

Children and Young People's Mental Health and Wellbeing coalition's submission in response to the

# Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021

Prepared by:



[info@reachout.com](mailto:info@reachout.com)



[policy@orygen.org.au](mailto:policy@orygen.org.au)



[ranczp@ranczp.org](mailto:ranczp@ranczp.org)



[admin@insideoutinstitute.org.au](mailto:admin@insideoutinstitute.org.au)



[info@sane.org](mailto:info@sane.org)

November 2021

# Executive Summary & Key recommendations

The *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill* is broadly welcomed by the Royal Australian and New Zealand College of Psychiatrists, ReachOut, InsideOut Institute, Orygen Youth Mental Health and a number of youth mental health researchers. This submission focuses on the implications of the Bill on children and young people under 18 years old.

The *Bill* paves the way for the introduction of an Online Privacy Code. The Code will apply to three types of organisation, social media platforms, data brokers and other larger online platforms.

The *Bill* outlines that a Code must require social media organisations to ensure:

- that their collection, use or disclosure of children’s personal information is ‘fair and reasonable’<sup>1</sup>, and
- that in determining whether collection use or disclosure is fair and reasonable in the circumstances, the company must have the best interests of the child as the primary consideration<sup>2</sup>.

We welcome the *Bill* and the Code it will create, however we recommend that:

1. The ‘best interests’ principle is enhanced and not reduced, restricted or removed at any stage in the Code development process. We would welcome clarification in the Bill that the best interests principle must apply to:
  - Recommender systems and algorithms
  - Digital marketing and commercial profiling systems
  - Nudging and sticky design
  - Automated decision making systems
  - Geolocation systems
  - Connected Toys and devices
  - Parental controls
2. The Code should be developed by the Information Commissioner in the first instance. Industry involvement in drafting the Code should be advisory, and Industry should be provided with a clear, strong set of requirements around how the best interests principle should be interpreted to ensure the Code is robust. A possible set of requirements has already been developed by an Australian coalition of children’s advocates.

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<sup>1</sup> Subdivision 2A, 26KC (6) (e)

<sup>2</sup> Subdivision 2A, 26KC (6) (f)

3. The scope of organisations bound by the future Code be expanded to ensure that larger platforms and services specifically targeting children are included, in proportion to the size of the underage population:
  - This could be achieved by Ministerial specification to include EdTech, Gaming platforms, Health and Wellbeing Apps and operating systems such as iOS/Android, in scope, or amending provision Division 2A, 6W(4) to include a provision for 560,000 Australian End-Users under 18.
  - Ensuring that all three categories of OP organisations are covered by the Code's best interests requirements, including data brokers and larger online platforms.
  - For services that don't require accounts, the definition should be limited to those that collect personal information.
4. The Code should also make clear how compliance will be monitored and enforced, and these mechanisms should be strong. We have suggested that data protection impact assessment should be undertaken, made public and be available to the OAIC, but we welcome clarity about the range of enforcement options available to the OAIC and the ability to comment on these during the Code development process.

## Who endorses this submission: the coalition

This submission reflects the views of mental health professionals and four of Australia's largest youth mental health service providers and research organisations:

- Royal Australian and New Zealand College of Psychiatrists: The College is responsible for training, educating and representing psychiatrists in Australia and New Zealand. We are accredited by the Australian Medical Council and the Medical Council of New Zealand.
- ReachOut: ReachOut is the most-accessed online mental health service for young people and their parents in Australia.
- InsideOut Institute: Australia's national institute for research and clinical excellence in eating disorders. The Institute comprises a team of expert researchers, clinicians and public policy-makers dedicated to solving the tyranny of eating disorders.
- Orygen: is Australia's Centre of Excellence in Youth Mental Health. We deliver clinical services, translational research, policy advice, advocacy and workforce development to support young people grow into adulthood with optimal mental health.
- SANE Australia: SANE Australia is a national mental health charity making a real difference in the lives of people affected by complex mental health issues through support, research and advocacy.

As well as academic researchers in the field:

- Dr Piers Gooding, Research Fellow, Melbourne Law School, University of Melbourne. Dr Gooding is the current recipient of an Australian Research Council Discovery Early Career Research Fellowship to examine the law and regulation of digital technology in mental health care.
- Dr Hannah Jarman, Research Fellow, Centre for Social and Early Emotional Development, Deakin University. Dr Jarman recently completed her PhD which investigated the impact of social media on adolescents' body image and well-being, and is actively involved in eating disorder research.

