13 December 2021

Online Privacy Bill
Attorney General's Department
4 National Circuit
BARTON ACT 2600

(submitted by email: OnlinePrivacyBill@ag.gov.au, extension granted)

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

Justice Connect welcomes the opportunity to respond to the Exposure Draft and Regulation Impact Statement of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (**the Bill**) and related Online Privacy Code (**the Code**).

## About Justice Connect

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and achieve social justice. We help those who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our communities thrive.

We have been serving the community for more than 25 years. We are a registered charity, operating nationally.

## Our expertise – our Not-for-profit Law program

This submission draws on the experience of our specialist Not-for-profit Law program which provides free and low-cost legal assistance to not-for-profit community organisations and social enterprises, many of whom are registered charities.

We handle more than 1,600 enquiries annually from a diverse range of groups, primarily small-medium and most volunteer run. These enquiries include a broad range of questions about privacy, with over 75 privacy-specific enquiries in the past 2 years. Our Privacy page (www.nfplaw.org.au/privacy), which includes further links to dedicated resources, has received over 6,000 unique views in the past two years, while our Privacy Guide has been

downloaded several times each day over the same period. We also regularly deliver training on privacy law for not-for-profits.

## Our submission

Our submission focusses on the impact of the introduction of the Bill and Code for small-medium sized not-for-profit organisations. It appears that there are some unintended consequences, including consequences that could impact on service provision for children and vulnerable people.

The structure of our submission is as follows:

1. overarching comments
2. classification of organisations providing social media services
3. classification of organisations providing data brokerage services, and
4. considerations impacting children and vulnerable groups.

## 1. Overarching comments

We are **supportive** of many of the broad principles outlined in the Bill and Code, including that:

i. people should have clarity around the collection and use of their personal information, and

ii. legislation should provide extra safeguards for the collection of personal information from and about children and people not capable of making decisions about the collection of their data.

But we are **concerned** that, despite commentary in the Explanatory Paper that not-for-profits are not intended to be impacted by the Bill, some aspects of the Bill (social media and data brokerage services) will capture them, even small ones.

Without sufficient clarity about who is in and who is out of these reforms, there is a high risk of unintentional non-compliance. And even for those not-for-profits who realise that they are captured, there will be considerable concern about how to comply and about the significant penalties for non-compliance (especially when there is no legislative requirement to consider the purpose of the organisation or its size when applying the penalties). Because of this the Bill and Code could impede not-for-profits from undertaking important community-focused work, including providing services to vulnerable children and other at-risk cohorts.

**Our overarching comment is that applicability of the Bill is not sufficiently clear.**

## 2. Classification of organisations that provide Social Media Services

### Our recommendation

**We recommend that the ambit of the Bill as to the application of the Social Media Services provisions be clarified and, at least in this initial phase, should not apply to not-for-profit organisations or, alternatively, should not apply to organisations with an annual revenue below $50 million.**

### Our reasoning

The provisions regarding 'Social Media Services' as drafted are likely to encumber not-for-profit organisations irrespective of the sentiment expressed in the Explanatory Paper regarding the limits of organisations intended to be captured by the Bill. We note that the organisations described as being covered, such as Facebook and Reddit, are of a distinctly different size and operate very much 'for profit' rather than 'for purpose' (Noting that not-for-profit organisations cannot distribute profits to members and a sub-set of not-for-profits are registered charities with named charitable purposes).

The Explanatory Paper states that 'Social Media Services' will be subject to the Code. These services are defined as where an organisation provides an electronic service (including websites, apps, hosting services, peer-to-peer platforms) with 'the sole or primary purpose of enabling online social interaction' and posting of material by users.

The Bill is specific as to the sole or primary nature of the service facilitating online interaction, rather than the purposes of the services or organisations themselves. This means organisations which engage in activities meeting the definition of 'Social Media Services,' will be subject to the Bill irrespective of whether they are a large or small, or a company such as Facebook rather than a not-for-profit.

We are concerned that this could encumber not-for-profits in several ways, for example if they:

i. enable an electronic service as their primary activity, for example as a forum for mental health support,

ii. enable an online, open-invitation social forum for the purposes of encouraging interactions between staff, volunteers and/or public users, or

iii. establish an online forum to encourage postings of material and interactions from users, for example a discussion forum about community concerns about disaster recovery work in their area.

The activities described above would be covered by the Bill irrespective of whether the activities undertaken by the not-for-profit relate to a publicly accessible 'open' network or an invitation-only 'closed' network because the definition of 'Social Media Services' in the Bill is not specific as to open or closed networks.

Like the corporate sector and the broader public, and particularly since the COVID-19 pandemic, not-for-profits are increasingly creating their own online platforms to more effectively and efficiently reach those who need their help both with open (publicly accessible) applications as well as closed networks.

As one example, at Justice Connect we have won several design and innovation awards for the platforms we have developed[1] so those seeking legal help with problems such as eviction, bankruptcy, or representing themselves in court can access information from anywhere in Australia any time. Our Not-for-Profit program has also provided advice to multiple organisations about creating platforms that are in the public interest to support people experiencing mental health concerns, address self-harm in the community and in support of children and vulnerable people.

Clarity as to the types of services to be encumbered, as well as the applicability of provisions addressing responsibilities of and penalties relating to organisations which engage in 'Social Media Services,' is a threshold requirement requiring further work. We note that:

- greater clarity could be achieved by expressly excluding not-for-profits as a class of organisations under section 6W(7). This would require the Minister to be satisfied that it is desirable in the public interest which provides a mechanism to further refine the types/size of not-for-profits and/or the nature of the services provided to ensure they are public interest focused, and
- if an exemption approach is not favoured, then a clear size threshold would help ameliorate the impact on small not-for-profits (and small business). We suggest a threshold of at least $50 million in annual revenue for the initial phase of the introduction of these significant reforms.

