Law Council
OF AUSTRALIA

Social Media (Anti-Trolling) Bill 2022

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000[1] lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

[1] Law Council of Australia, The Lawyer Project Report, (pg. 9,10, September 2021).

Acknowledgement

The Law Council is grateful for the assistance of its Defamation Working Group, the Media and Communications Committee of the Business Law Section, the Victorian Bar, the Law Society of New South Wales and the Law Society of South Australia in the preparation of this submission.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Legislation Committee's (**Committee**) inquiry into the Social Media (Anti-Trolling) Bill 2022 (Cth) (**the Bill**).

2. In recent years, defamation has become an area of increasing prominence in terms of community and media interest. It is also an area of law that has arguably struggled to keep pace with developments in online publishing, including social media.

3. The Law Council acknowledges that the Bill has two primary purposes:

   (a) to respond to potential issues arising as a result of the decision of the High Court of Australia (**High Court**) in *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 (***Voller***); and

   (b) to create additional mechanisms for social media users to identify an anonymous user who has posted potentially defamatory material for the purpose of potentially bringing a defamation action.

4. The Law Council notes that a review of the Model Defamation Provisions (**MDPs**) is currently being undertaken, through the Meeting of Attorneys-General (**MAG**) processes, in relation to the liability of internet intermediaries. This review has been a substantial and in-depth process and has the potential to ensure that reforms to the law of defamation in Australia are developed in a way which is comprehensive, complementary, certain and clear. Therefore, the Law Council considers that intervention at the federal level in the law of defamation should not occur until the completion of the Stage 2 Review process and should form part of any package of reforms to the liability of online intermediaries more broadly.

5. In light of discussion in relation to the Bill focusing on 'trolling', the Law Council considers it important to recognise the limited role in which this Bill will address issues related to trolling. Defamatory material comprises only a small component of trolling activity online and despite the proposed reforms, defamation law is likely to continue to be, for many reasons outlined further in this submission, a relatively ineffective mechanism for seeking individual reputational redress and for reducing trolling activity on social media.

6. Following the decision in *Voller*, it is appropriate to reconsider the circumstances in which internet intermediaries will be liable in defamation for third-party content. In the Law Council's view, the law should place a greater onus on the originator of potentially defamatory online material and not emphasise internet intermediaries as the primary entities to be liable in defamation.

7. As such, the Law Council is generally supportive of reforms (including exemptions for certain social media users) to set more appropriately, and more workably in practice, when social media page owners should be considered publishers of third-party material. However, in the Law Council's view, the proposed blanket protection provided under clause 14 does not adequately balance competing public interests, may leave victims without recourse and, in certain circumstances, may provide unwarranted complete protection from liability. The balancing act requires careful additional consideration which should form part of the ongoing Stage 2 Review process and any subsequent reform proposal.

8. In seeking to clarify when the provider of the social media service is liable as a publisher of potentially defamatory material, the Bill proposes a new safe harbour defence primarily contingent on the establishment of, and compliance with, a complaints scheme. The Law Council has identified several key issues with the design of the proposed safe harbour defence including removing incentives to monitor and address defamatory material, practical difficulties for social media providers in collecting the necessary information and potential increased censorship by social media providers. The Law Council is aware of preferable models being considered as part of the Stage 2 Review and recommends that the proposed reforms be reconsidered in the context that review.

9. The Bill also proposes to establish a framework through which a prospective applicant can apply to a court for an 'end-user information disclosure order' (**EIDO**) that requires the provider of a social media service to disclose certain information about a potential complainant. It is unclear to the Law Council how the proposed process will differ in practicality from the preliminary discovery process which is utilised by prospective defamation plaintiffs in Australia who require information about the identity of a potential defendant.

10. Finally, the Law Council is of the view that any amendments to the law which seek to provide for the identification of users by internet intermediaries without the user's consent should require a court to carefully consider and balance competing considerations – including the right of individuals to have their reputations protected, privacy rights, freedom of expression, harm to reputation, and the public interest of any matters disclosed. Such a framework has not been adequately included in the Bill.

General Comments

Current review of the Model Defamation Provisions

11. Defamation law in Australia has largely been left by successive Australian governments to be dealt with at the state and territory level through the MDPs and through the common law.

12. In late 2018, the Council of Attorneys-General (**CAG**) (now the MAG) agreed to review the MDPs. A Defamation Working Party (**DWP**) was established to assess whether the existing defamation laws are meeting their policy objectives, particularly in response to the rise of online publications and technological changes since the provisions were developed.

13. At the 29 November 2019 meeting, the CAG agreed that the DWP will separately progress a second stage of reforms focused on the responsibilities and liability of digital platforms for defamatory content published online (as well as some other new and emerging issues affecting defamation law).[2]

14. The Stage 2 Review of the MDPs commenced in April 2021. Part A of that review addresses the question of internet intermediary liability in defamation for the publication of third-party content. This includes the matters raised in the recent High Court decision in *Voller*.

