Australian Government
Attorney-General's Department

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# Submission to the inquiry into the Social Media (Anti-Trolling) Bill 2022

## Legal & Constitutional Affairs Legislation Committee

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# Introduction

The Attorney-General's Department (the department) provides the following submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Social Media (Anti-Trolling) Bill 2022 (the Bill) in response to the Committee's invitation, dated 15 February 2022.

## Overview of the Bill

Australians can be the subject of defamatory material posted on social media. The challenges presented by defamation on social media are particularly acute, given the speed at which such material can spread and the limited scope to contain the spread of a defamatory post once it has been published on a social media network. Where such material is posted anonymously, complainants may have limited ability to identify the poster, and the capacity to seek vindication by commencing defamation proceedings may be limited. The Bill's measures are designed to address the challenges of defamatory material posted on social media.

'Trolling' is not a legal term, and can refer to a range of inappropriate or abusive behaviours online, up to and including serious criminal offences. The Bill addresses one form of online abuse, namely posting defamatory material on social media.

There is overlap between defamation and other forms of online abuse. According to the e-Safety Commissioner, around 40 per cent of adult cyber abuse complaints received in the first four weeks of operation of the *Online Safety Act 2021* appear to be defamatory in nature or concern purely reputational damage. Between 1 July 2017 and 13 December 2021 (prior to the commencement of the *Online Safety Act 2021*), approximately 25.4% of reports to the eSafety Commissioner about adult cyber abuse related to defamatory material.

The Bill responds to the High Court's decision in *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 (*Voller)*, which made clear that people who administer or maintain pages on social media platforms may be publishers of material posted by third parties on their pages for the purposes of defamation law, even if they are unaware of the comments.

Broadly speaking, the Bill seeks to achieve two outcomes:

First, the Bill clarifies who is a publisher for the purposes of defamation law. It deems a person who administers or maintains a social media page not to be a publisher of third-party material, thereby providing immunity from potential liability. This modifies the outcome of the *Voller* decision. It also deems a social media service provider to be the publisher of material posted on its platform, which is consistent with the *Voller* decision.

Second, the Bill creates new mechanisms for Australians to ascertain whether potentially defamatory material on social media was posted in Australia and, if so, to obtain the poster's relevant contact details for the purposes of instituting defamation proceedings in an Australian court. Further, the Bill requires social media providers to have a presence in Australia to strengthen the enforceability of the Bill, and allows the Attorney-General to intervene in certain cases and provide legal assistance where necessary.

In developing the Bill, the department consulted with a number of stakeholders, including the Department of Infrastructure, Transport, Regional Development and Communication, the Defamation Working Party (which is comprised of representatives from the states and territories operating under the direction of the Meeting of Attorneys-General), the Office of the Australian Information Commissioner, the eSafety Commissioner, the legal community, academics, social, digital, and traditional media stakeholders, as well as advocacy and specific interest groups. Public consultation on the Bill ran for approximately 5 weeks, during which time the department received 44 written submissions and 25 survey responses via an online consultation hub.

## The *Voller* decision

On 8 September 2021, the High Court dismissed appeals from a judgment of the New South Wales Court of Appeal as to whether the appellant media companies were responsible for the publication of allegedly defamatory 'comments' that were posted by third-party Facebook users in response to news stories about Mr Voller. The relevant defendant media companies maintained a public Facebook page, which provided hyperlinks to stories on their websites. Other Facebook users could post comments on the Facebook page. Those users posted allegedly defamatory material about Mr Voller in the comments section of the pages.

A majority of the High Court held that the liability of a person as a publisher depends upon whether that person, by facilitating and encouraging the relevant communication, 'participated' in the communication of the defamatory matter to a third person. The majority found that, by creating a public Facebook page and posting content, the media companies had participated in the communication of the defamatory matter, and were therefore publishers.

As a result of the *Voller* decision, it is likely that Australians who operate or maintain social media pages that invite public comments could be found to be publishers of the defamatory material posted on their page by third parties, and face potential liability.

## General considerations

### Defamation law in Australia

Defamation is a tort at common law, which can be modified by state, territory and Commonwealth legislation. Defamation has largely been dealt with by the states and territories, following an agreement to enact uniform model defamation provisions from 2004.

Under the Bill, defamation will still be governed by state and territory laws. The Bill will complement current defamation laws, by addressing a small number of specific issues that are relevant to a defamation claim arising from social media – such as clarifying who is a publisher and modifying what defences are available. All other aspects will be left unchanged, as provided for in state and territory law and the common law.

