28 February 2022

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Ms Dunstone and Senators,

YouTube welcomes this opportunity to make submissions to the Senate Legal and Constitutional Affairs Committee in relation to the Social Media (Anti-Trolling) Bill 2022.

We understand the Australian Government to be seeking to achieve a policy outcome whereby potential defamation claimants are able to identify, and bring claims directly against, the original posters of material on social media services. We commend this policy intent. We agree that this is the most efficient way to resolve disputes about content online. It is consistent with the intent of defamation law to hold authors of content accountable for their comments and consistent with our long-held preferences and practices.

We take our responsibility as a platform seriously, which is why we have community guidelines against harassment, cyber-bullying, and hate speech, among others (https://www.youtube.com/intl/ALL_au/howyoutubeworks/policies/community-guidelines). We offer a dedicated webform for defamation complaints (https://www.youtube.com/intl/ALL_au/howyoutubeworks/policies/legal-removals/) and we regularly produce data in response to preliminary discovery orders issued by Australian Courts.

YouTube is concerned, however, that the specific mechanisms by which the Bill seeks to achieve its policy intent will lead to a censored society. Australian legal and civil society organisations are better placed to make submissions about these issues,[1] so we will limit

[1] See for example the Submissions of the Law Council of Australia to the Attorney-General's Department in relation to the Exposure Draft of the Bill: https://www.lawcouncil.asn.au/resources/submissions/social-media-anti-trolling-bill-2021-exposure-draft

ourselves here to observing that defamation law reform is best considered holistically (as the ongoing State and Territory law reform process is attempting to do), rather than in what may appear to be a rushed and piecemeal fashion. There is significant overlap between the Bill and Stage 2 of the ongoing review of Australia's model defamation provisions at the State and Territory level. The Bill would, in effect, create a specific legal regime that applies only to social media services, with the liability of other websites left to be determined by State and Territory legislation and the common law. This creates unnecessary complexity and confusion in the law of defamation, which is already complex enough. It is also inconsistent with the creation of a platform-neutral media regulatory framework.

YouTube is also concerned that, in its current form, the Bill is unworkable, leaving providers of social media services to be deemed publishers of material in circumstances where this would be entirely inappropriate. In particular:

1. the removal of the defence of innocent dissemination for providers of social media services exposes social media providers to an unprecedented level of defamation risk while being wholly unnecessary to achieve the Bill's objectives;
2. there are gaps in the proposed defence in section 16(2) of the Bill that would expose even the most compliant of providers to significant liability;
3. the requirement that providers of social media services collect and validate users' names and phone numbers runs contrary to privacy best practices and expectations, in circumstances where an email address and other data already collected by providers would be sufficient to meet the Bill's objectives; and
4. the requirement that overseas providers of social media services have a local nominated entity with access to users' data is unnecessary and potentially in tension with the Australia-US FTA (AUSFTA) and the recently announced CLOUD Act Agreement.

We discuss each of these four points further, below.

1. Innocent dissemination

Removing the ability of a provider of a social media service to rely on a defence of innocent dissemination represents a significant and problematic shift in the law of defamation. In many cases, innocent dissemination is the only defence available to a provider of a social media service (or any other secondary publisher) given that it is not the originator of the content and, for example, is not in a position to assess the truth of the content. Without a defence of innocent dissemination, if a provider is unable to meet any of the Bill's prescribed requirements, it will be potentially liable to the applicant not just for the period after it becomes aware of the applicant's concerns (being the period when it is able to take appropriate action in relation to the content), but also for the period before the provider is even aware of the material's existence. Social media companies cannot know whether content is defamatory, and take appropriate action, without first being put on notice of that content. For context, 500 hours of content is uploaded to YouTube every minute.

The removal of the innocent dissemination defence is also unrelated to the Bill's stated purpose, being to promote the resolution of defamation disputes between originators and complainants. This purpose can be achieved while retaining the defence of innocent dissemination. The proposed complaints scheme defence and innocent dissemination are not mutually exclusive.

Section 15(3) of the Bill should be removed.

2. Gaps in the proposed defence

To be entitled to the proposed defence in section 16 of the bill, a provider must prove that it satisfies one of the three conditions in section 16(2)(d).

The first condition is that an applicant has requested, and the provider has disclosed, the contact details of the poster — this can only happen with the poster's consent. Even assuming the poster sometimes consents (our experience in other contexts is that the poster almost never consents to the disclosure of their personal information to a third party), there will be many occasions when this condition is not satisfied despite the best efforts of the provider.

The second condition is that an end-user information disclosure order is made and complied with. YouTube has no concerns with this condition, although notes this condition will not be satisfied in all cases. There will be many circumstances in which a provider, through no fault of its own, simply does not have relevant data to provide. For example, if a poster deletes their account, their contact data will also be deleted, consistent with privacy laws and expectations. Providers should not be liable to applicants in these circumstances. This is an additional reason why the definition of "relevant contact details" should be limited to those "data reasonably available to the provider at the time a request or disclosure order is made" (see further, below).

