



Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 Exposure Draft and the Privacy Act Review

Combined submission to the Australian
Government, Department of the
Attorney-General.

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yourtown, December 2021

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yourtown is a national organisation and registered charity that aims to tackle the issues affecting the lives of children and young people. Established in 1961, **yourtown's** mission is to enable young people, especially those who are marginalised and without voice to improve their quality of life. **yourtown** provides a range of face-to-face and virtual services to children, young people and families, these include:

- Accommodation and therapeutic responses to young parents with children who are at risk
- Accommodation and therapeutic responses to women and children seeking refuge from domestic and family violence, including post refuge support
- Expressive Therapy interventions for young children and infants who have experienced trauma and abuse or been exposed to violence
- Young Parent Programs offering case work, individual and group work support and child development programs for young parents and their children
- **Parentline**, a telephone and online counselling and support service for parents and carers
- **Kids Helpline**, a national free 24/7 telephone and on-line counselling and support service for 5 to 25 year olds, with special capacity for young people with mental health issues
- Employment, educational programs and social enterprises, which support young people to re-engage with education and/or employment, including programs specifically developed for those experiencing long term unemployment
- Mental health service/s for children aged 0-11 years old, and their families, with moderate mental health needs.

Kids Helpline

Kids Helpline is Australia's only national 24/7 confidential support and counselling service specifically for children and young people aged 5 to 25 years. It offers counselling support via telephone, email, webchat and counsellor supervised peer to peer support via (My Circle). In addition, Kids Helpline provides a range of tailored self-help resources on its website. Kids Helpline is staffed by a paid professional workforce, with counsellors holding a tertiary qualification.

Since its establishment in March 1991, children and young people have been contacting Kids Helpline about a diverse group of issues ranging from everyday topics such as family, friends, and school to more serious issues of child abuse, bullying, mental health issues, drug and alcohol use, self-injury and suicide.

In 2020, the **yourtown** website had more than 3.6 million unique visitors and the Kids Helpline website had more than 2.1 million unique visitors. In addition, Kids Helpline counsellors responded to 176,012 contacts from children and young people aged between 5 and 25 years. The top concerns were about mental health, emotional wellbeing, family relationships, suicide, and friend and peer relationships.

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

yourtown welcomes the work of the Attorney-General's Department to enhance online privacy and other measures as articulated under the exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the draft Bill). **yourtown** strongly supports measures that strengthen the *Privacy Act 1988* and provide protections against the misuse of personal information via social media and other online platforms, particularly in relation to children and young people. However, significant caution should be exercised in drafting, so as to avoid negatively impacting children and young people who use online platforms to reach out for help and support.

Recommendation 1:

To ensure crucial helplines and online support platforms such as Kids Helpline are not inadvertently captured by such reforms, the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 should be amended to expressly exclude platforms that deliver online counselling services from the definition of 'OP organisations', ensuring they are not captured by the definition of 'large online platforms'.

The exposure draft has such a broad definition of 'large online platforms' there is a risk that **yourtown** (which provides critical online support services such as Kids Helpline) may inadvertently be captured by the legislation.

Large online platforms captured by the legislation are those that 'collect personal information about an individual in the course of or in connection with providing access to information, goods or services' (s 6W(4)(b)). **yourtown** would fall within this definition as it captures the personal information of those who contact it in order to provide online support and counselling services. Further, the definition of a 'large online platform' in the draft Bill includes organisations that carry on business with at least 2.5 million end-users in Australia (s 6W(4)(a)). Notably, in 2020, the **yourtown** website had more than 3.6 million unique visitors, with Kids Helpline website attracting more than 2.1 million unique visitors. The end-user numbers of Kids Helpline will only continue to grow over time. With the ongoing pressure within the mental health system for youth mental health support, the impact of COVID-19, and lack of available services throughout Australia, demand for Kids Helpline services as a safety net for the youth mental health system continues to increase.

yourtown and Kids Helpline would not be the only online counselling and support service captured by such a broad definition. Therefore, it is recommended that the draft Bill be amended to expressly exclude organisations that provide online support and counselling services from the definition of an OP organisation.

