

Protecting our privacy online

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

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Summary

The review of the Privacy Act, and the accompanying *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021* as well as the Online Privacy Code to be developed as part of the Bill are significant initiatives needed to protect the privacy of Australians online.

The Australia Institute's Centre for Responsible Technology welcomes the opportunity to make a submission to the exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021.

The Bill has many important elements, including some that can be improved, and we put forward the following recommendations:

- 1) That the Bill move away from 'notice and consent' models which have proven to be ineffectual, and place the regulatory burden on platforms rather than individuals, considering requirements such as:
 - **Purpose limitations**, making sure that data collection is restricted for the explicit and singular purpose to which it was consented to, and no secondary usage or extra data transfer is conducted.
 - **Data separation**, limiting the ability for a company to share user data between its different products and services (e.g. consenting to use Google Maps doesn't mean Google can use that location data to target users using Google Search).
 - **Data minimisation**, only capturing the minimal amount of data.
- 2) 'Clean slate' or 'right to erasure' requirements are introduced to allow individuals to request their personal information to be removed from data services and platforms if they choose to.
- 3) That the Online Privacy Code be developed by the Office of the Information and Privacy Commissioner and not by a technology industry lobby group which will likely do the bare minimum and compromise the scope and effectiveness of the Code.

Introduction

The Centre for Responsible Technology welcomes the opportunity to provide feedback on the exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021.

As part of the Privacy Act Review, a separate amendment, the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 has been proposed which looks specifically at the role of large online platforms and data brokers in the data privacy of Australians. This separate Bill recognises the large impact digital technology has on privacy, particularly in relation to large scale data collection and processing.

The Bill also requires the development of a binding Online Privacy Code, which will specify responsibilities and requirements from social media platforms, data brokers and large online platforms.

The addition of a specific Bill with the development of an Online Privacy Code and its acknowledgement of the impact of digital platforms is commendable. This will go towards addressing many privacy breaches now playing out digitally.

While the Bill has some beneficial recommendations, there are some areas that can be improved. The Bill still overly focuses on a 'notice and consent' model of governance, downplays consumer actions like the right to erasure, and allows for less scrutiny in code developments.

Privacy by design - beyond the 'notice and consent' model

Privacy legislation has to date, been largely using a 'notice and consent' framework for its governance. The 'notice and consent' model requires organisations who collect personal information to inform users (notice) and ask for their permission to collect that information (consent).

The development of an Online Privacy Code as part of the Bill requires the Code to adhere to broader Australian Privacy Principles,¹ which rely on a notice and consent framework. This includes requirements for simple and clear privacy policies, simple and clear notices, and seeking consent from the public.

There are clear limitations with the notice and consent model that are now widely acknowledged.²³⁴ The Australian Competition and Consumer Commission (ACCC) Digital Platform Inquiry,⁵ and the broader Privacy Act Review discussion paper,⁶ have called out that current notice and consent frameworks often use overly cumbersome privacy notices, which are complex and take too long to read, and that most people therefore do not read them. Most notices often use jargon heavy and ambiguous language which are not easily understood.

Even if notices become easy to understand and clearly lay out how personal information is collected, the sheer scale and volume of data processing online mean that individuals would have a very difficult time providing informed and meaningful consent to each specific data exercise across multiple products and services.

¹ Office of the Australian Information Commissioner (2021), *Australian Privacy Principles*, <https://www.oaic.gov.au/privacy/australian-privacy-principles>

² Johnston (2020), *Re-thinking transparency: If notice and consent is broken, what now?*, <https://www.salingerprivacy.com.au/2020/05/29/re-thinking-transparency/>

³ Park (2020), *How "Notice and Consent" Fails to Protect our Privacy*, <https://www.newamerica.org/oti/blog/how-notice-and-consent-fails-to-protect-our-privacy/>

⁴ King, Katsanevas, Flanagan (2021), *Online privacy notices don't work. Here are 9 alternatives*, <https://www.weforum.org/agenda/2021/04/online-privacy-notices-are-a-farce-here-s-an-alternative/>

⁵ ACCC (2019), *Digital platforms inquiry – final report*, <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

⁶ Attorney-General's Department (2021), *Privacy Act Review Discussion Paper*, https://consultations.ag.gov.au/rights-and-protections/privacy-act-review-discussion-paper/user_uploads/privacy-act-review---discussion-paper.pdf

Rather than placing the burden on individuals, there should be more emphasis on platform responsibility and 'privacy by design' features, with privacy-friendly restrictions and architecture which limit data collection in the first instance.

The 'notice and consent' model is further expanded in the broader Privacy Act Review and more detail and recommendations will be supplied as part of this process.