Reset Tech Australia, supported and helped prepare this submission but have also submitted a longer response covering the broader implications of the Bills.

## Why have we prepared this submission: the connection between children's data and mental health

Data is the fuel that drives the current digital world. Social media platforms, data brokers or large online platforms could not operate without collecting and processing huge amounts of personal data.

While there are many gaps in understanding how this data-driven digital world affects young people's mental health and well-being, there is reason to adopt a precautionary approach to regulating how these sectors collect and use children's data.

For example, extensive evidence suggests that:

- **Recommender systems and algorithms can exacerbate risks and harms.** Social media platforms create personalised algorithms and recommender systems that dictate what content young people see when they are online. While little is known about how these 'black boxes' chose content, estimates suggest that 70% of watch time on YouTube is dictated by what their recommender systems presents viewers<sup>3</sup>, TikTok's ForYou Page is entirely populated by recommended content as is Instagram's Search page. Children's data is used to develop and train these algorithms. These algorithms amplify a number of known risks:
  - Social media platforms are a key site of cyberbullying. One in five young Australians reports being abused, threatened or excluded online<sup>4</sup>. Social media recommender algorithms, which train on young people's data, are involved in escalating or promoting cyberbullying content. Social media recommender systems are known to privilege and promote incendiary content<sup>5</sup> including content that falls under the definition of bullying and abuse.
  - Social media use can have a maladaptive effect on young people's body image, and is associated with unrealistic body ideals<sup>6</sup>. Social media recommender algorithms have been documented recommending Pro-Anorexia content<sup>7</sup> and Anorexia Community including AnaCoaches as 'friends' to children's accounts<sup>8</sup>. This access to harmful content and communities can have the effect of 'normalising' disordered eating and trigger the emulation of these destructive behaviours<sup>9</sup>.

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<sup>3</sup> Ashley Rodriguez 2018 'YouTubes Recommendations Drive 70% of What We Watch' *Quartz* [qz.com/1178125/youtubes-recommendations-drive-70-of-what-we-watch/](https://qz.com/1178125/youtubes-recommendations-drive-70-of-what-we-watch/)

<sup>4</sup> eSafety Commissioner 2017 'Cyberbullying' [www.esafety.gov.au/key-issues/cyberbullying](https://www.esafety.gov.au/key-issues/cyberbullying)

<sup>5</sup> Luke Munn 2020 'Angry by design: toxic communication and technical architectures' *Humanities and Social Sciences Communications* [www.nature.com/articles/s41599-020-00550-7](https://www.nature.com/articles/s41599-020-00550-7)

<sup>6</sup> Grace Holland & Marika Tiggemann 2016 "A systematic review of the impact of the use of social networking sites on body image and disordered eating outcomes" *Body Image* 17, pp.110-110 [doi.org/10.1016/j.bodyim.2016.02.008](https://doi.org/10.1016/j.bodyim.2016.02.008)

<sup>7</sup> Ysabel Gerrard 2018 'Beyond the hashtag: Circumventing content moderation on social media' *New Media & Society* 20(12):4492-4511. doi:10.1177/1461444818776611

<sup>8</sup> Suku Sukunesan 2021 'Anorexia coach': sexual predators online are targeting teens wanting to lose weight. Platforms are looking the other way [theconversation.com/anorexia-coach-sexual-predators-online-are-targeting-teens-wanting-to-lose-weight-platforms-are-looking-the-other-way-162938](https://theconversation.com/anorexia-coach-sexual-predators-online-are-targeting-teens-wanting-to-lose-weight-platforms-are-looking-the-other-way-162938)

<sup>9</sup> Giuseppe Logrieco, Maria Marchili, Marco Roversi, & Alberto Villani 2021 'The Paradox of Tik Tok Anti-Pro-Anorexia Videos: How Social Media Can Promote Non-Suicidal Self-Injury and Anorexia.' *International Journal Of Environmental Research And Public Health*, 18(3), 1041. [doi:10.3390/ijerph1803104](https://doi.org/10.3390/ijerph1803104)