On 8 June 2018, the Council of Attorneys-General (now the Meeting of Attorneys-General (MAG)) reconvened a Defamation Working Party to review the Model Defamation Provisions. The working party is progressing reform of the Model Defamation Provisions in two stages. Stage 1, completed in July 2020, focused on reviewing the Model Defamation Provisions to ensure their policy objectives remain valid and to update the provisions to ensure they are appropriate. Stage 2, currently in progress, is focusing on the responsibilities and liability of digital platforms for defamatory content published online. While the Stage 2 Review of the Model Defamation Provisions remains a priority for MAG in 2022, it is unclear what reform will

arise from that review and when it will be implemented. The Government considers that the issues addressed in the Bill – the consequences of the *Voller* decision and the harmful effects of defamatory material on social media – require urgent reforms.

The Bill is narrowly focussed, addressing specific aspects relating to defamatory material on social media, whilst leaving broader issues of defamation liability across the digital landscape to be considered as part of the MAG review process. The department continues to work closely with states and territories on the broader MAG review process.

## Anonymity and privacy considerations

The Bill recognises that many Australians have legitimate reasons to be anonymous or to use a pseudonym on social media. The Bill does not prohibit, prevent or disincentivise being anonymous online, nor does it require social media users to make their real name visible. Rather, where an anonymous poster posts material that harms another person's reputation, the Bill provides pathways for the complainant to obtain relevant contact details for the purposes of potential defamation proceedings.

Facilitating the disclosure of the poster's contact details in relevant circumstances will impact on the privacy of individuals. However, this impact is reasonable, necessary and proportionate to achieve the Bill's objective, to support Australians to identify, and bring legal proceedings against, anonymous users who post defamatory material on social media. This legitimate policy end requires the disclosure of personal information to be effective.

The Bill includes a number of limitations and safeguards to minimise its impact on the right to privacy and on legitimate anonymous use of social media:

- The contact details that can be disclosed are narrowly defined, consistent with a data minimisation approach, to include only a person's name, email address, telephone number and such other information as is specified in legislative rules. These are the minimum details that are likely to be necessary to allow the commencement of legal proceedings.
- A social media service provider can only disclose a poster's contact details to the complainant with the poster's consent, or pursuant to a court order.
- If a court has concerns that disclosing the poster's contact information to the complainant presents a safety risk, it may refuse to order the disclosure.
- The only information that a social media service provider can disclose without the poster's consent or without a court order is country location data, which has been narrowly defined to only encompass whether the person appeared to have been located in Australia or outside of Australia when the material was posted.
- The disclosure mechanisms are only enlivened where there is reason to believe that the complainant has a genuine claim to obtain relief against the poster in a defamation proceeding.

## Other forms of online harm

The Bill addresses harm as a result of defamatory comments made on social media, which is one form of online harm. It complements the broader suite of regulation aimed at preventing online harm, such as the *Online Safety Act 2021* which commenced earlier this year and relevant provisions in the *Criminal Code Act 1995*. The Online Safety Act provides a level of protection for matters which fall into the category of adult

cyber-abuse or cyber-bullying material while the Criminal Code Act provides offences for use of a carriage service to menace, harass or offend.

# Measures in the Bill

## What behaviour does the Bill address?

The Bill will operate in a situation where a social media user ('poster') posts material on the social media page or account of another social media user ('page owner') that is potentially defamatory about a person ('complainant' or 'victim'). Some provisions of the Bill also operate where a social media user posts potentially defamatory material on their own page or account.

The state of the law of defamation following the *Voller* High Court decision is such that, in this situation, at least 3 different actors are all likely to be simultaneously considered the 'publisher' of that material. These are the poster, the page owner and the social media service provider. The publisher is considered responsible for publishing the material for the purposes of defamation law, and could potentially be held legally liable in a defamation claim. Where there are multiple publishers, a victim can choose to commence defamation proceedings against any or all of them.

The poster could be any person who uses the social media service, and could post the material in a way that their identity is not ascertainable (i.e., anonymously or pseudonymously). The page owner could also be any person or entity who maintains or administers a social medial page or account, and could include an individual, community group, small business or large corporation. The social media service provider could be a platform such as Facebook or Twitter.

To illustrate, the Billy Goats Cricket Club maintains a Facebook page. The Club puts a post on its Facebook page advertising upcoming elections for its executive positions. A Facebook user who appears as the user name *TailEnder_87* comments on that post stating that Mary, the incumbent treasurer, has been stealing money from the club. Mary is horrified, and wants to take action in response. Under the current law, *TailEnder_87*, the club and Facebook are likely all publishers of the comment for the purposes of defamation law, and each could potentially be held liable. Mary does not know the identity of *TailEnder_87*, which makes it difficult for her to engage with that person or to commence legal proceedings against them. Mary might be able to commence defamation proceedings against Facebook, the club or both.

