

28 February 2022

Senator the Hon Sarah Henderson
Chair
Legal and Constitutional Affairs Legislation Committee
Parliament of Australia

Via online submission

Dear Senator

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MIGA submission – Social Media (Anti-Trolling) Bill

As a medical defence organisation and professional indemnity insurer, MIGA appreciates the opportunity to make a submission to the Committee's inquiry into the Social Media (Anti-Trolling) Bill 2022, following its earlier feedback to the Attorney-General's Department on the exposure draft of the bill.

MIGA's feedback focuses on the potential impact of the bill on doctors and other healthcare providers using social media for professional purposes and who may be the subject of online reviews of their healthcare.

MIGA

- Supports healthcare providers not being liable for comment made by others on social media pages hosted by them
- Is concerned other aspects of the bill will disincentivise use of complaints processes for removal of defamatory online reviews about healthcare providers
- Sees the bill as emphasising use of defamation processes rather than complaints processes to resolve disputes over reviews, which are unlikely to be in the best interests of those involved
- Proposes the bill be amended to include requirements that both social media services and hosts of healthcare provider review websites have an appropriate process for removal of defamatory comments as a condition of avoiding liability / accessing a defence under the bill.

MIGA's interest

MIGA is a national medical defence organisation and professional indemnity insurer with over 36,000 members and clients across the country practising in both hospital and community healthcare settings.

It advises and assists doctors faced with a range of issues relating to social media in their practice, including adverse online reviews about the healthcare they provide.

MIGA has also worked closely with governments, regulators and other industry stakeholders on a range of issues involving social media.

Online reviews of healthcare

Online reviews by patients of their healthcare have increased exponentially over the past decade.

They are posted on both 'social media services' (as defined in s 13 of the *Online Safety Act 2021* (Cth)) and individual websites which are set up for the purpose of hosting reviews.

There is a clear distinction to be drawn between

- Reviews / comments made on social media services and websites which are set up for the purposes of, focus on and / or advertise themselves as facilitating online reviews – it is the providers of these services and websites whom MIGA considers should have additional responsibilities around posting of reviews / comments by others – both share the roles and responsibilities recognised in the Second Reading Speech (p

12) where they are promoting and disseminating this material, and there are community expectations of responsibility for services offering potential for significant harm

- Websites which are not focused on hosting reviews / comments, such as those commonly set up by healthcare providers and other professionals / services to support their businesses – these are the businesses and people for whom MIGA agrees with the Government’s position (p 11, Second Reading Speech) that they should not have to risk defamation liability in order to engage with their client base on social media.

MIGA has reservations about the role played by online reviews of healthcare but acknowledges they are a reality of today’s online world.

Many reviews of healthcare would not be considered defamatory. Unfortunately significant numbers of defamatory reviews are posted where valid defences are not available. In addition ‘fake’ reviews (ie those not reflecting real occurrences) are sometimes made.

Such defamatory reviews are deeply problematic for healthcare providers. They cannot respond directly online in any meaningful way given legal and professional obligations of privacy and confidentiality.

Online reviews of healthcare offer no value in

- Allowing patients to have their concerns dealt with in a meaningful way, given all states and territories have dedicated healthcare complaints entities
- Ensuring the public only access safe healthcare, given doctors and other registered health professionals are regulated by health professional boards and any restrictions on practice are publicly available via the Australian Health Practitioner Regulation Agency’s online registry.

The personal and professional impacts on healthcare providers of defamatory reviews can be devastating. As recognised in the Second Reading Speech (p 10), the viral capacity of posts can amplify harms.

MIGA shares the concerns of the Australian Small Business and Family Enterprise Ombudsman in its [submission](#) to Commonwealth Parliamentary Inquiry into Social Media and Online Safety, namely that

[Fake] reviews damage business reputations and cause significant distress to staff and business owners ...

Fake reviews often receive prominence on online platforms used by the public to find business services, such as Facebook, Google ...

Fake reviews may contribute to a loss of sales over an extended period causing economic loss.

Further, as a small business owner’s identity is often intrinsically linked to their business, fake reviews contribute to mental health strains.

Recent defamation cases brought by healthcare providers against reviewers exhibit clearly the significant impacts defamatory reviews can have, including

- Being seen by many current and prospective patients, who may reconsider their willingness to seek care from that provider¹
- Significant declines in professional workload²
- Major damage to physical and emotional health, reputation and business.³

Given the strains and pressures of the COVID-19 pandemic on the healthcare profession, there are risks that the effects of a defamatory review on a healthcare provider will be accentuated.

Importance of processes for removing defamatory online reviews

Both social media services and review websites may have terms of service (or similar) which provide for removal of reviews for a range of reasons, including defamation.

Healthcare providers have varying levels of success in having online reviews removed by social media services and review websites on the grounds of defamation.

¹ *Nettle v Cruse* [2021] FCA 935 at [50] to [51]; *Tavakoli v Imisides (No 4)* [2019] NSWSC 717 at [77]

² *Nettle* at [53]

³ *Dean v Puleio* [2021] VCC 848 at [29] to [30], [37]; *Tavakoli* at [81]

The accessibility and workability of these mechanisms for seeking removal of defamatory posts differs across social media services and review websites.