- The ability of recommender algorithms to normalise harms also applies to other disorders and extreme behaviours such as self harm. For example, in the UK the Coroners Office is investigating the role of social media algorithms in the suicide of a 14 year old, after ‘addictive features’ kept her hooked and the algorithm fed her more and more extreme self harm materials<sup>10</sup>. A recent experiment in Australia found that it took TikTok’s recommender algorithm only 7 hour and 42 minutes to ‘learn’ that a child was interested in content that promoted harmful gender stereotypes and began to recommend this content at such a frequency that it would take only 5-6 days of regular use before their social media feed was completely filled with this content<sup>11</sup>.
- **Micro-targeting commercial advertising creates risks.** Micro-targeted advertising is core to the business models of the social media sector and data brokers. Micro-targeted, or behavioural advertising, uses young people’s personal data, such as their geographic location or previous browsing history, to enable personalised advertising to children. Children’s data is used to create the profiles and algorithms that drive micro-targeting. While micro-targeting can be neutral or even beneficial in some settings, this sort of commercial advertising is problematic in multiple ways:
  - It has been shown to increase commercial pressures on children, which can lead to disappointment and frustration, and parent-child conflict<sup>12</sup>. Microtargeting, which is designed to be more persuasive, could only exacerbate these issues.
  - It is at odds with what children and families want, which can reduce self-efficacy and agency. There is emerging evidence that children and young people themselves resent being targeted by surveillance advertising, with a recent poll finding that 82% of 16 & 17 year olds have come across ads that are so targeted they felt uncomfortable<sup>13</sup>. Similarly, 65% of parents were uncomfortable with businesses targeting ads to children based on information they have obtained by tracking a child online<sup>14</sup>.

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<sup>10</sup> Tom Knowles 2021 ‘Molly Russel: Coroner Voices Alarm Over Delays to Inquest’ *The Times* [www.thetimes.co.uk/article/molly-russell-coroner-voices-alarm-delays-inquest-gmfmk7bwp](http://www.thetimes.co.uk/article/molly-russell-coroner-voices-alarm-delays-inquest-gmfmk7bwp)

<sup>11</sup> Dylan Williams, Alex McIntosh & Rys Farthing 2021 *Surveilling young people online* Reset Australia [au.reset.tech/uploads/resettechaustralia\\_policymemo\\_tiktok\\_final\\_online.pdf](http://au.reset.tech/uploads/resettechaustralia_policymemo_tiktok_final_online.pdf)

<sup>12</sup> Sandra Calvert 2008 ‘Children as Consumers: Advertising and Marketing’ *Future Child* Spring 18(1):205-34. doi: 10.1353/foc.0.0001, Amani Al Abbas, Weifeng Chen & Maria Saberi 2019 ‘The Impact of Neuromarketing Advertising on Children: Intended and Unintended Effects’ *Annual PwR Doctoral Symposium 2018–2019* [knepublishing.com/index.php/Kne-Social/article/view/5187](http://knepublishing.com/index.php/Kne-Social/article/view/5187)

Moniek Buijzen, Patti Valkenburg 2003 ‘The effects of television advertising on materialism, parent–child conflict, and unhappiness: a review of research’ *Journal Applied Developmental Psychology* 24(4):437–456 [doi.org/10.1016/S0193-3973\(03\)00072-8](http://doi.org/10.1016/S0193-3973(03)00072-8)

<sup>13</sup> Dylan Williams, Alex McIntosh & Rys Farthing 2021 *Keep it to a Limit* Reset Australia [au.reset.tech/uploads/resettechaustralia\\_policymemo\\_pollingreport\\_final-oct.pdf](http://au.reset.tech/uploads/resettechaustralia_policymemo_pollingreport_final-oct.pdf)

<sup>14</sup> Office of the Australian Information Commissioner 2020 Australian Community Attitudes to Privacy [www.oaic.gov.au/data/assets/pdf\\_file/0015/2373/australian-community-attitudes-to-privacy-survey-2020.pdf](http://www.oaic.gov.au/data/assets/pdf_file/0015/2373/australian-community-attitudes-to-privacy-survey-2020.pdf)