## What does the Bill do?

The Bill creates a framework to allow Australians to respond to defamatory content posted on social media. Broadly speaking, the Bill seeks to achieve two outcomes:

- First, the Bill clarifies who is a publisher of material posted on social media for the purposes of defamation law.
- Second, the Bill provides a number of mechanisms to help Australians who are the subject of defamatory material posted on social media to respond appropriately, including allowing them to obtain the contact details of anonymous posters in appropriate circumstances.

## Clarifying who is a publisher

The Bill modifies the outcome of the *Voller* decision by providing that owners of a social media page are not 'publishers' of material posted on their page by a third party for the purposes of defamation law. This will protect social media page owners from potential liability for defamatory material posted by others. This protection applies to Australian social media page owners irrespective of where the material is posted.

The Bill also confirms that social media service providers are publishers of material posted on their platform for the purposes of defamation law. Social media service providers may, in any case, be a publisher as a consequence of the High Court's reasoning in *Voller*. The Bill clarifies that this is definitely the case, and avoids the need for a complainant to have to prove this in legal proceedings. As explained below, the provider can have access to a conditional defence against potential liability, if it complies with the requirements of the Bill to support the complainant to respond when faced with defamatory material on social media.

## Responding to defamatory material on social media

The Bill establishes two new mechanisms which will allow Australians faced with defamatory material posted on social media to obtain the poster's contact details, to assist in potential defamation proceedings. A victim may choose to pursue either, or both, in any order. These mechanisms apply where the poster is located in Australia when posting the material. The Bill also includes a number of additional measures to further support Australians to respond to defamatory material on social media.

### Complaints scheme

The first mechanism is a complaints scheme administered by social media service providers, which provides a quick and low-cost way for victims to raise concerns about defamatory material and obtain the poster's contact details. The Bill sets out the prescribed requirements for the complaints scheme to be established by social media service providers.

Social media service providers may adapt an existing complaints scheme to meet the prescribed requirements, or add elements that serve other purposes, provided the prescribed requirements are met.

Under the complaints scheme, a complainant can obtain information from the social media service provider about whether the material was posted in Australia. This can facilitate an informed decision about whether to proceed with litigation. Making a complaint will also put the poster and social media service provider on notice that the material is considered defamatory, which may lead the poster or the provider to remove the material.

When a complaint is made, and if the material was posted in Australia, the social media service provider must notify the poster that the material is the subject of a complaint, and must report back to the complainant about any response or outcome from notifying the poster. This may involve the poster agreeing to remove the material, asserting that the material is not defamatory, or refusing to engage with the complaint.

The complainant can also request the poster's relevant contact details under the complaints scheme. Where the poster consents, the social media service provider may provide the complainant with the poster's relevant contact details. This is designed to place the complainant in a position where they can effect service of legal

proceedings, or seek an order for substituted service, if they wish to do so. The complaint scheme's consent requirement is an important limitation to protect the privacy of the poster and manage any potential safety risks. The Government's view is that there should be no compulsory disclosure of private information by individuals outside of a court-supervised process.

The Bill expressly contemplates, through the complaints scheme, that the social media service provider may remove material with the consent of the poster. However, neither the complaints scheme nor any other part of the Bill adds to or affects existing mechanisms that allow defamatory and harmful content to be taken down. The Bill does not require, authorise or incentivise take down, or prohibit it, leaving this to existing mechanisms.

## End-user information disclosure orders

The second mechanism is a new form of court order, called an end-user information disclosure order (EIDO). The complainant (called the applicant in this context) can apply for an EIDO from any Australian court that has jurisdiction to hear a substantive defamation proceeding, or from Division 2 of the Federal Circuit and Family Court of Australia.

EIDOs can require a social media service provider to disclose to an applicant whether material was posted in Australia and, if so, the poster's relevant contact details. Among other things, the court must be satisfied that there are reasonable grounds to believe that the applicant would be able to obtain relief in a defamation proceeding. Independent judicial oversight ensures that the Bill enables compulsory disclosure of relevant contact details only in appropriate circumstances.

The Bill also makes clear that a court may refuse to grant an EIDO where disclosure of the relevant details is likely to present a risk to the poster's safety. The Bill does not envisage that the court must take positive steps to investigate the safety of the poster prior to granting 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 safeguard does not limit a court's existing power to refuse to make an order for other reasons.

The Bill expressly allows for legislative rules in relation to the practice and procedure to be followed by the court in determining an application for an EIDO. Among other things, this would allow for additional safeguards to be built into the EIDO process if required.

