

28 February 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

BY E-MAIL: legcon.sen@aph.gov.au

Dear Sir/Madam,

SUBMISSIONS REGARDING PROVISIONS OF THE SOCIAL MEDIA (ANTI-TROLLING) BILL 2022

We refer to the Senate Standing Committee on Legal and Constitutional Affairs' invitation for submissions contributing to the Committee's inquiry into the provisions of the Social Media (Anti-Trolling) Bill 2022.

HRLA is Australia's only religious freedom law firm specialising in the areas of freedom of thought, speech and conscience. We regularly have carriage of matters in all states and territories that touch on significant issues of free speech and religious freedom.

We enclose our submissions with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerely,

John Steenhof
Principal Lawyer

Human Rights Law Alliance Submission on Provisions of the Social Media (Anti-Trolling) Bill 2022

Summary Submission

1. HRLA supports the overall purpose of the Social Media (Anti-Trolling) Bill 2022 (**Bill**). As Paul Fletcher MP outlined in his second reading speech, Australia's laws that concern public speech need to be fit for purpose to deal with present realities of how Australians interact in the public sphere.¹
2. The Bill makes some positive changes to free speech and religious speech protections in Australia, but it fails to address key issues. The current state of Australian federal, state and territory laws in protecting the free speech of both religious and non-religious Australians is insufficient. The Bill is a good first step, but there remains no robust protection for free speech or statements of religious belief:
 - 2.1. Protecting page owners from liability for 3rd party comments in defamation actions is a good legislative measure;
 - 2.2. People should take responsibility for their own words and actions, the end-user unmasking orders strike a suitable balance for achieving this;
 - 2.3. Greater issues for the protection of free religious expression and free speech remain:
 - (a) The misuse of state and territory based vilification legislation to suppress speech and harass religious Australians;² and
 - (b) Next to no proper protections for religious belief and activity that adequately reflect Australia's international treaty commitments.
3. We make our full submissions below.

Protecting page owners from liability for third party comments

4. The proposed clause 14 of the Bill is an appropriate first step in the journey Australia must take towards re-balancing the right to free speech and religious free expression against other rights in Australia:

14 Liability of page owner for defamation – third party material

If:

- (a) an end-user of a social media service (the **page owner**) maintains or administers a page of the social media service; and
- (b) another end-user has posted material on the page; and
- (c) the page owner is an Australian person;

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, Thursday 10 February 2022, 10, (The Hon Paul Fletcher, Minister for Communications, Urban Infrastructure, Cities and the Arts)

² *Anti-Discrimination Act 1991* (QLD), s 124A; *Anti-Discrimination Act 1977* (NSW), 38S.

then, for the purposes of the general law of the tort of defamation, the page owner is taken not to be a publisher of the material.

5. HRLA understands that this clause is in direct response to the majority decision in *Voller*.³ In that case each of the appellants maintained a public Facebook page, on which third parties had posted defamatory content concerning the respondent, Dylan Voller. One of the key issues before the High Court was whether the appellants were publishers of the third party comments for the purposes of the tort of defamation. The majority found that they were.⁴
6. The burden that this decision places on all social-media page owners is immense. The capacity of this decision to have a great chilling effect on free and open debate online due to either self-censoring or the over-zealous censoring of page owners on their own pages for fear of defamation action is unacceptable.
7. HRLA supports the inclusion of clause 14 in the Bill because:
 - 7.1. shielding page-owners from responsibility for the words of others is an appropriate decision that reflects the realities of how social media-sites operate and the sheer volume of comments that can be produced;
 - 7.2. it encourages polite candour and honesty from page owners that can generate genuine open discussions whilst striking the right balance by still allowing page owners and third parties to be held accountable for their own words – as is clarified by the Explanatory Memorandum.⁵

End-user information disclosure orders help keep people accountable for their own words

8. HRLA supports the inclusion of the complaints scheme and associated end-user information disclosure orders clauses in the Bill.
9. The complaints scheme requires a social media provider to establish an appropriate mechanism for an end user to make a complaint to the provider about the potentially defamatory behaviour of other end users.⁶
10. HRLA supports the effective incentive to encourage social media providers to provide a complaints mechanism. This is the defence for a provider of a social media service in clause 16,⁷ which will allow a social media provider the opportunity to shield themselves from liability as publisher of defamatory material if they have taken the required steps to assist an end user in uncovering who is making potentially defamatory remarks.
11. This is an appropriate mechanism because it recognises the disproportionate power, access to information and opportunity to resolve online conflict that social media providers have.

³ *Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller* [2021] HCA 27.

⁴ *Ibid*, [105]-[106].

⁵ Explanatory Memorandum, Social Media (Anti-Trolling) Bill 2022 (Cth), 14.

⁶ Social Media (Anti-Trolling) Bill 2022 (Cth), cl 17.