The third condition is that the applicant has not applied to a court for an end-user information disclosure order. This should be broadened to include where the applicant has applied for but not received a court order. Section 19(3) of the Bill provides an example of where a court may refuse to grant such an order, although there are many others, including because the application is defective. When an independent judge has reviewed relevant evidence and concluded that the applicant is not or should not be entitled to the poster's details, that should be sufficient for a provider of social media services to avail itself of the defence.

We recommend that section 16(2)(d)(iii) be amended to read: "the applicant (or a person acting on behalf of the applicant) has not applied to a court for<u>, or a court has not made,</u> an end-user information disclosure order against the provider, or the nominated entity of the provider<u>, in respect of the material</u>."

3. Privacy concerns

We are concerned that the Bill effectively requires providers of social media services to verify the identity of all users of the service in Australia or otherwise lose the benefit of the proposed defence and be exposed to significant liability for defamation. A provider of social media services should be entitled to the proposed defence if it engages in reasonable and responsible data collection processes. It is unreasonable to expect a provider to collect, at the time a user subscribes to the provider's service, identity validating documents such as a driver's licence, etc. Such a requirement may be inconsistent with user privacy expectations and existing privacy laws. Australian Privacy Principle (APP) 3 prohibits an APP entity from collecting personal information that is not reasonably necessary for one or more of its functions. APP 2 requires an APP entity to provide users an option of not identifying themselves or to use a pseudonym when dealing with the entity. Mandatory identity verification could also restrict access to services for vulnerable individuals who may not have the information necessary to verify their identity or who have legitimate concerns with providing such information.

The privacy implications associated with any requirement to verify the identity of Australian social media users has been raised in the context of the Online Privacy Bill and the Discussion Paper outlining potential changes to the *Privacy Act 1988* (Cth). We suggest that any such requirement for identity verification be undertaken in close consultation with the Office of the Australian Information Commissioner and consider feedback submitted in response to the above two consultations.

In addition, the requirement that the provider disclose (and therefore collect) a phone number goes beyond what is necessary for an applicant to contact a poster or to commence proceedings. The Explanatory Memorandum suggests that the current definition of "relevant contact details" is intended to capture the minimum information necessary to effect substituted service.[2] However, it is well-established that a court may make an order for substituted service to an email address.

YouTube proposes that the definition of "relevant contact details" in the Bill be amended to mean the contact details "provided by the poster" to the provider of the relevant social media service and "data reasonably available to the provider at the time a request or disclosure order is made".

4. Nominated entities

YouTube disagrees that the mere fact a provider of a social media service is based overseas creates barriers to the operation of the complaints scheme and end-user information disclosure order mechanisms in the Bill.

[2] Explanatory Memorandum, Social Media (Anti-Trolling) Bill 2022, p 11-12

Applicants in Australia are already able to — and regularly do — commence legal proceedings, including for preliminary discovery, against overseas entities in Australian Courts, including Google LLC (the entity that owns and operates YouTube). Google LLC accepts service of such legal processes by registered post. Google and YouTube also have in place sophisticated mechanisms and systems to review and respond to complaints from Australian users about content (including defamation claims).

The conditions a nominated entity is required to meet for the purposes of the Bill are impermissibly vague and impossible to satisfy despite the proposed legislation imposing significant ongoing pecuniary penalties for non-compliance with those conditions. For example, section 21(1)(f) of the Bill is problematic insofar as it requires a nominated entity to have "access" to information that is in the possession, control and custody of another entity. In the case of YouTube, Google LLC provides the YouTube service to Australian users and it is Google LLC who would have access, control or possession of the data sought by an end-user disclosure order. It is difficult to conceive how a nominated entity without physical access to data could ever establish it has "access" to that information, and it seems unnecessary given existing laws would enable preliminary discovery against the relevant entity.

Part 4 of the Bill also appears to be in tension with Article 10.5 of Australia's free trade agreement with the United States, which reads:

> *Neither Party may require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.*

We note that section 22(1) of the Bill imposes a significant penalty on providers of social media services that do not have local enterprises irrespective of whether they seek to avail themselves of the defence in section 16(2).

We also understand these issues have been considered and addressed in the context of the recently concluded CLOUD Act Agreement between the United States and Australia, which was announced by the Australian and US Governments in a joint press release on 15 December 2021. It would be a perverse outcome for the Australian Government to have reached that agreement only to undermine it by seeking to hold an overseas-based service provider hostage with a law that it does not need. Other countries with less palatable records might then follow suit.

For these reasons, our view is that Part 4 of the Bill is unworkable, is not required to achieve the Bill's objectives, and should be removed.

Thank you again for this opportunity to make submissions. We also refer you to Google Australia and DIGI's submissions to the Attorney-General's Department in relation to the Exposure Draft of the Bill (including section 2 of Google Australia's submissions outlining practical concerns with the proposed complaints scheme).