



Law Council
OF AUSTRALIA

Office of the President

17 March 2022

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Supplementary Submission: Social Media (Anti-Trolling) Bill 2022 (Cth)

1. The Law Council of Australia thanks the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) for the opportunity to respond to its inquiry into the Social Media (Anti-Trolling) Bill 2022 (Cth) (**Bill**), including in its recent appearance before the Committee on Thursday, 10 March 2022.
2. This supplementary submission seeks to provide answers to questions taken on notice during the course of the hearing.

Responding to the *Voller* decision

3. During the course of the hearing, the Chair queried what interim solution is required to respond to the issues potentially created by the High Court's decision in *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 (**Voller**).
4. As noted in the Law Council's primary submission, while the Law Council agrees that reform to Australia's defamation laws is required following *Voller*, no adequate evidentiary basis for urgency of the Bill to interrupt the ongoing Meeting of Attorneys-General (**MAG**) review process and establish an interim solution has been provided.
5. The Law Council notes that although the media organisations in *Voller* were found to be publishers, final liability in the case was not determined by the High Court. In particular, it is important to note that the media organisations may have been able to rely on the defence of innocent dissemination. As such, the full implications, and the degree to which persons and organisations may be exposed to liability, is yet to be fully resolved. Additionally, the Law Council is not aware of any influx of litigation as a result of the *Voller* decision such that would require an 'interim' solution.
6. The MAG review process in relation to the liability of online publishers has been substantial and in-depth and has the potential to develop a comprehensive and considered approach to reform which addresses many of the shortcomings identified in relation to the Bill.

7. In its submission to Stage 2 of the MAG review, the Law Council provided a draft 'pre-action protocol for internet publications'.¹ Crucially, this model would apply to all online publishers (not just social media organisations) and would provide complainants with a relatively straightforward and timely takedown procedure (currently missing from the Bill). Further information on this alternative model is provided in the Law Council's submission to that process.

Basic online safety expectations

8. During the course of the Law Council's appearance, Senator Bragg asked the Law Council to take the following questions on notice:

Senator BRAGG: ... can you provide your view on the basic online safety expectations with respect to anonymity which are new? I would also be grateful for your, frankly, independent view on what sort of reporting you think would be useful for the commission to undertake in relation to anonymity. Further, could you give your considered view on how the proposed obligations in this bill would intersect with the basic online safety expectations?

9. The basic online safety expectations (**BOSE**) are created under Part 4 of the *Online Safety Act 2021* (Cth) (**OSA**). Under section 45 of the OSA, the Minister may, by legislative instrument, determine basic online safety expectations for social media services, relevant electronic services and designated internet services. The provider of such a service may be required to give the eSafety Commissioner reports about compliance with the applicable basic online safety expectations.
10. Subsection 46(1) of the OSA specifies the core expectations that must be specified in any determination under section 45. In addition, subsection 46(2) specifies that the subsection (1) does not limit the expectations that may be specified in a determination.
11. The *Online Safety (Basic Online Safety Expectations) Determination 2022* (Cth) was made by the Minister on 20 January 2022. Subclause 9(1) of this instrument specifies the following additional expectation:

If the service permits the use of anonymous accounts, the provider of the service will take reasonable steps to prevent those accounts being used to deal with material, or for activity, that is unlawful or harmful.

12. As such, the eSafety Commissioner has the power to require social media services to report on how they are meeting this additional expectation. It appears to the Law Council that this power could be used by the eSafety Commissioner to require social media services to report on the steps being taken to prevent anonymous accounts being used to promote defamatory material.
13. As identified in the Explanatory Memorandum to the OSA, the BOSE are intended to 'uplift the online safety practices of social media services by providing a clear articulation of the community's expectations' and through the reporting obligation within the BOSE 'create greater transparency of the online safety practices for both government and the community, and encourage uplift through imposing reputational

¹ Law Council of Australia, Submission to Attorneys-General, *Review of Model Defamation Provisions – Stage 2* (4 June 2021) [32]-[35] and Appendix 2 <<https://www.lawcouncil.asn.au/resources/submissions/review-of-model-defamation-provisions-stage-2-discussion-paper>>.

costs for non-compliance'.² The Law Council notes that there is the potential for the BOSE to improve the practices of social media services. However, given that the BOSE have only been in effect since January 2022, their impact is yet to be determined.

14. While both the Bill and the BOSE seek to improve behaviour online and increase the role of social media providers in preventing harmful behaviour online, the intersection between the two appears to be minimal. However, the establishment of, and compliance with, a complaints scheme contemplated in the Bill,³ and compliance with any end-user information disclosure orders granted by a court, may indicate a degree of compliance by a social media organisation with the additional expectation extracted above.

Title of the Bill

15. During the course of the hearing, Ms Carnabuci noted that the previous title of the Bill appeared to be the 'Social Media (Defamation) Bill'. Ms Carnabuci took on notice to provide further details of this understanding.
16. The Law Council notes that page two of the Detailed Explanatory Notes released to accompany the Exposure Draft of the Bill referred to the Bill as the 'Social Media (Defamation) Bill'.⁴ This apparent reference to an earlier title was identified during Additional Estimates for the Attorney-General's portfolio on 15 February 2022.⁵

Contact

17. If the Law Council can be of any further assistance to the Committee in its consideration of this Bill, please contact

Yours sincerely

Mr Tass Liveris
President

² Explanatory Memorandum, Online Safety Bill 2021 (Cth) 35.

³ Note: the establishment of the specified complaints scheme is not mandatory and is only required if the social media service wishes to avail itself of the proposed safe-harbour defence.

⁴ Detailed Explanatory Notes, Exposure Draft: Social Media (Anti-Trolling) Bill 2021 (Cth).

⁵ Additional Estimates, Attorney-General's Portfolio, Senate Legal and Constitutional Affairs Legislation Committee, 15 February 2022, 38-9 (Senator Watt).