[1] For example: for our Online Gateway – 2019 Victorian Premier's Design Award https://premiersdesignawards.vic.gov.au/entries/2019/service-design/justice-connect-gateway-project and our 'Dear Landlord' https://good-design.org/projects/dear-landlord-by-justice-connect/

## 3. Classification of organisations that provide Data Brokerage Services

### Our recommendation

**We recommend that the ambit of the Bill as to the application of the Data Brokerage Services provisions be clarified and, at least in this initial phase, should not apply to not-for-profit organisations or, alternatively, should not apply to organisations with an annual revenue below $50 million.**

**We recommend that an explanatory note be added to section 6W[3][a] of the Bill to repeat the example about charities disclosing to a marketing agency as contained in the Explanatory Paper to the Bill.**

### Our reasoning

The provisions regarding Data Brokerage Services as drafted will encumber not-for-profit organisations irrespective of the sentiment expressed in the Explanatory Paper regarding the limits of organisations intended to be captured by the Bill.

The provisions regarding 'Data Brokerage Services' apply to an organisation that 'collects personal information about an individual for the sole or primary purpose of disclosing that information' (section 6W[3][a]).

The Explanatory Paper states that the Bill is intended to apply to organisations which trade in personal information rather than to organisations which disclose data for a secondary purpose. The Explanatory Paper gives the example of a charity disclosing information to a marketing agency as being excluded from the operation of the Bill. It would assist with clarity about how the Bill is intended to apply to have this example (at least) as an explanatory note to the relevant provision in the Bill.

But this marketing agency example is not the only way not-for-profits may disclose personal information to fulfil their purposes, including charitable purposes. For example, this type of disclosure may happen when working with other not-for-profit organisations as part of activities relating to campaigning, education, information provision or awareness raising. To elaborate further:

- one not-for-profit partner may set up a new website (under the banner of a campaign name) and collect personal information which they then share with the other not-for-profits that they have partnered with to run a campaign on a policy issue, or

- a partnership[2] may exist between a larger charity which shares information with a smaller locally-based (grassroots) not-for-profit to more quickly and effectively deliver necessary 'on the ground' services to a particular community.

In each case, not-for-profit forums, facilities, initiatives and/or organisations may be set up for the purposes, including the primary purposes of disclosing and facilitating the sharing of information including personal information.

As with 'Social Media Services', clarity as to the types of services to be encumbered, as well as the applicability of provisions addressing responsibilities of and penalties relating to organisations which engage in 'Data Brokerage Services,' is a threshold requirement requiring further work. The suggestions about how this can be achieved (Ministerial exclusion or a size threshold), as discussed at heading (3) above apply here as well.

# 4. Considerations impacting children and vulnerable groups

## Our recommendation

**We recommend that a legislative exemption be provided for organisations seeking to collect personal information from children, vulnerable people and people not considered capable of making their own decisions, where doing so (or otherwise not seeking consent from a parent or guardian) is in the best interests of that child or vulnerable person.**

**We recommend that this exemption:**

a. **be framed by reference to what is 'reasonable in the circumstances', and**

b. **include a non-exhaustive list of circumstances whereby obtaining consent from a parent or guardian is not required because it is not in the best interests of the child or vulnerable person to obtain that consent, or to delay service provision to that child or vulnerable person while parental or guardian consent is sort.**

**We recommend updated guidance be provided by the Office of the Australian Information Commissioner about best practice in obtaining consent from children and other vulnerable people, including examples of what steps service providers can take in circumstances such as family violence involving the parent or guardian whose consent is otherwise required to be sought.**

[2] We note that the term 'partner' is often used loosely in the not-for-profit sector (ie, not in the legally defined sense).

## Our reasoning

We are concerned that the new requirements for obtaining consent for children and vulnerable people will have unintended consequences that will negatively impact the provision of services that are in the best interests of those children and vulnerable people.

Under the Code organisations will be required to obtain express consent from a parent or guardian before collecting, using or disclosing personal information of a child under the age of 16.

The Explanatory Paper states that services must ensure collection is in the best interest of the child and that this be the primary consideration when determining what is fair and reasonable. We agree with this policy statement, but note that the Explanatory Paper already contemplates that the Code may make provision about what constitutes reasonable steps, or matters to take into account when considering whether the collection, use or disclosure of a child's personal information is fair and reasonable in the circumstances. The requirement to obtain consent could be couched in the same terms as collection, use and disclosure, to account for instances where it would not be fair or reasonable to do so. We query if this may be a drafting oversight.

However, the exception of reasonable steps is not sufficient. We are concerned that not-for-profits that support children, vulnerable people and people not considered capable of making their own decisions, will be prohibited from continuing urgent and crucial activities necessary for the ongoing care and emergency support for these people. For example, there are situations where taking any steps to secure consent from a parent or guardian can (proactively) put a child at risk of harm if, say, they are escaping family violence. This may also affect the willingness for organisations to create new services to meet this need.

**These reforms will be significant for not-for-profit organisations, especially if they apply regardless of size. The not-for-profit sector relies heavily on volunteers and 65% of charities are small (annual revenue of less than $250,000).**[3] Given this context it makes the support provided by way of practical guidance and training even more important and why we have included a recommendation about guidance.

We would be happy to discuss or expand on any of our comments. We agree to this submission being made public (with signature redacted).

[3] Australian Charities and Not-for-profits Commission: Australian Charities Report - 7th Edition https://www.acnc.gov.au/tools/reports/australian-charities-report-7th-edition

Yours sincerely,

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