- There is evidence that children and young people are less able to distinguish between advertising and information in digital contexts<sup>15</sup>. This has the ability to confuse children and young people, and reduce their sense of self-efficacy and agency.
- Sponsored content, or ‘ads’ that are produced by content creators, are also promoted to teenagers by social media recommender systems. They often fall outside traditional advertising standards and regulation<sup>16</sup> so are innately more risky, and we have seen that they often promote untested and unapproved health and diet products/behaviour/tips. The ‘seamless’ integration of sponsored content into children’s feeds may also make them harder to distinguish as advertising.
- **Platforms deliberately design addictive and ‘sticky’ features that are risky.** Big data platforms such as social media platforms and freemium games have addictive features and facilitate a ‘flow state’. These sticky and addictive features create risks. For example:
  - Marketing researchers optimise flow with salient features because they create market value. This currently applies platform-wide to all consumers including vulnerable children and young people<sup>17</sup>. This leaves young people more vulnerable to advertising.
  - Children are vulnerable to addiction due to underdeveloped cognitive control<sup>18</sup>. While rates are still low ‘gaming addiction’ is a recognised disorder that affects young people<sup>19</sup>.
  - Heavy use of social media platforms correlates with poor sleeping patterns among young people<sup>20</sup>, which is known to affect their mental health and wellbeing. Sticky and addictive features are often cited as one reason young people are unable to ‘put down’ their phones and sleep<sup>21</sup>.

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<sup>15</sup> Laura Owen, Charlie Lewis, Susan Auty, Moniek Buijzen 2012 ‘Is children’s understanding of non-traditional advertising comparable to their understanding of television advertising? *Journal Public Policy Mark.* 2012;32(2):195–206 [doi.org/10.1509/jppm.09.003](https://doi.org/10.1509/jppm.09.003)

<sup>16</sup> Rafqa Touma and Zena Chamas 2021 ‘A Freebie is Enough’ *The Guardian* [www.theguardian.com/media/2021/sep/20/a-freebie-is-enough-influencer-gift-posts-trigger-breaches-in-australian-ad-standards](https://www.theguardian.com/media/2021/sep/20/a-freebie-is-enough-influencer-gift-posts-trigger-breaches-in-australian-ad-standards)

<sup>17</sup> Christian Montag, Bernd Lachmann, Marc Herrlich, and Katharina Zweig. 2019 ‘Addictive Features of Social Media/Messenger Platforms and Freemium Games against the Background of Psychological and Economic Theories’ *International Journal of Environmental Research and Public Health* 16, no. 14: 2612. [doi.org/10.3390/ijerph16142612](https://doi.org/10.3390/ijerph16142612)

Jamie Carlson, Natalie de Vries, Mohammad Rahman, Alex Taylor 2017 ‘Go with the flow: engineering flow experiences for customer engagement value creation in branded social media environments’. *J Brand Manag* 24, 334–348 [doi.org/10.1057/s41262-017-0054-4](https://doi.org/10.1057/s41262-017-0054-4)

Jean Eric-Pelet, Said Ettis, Kelly Cowart 2017 ‘Optimal experience of flow enhanced by telepresence: Evidence from social media use’ *Information & Management* 54(1) 115-128 [doi.org/10.1016/j.im.2016.05.001](https://doi.org/10.1016/j.im.2016.05.001)

Nagisa Sugaya, Tomohiro Shirasaka, Kenzo Takahashi, Hideyuki Kanda 2019 ‘Bio-psychosocial factors of children and adolescents with internet gaming disorder: a systematic review’. *BioPsychoSocial Med* 13, 3 [doi.org/10.1186/s13030-019-0144-5](https://doi.org/10.1186/s13030-019-0144-5)

<sup>18</sup> Beatriz Luna 2010 ‘Developmental Changes in Cognitive Control Through Adolescence’ *Advanced Child Development Behaviour* 37: 233–278 [ncbi.nlm.nih.gov/pmc/articles/PMC2782527/](https://ncbi.nlm.nih.gov/pmc/articles/PMC2782527/)

<sup>19</sup> Daniel King, Marc Potenza, 2019 ‘Not Playing Around: Gaming Disorder in the International Classification of Diseases (ICD-11)’ *Journal of Adolescent Health* 64 P5-7 [doi.org/10.1016/j.jadohealth.2018.10.010](https://doi.org/10.1016/j.jadohealth.2018.10.010)

