meaning the vast majority of Australian children could use a platform that was not covered by the Code. In response to this, we would recommend that the definition of large online platforms be expanded to 2.5million end-users in Australia *or* 290,000 (10%) of end-users in Australia estimated to be under the age of 18. If our aim is to avoid children using platforms that do not take their specific needs into account, these are sensible measures to achieve that end.

5. Drafting of the Code

As outlined in the Bill and also as governed by the *Privacy Act 1988*, the Code may either be drafted by representatives of the industry that will be regulated, or if a suitable industry representative cannot be found, the Information Commissioner themselves may draft the Code.

Given the breadth of areas that we hope the best interests requirement will cover, the scale of the potential risks that children face in the online world, as well as the meaningful engagement we would like to see with children and young people in the drafting process, we believe that a public authority directly accountable to the Australian community should be closely involved in the drafting of the Code. This could be either the Information Commissioner providing clear, outcome-based instructions to the Code developers, or alternatively, the Information Commissioner drafting the Code themselves.

As part of the drafting process, we also believe that children's advocates, the Children's Commissioner, civil society and experts/academics, should be included in the Code development process in addition to children and young people being consulted. Doing so will ensure we develop a Code that is co-designed and truly works in the best interests of children.

Summary of Recommendations

UNICEF Australia welcomes the Online Privacy Bill as a positive step in the right direction to implement upstream regulation to advance children's rights in the digital world. We also believe that the following recommendations will further strengthen the Bill and create a better digital world for children:

1. We recommend that the Committee on the Rights of the Child's General Comment 14 be used as a guide in determining how the best interests principle should be incorporated into the Code
2. We recommend the Code requires the best interests principle be considered in recommender systems and algorithms for children, automated decision making and profiling where it processes children's data, digital marketing and commercial profiling, and testing for 'persuasive' design using children's data
3. We recommend children and young people be directly consulted in the development of the Code, as well as in any reviews and in its ongoing operation
4. We recommend that any age verification or parental consent measures be implemented in a way that are in the best interests of the child, are evidence-based, are privacy preserving, and do not create additional access barriers for vulnerable, disadvantaged or marginalised children and their families
5. We recommend the Code be expanded to ensure all services used extensively by Australian children are covered including educational technology providers, games and commercial health apps. Additionally, the definition of large online platforms should be expanded to 2.5million end-users in Australia *or* 290,000 end-users in Australia estimated to be under the age of 18.
6. We recommend the Information Commissioner be closely involved in the drafting of the Code, either by providing clear, outcome-based instructions to the Code developers, or by drafting the Code themselves. Children's advocates, the Children's Commissioner, civil society, and experts/academics, should also be involved in the Code development process in addition to children and young people.

UNICEF Australia is grateful for the opportunity to provide a submission to this consultation and we look forward to the ongoing development of the Online Privacy Bill.

Nicole Breeze

Director of Australian Programs and Child Rights

UNICEF Australia

ⁱ Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021)

ⁱⁱ *Convention on the Rights of the Child*, opened for signature 20 November 1989, Treaty Series Vol. 1577 (entered into force 2 September 1990) art 3

ⁱⁱⁱ Committee on the Rights of the Child, *General comment No. 25 (2021) on children's rights in relation to the digital environment*, 86th sess, CRC/C/GC/25 (2 March 2021)

^{iv} Ibid

^v Ibid

^{vi} Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 62nd sess, CRC/C/GC/14 (29 May 2013)

^{vii} *Convention on the Rights of the Child*, opened for signature 20 November 1989, Treaty Series Vol. 1577 (entered into force 2 September 1990) art 12

^{viii} UNICEF Australia, *Children's Voices in a Changing World: 2021 UNICEF Australia Young Ambassador Report* (Report, June 2021)

<https://www.unicef.org.au/our-work/unicef-in-emergencies/coronavirus-covid-19/childrens-voices>

^{ix} ABS, *National State and Territory Population* (16 September 2021) <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release#data-downloads-data-cubes>