The Privacy Act Review

In parallel with the exposure draft of the Bill, the Government has also released a discussion paper on its review (the Review) of the *Privacy Act 1988* (Cth) (the Act) with the purpose of considering whether the scope of the Act and its enforcement mechanisms remain fit for purpose. A key component of this review is adoption of an Online Privacy Code (the Code), which will go further than the existing Australian Privacy Principles. This includes introducing a new right for individuals to request that an OP organisation cease the use of, or disclosure of personal information (14.1, the Review), as well as consideration of stricter consent and verification requirements in relation to children and vulnerable individuals (13.1 the Review).

Preferred Recommendation 2a:

The Act should omit any reference to inflexible mechanisms involving age assurance or parental consent for children under the age of 16, rather, the Act should adopt a child rights approach and require **application of the 'best interests' principle as the overarching framework for regulation of online platforms.**

yourtown does not support that age related consent changes should be made to the Act. Instead, the proposals should be re-focused upon prioritising the creation of **'child safe online environments'**. Online platforms should be required to protect and promote the rights of children and young people, with children of all ages empowered to know, understand and exercise their rights in the digital world.

yourtown supports an approach to online safety for children and young people that aligns with **the 'best interests' principle under Article 3 of the United Nations Convention on the Rights of the Child** as the preferred framework for regulation of online environments. This child rights approach reflects international best practice in supporting children and their rights,¹ including their right to guide and support their online experiences.

yourtown endorses the Institute of Child Protection Studies, Australian Catholic University position that:

'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.'

Mandating arbitrary age access requirements will result in injustice against children, particularly those who are most disadvantaged, and will create discriminatory barriers for **'under age children'** when needing to access online help, support and information. On the other hand, should the government adopt a **'best interests approach'**, **this** would enable re-direction of safety responsibilities towards online platforms and place the obligation upon the platform (rather than the child) to make genuine assessments of the risks of harm, and take reasonable steps to prevent harm (in terms of content and access) regardless of the age of the child accessing the platform.

Alternative Recommendation 2b:

Should the Government proceed with the proposed age and consent proposals, online platforms such as Kids Helpline that deliver online counselling services to children and young people should be expressly excluded from any requirement to obtain consent from a parent or guardian where a child is under the age of 16.

Should the Act be amended to require consent by a parent or guardian where a child is under the age of 16 years (without appropriate exclusions), it is foreseeable that there will be an immediate and significant impact upon the ability of children younger than 16 to seek help in a crisis or when

¹ United Nations Child Rights Committee's [General Comment 25](#) (Rights in a Digital World)

they are unsafe. Such requirements could place (or leave) children in situations of life-threatening harm.

Kids Helpline is a free and essential support service available for every Australian child or young person aged 5 to 25, living anywhere in Australia. They can contact Kids Helpline on any day, at any time, and for any reason, including if they are feeling unsafe; being abused, or feel like hurting themselves or others.

During 2020, Kids Helpline responded to:

- 45,035 counselling contacts about mental health and wellbeing,
- 13,212 counselling contacts about suicide, and
- 6,886 counselling contacts about child abuse and family/domestic violence.²

In 2020 Kids Helpline also enacted 53 duty of care interventions per week, 40.4% of which were related to young people under 16 years. Duty of care interventions occur when a Kids Helpline counsellor considers a child or young person to be at risk of imminent harm and contacts police, child safety, or ambulance services. While the main trigger for interventions in 2020 involved suicide attempts, duty of care interventions related to child abuse increased by 62% from 2019. Mandating consent to disclosure risks restricting Kids Helpline's ability to respond to a young person in crisis, and would mean we could not send the police, or ambulance to check on them (where there is no legal requirement to do so). It would also restrict Kids Helpline's ability to refer a child under the age of 16 to another service for support.

Kids Helpline is **an integral part of Australia's social support system** for children and young people, and a safety net to the mental health system. It plays a unique and critical role in support systems such as child protection, mental health, homelessness and e-safety. When initially seeking help, children and young people often feel more comfortable making contact via online support services. This can include accessing websites with age appropriate information such as the Kids Helpline website, and making contact via online counselling modes such as **Kids Helpline's email and webchat counselling services**. Central to this, is the ability to be anonymous. The anonymity and confidentiality of these mechanisms enables children and young people to test the reliability of the service, and overcome their fears of being judged when seeking help for issues that have attached stigma (e.g. mental health and suicide ideation). Once trust is built with our online service, children and young people may then feel more comfortable and confident talking to counsellors via phone counselling.