15. The Law Council considers that intervention at the federal level in the law of defamation should not occur until the completion of the Stage 2 Review process being undertaken through the MAG and should form part of any package of reforms to the liability of online intermediaries more broadly.

16. The Law Council notes that the Stage 2 Review (and the previous Stage 1) has been a substantial and in-depth process involving significant contributions from parties across the defamation law landscape. Given the time which has passed since submissions on Stage 2 closed in May 2021, and the apparent desire to now enact further change to defamation laws, it is now an appropriate time for the interconnected issues canvassed in Stage 2 to be progressed comprehensively, rather than simply selecting this one issue for reform.

17. While the Law Council agrees that reform to Australia's defamation laws is required, no adequate evidentiary basis for urgency of the Bill to interrupt the ongoing review process has been provided. The Law Council considers that effective defamation law reform requires reform well beyond that considered in the Bill. It is critical that any reform proposal be developed in a way which is comprehensive, complementary, certain and clear.

18. For example, while the Law Council recognises that defamatory content may be relatively common on the pages and comment sections of social media services, it is not clear why a system should be introduced in this space that does not operate in other similar contexts (for example, online review services).

19. It is also critical that the proposed reforms be considered carefully in the context of the wider suite of existing laws, importantly, including the recent amendments to the MDPs. For example, in several jurisdictions it is now not possible to sue for

[2] Stage 1 amendments to the MDPs commenced in New South Wales, Victoria, South Australia, Queensland and the Australian Capital Territory on 1 July 2021 and in Tasmania on 12 November 2021.

defamation without first issuing a concerns notice to the defendant. It remains relatively unclear how the new processes proposed in the Bill would sit with this requirement. The introduction of new laws simultaneously at the state and federal level dealing with the same, similar or related issues is likely to increase costs and confusion for the parties as issues are worked out by the courts. This will impact particularly on those seeking redress who might face additional difficulties in obtaining an outcome.

20. The Law Council also notes that the Bill does not seek to address the relative responsibility as between various parties when material is posted online which is in contempt of court, or in breach of suppression orders (for example, in breach of a suppression order on identifying a person or certain facts). There are also certain state and territory laws which prohibit identification of certain people or facts (for example, identification of children). More clarity is required as to the responsibility between the originator of the material (i.e. a poster/commenter), the page owner and the social media platform. While these issues are not specific to defamation, the Law Council considers that greater consideration should be given to this related issue in the context of responsibility for online publication (preferably in a manner in harmony with the Stage 2 Review).

Title of the Bill and role of the Bill in preventing 'trolling'

21. As indicated by the title of the Bill, it is intended that the Bill will address, at least to some degree, so called 'trolling' behaviour on social media.

22. In this regard, the Bill seeks to provide users considering bringing defamation proceedings for comments or material posted anonymously on social media with additional methods to 'unmask' an anonymous user through:

    (a) a complaints mechanism that allows the user to raise concerns about the defamatory post with the provider and, with consent, obtain the contact details of the originator, and

    (b) through an 'end-user information disclosure order' from a court.

    These methods are discussed further below.

23. As noted by the eSafety Commissioner, there is the 'potential for confusion over what the Bill seeks to achieve … as the term 'trolling' is not generally understood as being synonymous with defamation'.[3] Importantly, defamatory material comprises only a small component of 'trolling' activity online. This component is even smaller when limited only to anonymous defamatory content. Instead, trolling behaviour is generally considered in public discourse to involve abuse or bullying.[4]

24. Additionally, despite the proposed reforms, defamation law is likely to be, for many reasons, a relatively ineffective mechanism for seeking individual reputational redress and for reducing trolling activity on social media, not least of which are that the cost of complex defamation proceedings makes them inaccessible to many individuals and that the time taken to achieve an outcome can be lengthy.

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[3] eSafety Commissioner, Submission no 53 to House Select Committee on Social Media and Online Safety, Parliament of Australia, *Inquiry into Social Media and Online Safety* (January 2022) 60.

[4] The website of the eSafety Commission notes that the term 'troll', when used correctly, describes online tricksters or provocateurs which 'are not always bad … [and] can prompt people to talk about contentious subjects'. However, it is also noted that public discussion of trolling often refers to online hate, bullying and abuse. See, eSafety Commissioner, 'Trolling' (Web Page) <https://www.esafety.gov.au/young-people/trolling>.