Unfortunately a court judgment or order may be required by social media services or review websites in order to remove a defamatory review. MIGA sees no compelling reason for this where such services and websites are able to (and should) assess whether a review is likely to be found defamatory.

At their best mechanisms for removal of defamatory reviews are an important part of attempting to ensure fair and balanced online comment and reducing the harms caused by such reviews.

These processes provide a disincentive to posting of defamatory reviews in the first place.

Expeditious removal of a defamatory online review is almost always better than inevitably protracted and costly defamation proceedings. The most extreme attacks on reputation and significant emotional, mental health and financial costs recognised in the bill's Second Reading Speech (p 11) are often better dealt with through an appropriate review removal mechanism.

The bill's proposed complaints scheme could be quick and low cost, but it does not necessarily solve the problem of a defamatory review without the drawn-out and costly use of defamation proceedings. In addition there would be many instances where posters of defamatory reviews would decline to release their contact details, they cannot be identified by the social media service or host of the review website, or their location means there is little or no point in pursuing defamation proceedings.

MIGA is also concerned that s 17(1)(i) of the bill would impose a high threshold for a social media service provider to take action, where it contemplates a need for a request to "*genuinely relate to the potential institution by the complainant of a defamation proceeding against the poster in relation to the material*". This could potentially exclude those complainants who merely wish to engage with the poster from accessing the complaints scheme.

Defamation actions

Defamation actions are rarely the best option for responding to defamatory online reviews about healthcare.

Doctors and other healthcare providers have succeeded in these cases. However the nature of defamation processes means success may be hollow given

- Significant elapse of time between review and final defamation judgment – it would be rare for this to be less than a year, usually more
- Time, stress and cost involved in prosecuting a defamation claim
- Inherent inability of a damages award to truly rectify the impact of a defamatory online review about a healthcare provider
- Media coverage associated with a defamation action
- Unlikelihood of defendant reviewers being able to satisfy judgments against them.

Impacts of the bill's proposals on defamatory reviews of healthcare

Allowing a defence for social media services based on following a complaints scheme that is focused merely on release of reviewer information

- Provides no incentive for these services to maintain procedures for removal of defamatory reviews
- Risks disincentivising use by services of existing complaint processes
- Could lead to a significant increase in defamatory online reviews of healthcare providers, particularly anonymous or otherwise untraceable ones.

Healthcare providers could be left merely with the unattractive option of pursuing defamation proceedings if faced with a defamatory review.

There is no compelling reason why a social media service or review website host should not be liable for a defamatory review about a healthcare provider where the review has been brought to their attention and they have had a proper opportunity to consider its removal.

Whilst MIGA agrees that the bill does not restrict existing mechanisms to effect takedown of defamation material, it does not agree with the bill's Explanatory Memorandum (p 6) that it does not affect existing mechanisms, nor that it does not impact on protection from unlawful attacks on honour and reputation, as incentives for the use of complaints mechanisms offering takedown procedures where appropriate are removed. Only release of information scheme is incentivised.

Removal of liability for page owners generally will discourage hosts of review websites that are not social media services from removing defamatory reviews and having a complaints process to deal with these reviews. This could lead to defamatory reviews about healthcare providers shifting from being made on social media services to these websites. The impacted healthcare provider may be unable to identify and locate a reviewer and the website would not be liable.

MIGA considers it imperative to ensure there are clear incentives for social media services and review websites to provide meaningful, workable and fair complaints processes, which include scope for removal of a defamatory review. The best way to do this is to require such a process to exist and be followed appropriately as a condition of such services and websites avoiding liability for a defamation claim.

Whilst it agrees with the Government's position (see p 10, Second Reading Speech) that hosts of websites for a broad range of business and personal purposes do not have the resources to continuously monitor and moderate their social media pages (and nor should they be expected to), MIGA consider the position is very different for those websites which seek to host online reviews. These are not the "*normal social media page*" referred to in the bill's Second Reading Speech. When intentionally providing a forum where defamation could occur, appropriate levels of responsibility should be assumed by the provider.

A meaningful 'take down' option for a defamatory review about healthcare is an imperative to avoid significant and potentially long-lasting personal and professional impacts on healthcare providers. This is consistent with the Ombudsman's recommendation in its Parliamentary inquiry [submission](#) that digital platforms have tools to prevent fake reviews and to create a more accessible and transparent review system.

Requiring meaningful mechanisms for removal of defamatory reviews

MIGA proposes

- The complaints process defence for social media services under ss 16 and 17 of the bill be expanded to include requirements that
 - o The service provide an easily accessible, clearly defined and expeditious process for removal of a defamatory review
 - o A service may be liable for a defamatory review if the subject of the review requests removal and the service declines to do so
- Scope for review website hosts to avoid liability as a publisher of a defamatory review under s 15 of the bill be made conditional on the provision of a complaints scheme consistent with that proposed above for social media services, meaning these hosts may still be liable if they fail to remove a defamatory review under their processes
- Legislative rules contemplated under s 32 of the bill should be used to create a legislative instrument which details the content and operation of an appropriate complaints scheme.

Next steps

If you have any questions or would like to discuss, please contact Timothy Bowen,

Yours sincerely

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