However, to provide brief examples for this submission, these features could include:

- Purpose limitations, making sure that data collection is restricted to the explicit and singular purpose for which it was consented to, and no secondary usage or extra data transfer is conducted.
- Data separation, limiting the ability for a company to share user data between its different products and services (e.g. consenting to Google Maps use of location data does not give Google the right to use that location data to target users using Google Search).
- Data minimisation, only capturing the minimal amount of data.

Clean slate and Right to Erasure measures

The Online Privacy Bill has introduced more controls for individuals in their personal data management, but falls short of allowing users to completely erase or have their data deleted should they choose to do so.

Currently, proposals as part of a new Online Privacy Code include requirements for organisations to stop using or disclosing personal information about individuals users upon their request. The proposal specifically states that this requirement does not amount to a 'right to erasure' request.

'Clean slate' provisions or 'right to erasure/right to delete' has strong precedents in other data privacy legislation like the European Union's General Data Protection Regulation (GDPR) and the California Consumer Privacy Act (CCPA).

The GDPR specifies strong data erasure requirements if requested by individuals including withdrawal of prior consent, once the purpose of the original data collection has expired, or if the data was unlawfully collected.⁷

The CCPA includes the right to know about personal information collected, the right to delete this information, as well as the right to opt-out of the sale of their personal information.⁸

A 'right to erasure' action would empower individuals and give them agency over their data management, especially as data processing online increasingly becomes more complex and harder to keep track of. There are many reasons why personal information may be considered private, outdated, or out of context. Minors and young people in particular should also be protected from permanent digital records of their activities before they are legal adults.

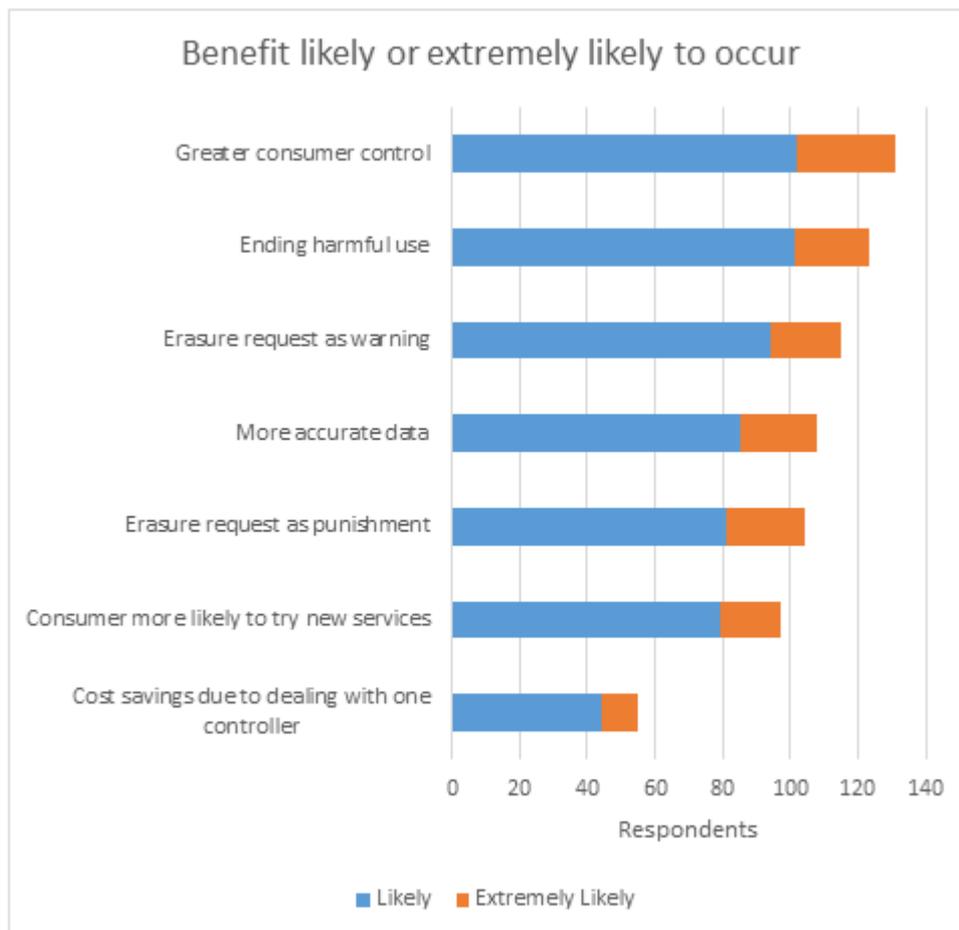
During the rollout of the GDPR, the UK's Department for Culture, Media & Sport commissioned a report which sought to quantify the economic benefits arising from greater consumer trust and agency in the digital economy. The report looked specifically at the benefits of individual control, such as the 'right to erasure', and conducted a combination of quantitative and qualitative surveys, online forums, in-depth interviews and literature reviews.