25. In a submission to the Inquiry into Social Media and Online Safety, the eSafety Commissioner provided the following comment regarding the limited usefulness defamation proceedings for children, particularly when compared with existing mechanisms such as the Cyberbullying Scheme:

> *eSafety noted some discussion through the Inquiry proceedings about how the proposed Social Media (Anti-Trolling) Bill 2021 (Cth) may address online abuse targeting Australian children and young people, but no discussion of the Cyberbullying Scheme already under effective operation in this context. Based on our operational experience and engagement with young people through the scheme, they are often dealing with nasty comments, offensive images, fake accounts or threats. Where those behaviours meet the legislative threshold for cyberbullying, we would suggest this would be an effective way of addressing what is a common but damaging form of youth-based social discourse online and would provide an effective set of remedies. Of course, a family could choose to commence defamation proceedings against another child or their parents in some cases, but we would respectfully suggest this would be a much more taxing and expensive course of action and may have much broader impacts across the school community.*[5]

26. Further, the necessity of the Bill in addressing trolling behaviour is questionable given that *Online Safety Act 2021* (Cth) (**OSA**) allows the e-Safety Commissioner to order social media companies to remove cyber abuse material directed towards a person within 24 hours or face a penalty.[6] The OSA also provides the Commissioner with powers to obtain information about the owners of anonymous accounts who engage in online abuse.[7]

27. Given that much of the political and media discussion of this Bill has focused on trolling,[8] it is important to recognise the limited way in which this Bill will address issues related to trolling.

28. The Law Council is concerned that the Bill may actually result in a loss of presently available options for recourse by a person defamed through social media, in a manner which does not adequately balance legitimate competing interests or provide a practical alternative means of facilitating the efficient resolution of disputes

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[5] eSafety Commissioner, Submission no 53 to House Select Committee on Social Media and Online Safety, Parliament of Australia, *Inquiry into Social Media and Online Safety* (January 2022) 16.

[6] *Online Safety Act 2021* (Cth) ss 7(1), 8(1), 88, 91; *Crimes Act 1914* (Cth) s 4AA(3); *Notice of Indexation of the Penalty Unit 2020* (Cth).

[7] *Online Safety Act 2021* (Cth) ss 37(3), 194.

[8] See, eg, Hon Scott Morrison MP, Prime Minister and Senator the Hon Michaelia Cash, Attorney-General, Combatting Online Trolls and Strengthening Defamation Laws (Media Release, 28 November 2021) <https://www.pm.gov.au/media/combatting-online-trolls-and-strengthening-defamation-laws>; Hon Scott Morrison MP, Prime Minister, *Press Conference, Queanbeyan, NSW* (Transcript, 1 December 2021) <https://www.pm.gov.au/media/press-conference-queanbeyan-nsw>: Cait Kelly, 'Australian government's 'anti-troll' legislation would allow social media users to sue bullies', *The Guardian* (Online, 28 November 2021) <https://www.theguardian.com/australia-news/2021/nov/28/coalition-bill-would-force-social-media-companies-to-reveal-identities-of-online-bullies>; Ashleigh Gleeson, How Australia's crackdown on social media trolls will work, *news.com.au* (Online, 29 November 2021) <https://www.news.com.au/technology/online/social/how-australias-crackdown-on-social-media-trolls-will-work/news-story/433cb3b66ccf75cb15ed5f4dcb0c3408?btr=3217c54f4ea077ee29116f514dc9646d>; Nick Bonyhady, ''We've had enough with trolling': AG Cash pressures Labor on social media crackdown', *Sydney Morning Herald* (Online, 20 December 2021) <https://www.smh.com.au/technology/we-ve-had-enough-with-trolling-ag-cash-pressures-labor-on-social-media-crackdown-20211217-p59ie0.html>.

over online content. This outcome seems inconsistent with the broader public policy underlying the Bill, as well as recent defamation reforms.

29. To better address bullying and harassment online (including in cases involving defamatory material) consideration should be given amending the OSA to increase the powers of the Federal Court to order the removal of the material at an interlocutory stage, and as part of this process, shifting the onus onto the respondent (in particular, the originator) to justify material remaining online.

30. The Law Council also notes that the Bill and the current Inquiry of the House Select Committee on Social Media and Online Safety do not seek to address the broader issues in respect of preserving the integrity of democratic institutions against misinformation on social media. Consideration should be given to these issues as part of efforts to improve behaviour on social media and regulate social media organisations and their algorithms.

Impact on legal assistance services

31. Media reporting has indicated that the Australian Government recognises the difficulty of accessing redress due to the cost of defamation proceedings and is considering a community legal centre style model to enforce the provisions of the Bill.[9]

32. Public funding for litigation under the Bill raises many further issues, including in respect of whether existing legal assistance bodies will be required to provide new services (either within their existing funding or from new funding for this additional service), or whether new specialist services (with new resourcing) will be established. The potential for demand to significantly outstrip the supply of funding is of concern to the Law Council.

33. Issues may also arise in relation to how cases would be selected to receive funding and what types of matters might be advanced.

34. The Committee should seek further information from the Australian Government as to how such a legal assistance model might be designed given the important role that it might play in allowing Australians to seek redress under the Bill and the potential impact it would have on an already under-resourced legal assistance sector. Should the model proceed it is critical that the Australian Government consult with the legal profession, and in particular the legal assistance sector, on its design.

