Ministerial responses — Report 3 of 2022[1]

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Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

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Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

By email: human.rights@aph.gov.au

Dear Chair

Thank you for your correspondence dated 21 March 2022 regarding the Social Media (Anti-Trolling) Bill 2022 (the Bill). I thank the Committee for its consideration.

As set out in the *Human rights scrutiny report No. 2 of 2022*, to assess the compatibility of the Bill with the rights to privacy and freedom of expression, the Committee has requested advice in relation to the following questions:

1. Why the existing preliminary discovery process in defamation proceedings is insufficient so as to justify the need to introduce end-user information disclosure orders?

2. Why does the bill not require the court to balance competing rights and interests (particularly the rights to privacy and freedom of expression) as well as consider other relevant matters, such as the form of expression and the context in which it is made?

3. How would the court's power to refuse to make a disclosure order, where to do so would pose a safety risk to the poster, be effective in practice, noting it is not clear how the court would obtain the necessary information to make this assessment?

4. What safeguards are there, if any, to ensure that the poster's personal information is only used by the applicant for the purposes of instituting defamation proceedings?

5. Why does the bill not prohibit the unauthorised use and disclosure of the poster's personal information once it is disclosed?

Regarding the Committee's first question, while there are similarities between existing orders for preliminary discovery and end-user information disclosure orders (EIDOs) proposed in the Bill, EIDOs connect to a scheme that is specifically focused on defamation on social media. For example, compliance with an EIDO will permit a social media service provider to access the conditional defence in the Bill. EIDOs are also capable of disclosing country location data, which will empower the prospective litigant to make an informed decision whether to progress defamation proceedings. Moreover, EIDOs will be effective against a social media service's nominated Australian entity, not just the social media service, which will make enforcement in Australia more effective. EIDOs will operate in parallel to preliminary discovery orders, and a complainant can choose the mechanism best suited to their circumstances.

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7300

Regarding the Committee's second question, one of the purposes of the Bill is to empower Australians who are the subject of defamatory material posted anonymously on social media to respond appropriately. The complaints mechanism and EIDO scheme support these Australians to obtain relevant contact details that allow them to serve legal proceedings against the poster. The overarching consideration of these mechanisms is to enable the disclosure of relevant contact details when potentially defamatory material has been posted on social media, with strong safeguards to ensure details are not able to be provided in other circumstances.

Provided potentially defamatory material has been posted, as assessed by a court, the Government considers it is appropriate for contact details to be provided to support the commencement of legal proceedings. Other considerations such as freedom of expression, privacy or 'the type of expression and the context in which it was made' should not override this tenet. This is the same approach taken with the existing preliminary discovery mechanism.

At the same time, the Bill recognises that many Australians have legitimate reasons to be anonymous or to use a pseudonym on social media. Anonymity and pseudonymity can enable marginalised groups in the community to use the internet without fear for their safety, and are therefore important in promoting freedom of expression and privacy. However, anonymity should not be used as a shield to make harmful remarks that damage other people. This is the balance the Bill strikes. In determining whether an EIDO should be granted, the Bill recognises the court can balance the interest in granting an order against risks to safety, and maintains its general discretion to consider the interests of justice and any other circumstances of the case.

In relation to the third question, the Bill makes clear that courts can refuse to grant an EIDO if doing so is likely to present a risk to the safety of the poster. The Bill does not envisage that the court must take positive steps to investigate the safety of the poster prior to making an EIDO. Rather the court would make such a determination in light of all the circumstances of the case, on the basis of information available to it. This could arise, for example, in circumstances where there is information before the court (such as the substance of the posted material) indicating that the poster knows the prospective applicant and had previously been the subject of intimate partner or family violence at the hands of the applicant.

The Government considered including mechanisms to notify interested persons about an EIDO application, and to provide a right to be heard, to support the Court's consideration of safety risks. However, such a requirement would add complexity, time and cost to the process. EIDO applications are intended to be as simple and cost-effective as possible, to provide Australians with an accessible mechanism to respond to defamatory comments on social media. The approach taken seeks to strike a balance between these competing considerations. At the same time, the Bill expressly allows practice and procedural rules in relation to EIDO applications to be provided for in legislative rules. Among other things, this could be used to provide for notification requirements and rights for interested persons to be heard.

Regarding the fourth and fifth questions, relevant contact details can only be disclosed with the poster's consent, or pursuant to a court order. This ensures contact details are only disclosed in appropriate circumstances. Whilst there is no express prohibition on disclosed details being used for another purpose, under the complaints scheme the poster has complete control over whether the contact details are provided. Under the EIDO process, an implied undertaking applicable to all relevant court orders would prevent such information being used for another purpose.

The High Court has made it clear that a restriction on the use of documents generated by litigious processes applies an obligation of substantive law. Moreover, the Court has made clear that the undertaking may in some cases extend to third parties: see generally *Hearne v Street* (2008) 235 CLR 125. A breach of the implied undertaking is punishable by contempt. The Government considers that these existing mechanisms are sufficient to prevent disclosed details being used for other purpose, and an express prohibition in the Bill was not necessary. Moreover, the approach in the Bill aligns with existing protections in preliminary discovery processes.

I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
07/04/2022