## Conditional defence

The Bill incentivises social media companies to adopt the complaints scheme, and comply with mechanisms to identify anonymous posters, by granting them access to a conditional defence from defamation liability. In order to have the benefit of the defence, social media service providers are required to:

- have a complaints scheme that meets the prescribed requirements
- comply with the scheme in the handling of a complaint
- comply with any EIDO granted by a court
- where applicable, disclose the poster's relevant contact details, and
- have an incorporated entity which is based in Australia.

If a social media service provider is unable or unwilling to disclose the poster's relevant contact details to the complainant, it will not have access to the defence, and will therefore face potential defamation liability. This

includes where the poster does not consent or where a court has refused to grant an EIDO. This ensures victims will have an appropriate defendant against whom to commence defamation action.

Where a complainant does not make a complaint under the scheme, does not request the poster's contact details or does not apply to the court for an EIDO, the social media service provider will retain access to the defence (provided other requirements are met). This ensures the defence will be available where the complainant still has avenues available to obtain the poster's contact details.

## Nominated entity requirement

To ensure that foreign social media service providers can comply with its measures, the Bill requires foreign providers to have an Australian 'nominated entity' that can handle complaints and be served with court orders. The requirement to establish a nominated entity applies where the provider is incorporated in a foreign country and either 250,000 Australian persons hold accounts with the provider or the provider is otherwise specified by legislative rules.

The nominated entity is required to be incorporated in Australia, have an office in Australia, and be an agent for the provider. The nominated entity is also required to have access to country location data and relevant contact details of posters in relation to material posted in Australia, and have authority to receive complaints and requests under the complaints scheme. This will make it significantly easier for Australians to make complaints, obtain information about a poster (where permitted by the Bill), and to serve and enforce EIDOs when granted by a court.

The Bill allows flexibility in the way that social media service providers and their nominated entities meet the requirement to have access to relevant data. It does not require data localisation or transfer of data into Australia. For instance, if relevant contact details and country location data relating to users are held offshore, the nominated entity may establish arrangements that allow it to access that data on a case by case basis as required.

The obligation to establish a nominated entity is enforceable by a civil penalty provision of 500 penalty units (which currently equates to $555,000 for a body corporate), and establishing a nominated entity is also a prerequisite for accessing the conditional defence. These two consequences for failing to establish a nominated entity serve two different purposes. The civil penalty provides an incentive for a nominated entity to be established, and allows for this requirement to be enforced, prior to a complaint arising. This ensures that a nominated entity is available to assist Australian complainants when a complaint arises. The condition in the defence provides an additional incentive to comply with the requirement, which may avoid any difficulties in enforcing a civil penalty against a social media service provider in a foreign jurisdiction.

## Attorney-General intervention and legal financial assistance

The Bill empowers the Attorney-General to intervene in proceedings in two circumstances.

First, the Attorney-General may intervene in a matter arising under the Bill. This may include, for example, an application for an EIDO. When novel or complex legislation such as this Bill is implemented, it is important that the Government can put its views to the court about how it is intended to apply. This intervention power would therefore allow the Attorney-General to promote clarity in cases that arise under this Bill and assist in settling this limited aspect of defamation law.

Second, the Attorney-General may intervene in defamation proceedings in a federal jurisdiction to which a social media service provider is party and where it is in the public interest to do so. Defamation cases before the courts can be complex, and can sometimes involve a significant power imbalance between a large publisher and an individual. This intervention power would therefore allow the Attorney-General to address this imbalance, where it is in the public interest to do so.

Where the Attorney-General chooses to intervene, the Commonwealth is taken to be a party to the proceeding, and the court may award costs orders against the Commonwealth as it sees fit.

In recognition that ministerial intervention can lead to an increase in legal costs, the Attorney-General may authorise payment to the applicant by the Commonwealth for costs reasonably incurred in relation to the proceeding. A request for legal financial assistance under this provision will be considered in accordance with guidelines made by the Attorney-General.

## Commencement period

The Bill provides for different commencement periods for different provisions. The provisions which deem page owners to not be publishers commence on the earlier of proclamation or 6 months after the Bill receives Royal Assent. The remaining substantive provisions of the Bill – including those relating to the complaints process, applications for EIDOs, nominated entity obligations, and Attorney-General's intervention power – commence on the earlier of proclamation or 12 months after the Bill receives Royal Assent. The longer commencement period for these provisions allows additional time for the necessary operational procedures and technical mechanisms to be implemented by the courts and social media service providers before those substantive provisions of the Bill commence.