Liability

Fairfax Media Publications v Voller

35. As stated in the Explanatory Memorandum, the Bill seeks to address issues raised by the High Court's decision in *Voller*.[10]

36. The High Court, by a 5-2 majority, in *Voller* found that the appellants (several news organisations) were the publishers of the third-party user comments made on their

[9] See, eg, Lisa Visentin and Nick Bonyhady, 'Government considering publicly funded legal services to enforce proposed anti-trolling laws', *The Sydney Morning Herald* (Online, 29 November 2021) <https://www.smh.com.au/politics/federal/government-considering-publicly-funded-legal-services-toenforce-proposed-anti-trolling-laws-20211129-p59d3k.html>.
[10] Explanatory Memorandum, Social Media (Anti-Trolling) Bill 2022 (Cth) 2, 4-5 ('Explanatory Memorandum').

Facebook pages.[11] The majority 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.[12] The majority found that the news organisations, through the creation and administration of a public Facebook page and the posting of content on that page, facilitated, encouraged and assisted the publication of comments from third-party users and were therefore publishers of the third-party comments. The majority rejected the appellants' argument that for a person to be a publisher they must know of the relevant defamatory matter and intend to convey it.[13]

37. The decision has significant implications for those who operate online forums (forum administrators) which allow third parties to make comments, post material and the like, including the media, businesses, community groups and individuals.

38. It remains unclear whether hosts of third-party comments would be able to avail themselves of the defence of innocent dissemination pursuant to clause 32 of the MDPs or the immunity provided in section 235 of the OSA (which came nto effect on 23 January 2022 and replaces clause 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth)). The availability of these defences would turn upon an absence of knowledge or awareness of the defamatory nature of the content. In practice an internet intermediary would need to remove the alleged defamatory content to have the benefit of the provisions.

39. The Bill seeks to partially override the decision in *Voller*, by:

- placing greater onus of responsibility on the originators of social media material (the 'poster');
- placing a greater onus of responsibility on providers of social media services as primary publishers of the content posted on their sites;
- providing providers of social media services with a defence that will be available where the required complaints process is established and properly followed; and
- absolving hosts or administrators of social media pages ('page owners') from any liability for defamatory posts of third parties, even as a secondary publisher.

40. The key means by which the Bill seeks to address the implications of *Voller* is by deeming that any Australian person (including a company incorporated in Australia) who administers or maintains a social media page will not be a publisher of third-party material posted on their page and is therefore immune from potential liability under defamation law.

General comments on liability for defamation as a publisher

41. Following the *Voller* decision, Australia's defamation laws should be carefully considered to determine the appropriate circumstances in which internet intermediaries will be liable in defamation for third-party content, especially where they are unaware in practice of the defamatory content, or where it would be impracticable for them to have awareness of the defamatory content before it is published.

[11] *Fairfax Media Publications Pty Ltd & Ors v Voller* [2021] HCA 27, [55] (Kiefel CJ, Keane and Gleeson JJ), [106] (Gageler and Gordon JJ).
[12] Ibid [32] (Kiefel CJ, Keane and Gleeson JJ), [106] (Gageler and Gordon JJ).
[13] Ibid [23]-[35] (Kiefel CJ, Keane and Gleeson JJ).

42. In the Law Council's view, the law should not emphasise internet intermediaries as the primary entities to be liable in defamation. An internet intermediary who is not the originator of a defamatory publication is often unable to rely on defences that would otherwise be available to the originator, such as truth, as the intermediary does not have the information that is available to the originator. Furthermore, it may be easier and more attractive for a complainant to pursue an internet intermediary (who will usually be more readily identifiable than the originator of a defamatory publication), particularly when the originator is impecunious.

43. Shifting the focus of liability in defamation primarily to the originator of the defamatory publication would allow a more effective balancing of freedom of expression and a person's right to defend their reputation. By holding the originator accountable, the internet intermediary does not have to be the arbiter of which publications should or should not remain online – the content can remain online if the originator chooses to defend the publication (which is preferable, as the originator is often best placed to defend the publication). Similarly, holding the originator of a publication liable for any action in defamation emphasises the accountability of originators for their publications online. This may disincentivise antisocial online behaviour, such as abusive posts, as the originator can no longer hide behind a defenceless, third-party publisher defendant with deeper pockets.

44. However, the Law Council also recognises that in many cases it is important to maintain some form of recourse against internet intermediaries. Intermediaries are responsible for the design of their platforms, (including the extent to which users can manage content, such as through moderation or prohibition of commenting functions) or their use of a particular platform and profit from the network effects of the platforms.

45. The Law Council recognises that it is also important, where a complainant is unable to pursue an originator, that they are still able to seek redress, and importantly, have defamatory content removed. An important aspect of defamation over the internet, compared with other defamatory publications, is the fact that defamatory publications on the internet can be downloaded for an indefinite period and typically across an unconstrained geographic area. The ability of internet intermediaries such as the providers of social media services to remove defamatory material is therefore another significant reason for imposing liability on internet intermediaries.