<sup>20</sup> Holly Scott, Steaphany Biello, Heather Woods ‘Social media use and adolescent sleep patterns: cross-sectional findings from the UK millennium cohort study’ *BMJ Open* 9(9) [doi.org/10.1136/bmjopen-2019-031161](https://doi.org/10.1136/bmjopen-2019-031161)

<sup>21</sup> Alice Walton 2019 ‘Social Media Use May Mess with Teens Sleep’ *Forbes* [www.forbes.com/sites/alicegwaltton/2019/10/24/heavy-social-media-use-may-steal-teens-sleep/](https://www.forbes.com/sites/alicegwaltton/2019/10/24/heavy-social-media-use-may-steal-teens-sleep/)

When put together, this combination of recommended content, micro-targeted advertisement, sponsored content and sticky designs has the capacity to overwhelm children and young people, and distort their world views. The use of data to recommend content and advertising across multiple platforms, whether initially useful or not, can lead to children and young people feeling overwhelmed by the sheer amount of related content they receive, and unable to disconnect. Even if they are cognitively and emotionally able to recognise harmful content, it is extremely difficult to stop receiving it once data has been used to suggest similar content and advertising across platforms. The lived experiences of young people describe these combined effects, and the severe mental health issues they can significantly contribute to.

*You can look at one post that might relate to disordered eating messaging and then get into a whole wormhole of looking through content for hours. You just keep scrolling down the recommended posts and get caught in all this messaging that reinforces itself and the next day there will be more content and it is a very difficult spiral to get out of sometimes.*

*YouTube was a particularly problematic website for me. I used to look up work out videos and all that kind of stuff, and because I was watching those videos, what was recommended was all this other disordered content. It suggested other Youtubers to follow and I got very trapped in that mindset for a long time.*

*You can know stuff intellectually, you can be taught all these things and yet it can still happen to you. Through unhelpful things like Youtube just posting and recommending harmful content from influencers and things. There is only so much that education and teaching people can do and a lot of it is out of our control at the end of the day. (Now aged 23yrs)*

*When I first started using disordered eating terms and searching them into the search engine it would give me a suggestion of other pages to follow or other unhelpful blogs to follow, those sorts of connections can be really harmful because in those communities people may be posting whatever it is that's disordered and I think that can be really detrimental in fuelling someone's eating disorder.*

*When I was using Instagram, It was certainly my experience that things would pop up and it gets harder and harder to get rid of those suggestions. It probably took a few months before those suggestions were gone, even after unfollowing those things, things were still popping up on my page. (Now aged 23yrs)*



*When I was 11 I had negative experiences with social media with graphic imagery of self-harm and posts about suicidal ideation.*

*I followed a lot of people who posted content of this nature and soon I felt like I was in a perpetual cycle of seeing more and more similar posts that at the time made it feel normal and ok.*

*No one around me knew I was self-harming and when they did, they didn't know how to support me. This pushed me to rely more heavily on what I thought was the support of these online communities.*

*I thought they were the only people who truly understood what I was feeling and going through.*

*What I now realise wasn't helpful is that the social media platforms didn't offer healthy alternatives or pathways to support. I know now that these platforms can be designed to be safer - but many still aren't, or at least could do much more.*

*Today, I have enough experience and knowledge to be able to curate my feed so that I follow credible mental health resources - but back then, like many young people today, I didn't.*

*Social media is such a big part of young peoples' lives and it's great that many Australian mental health organisations offer really positive and important mental health support via social media - for example headspace, ReachOut and Orygen. But I think my example shows the vulnerability of young people on social media and highlights the fact that social media companies need to do more to keep young people, their users, safe while they're using their platforms.*

*As someone who has lived the dangers that do exist on social media, I think implementing safety by design and following a 'best interests' principle when using young people's data are vital. For the young people experiencing today what I did when I was 11, all I can say is now is the time for action on this to deliver a safer online environment. (Now aged 18)*

*In my lived experience, data mining is such a huge factor in the development and maintenance of my personal eating disorder. My usage of social media definitely reflected data collection and data mining from a very young age, under the age of 12, when things like targeted advertising was so detrimental to me.*

*I was falling victim to targeting advertising that heavily affected me and I do believe it played a role in the development of my eating disorder. As from such a young age I was exposed to this perception of health where, to be healthy you have to be fit, you have to be thin, you have to prescribe to diet culture. (Now aged 21yrs)*

The relationship between the collection and use of children’s data and their mental health does not have to be uniquely harmful.