⁷ Social Media (Anti-Trolling) Bill 2022 (Cth), cl 16.

Responsibility should follow with these privileges and the Bill appropriately holds social media providers accountable without unduly punishing them for running their service.

12. The right to privacy is an important human right. Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* recognises that people should be free from arbitrary or unlawful interference with their privacy, family, home or correspondence:

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 2. Everyone has the right to the protection of the law against such interference or attacks.
13. We agree with the Statement of Compatibility contained in the Explanatory Memorandum, that the exposure of personal information by social media providers, in this circumstance, is targeted at a legitimate objective and uses proportionate means to balance competing policy objectives of respect for the right to privacy, but also holding people accountable for their words and actions.⁸ As is clear from Article 17(1), privacy is to be respected, but so too is the honour and reputation of the individual so that his reputation might not be maligned without recourse to relief.
14. Social media presents an unparalleled ability for users to remain anonymous and create immense distance between themselves and others when engaging in unsavoury exchanges online. HRLA supports the Bill effectively holding people accountable for their own words and actions.

Free speech issues that are not addressed by the Bill

15. The Bill makes some instrumental changes for free speech in Australia by protecting social media end-users from being held accountable for the speech of others. This is a positive step towards the kinds of protections that free speech and religious speech need in Australia. However, the Bill is aimed at a very narrow issue and does not address the prevailing concerns for free speech in Australia.
16. Two issues weigh more heavily against free speech and free expressions of religious belief for everyday Australians:
- 16.1. the misuse of state-based vilification laws to harass and suppress the free speech and religious expression of Australians; and
 - 16.2. the complete lack of protections in light with Article 18 of the ICCPR for statements of religious belief from defamation claims and vilification complaints.
17. Australia is a signatory to the ICCPR. The standards set out in that treaty for the protection of free speech, open debate, and freedom of religious expression are extremely high. In the case of freedom of religious belief and expression, this right is one of the few that is non-derogable

⁸ Explanatory Memorandum, Social Media (Anti-Trolling) Bill 2022 (Cth), 7.

under Article 4 and as set out in the *Siracusa Principles*.⁹ This means that the right to freedom of religious belief is absolute and that the right to freedom of religious activity can only be detracted from in the most extreme of circumstances, such that it is necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.¹⁰

18. The ICCPR sets out important freedom of speech and freedom of religious belief and activity rights in Articles 18 and 19:

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For respect of the rights or reputation of others;
 - b. For protection of national security or of public order (*ordre public*), or of public health or morals.

19. The Australian High Court has recognised the importance of free speech and religious free speech rights at common law. In the *Adelaide Preachers* case, two street preachers were convicted under local by-laws that prohibited street preaching without a licence from the city. One of the questions that the High Court addressed was whether the by-law contravened an

⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 4; American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International covenant on Civil and Political Rights* (April 1985) <<https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>>, last accessed 24 February 2022.

¹⁰ *International Covenant on Civil and Political Rights*, above no. 9, art 18(3); *Siracusa Principles*, above no.9, 12.

implied principle of free speech under the Constitution.¹¹ The Court found that the by-law had not. However, French CJ outlined the grave importance of the right of free speech at common law and outlined the ‘principle of legality’, namely that when interpreting legislation, a court will do so in a way that does not involve interference with fundamental common law rights, like free speech.¹²

20. International case law affirms the importance of the fundamental human right of free speech. The right to freedom of expression and of a free and uncensored press or other media has been described as of paramount importance.¹³ Just as the Siracusa Principles affirm that restriction of the freedom of religious activity must be necessary to proportionately balance other goods such as public safety, restrictions on free speech must also be necessary to protect the rights or reputations of others and not merely a stated purpose of a restriction.¹⁴
21. Such an important set of rights requires better protection at Australian law. Australian law currently does little to protect free-speech rights and instead contains laws that can be used to frustrate free expression.
22. State-based vilification laws are the chief problem. These laws make unlawful public acts that incite hatred, serious contempt for or severe ridicule of a person on the ground of a protected attribute, such as sex or religion.¹⁵
23. Vilification laws have several key flaws that are antithetical to free speech as have been unpacked in the cases of *Sunol v Collier* and *DHL v Nationwide News Pty Ltd*:
 - 23.1. it is unnecessary to prove that the respondent intended to incite hatred or serious contempt;
 - 23.2. it is unnecessary to prove that anyone was actually incited to hatred or serious contempt; and
 - 23.3. these laws lack a truth defence, such as is available in a defamation action.¹⁶
24. The case law shows that these laws severely undermine the international standards for legitimate limitations on free speech and public expressions of religious belief set out in Articles 18(3) and 19(3) of the ICCPR.
25. Concerningly, the recent ACAT appeal decision in *Rep v Clinch* has confirmed the original Tribunal’s application of the *Voller* principle of page owners being liable for 3rd party comments, thereby transferring the destructive principle across from defamation law into

¹¹ Neil Foster, ‘Religious Free Speech After Ruddock: Implications for Blasphemy and Religious Vilification Laws’ (Religious Freedom After Ruddock Conference, 6 April 2019), <<https://lawandreligionaustralia.files.wordpress.com/2019/04/foster-full-paper-for-rf-after-ruddock-conference.pdf>>, last accessed 24 February 2022, 25.

