Australian Government Attorney-General’s Department

Online Privacy Bill Exposure

December 2021

Improve the Mental Health of Communities
About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises governments on mental health care. The RANZCP is the peak body representing psychiatrists in Australia and New Zealand and as a bi-national college has strong ties with associations in the Asia-Pacific region.

The RANZCP has over 7300 members, including more than 5300 qualified psychiatrists and almost 2000 members who are training to qualify as psychiatrists. Psychiatrists are clinical leaders in the provision of mental health care in the community and use a range of evidence-based treatments to support a person in their journey of recovery.

The following RANZCP committees have been consulted in the development of this submission into the Australian Online Privacy Bill Exposure Draft consultation:

- Section of Psychiatry of Intellectual and Developmental Disability
- Section of Private Practice Psychiatry
- Faculty of Child and Adolescent Psychiatry
- Section of Youth Mental Health
- Section of Child and Adolescent Forensic Psychiatry
- Family Violence Psychiatry Network

These committees are made up of psychiatrists and community members with lived experience. As such, the RANZCP is well positioned to provide advice about this issue due to the breadth of academic, clinical and service delivery expertise it represents.

Introduction

On 25 October 2021, the Australian Government’s Attorney General’s Department (AGD) released the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (the Online Privacy Bill) for consultation. This is one component of its broader review of Privacy Act protections.

The RANZCP has previously contributed to requests from the AGD on the issue of privacy protections as they relate to health information and vulnerable groups. These included a submission to the Australian Law Review Commission’s inquiry - Family Law for the Future: An Inquiry into the Family Law System. The RANZCP’s position on privacy protections as they can apply to vulnerable groups and the importance of the confidential nature of the consumer-practitioner relationship, particularly to those most vulnerable, are also outlined in the Position Statement 89 - Patient–psychiatrist confidentiality: the issue of subpoenas, Position Statement 83 - Recognising and addressing the mental health needs of the LGBTIQ+ population, and Professional Practice Guideline 3 – Australian Family Court Proceedings. The responses below reflect these established statements and guidelines.

This submission addresses how the proposed changes apply to other vulnerable groups (apart from children). The RANZCP would highlight that there is an imbalance in the exposure draft regarding the focus placed on children versus other vulnerable groups.
Below is also a legend of terms referred to in the exposure draft and other documents:

<table>
<thead>
<tr>
<th>TERMS</th>
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<tbody>
<tr>
<td><strong>OP Organisation</strong></td>
<td>Online Privacy Organisation. Includes social media platforms/data brokerage services (ie services that trade information) and large online platforms (eg Google, Apple, Amazon)</td>
</tr>
<tr>
<td><strong>OP Code Developer</strong></td>
<td>Entity designated with drafting OP Code. Under the changes proposed can be either the Commissioner or the Commissioner can designate the task to an industry body or organisation identified as qualified.</td>
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<tr>
<td><strong>APP</strong></td>
<td>Australian Privacy Principles. There are 13 principles, and they are found in Schedule 1 to the Privacy Act 1988.</td>
</tr>
<tr>
<td><strong>Commissioner</strong></td>
<td>Commissioner of the OAIC (Office of the Australia Information Commissioner)</td>
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1. Definitions
The exposure draft flags the insertion of various new definitions into the Act including for example a definition of ‘child’ (see page 3 of the exposure draft).

**RANZCP RESPONSE:**

The RANZCP encourages the AGD to consider improved specificity regarding the terminology relating to vulnerable groups (apart from children which is satisfactorily covered) that are being referred to in the proposed changes. A definition of ‘vulnerable groups’ or the term ‘vulnerable’ should be included.

The explanatory notes, for example, identify that the OP code will explain how existing and new obligations will apply in relation to children and vulnerable groups. However, the draft exposure Bill does not include a definition for vulnerable groups.

It is noted that as part of the proposed changes that the term ‘child’, not previously defined, is to be inserted in the *Privacy Act 1988*. We acknowledge that the term ‘vulnerable’ is not easily defined but if the amendments are to be introduced, a definition would be appropriate.

2. Risks to vulnerable groups
The exposure draft identifies the risk to children of certain online practices such as online tracking and behaviour monitoring but does not seem to connect these same risks to other vulnerable groups.

**RANZCP RESPONSE**

The RANZCP highlights that the risks associated with online platforms including social media (e.g. online tracking, behavioural monitoring), identified as impacting children also pose a risk to other vulnerable groups. There is the potential to acknowledge and address these risks in more detail in the proposed changes.

We would also suggest that there should be consideration regarding providing guidance for an assessment, as to who is included as vulnerable and who is not. There is currently no guide as to the considerations the court/judge must/may consider in making a judgment as to whether the law applies.

3. Requirements under Section 26KC(6) (new section proposed) outlining specific requirements and steps an OP organisation must take to ensure it is not exploiting children's personal information

**RANZCP RESPONSE**

The RANZCP would suggest the same wording under the new section 26KC(6) outlining specific requirements for OP organisations, as they apply to children, and the steps they must take to ensure they are not exploiting a children’s personal information, should also be included for other vulnerable groups.

We would also support an additional section following section 26KC(6), specifically stating requirements for interactions with those persons belonging to a vulnerable category.

As this section seeks to mitigate the impact and exploitation of children by online platforms, particularly social media platforms but also those services that trade personal information and larger services such as Google, Apple and Amazon, there should be another additional section (like that at 26KC(6) for children) which covers other vulnerable groups.
4. Insertion of section 26KC(7)(b) – industry body/OP Code developer to determine what is ‘fair and reasonable’ under section 26KC(6) as to the collection, use and disclosure of children’s personal information

RANZCP RESPONSE
The insertion of section 26KC(7)(b) which, if the development of the OP code is designated to an industry body by the Information Commissioner (as allowed under section 26KE), would mean the same industry body would be able to make provisions in relation what constitutes ‘fair and reasonable’ in particular circumstances under 26KC(6).

The RANZCP would seek clarity regarding the balancing of competing priorities between the commercial interests of the industry body and that of vulnerable groups. Beyond ‘fair and reasonable’ the same language used elsewhere of ‘best interests’, with respect to children, at a minimum, should also be applied to other vulnerable groups.

5. The use of language – use of ‘may’ versus ‘must’ in terms of new requirements imposed on OP organisations.

RANZCP RESPONSE
Further to the point above, the RANZCP would urge caution regarding the use of ‘may’ in respect of the provisions at section 26KC(7)(b) as they apply to requirements at 26KC(6)(e). The word ‘may’ does not sufficiently place onus on the OP organisation/industry body to protect the integrity of the personal information collected. We are concerned by the situation where the industry body is the determiner and arbitrator of what ‘may’ constitute ‘fair and reasonable’ would potentially make interpretation difficult at law and have significant implications regarding establishing breaches of privacy where they occur.