The digital world has the capacity to be brilliant for young people, to promote social connection and help improve mental health outcomes. New and innovative digital technologies are emerging to improve mental health support<sup>22</sup> and challenge the global mental health service gap.<sup>23</sup> The collection and use of children’s data may allow for more effective, personalised digital mental health services, as well as the digital services that support known resilience factors like friendships and support networks. Research is increasingly showing that what young people do online matters as much as the amount of time young people spend online<sup>24</sup>; it’s the quality of digital services that matters.

The digital world is a significant part of contemporary childhood, and the experience of the global pandemic suggests that it will and should remain so. Our response to the Bill is underpinned by this belief that the digital world can and should be brilliant for young people. But we need regulations in place to make sure it functions in ways that maximise the huge potentials for children while minimising the documented capacity for social media platforms, data brokers and large online platforms to harm their mental health and wellbeing.

We broadly welcome the Bill as one way to ensure the quality of the digital services available to Australian children and young people improves their digital experiences, and subsequently their mental health and wellbeing.

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<sup>22</sup> See for example Michael Carr-Gregg 2015 Using Technology to Improve Young People’s Mental Health AIFS Webinar Series [aifs.gov.au/cfca/webinars/logging-using-technology-practice-improve-young-peoples-mental-health](https://aifs.gov.au/cfca/webinars/logging-using-technology-practice-improve-young-peoples-mental-health)

<sup>23</sup> Vikram Patel et al 2018 ‘The Lancet commission on global mental health and sustainable development’. *The Lancet*, 392(10157), 1553–1598 [doi.org/10.1016/S0140-6736\(18\)31612-X](https://doi.org/10.1016/S0140-6736(18)31612-X)

<sup>24</sup> See for example, Adam Waytz & Kurt Gray 2018 ‘Does Online Technology Make Us More or Less Sociable? A Preliminary Review and Call for Research’ *Perspectives on Psychological Science* [doi.org/10.1177/1745691617746509](https://doi.org/10.1177/1745691617746509)

Janna Clark, Sara Algoe, Melanie Green 2017 ‘Social Network Sites and Well-Being: The Role of Social Connection’ *Current Directions in Psychological Science* [doi.org/10.1177/0963721417730833](https://doi.org/10.1177/0963721417730833)

# What is our response to the Bill: recommendations for enhancements and improvements

## a. Welcoming and enhancing a rights-based approach

The United Nations Committee on the Rights of the Child recently passed General Comment 25 (2021) on Children's Rights in Relation to the Digital Environment, which sets out obligations on states to protect children's data. Specifically, Sec 70 notes that:

*States parties should take legislative, administrative and other measures to ensure that children's privacy is respected and protected by all organizations and in all environments that process their data. Legislation should include strong safeguards, transparency, independent oversight and access to remedy. States parties should require the integration of privacy-by-design into digital products and services that affect children. They should regularly review privacy and data protection legislation and ensure that procedures and practices prevent deliberate infringements or accidental breaches of children's privacy.*

The Government's action to ensure that this obligation is met through the proposed Bill is welcome. Enshrining the rights based 'best interests principle' into privacy legislation is an important way to make sure that children's rights are protected as they increasingly connect with the digital world.

We understand that the best interests principle also underpins comparable codes internationally, including the UK's Age Appropriate Design Code, and is a central pillar to Ireland's proposed Fundamentals for a Child Oriented Approach to Data Processing. In the UK, where the Code has recently and successfully come into force, we saw information society services introduce a range of measures that protect British children, including:

- Defaulting children's accounts to private. In the 8 months leading up to the enforcement of the code, TikTok announced that it was defaulting all users aged 13-15 to private accounts<sup>25</sup>, Facebook announced that 'everyone who is under 16 years old (or under 18 in certain countries) will be defaulted into a private account when they join Instagram<sup>26</sup>' and Google announced that it would 'gradually start adjusting the default upload setting to the most private option available for users ages 13-17 on YouTube<sup>27</sup>'.
- Not using children's data to enable pervasive and persuasive commercial micro-targeting. Google announced it will block microtargeting based on age, gender or interests of people under 18<sup>28</sup>, and Facebook limit the ability of advertisers to select children to target (allowing selected targeting based on age, gender and geography only)<sup>29</sup>.

