



THE LAW SOCIETY
OF NEW SOUTH WALES

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13 January 2022

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Mr Tidball,

Social Media (Anti-Trolling) Bill 2021 – Exposure Draft Consultation

Thank you for your memorandum seeking input in respect of the exposure draft Social Media (Anti-Trolling) Bill 2021 (“draft Bill”). Given the time available for comments, the Law Society provides below a relatively high-level submission, informed by its Public Law and Privacy & Data Law Committees.

The Law Society notes that the draft Bill is intended to provide a framework to allow Australians to respond to defamatory content posted on social media platforms.

We understand that the Federal Parliament established the House Select Committee on Social Media and Online Safety (“House Select Committee”) to inquire into online harms, and that it is intended that the House Select Committee will scrutinise the issues addressed by the Draft Bill and the measures it proposes in the broader context of online harms that may be faced by Australians on social media and other online platforms.

General comments

The draft Bill, and the terms of reference of the House Select Committee, are focused on the preservation of individual reputations through defamation law. In our view, defamation law is likely to be, for many reasons, a relatively ineffective mechanism for seeking individual reputational redress, not least of which is that the cost of defamation proceedings makes them inaccessible to many individuals. In this regard, we note media reporting that the Government is considering a community legal centre style model to enforce the provisions of the draft Bill.¹

Public funding for litigation under the draft Bill raises many further issues, including in respect of whether existing legal assistance bodies will be required to provide new services, or whether new specialist services (with new resourcing) will be established. Issues may also arise in relation to how cases would be selected to receive funding and what types of matters might be advanced. The Law Society would be concerned for the potential for partisan political issues

¹ 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-to-enforce-proposed-anti-trolling-laws-20211129-p59d3k.html>>.

to be advanced in this way. The potential for demand to significantly outstrip the supply of funding is also a cause for concern.

Further, we query the necessity of the draft Bill, noting that the *Online Safety Act 2021* (Cth) already 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 of 500 units - a \$111,000 fine.² This Act also provides the Commissioner with powers to obtain information about the owners of anonymous accounts who engage in online abuse.³

More concerningly, the Law Society is of the view that the draft Bill and the terms of reference for the House Select Committee's inquiry fail to address the broader issues in respect of preserving the integrity of democratic institutions against misinformation circulated and amplified via social media platforms. In our view, this is not merely a theoretical possibility. Social media platforms to reach vast numbers of people almost instantaneously, and the ability and desire of relevant private corporations to self-regulate material published and available on their social media platforms can be called into question.

The Law Society submits that the approach taken by the draft Bill and the current House Select Committee is unduly narrow and views the underlying systemic issues through an inappropriate prism. As a result, the draft Bill is unlikely to provide effective regulation of online harms that affect individuals, nor of harms to the integrity of Australia's democratic institutions. The Law Society suggests that an effective regulatory approach requires independent oversight of how the underlying algorithms operate. We note the views of Reset Australia, the Australian affiliate of a global initiative to counter digital threats to democracy, that the policy directions required to address "social media's online hate problem" are:

Increased transparency so evidence-based solutions can be found. This would include the introduction of "live lists" of the top trending issues during contentious periods - such as pandemics and elections.

A shift towards systemic issues, rather than focusing on content takedowns and user identification. Design features and algorithms that promote harmful content are at the root of the problem, and need to be tackled.

A 'Black Letter Law' by default approach which develops robust, legislated regulation which is enforced by independent arbitrators and written by policymakers, not the industry.⁴

We note for the Law Council's consideration Reset Australia's view that self-regulation is not effective, and that what is required is an independent public regulator with the power to inspect and audit algorithms, and to issue fines, notices and other civil sanctions.⁵

Specific comments

The Law Society has specific concerns relating to section 18, relating to end-user information disclosure orders. There appears to be no limitation as to what the prospective applicant can do with information granted through the disclosure order. We suggest that section 18 include that the purpose for which the information be disclosed should be limited to the purpose of

² *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).

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

⁴ Reset Australia, 'Troll hunting isn't solution to social media's hate problem,' (Media Release, 27 November 2021) <<https://au.reset.tech/news/troll-hunting-isn-t-solution-to-social-media-s-hate-problem/>>.

⁵ Reset Australia, 'Big Tech's 'Australian Code of Practice on Disinformation' is both pointless and shameless,' (Media Release, 21 February 2021) <<https://au.reset.tech/news/big-tech-s-australian-code-of-practice-on-disinformation-is-both-pointless-and-shameless/>>.

determining whether to initiate court proceedings. It is our view that any other use of the information should be expressively prohibited and subject to a penalty.

Further, the current form of section 18(3) 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. The provider of the social media service holds the contact information and location data of the commenter, and we question how the court could be cognisant of any risks to the commenter, unless the commentator has an opportunity to respond or has knowledge that the order is being made.

If you have any queries, or would like any further information, please contact Stephanie Lee, Policy Lawyer, on (02) 9926 0275 or stephanie.lee@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J van der Plaat', with a stylized flourish at the end.

Joanne van der Plaat
President