⁷ Horizon Programme of the European Union (2021), *GDPR right to erasure ('right to be forgotten')*, <https://gdpr.eu/article-17-right-to-be-forgotten/>

⁸ Bonta (2021), *California Consumer Privacy Act (CCPA)*, <https://www.oag.ca.gov/privacy/ccpa>

The 'right to erasure' was seen as having a range of benefits including ending harmful use of data, more accurate data and cost savings as part of the EU's GDPR rollout.

Figure 1: Likelihood of benefit from right to erasure, survey of data professionals. Source: London Economics (2017) *Research and analysis to quantify the benefits arising from personal data rights under the GDPR*.⁹



The relevant exemptions would need to be investigated, including information that is of public benefit (e.g. regarding public figures and those who need to be held to account such as politicians), matters relating to public health, legal claims, national security or data for historical/scientific purposes, but ultimately a right to erasure would significantly protect individuals and balance the information and data asymmetry between them and large companies processing their data.

⁹ London Economics (2017), *Research and analysis to quantify the benefits arising from personal data rights under the GDPR, Report to the Department for Culture, Media & Sport*, <https://www.oag.ca.gov/privacy/ccpa>

Code Development and Variations

One of the requirements of the proposed Bill is the development of a new Online Privacy Code which will be a legally binding framework which social media platforms, data brokers and large online platforms will need to adhere to.

There are two distinct options for developing the Code – either through an industry body, or in-house through the Office of the Information and Privacy Commissioner.

If the industry group option is exercised it is likely that the Digital Industry Group Inc. (DIGI)¹⁰, a digital lobby group funded by the largest digital platforms including Google, and Meta (Facebook) will be nominated to develop the Code.

Apart from the clear conflicts of interest, lobby groups in other industries are openly criticised when they develop policy in their respective fields – for example if the Mineral Council draft mining policy¹¹, or if Cotton Australia try to draft water policy. Technology policy should be no exception.

DIGI's recent contributions to Australia's technology policy includes development of the Mis-and Disinformation Code of Conduct and the development of one of the eSafety Industry Codes.

The Mis-and Disinformation Code in particular, which DIGI led, included the bare minimum in tackling the disinformation issue.¹² The Code has been criticised by civil society groups, including by the Centre for Responsible Technology as being inadequate and ineffectual.¹³

Should DIGI be engaged to develop the Online Privacy Code, a similar approach will likely be taken, as its member organisations benefit from the status quo and would not entertain any policies which would threaten its profit and data-intensive business models.

We recommend that the Online Privacy Code be developed through the Office of the Information and Privacy Commissioner with the relevant industry and public consultations to ensure the veracity and effectiveness of the Code, and to ensure that it's not watered down by the vested interest of the digital companies and their representatives.

¹⁰ DIGI (2021), *DIGI website*, <https://digi.org.au/>

¹¹ Campbell (2015), *Coal industry writing the NSW Govt's rules on economics*, <https://www.theaustralian.com.au/business/business-spectator/news-story/coal-industry-writing-the-nsw-govts-rules-on-economics/fa754fbc0db2bd3bd14153a2647580fe>

¹² Smith & Ward (2021), *Tech giants' 'laughable' disinformation solution slammed*, <https://www.afr.com/technology/tech-giants-laughable-disinformation-solution-slammed-20211010-p58ys8>

¹³ Sadler (2021), *Big Tech misinformation efforts slammed as 'woefully inadequate'*, <https://www.innovationaus.com/big-tech-misinformation-efforts-slammed-as-woefully-inadequate/>

The proposed Bill also currently stipulates that any Code amendments do not necessarily need to engage the public or go through a public consultation process. This should be amended so that there is full transparency and engagement with the public and consumer/user groups so that the Code's integrity continues to hold up once it has been passed.

Conclusion

The exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 proposes some much needed protections for the privacy of Australia. However there are global precedents the Bill can learn from like the impact of the EU's GDPR and the CCPA to apply to the Australian legislation. The Bill should also take care to not let proposed actions be watered down by outdated frameworks such as the 'notice and consent' model and by handing over Code developments to technology representatives with vested interests. The Online Privacy Bill and the broader Privacy Act Review is a great opportunity to hold technology companies who have been breaching the privacy of Australians finally to account.