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<sup>25</sup> Eric Han 2021 'Strengthening privacy and safety for youth on TikTok' [newsroom.tiktok.com/en-us/strengthening-privacy-and-safety-for-youth](https://newsroom.tiktok.com/en-us/strengthening-privacy-and-safety-for-youth)

<sup>26</sup> Instagram 2021 'Giving young people a safer, more private experience' [about.instagram.com/blog/announcements/giving-young-people-a-safer-more-private-experience](https://about.instagram.com/blog/announcements/giving-young-people-a-safer-more-private-experience)

<sup>27</sup> James Beser 2021 'New safety and digital wellbeing options for younger people on YouTube and YouTube Kids' [blog.youtube/news-and-events/new-safety-and-digital-wellbeing-options-younger-people-youtube-and-youtube-kids/](https://blog.youtube/news-and-events/new-safety-and-digital-wellbeing-options-younger-people-youtube-and-youtube-kids/)

<sup>28</sup> James Beser 2021 *ibid*

<sup>29</sup> Instagram 2021 *ibid*

This suggests that Codes based on ‘best interests’ principles work to create positive changes for children’s digital experiences.

Australian children did see some increase in protections following the UK’s adoption of their Age Appropriate Design Code, but they did not see the full benefits afforded to UK children from these changes. Australian children should not be reliant on other jurisdictions for protection, nor should they receive watered-down protections. Australian children need their own, robust code.

We understand that under the process described in the Privacy Act, the Code has a long carriage before it is enforced. We strongly recommend that at no stage in this process is the ‘best interests’ principle reduced, restricted or removed. Instead, we would like to see the ‘best interests’ principle strengthened and reinforced in the development of the code.

We would like to see the Best Interest Principle specifically applied to:

- Recommender systems and algorithms
- Digital marketing and commercial profiling systems
- Nudging and sticky design
- Automated decision making systems
- Geolocation systems
- Connected Toys and devices
- Parental controls

#### **b. Ensuring that the ‘Best Interests’ principle is enforced as intended**

We believe the Code would be more reflective of community standards if it were drafted by the Information Commissioner in the first instance.

Where Industry is involved in drafting the Code, it should be in an advisory capacity and they should be provided with a clear, strong set of rights-based requirements around how the ‘best interests’ principle should be interpreted is the best way to ensure an effective Code.

The requirements can and should be informed by the UK’s Age Appropriate Design Code’s 15 Standards and the UN Committee on the Rights of the Child’s General Comment 25 (2021) on Children’s Rights in Relation to the Digital Environment. We note that a coalition of children’s charities<sup>30</sup> has described a potential list of requirements based on the Age Appropriate Design Code and the General Comment. These form a good starting point that we have built on.

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<sup>30</sup> Children’s Data Code 2021 [childrensdatacode.org.au](https://childrensdatacode.org.au)

## Requirements on service providers

Ensure accountability and transparency, by:

- Publishing T&Cs in plain speak, appropriate to the age of their youngest users.
- Enforcing T&Cs. Providers should be required to live up to their T&Cs, and children, young people and families should have a right of redress if they do not.
- Offering a clear process to ‘make things right’ where things go wrong. Children, young people and families should be able to exercise their rights easily.

Ensure safety and privacy, by:

- Adjusting default settings to high privacy and low risk for children, defining what this looks like for young people, and making it clear about any risks associated with changing them.
- Undertaking a children’s data protection impact assessment before collecting or processing data. These should be made public and be available to the OAIC.
- Age gating, assuring and verifying services. Services should be appropriate to the ages of their users. It should be clear when a service needs to know a user’s age. Providers should implement safe, privacy preserving ways to confirm a user’s age.

Ensure young people stay in control of their data by:

- Meeting the principles (of) requiring expressed consent, ensuring transparency around when and what data is being processed, minimising data collection and restricting sharing.
- Offering easy ways for children & families to request, access and correct their data.
- Offering easy ways for children & families to exercise ‘the right to delete’.

Require services to speak to children and young people, so their thoughts about how their data should be collected and used are considered.

Respect children and young people as digital citizens. This means services can’t shut them out, or downgrade their service, ‘because it’s too hard’ to meet their needs.