Liability for defamation—publisher

46. Clause 14 of the Bill provides the primary protection for person who maintains or administers a page on a social media service from defamation liability:

> ***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;*
>
> *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.*

47. The Law Council is generally supportive of an exemption for certain page owners (especially where they have limited capacity to have material removed from pages on social media platforms) but repeats its position that any intervention at the federal level in the law of defamation should be delayed until the completion of the Stage 2 Review process being undertaken through the MAG and should form part of any package of reforms to the liability of online intermediaries more broadly.

48. Should the Bill proceed, the Law Council is concerned by the breadth of the protection from liability for defamation created by clause 14. This proposed provision removes any form of liability in defamation a page host or administrator might otherwise have been exposed to for material posted by others, including as a secondary publisher. On the current drafting, hosts and administrators would not even be required to remove defamatory posts of which they become aware. In rectifying these issues, a careful balance needs to be struck between competing public interests.

49. Important concerns were raised following the decision in *Voller* that, under current laws, people such as individuals, community groups and small businesses with social media could be arguably unfairly classified as publishers.[14] Such people and organisations generally will not have the capacity, capability or legal knowledge sufficient to review potentially defamatory material, straightforward access to legal advice or the resources of larger organisations (for example, to employ trained moderators to review content).

50. Since the decision in *Voller*, concerns have also been raised that there may be a chilling effect on freedom of speech and engagement in issues of public interest if people who administer social media elect to censor material or disable comment functionalities to ensure that they are not potentially liable for defamatory comments posted by others.

51. On the other hand, the Bill may remove much of the incentive for page owners to moderate their social media pages for potentially defamatory material. This has the potential to result in additional defamatory material being left online that would otherwise be dealt with quickly and pragmatically by the page host acting alone. This is despite the purported intention of the Bill being to reduce defamatory comments and provide greater access to recourse for affected persons.

52. It is also important to note that page owners are not necessarily always 'innocent bystanders' to defamatory material posted on their pages. Although subclause 15(2) of the Bill would capture page owners who post defamatory material themselves, where page owners seek or conduce defamatory material but do not post the material themselves (for example, actively encouraging conversations where the users ultimately end up defaming each other), they would not be liable as publishers. This seems antithetical to the purported intention of the Bill.

53. The Law Council is generally supportive of reforms to set more appropriately and more workably in practice, when social media page owners should be considered publishers of third-party comments on social media. However, in the Law Council's view, the proposed blanket protection provided under clause 14 does not adequately balance competing public interests, may leave victims without recourse and, in certain circumstances, may provide unwarranted complete protection from liability. The balancing act requires careful additional consideration. Such a process is currently being undertaken as part of the review of the MDPs and the Law Council

[14] It remains unclear whether such people would have access to defences despite being a 'publisher'.

considers that any reform to protections for potential publishers should not pre-empt this process.

Liability for defamation—providers of a social media service

54. Subclauses 15(1) and (2) specify that the provider of the social media service is a publisher of a potentially defamatory comment if it is made in Australia. As noted in the Explanatory Memorandum, this may already be the case at common law following the decision in *Voller*.[15] However, the proposed reforms seek to confirm this and to avoid the need for a complainant to have to prove this point by applying the test espoused in *Voller*.[16]

55. 'Social media service' is the term used in the Bill and is defined in clause 6 to mean an electronic service that is a social media service (within the meaning of the OSA) or an electronic service specified in the legislative rules, but does not include an exempt service.

56. Social media service is defined is paragraph 13(1)(a) of the OSA to include an electronic service that satisfies the following conditions:

    (i) the sole or primary purpose of the service is to enable online social interaction between two or more end-users;

    (ii) the service allows end-users to link to, or interact with, some or all of the other end-users;

    (iii) the service allows end-users to post material on the service.

57. This definition is not intended to capture online games, or online business interaction, for example, where businesses have established online feedback facilities to deal with their customers.[17]

58. The definition of a 'social media service' is otherwise yet to be considered. There remains the possibility that the definition will impact a broad range of service providers (perhaps unintentionally). Further clarification and guidance will be required should the Bill proceed to assist different platforms to understand whether they are captured.

Defence for the provider of a social media service and the establishment of a complaints scheme

59. While the Bill seeks to clarify that the provider of the social media service is a publisher of potentially defamatory material if it is posted in Australia, it also provides a defence to these organisations under subclause 16(2) if they:

- establish a complaints scheme which meets the requirements prescribed in proposed clause 17; and
- where the applicant (or a person acting on behalf of the applicant) made a complaint to the provider under the complaints scheme – the provider complied with the complaints scheme in relation to the handling of the

[15] Explanatory Memorandum, 14.
[16] Ibid.
[17] See pages 71-3 of the Explanatory Memorandum of the *Online Safety Act 2021* (Cth) for further information.

complaint (including by disclosing the country location data of the commenter to the applicant); and

- any of the following conditions is satisfied:
  - where the applicant (or a person acting on behalf of the applicant) has made a complaint to the provider about the material, the applicant (or a person acting on behalf of the applicant) has requested the provider to disclose the relevant contact details of the poster;
  - in a case where an EIDO was made against the provider, or the nominated entity of the provider, the provider or nominated entity has disclosed the required information and has otherwise complied with the EIDO;
  - the applicant (or a person acting on behalf of the applicant) has not applied to a court for an EIDO; and
- at the time the material was posted, the social media service provider had established an Australian nominated entity satisfying the requirements set out in Part 4 of the Bill.