¹² *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, [43].

¹³ *Marques de Morais v Angola*, CCPR/C/83/D/1128/2002. 29 March 2005, [6.8].

¹⁴ *Faurisson v France*, CCPR/C/58/D/550/1993, 8 November 2006, [8].

¹⁵ *Anti-Discrimination Act 1977* (NSW), 38S.

¹⁶ *Sunol v Collier (No2)* [2012] NSWCA 44, [41]; *DLH v Nationwide News Pty Ltd (No2)* [2018] NSWCATAD 217, [10]-[11]; *Defamation Act 2005* (NSW) s 26.

vilification jurisprudence.¹⁷ In that case, Rep, a feminist public commentator, faced a successful vilification complaint from Clinch under transgender vilification laws in the ACT. Clinch successfully argued that Rep was responsible for 3rd party vilifying comments on Rep's social media posts.

26. Though the Bill addresses this significant problem for defamation actions and the parliament's intent could be acknowledged in future tribunal decisions regarding vilification complaints that involve social media, this is not a certainty. This Bill does not address the more significant litigious threat to free speech and religious expression of vilification actions.
27. Vilification complaints are far more accessible than defamation claims and are far more easily used by activists to suppress speech they disagree with, with little cost to themselves.
28. HRLA works with clients who are subjected to vexatious claims that have the sole purpose of using lawfare to suppress speech that the claimant does not like:

Case study: Katrina Tait – harassed by activist



Katrina Tait is a professional photographer who lives in Queensland. Katrina signed an online petition promoted by the Australian Christian Lobby that opposed 'Drag Queen Story Time' in local Brisbane public libraries. Being a mother-of-four and a devout Catholic, Katrina felt quite strongly about the issue and after signing the petition she posted she didn't think Drag Queens were appropriate role models for young children.

An LGBT activist in NSW saw her post and connected it to Katrina's photography business. The activist personally contacted Katrina by e-mail and threatened to make a homosexual vilification complaint under NSW laws even though Katrina lived in Queensland.

Katrina was initially distraught at the threatening messages she received. She was particularly disturbed by the fact that one of the e-mails contained a picture of her daughter. Katrina was very worried about her family's safety.

The activist also sent Katrina an e-mail with a purported media release that named her, her business, her previous address and her mobile phone number.

Katrina did not hear anything more until she received an e-mail from the NSW Anti-Discrimination Board a couple of months later enclosing a complaint from the activist. Rather than immediately dismiss what was obviously a worthless complaint, the Board accepted the complaint and had decided to investigate.

Thankfully, with HRLA's efforts and the increasing media attention on Katrina's story, the activist withdrew the complaint and the NSW Board had to drop their investigation.

¹⁷ *Rep v Clinch (Appeal)* [2021] ACAT 106, [13] & [172]-[174].

The activist who harassed Katrina threatened to share personal information about Katrina to encourage further harassment and malicious attacks. The aim was clearly to frighten her into self-censorship and to silence her. These actions were opposed to her rights of freedom of speech and expression.

Vilification laws must be amended to prevent malicious misuse of these laws that have such a low bar to entry.

29. There are no adequate protections for people like Katrina that protect statements of free speech and expressions of religious belief in a manner that reflect the high international standards set out in Articles 18 and 19 of the ICCPR.
30. Religious freedom rights are currently protected by “exceptions” for certain activities that would otherwise be unlawful discrimination under the federal, state and territory laws, in sections like 32, 44 and 46 of the ACT *Discrimination Act*.¹⁸ This protection is inadequate and couches positive religious rights widely recognised in international law as “exceptions”, as if they were a kind of special treatment. Religious belief and activity should receive positive protections under Australian law that recognise that religious Australians are prima facie not unlawfully discriminating or vilifying when they exercise their religious freedom rights through expressions of religious belief or religious activity.¹⁹
31. The Bill’s deficiency in addressing the real issues of free speech and religious speech protections in Australia highlight this inadequate protection in Australia’s laws. Statements of religious belief, religious activity and free speech require better protection in Australian domestic law for Australia to honour the commitments that it has made as a State party to the *International Covenant on Civil and Political Rights*.

CONCLUSION

32. We thank the Committee for the opportunity to make a submission and welcome any opportunity to appear in support of this submission.

¹⁸ *Discrimination Act 1991 (ACT)*, ss32, 44 & 46.

¹⁹ *International Covenant on Civil and Political Rights*, above no. 9, arts 18 & 19.