## Specifying how these principles apply to specific data uses

- Recommender systems and algorithms: should always be audited to ensure they function in children’s best interests.
- Automated decision making: should only be deployed when it is in children’s best interests, and any serious decisions affecting them should always be made by a human.
- Geolocation: should be turned off unless it’s in children’s ‘best interests’ or geolocation is so central to a service that it ceases to work without it (like a map app).
- Digital marketing and profiling: children should not be profiled unless it is in their ‘best interests’ or creating a profile is so central to a service that it ceases to work without it (like a personalised learning app). Marketers should not be able to select specific age groups under 18.
- Nudging and sticky design: should not be used in digital services that may be accessed by children unless it is in their ‘best interests’.
- Connected toys and devices: these must meet the requirements of the Code, including and especially data minimisation, restricted sharing, expressed consent.
- Parental controls: children and young people should know when these are turned on, and it should be clear to them what data their family is seeing.
- Age verification: Any tools used to verify age must be privacy preserving.

Figure 1: Proposed requirements on service providers and specific applications of the best interest principles, from the Children’s Data Code group with additions<sup>31</sup>.

<sup>31</sup> Children’s Data Code 2021, ‘Policy Asks’ [www.childrensdatacode.org.au/policy-asks/](http://www.childrensdatacode.org.au/policy-asks/)

### c. Revisit and broaden the scope of OP organisations

Three main categories of organisations will fall under the remit of the Code (OP organisations):

1. Social media/networking sites, whose primary purpose is to enable interactions or shared media between end-users where they can also connect and ‘post’ materials<sup>32</sup>. This will cover most social media platforms, e.g. Snapchat and TikTok.
2. Data brokers, whose main purpose is to collect and disclose personal information<sup>33</sup>. This will cover most Australian data brokers, e.g. Axciom and Experian.
3. Other large platforms that have in excess of 2.5m Australian end-users<sup>34</sup>. This will cover most other large digital services such as Uber and Spotify and potentially larger games like CandyCrush or Rovio.

In addition, any other specified organisations as determined by the Minister will fall under the remit of the Code<sup>35</sup>. All three categories should be required to meet the Best Interests principle.

We note that large platforms which are extensively used by primarily children may fall out of scope because of the magnitude of the 2.5million end-users requirement. At June 2019, Australia had just over 5.6m, residents aged below 18<sup>36</sup>. Many Australian children could use a platform targeting children that was not covered by the code, and it would take 45% of Australian children to use a service before it was covered by the Code.

This has particular implications for:

- Game developers and mobile game developers, who may be developing risky multiplayer products specifically targeting children but will be exempt.
- EdTech providers, who again may develop data heavy products specifically targeting children – and indeed many of these are vital and prescribed by state funded schools for children’s use – but may still be exempt.
- Health and Wellbeing apps, who may be collecting extremely sensitive data about vulnerable children en masse, but still not reach the 2.5m user threshold.
- Data collected by operating systems, such as iOS and Android. It is unclear if they would fall under the definition of ‘other large platforms’, the Bill should make certain that they do.

For the code to have wider and deeper effectiveness in its coverage of protecting children it’s scope must be expanded to ensure that larger platforms and services used by children, as 10% in proportion to the size of the underage population, are bound by the Code and best interests principle. It is imperative this be fully supported both through committed ministerial specification including EdTech, Gaming platforms, Health and Wellbeing Apps and iOS/Android platforms, and amending provision Division 2A, 6W(4).

For services that don’t require accounts, the definition should be limited to those that collect personal information.

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<sup>32</sup> Division 2A, 6W(1)

<sup>33</sup> Division 2A, 6W(3)

<sup>34</sup> Division 2A, 6W(4)

<sup>35</sup> Division 2A, 6W(6)

<sup>36</sup> ABS 2020 *National State and Territory Population* [www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release#data-downloads-data-cubes](http://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release#data-downloads-data-cubes)



**d. Ensuring the Code is adequately monitored and enforced**

The Code should also make clear how compliance will be monitored and enforced, and these mechanisms should be strong. Unless the Code is rigorously monitored and enforced it will not lead to positive changes for children. We have suggested that as an 'upstream' compliance mechanism data protection impact assessment should be undertaken, made public and be available to the OAIC, but we welcome clarity about the range of enforcement options available to the OAIC and the ability to comment on these during the Code development process.