60. The Law Council has identified three critical issues with the design of the proposed safe harbour defence including:

(a) providing very little additional benefit to victims by removing incentives to monitor and address defamatory material;

(b) practical difficulties for social media providers in collecting the information necessary to avail themselves of the safe harbour defence; and

(c) likely increased censorship by social media providers.

These issues are discussed further below.

Limited substantial benefit to applicants

61. As noted above, clause 15 provides social media providers with access to a new defence on the condition that they offer and comply with the proposed complaints scheme. This is designed to assist victims of online defamation with pathways to seek redress from online wrongdoers. However, the Law Council is concerned that it may be of limited benefit to applicants in practice and, in fact, may reduce avenues for redress (such as having the social media provider remove material on its own judgment).

62. To access the safe-harbour defence, the social media provider is only mandated to inform the applicant of the location (Australia or not Australia) of the originator and to seek the consent of the originator to provide additional contact details. Where the originator refuses consent (the likely outcome in most circumstances), there appears to be no further recourse for the applicant other than through the courts (for example, by seeking and EIDO). There is also no real incentive for the social media provider to voluntarily assist the applicant as, having complied with the scheme, they cannot be liable in defamation. This is in contrast to the current situation whereby social media providers have an incentive to exercise their own judgment in determining whether to take down publications they receive a complaint about.

63. The Law Council notes that preferrable models which place an onus on social media providers to remove material in certain circumstances are being considered as part of the Stage 2 Review.

Practical difficulties complying with the complaints scheme

64. The Law Council notes that 'relevant contact details' is defined in clause 6 of the Bill to mean:

- the name of the person or the name by which they are usually known;
- an email address and phone number that can be used to contact the person; and
- such other information as enabled by the legislative rules.

65. It is noted in the Explanatory Memorandum that the relevant contact details are 'intended to be such as is necessary to effect substituted service in an Australian court' and that '[f]ake or inaccurate details will not meet the definition'.[18]

66. Therefore, the proposed 'safe harbour' defence outlined in the Bill will only be available to a social media service provider if the 'relevant contact details' and country location data are accurate and sufficient to allow the complainant to sue the commenter.

67. The Law Council notes that there are likely to be significant difficulties for social media service providers to adequately verify the identities of its users, including retrospectively. This is particularly the case given that there are already extensive numbers of existing social media accounts operating in Australia. The proposed reforms also create an incentive for end-users to provide false information in order to avoid potential liability. Further, the use of software (or other services) by commenters to obscure or alter their 'location' (such as through the use of a virtual private network) could allow commenters to avoid liability.

68. In a submission to the Inquiry into Social Media and Online Safety, the eSafety Commissioner provided the following important information regarding the collection of contact information by social media platforms in the context of this Bill:

> *Relevant contact details', for these purposes, are the commenter's name or the name by which they are usually known, phone number and email address. Details which turn out to be fake or inaccurate, and so do not allow the complainant to effectively commence proceedings against the commenter, will not meet the definition.*
>
> *Accessing the conditional defence will require a significant expansion of services' current practices for the collection and verification of Australian users' information. In eSafety's experience, there is little consistency in the type of basic subscriber information collected by services, and the quality of the data can vary significantly. For example, a person may provide an email address or mobile phone number at sign-up, but as these are not always routinely re-verified, the data may go out of date. Additionally, while temporary or 'throwaway' email addresses may be prohibited by platforms' terms of service, this is not enforced across the industry. In these circumstances, as the Bill is currently drafted, the*

[18] Explanatory Memorandum, 12.

> *service may not be able to access the conditional defence from defamation liability.*
>
> *…*
>
> *It also appears to us that social media providers would be incentivised to take steps to retroactively collect and validate the relevant contact details for all of their existing Australian users, in case those users end up engaging in defamation in the future, if they wish to access the conditional defence from defamation liability. We believe some users may be hesitant to provide these details to services due to a lack of trust, and others may have difficulty complying – for example, low income users who may not have a static mobile phone number. We suggest there is benefit in considering a more targeted approach, involving the authentication or verification of those accounts which are identified as engaging in harmful behaviour, rather than all accounts*.[19]

69. If the complaints scheme requirement and related safe harbour defence are unworkable in practice, it is likely that in many cases social media service providers will be left without recourse to any applicable defence.