The proposal for requiring consent from under 16 year olds, particularly from parents or guardians will likely act as a deterrent to a child seeking help confidentially and anonymously. Further, requiring a child under the age of 16 to obtain consent from a parent or guardian in a situation of abuse or danger risks placing **that child's life at even further risk**, and cuts the child off from accessing an essential lifeline.

There are also practical barriers to implementing requirements for consent. For example, children who are under State guardianship may not be able to easily or swiftly obtain parental or guardian consent for the collection of personal data when accessing social media services or online platforms. In June 2020, approximately 46,000 children were in out-of-home care and more than 30,000 of these children were in out-of-home care for more than two years.³ Under

² yourtown (2021). Kids Helpline Insights 2020: National Statistical Overview. Brisbane

³ AIHW (2021). Child protection Australia 2019-21 <https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2019-20/summary> Accessed 23 November 2021.

such a proposal, thousands of disadvantaged Australian children would be denied the ability to quickly access online support or help, at any time of the day or night.

Further, young people aged 14 and 15 years may argue that if they can access their health records without parental consent, they should be able to give their own consent to the collection of personal information from social media services and large online platforms.

If the Government chooses to enact age and consent requirements, organisations such as **yourtown** (operating Kids Helpline), or online platforms such as Kids Helpline should be expressly excluded under the Act. Without legislation expressly protecting organisations that provide crisis online counselling and support such as Kids Helpline, children and young people may choose not to seek help and will fail to receive critical assistance, particularly in situations of abuse or where they are unsafe.

Recommendation 3:

All proposed amendments impacting children and young people, and other vulnerable persons must involve their input in the design, creation and maintenance of safe online environments and their regulation, including the content of the Online Privacy Code.

This should include recognition of their rights, views and involvement in the setting and maintaining of regulatory settings for access, use and privacy,

Where people are impacted by a policy or legislative change, they have the right to be involved and heard in how their rights and interests should be protected, promoted or limited. Where the Act, and particularly the Code impact the rights of children and young people it is critical that steps should be taken by the government to ensure children and young people are engaged meaningfully throughout the drafting and implementation process, and are supported to engage by experienced facilitators.

yourtown strongly recommends implementation of Safety by Design principles placing user safety and rights at the centre of the development of development of online services, particularly with respect to privacy and confidentiality. **yourtown** recommends the government work directly with children, young people and other vulnerable groups in the development of the Code to achieve the appropriate balance **between** 'safety' and 'rights' when using social media services and online platforms. Ideally, children and young people should be able to gain the benefits of digital technology (e.g. education and development, social connection particularly during lockdown, help-seeking) while their exposure to online risks (e.g. harmful tracking) is minimised.

Further, while the review paper states privacy practices including harmful tracking, profiling, or targeted marketing can be detrimental to children, young people and vulnerable people, it fails to acknowledge that certain forms of profiling and targeted marketing may not be harmful. For example, where data is used to target children and young people so they are aware of services (such as Kids Helpline) that are available to support them. Without these mechanisms, they may not be aware that they can anonymously and confidentially access support from Kids Helpline. Any reference to targeted marketing under the Act should exclude the use of data for education and information sharing in relation to essential support and help services, such as Kids Helpline.

Recommendation 4:

The Government, industry and community should commit to working directly with children, young people and other vulnerable groups in developing educational content, regarding the *Privacy Act 1988* and raising awareness of the Online Privacy Code, including where appropriate, building the capacity of children and young people to engage in this process.

Industry and the Government both need to hear from and work with children, young people and other vulnerable groups and model the development of resources following 'safety by design' principles. By listening to the experiences of children and young people, industry can be proactive and deliberate in minimising harmful privacy practices and implementing the Code so that it is easily understood and navigated by end users.

Educating children and young people about online safety and harmful privacy practices is likely to be more beneficial than regulating their online behaviour. In keeping with Safety by Design principles, organisations subject to the Code should have the responsibility to educate children, young people, parents and the wider community about the risks involved in using their services. This could include information about consent to collect and use of personal information hosted on service platforms in age appropriate ways.

Should you require further information about any issues raised in the submission, please do not hesitate Kathryn Mandla, Head of Advocacy and Research at **yourtown** via email at kmandla@yourtown.com.au.