Censorship

70. While it was noted in above that the Bill may reduce the monitoring of social media content, difficulty in practice complying with the complaints scheme process (for example due to tight timeframes or difficulty verifying contact details of users) may also mean that social media providers seek alternatives (such as increased censorship) to limit the impact of the proposed reforms on their operations. The Law Council notes concern that a practical consequence of the Bill may be the increased censorship by social media providers.

Limiting defences available – comments on the Exposure Draft of the Bill

71. In analysing the Exposure Draft of the Bill released by the Attorney-General's Department, the Law Council raised concern about the potential ability for applicants to severely limit the defences (including the safe harbour defence) available to social media service providers by avoiding the use of the complaints scheme. The Law Council is pleased that the revised drafting of the safe harbour defence (now subclause 16(2)) and the Explanatory Memorandum make it clearer that the defence will still be available to social media providers in the case that an applicant chooses not make a complaint to the provider, or makes a complaint to the provider but does not subsequently request the poster's relevant contact details under the complaints scheme.[20]

Position on the safe harbour defence

72. Potential safe harbour defences for internet intermediaries, including social media service providers, have been a significant focus of the ongoing Stage 2 Review. The Law Council considers that models being considered under the Stage 2 Review process, including models provided by the Law Council and the New South Wales

[19] eSafety Commissioner, Submission no 53 to House Select Committee on Social Media and Online Safety, Parliament of Australia, *Inquiry into Social Media and Online Safety* (January 2022) 60.
[20] Explanatory Memorandum, 15-16.

Bar Association,[21] which apply more broadly beyond social media and more closely align with international models, are preferable to the process proposed in the Bill. The Law Council recommends that the proposed defence for social media services and related complaints process be reconsidered in the context of the ongoing Stage 2 Review.

End-user information disclosure orders

73. Clause 18 of the Bill establishes a framework specific to potentially defamatory material on social media services through which a prospective applicant can apply to a court for an EIDO that requires the provider of a social media service disclose the commenter's 'country location data' and, if the comment was made in Australia, the commenter's contact details,[22] to the applicant .

Necessity of the new process

74. Existing civil procedure rules enable a complainant to ascertain an originator's identity by way of preliminary (or pre-action) discovery, including where the entity holding that information is overseas.[23] In fact, as identified in the Discussion Paper released as part of the Stage 2 Review, the current threshold in Australia for granting discovery orders to identify an originator is relatively low, compared to jurisdictions such as the United Kingdom and the United States.[24] The current threshold, as demonstrated in *Kabbabe v Google LLC* [2020] FCA 126 (***Kabbabe***), requires that the applicant show that they wished to commence proceedings against the unknown originator (which in *Kabbabe* was the poster of a Google review) and that the internet intermediary 'may' have information which could identify the originator.[25]

75. In fact, the existing preliminary discovery processes available in each jurisdiction are likely to be a more effective way to obtain information than seeking an EIDO. These processes allow a court to order the disclosure of *any evidentiary material*, which broadly includes anything the court deems relevant. Preliminary discovery also serves wide-ranging purposes, such as allowing the applicant to obtain information to decide whether a cause of action exists, against whom the claim lies, or formulate the claim properly.

76. It is unclear how the proposed process will provide additional utility from the preliminary discovery process which is already available to (and has been utilised by) prospective defamation plaintiffs in Australia who require information about the identity of a potential defendant.

77. There is also some practical uncertainty in the drafting of clause 19. Sub paragraphs 19(2)(e) and (f) make distinction between what can be sought, depending on the circumstances or extent of knowledge of the prospective applicant (that is, the

[21] See, Law Council of Australia, Submission to Attorneys-General, *Review of Model Defamation Provisions – Stage 2* (4 June 2021) Appendix 2; New South Wales Bar Association, Submission to Attorneys-General, *Review of Model Defamation Provisions – Stage 2* (31 May 2021) [53].
[22] The 'relevant contact details' that a social media service will be required to provide, on the making of an 'end-user information disclosure order', consist of the commenter's name, (or 'the name by which the person is usually known'), email address, and phone number.
[23] See, eg, *Kukulka v Google LLC* [2020] FCA 1229; *Kabbabe v Google LLC* [2-2] FCA 126; *Musicki v Google LLC* [2021] FCA 1393; *Lin v Google* LLC [2021] FCA 1113.
[24] Attorneys-General, *Review of Model Defamation Provisions – Stage 2* (Discussion Paper, 31 March 2021) [3.238].
[25] *Kabbabe v Google LLC* [2020] FCA 126.

prospective applicant must either be unable to ascertain the relevant contact details of the poster, unable to ascertain whether the material was posted in Australia, or reasonably believe that the material was posted in Australia). However, it is unclear how this works practically and whether the court can issue two separate orders at the same time. It appears that if a prospective applicant is unable to ascertain whether the material was posted in Australia, an order to disclose the country location data would be sought. Subsequently, the prospective applicant would have to seek a separate order for the relevant contact details of the poster. This presents an additional procedural step that may be counterproductive to the effective conduct of disputes.

Public policy considerations

78. The issue of identification of an underlying anonymous originator is a complicated and important one. Disclosure of such information should require the careful consideration of competing considerations, including among others:

    (a) privacy rights;

    (b) freedom of expression;

    (c) personal safety (for example, risk of family violence);

    (d) journalist source and whistle-blower protection; and

    (e) other public interests of any matters disclosed.

    Where material is posted anonymously, it is critical that the right of individuals to have their reputations protected is given due weight against some of the competing rights of the anonymous poster.

79. The Law Council is of the view that any amendments to the law which seek to provide for the identification of users by internet intermediaries without the user's consent should require a court to carefully consider and balance these factors. The end-user information disclosure order mechanism sought to be established under the Bill does not explicitly require this consideration.

80. Subclause 19(3) of the Bill allows the court to refuse to grant an order disclosing a commentator's contact details if the disclosure is likely to present a risk to the commenter's safety. While subclause 19(4) provides that subclause (3) does not limit the court's power to refuse to grant an EIDO.

81. Subclauses 19(3) and (4) are important to ensuring that the powers of a court are not limited in determining whether to grant an EIDO. The Explanatory Memorandum indicates that the key competing considerations raised above were in the mind of the drafters when drafting these provisions.[26]

82. In the Law Council's view, should the Bill proceed, clause 19 should be amended to explicitly require a court to give consideration to any factors in the interests of justice that might be relevant to the decision to make an EIDO. This could be achieved through a *non-exhaustive* list of factors to which the court *may* have regard.

[26] Explanatory Memorandum, 20-1.

83. It is worth noting, however, that the provider of the social media service holds the contact information and location data of the commenter, and it may be difficult for a court to properly consider the competing factors unless the commentator has an opportunity to respond or has knowledge that the order is being sought.

Potential use for other purposes

84. There appears to be no limitation as to what the prospective applicant can do with information granted through an EIDO. This leaves open the possibility of information gained through this process being used in a manner that may not be in the public interest.

85. The purpose for which the information is disclosed should be limited to the purpose of determining whether to initiate court proceedings. In the Law Council's view, any other use of the information should be expressly prohibited and subject to a penalty.

Position on end-user information disclosure orders

86. The Law Council notes that the issue of identification of an underlying anonymous originator has been an issue of much consideration as part of the Stage 2 Review process. The Law Council considers that models under consideration as part of this review more appropriately balance the value of anonymity online in certain circumstances, particularly, for example, through allowing people to report or express views in relation to matters of public concern, with the right of individuals to have their reputations protected.[27]

87. Should the Australian Government, or indeed the state and territory governments, wish to alter or add to the mechanisms currently available to a complainant to seek disclosure of the identity of a user who posted defamatory material online, this should only occur following the completion of the Stage 2 Review.

Nominated entities

88. Clause 22 of the Bill requires a provider of a social media service, if it is a foreign body corporate and has at least 250,000 Australian account-holders (or is specified in the legislative rules), to have a nominated entity in Australia that will be able to discharge key obligations proposed to be created under the Bill.

89. The Law Council notes that the potential introduction of legislation which mandates that overseas entities effectively incorporate in Australia or face civil penalties with purported extra-territorial reach is a relatively novel proposal with potentially significant and wide-ranging implications beyond those issues considered in the Bill. Careful consideration of these aspects of the Bill are required.

[27] In its submission in response to the Stage 2 Review Discussion Paper, the Law Council expressed support for the Canadian (Ontario) approach described in the Discussion Paper at paragraph 3.240: Law Council of Australia, Submission to Attorneys-General, *Review of Model Defamation Provisions – Stage 2* (4 June 2021) 5, 68. This test requires that the plaintiff take reasonable steps to identify the originator, and where there are not overriding privacy considerations, a 'Norwich Pharmacal' order may be granted where the public interest favouring disclosure outweighed the freedom of expression and privacy interests of the unknown alleged wrongdoer.

Miscellaneous

Attorney-General may intervene in a proceeding

90. Clause 25 of the Bill provides the Attorney-General with the power to intervene in proceedings in certain circumstances if the Attorney-General believes it is in the public interest to do so. The Explanatory Memorandum explains that the reasons underpinning this proposed power are twofold:

    (a) to address a power imbalance between a large publisher and an individual whose reputation has been harmed; and

    (b) to provide the Australian Government's views as to how the Bill is intended to apply.[28]

91. Where the Attorney-General intervenes, they may authorise an applicant's costs to be paid.

92. In the Law Council's view, the circumstances in which the Government may intervene in proceedings which often relate to freedom of communication and speech requires greater clarity, in particular given the potential for perceived or actual conflicts of interest.

International Comparisons

93. It would be useful for there to be a comparative review of regimes overseas to ensure changes under Australian law are in harmony with international best practice and to ensure that Australia does not fall further behind in the international media freedom rankings.

[28] Explanatory Memorandum, 24-5.