

Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.¹

Bills

Social Media (Anti-Trolling) Bill 2022²

Purpose	<p>This bill seeks to create a framework to regulate defamatory content posted on social media</p> <p>The bill would deem an Australian person who maintains or administers a social media page not to be the publisher for material posted on the page by another person. Instead, the social media service provider would be considered the publisher of material published on their service for the purposes of defamation law</p> <p>The bill would introduce a defence in defamation proceedings for social media service providers if certain conditions are satisfied, including the provision of, and compliance with, a complaints scheme</p> <p>The bill would introduce end-user information disclosure orders that would require a social media service provider to disclose the poster's relevant contact details and country location data to the potential complainant in defamation proceedings</p>
Portfolio	Attorney-General
Introduced	House of Representatives, 10 February 2022
Rights	Privacy; freedom of expression

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Media (Anti-Trolling) Bill 2022, *Report 2 of 2022*; [2022] AUPJCHR 28.

Disclosure of poster's personal information

Rights to privacy and freedom of expression

2.3 This bill sought to provide a framework to regulate who is responsible for defamatory content posted on social media, and introduce powers for anonymous commenters to be identified, for the purpose of instituting defamation proceedings. In particular, it sought to introduce end-user information disclosure orders that would require a social media service provider to disclose the poster's relevant contact details and country location data to the applicant, irrespective of whether the poster consents to the disclosure. The bill provided that the court may make a disclosure order if satisfied of particular matters, including that there are reasonable grounds to believe that there may be a right for the prospective applicant to obtain relief against the poster in defamation proceedings.

2.4 The committee noted that the bill may have promoted the right to privacy to the extent that it could assist potential applicants to institute defamation proceedings and seek an effective remedy for any reputational damage. However, the committee noted that the proposed measure also limited the right to privacy by permitting the collection and disclosure of the poster's personal information without their consent. The measure also engaged and limits the right to freedom of expression insofar as establishing a framework to lift the anonymity of social media users may have a chilling effect on free speech if it inhibits a person from expressing themselves on social media.

2.5 The committee requested further information to assess the human rights compatibility of the bill from the former Attorney-General in [Report 2 of 2022](#).³

Former Attorney-General's response⁴

2.6 The former Attorney-General advised:

1. Why the existing preliminary discovery process in defamation proceedings is insufficient so as to justify the need to introduce end-user information disclosure orders?

Regarding the Committee's first question, while there are similarities between existing orders for preliminary discovery and end-user information disclosure orders (EIDOs) proposed in the Bill, EIDOs connect to a scheme that is specifically focused on defamation on social media. For

3 Parliamentary Joint Committee on Human Rights, *Report 2 of 2022* (25 March 2022), pp. 22-36.

4 The minister's response to the committee's inquiries was received on 7 April 2022. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

example, compliance with an EIDO will permit a social media service provider to access the conditional defence in the Bill. EIDOs are also capable of disclosing country location data, which will empower the prospective litigant to make an informed decision whether to progress defamation proceedings. Moreover, EIDOs will be effective against a social media service's nominated Australian entity, not just the social media service, which will make enforcement in Australia more effective. EIDOs will operate in parallel to preliminary discovery orders, and a complainant can choose the mechanism best suited to their circumstances.

2. Why does the bill not require the court to balance competing rights and interests (particularly the rights to privacy and freedom of expression) as well as consider other relevant matters, such as the form of expression and the context in which it is made?

Regarding the Committee's second question, one of the purposes of the Bill is to empower Australians who are the subject of defamatory material posted anonymously on social media to respond appropriately. The complaints mechanism and EIDO scheme support these Australians to obtain relevant contact details that allow them to serve legal proceedings against the poster. The overarching consideration of these mechanisms is to enable the disclosure of relevant contact details when potentially defamatory material has been posted on social media, with strong safeguards to ensure details are not able to be provided in other circumstances.

Provided potentially defamatory material has been posted, as assessed by a court, the Government considers it is appropriate for contact details to be provided to support the commencement of legal proceedings. Other considerations such as freedom of expression, privacy or 'the type of expression and the context in which it was made' should not override this tenet. This is the same approach taken with the existing preliminary discovery mechanism.

At the same time, the Bill recognises that many Australians have legitimate reasons to be anonymous or to use a pseudonym on social media. Anonymity and pseudonymity can enable marginalised groups in the community to use the internet without fear for their safety, and are therefore important in promoting freedom of expression and privacy. However, anonymity should not be used as a shield to make harmful remarks that damage other people. This is the balance the Bill strikes. In determining whether an EIDO should be granted, the Bill recognises the court can balance the interest in granting an order against risks to safety, and maintains its general discretion to consider the interests of justice and any other circumstances of the case.

3. How would the court's power to refuse to make a disclosure order, where to do so would pose a safety risk to the poster, be effective in practice, noting it is not clear how the court would obtain the necessary information to make this assessment?

In relation to the third question, the Bill makes clear that courts can refuse to grant an EIDO if doing so is likely to present a risk to the safety of the poster. The Bill does not envisage that the court must take positive steps to investigate the safety of the poster prior to making 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 could arise, for example, in circumstances where there is information before the court (such as the substance of the posted material) indicating that the poster knows the prospective applicant and had previously been the subject of intimate partner or family violence at the hands of the applicant.

The Government considered including mechanisms to notify interested persons about an EIDO application, and to provide a right to be heard, to support the Court's consideration of safety risks. However, such a requirement would add complexity, time and cost to the process. EIDO applications are intended to be as simple and cost-effective as possible, to provide Australians with an accessible mechanism to respond to defamatory comments on social media. The approach taken seeks to strike a balance between these competing considerations. At the same time, the Bill expressly allows practice and procedural rules in relation to EIDO applications to be provided for in legislative rules. Among other things, this could be used to provide for notification requirements and rights for interested persons to be heard.

4. What safeguards are there, if any, to ensure that the poster's personal information is only used by the applicant for the purposes of instituting defamation proceedings?

5. Why does the bill not prohibit the unauthorised use and disclosure of the poster's personal information once it is disclosed?

Regarding the fourth and fifth questions, relevant contact details can only be disclosed with the poster's consent, or pursuant to a court order. This ensures contact details are only disclosed in appropriate circumstances. Whilst there is no express prohibition on disclosed details being used for another purpose, under the complaints scheme the poster has complete control over whether the contact details are provided. Under the EIDO process, an implied undertaking applicable to all relevant court orders would prevent such information being used for another purpose.

The High Court has made it clear that a restriction on the use of documents generated by litigious processes applies an obligation of substantive law. Moreover, the Court has made clear that the undertaking may in some cases extend to third parties: see generally *Hearne v Street* (2008) 235 CLR 125. A breach of the implied undertaking is punishable by contempt. The Government considers that these existing mechanisms are sufficient to prevent disclosed details being used for other purpose, and an express prohibition in the Bill was not necessary. Moreover, the approach in the Bill aligns with existing protections in preliminary discovery processes.

Concluding comments

2.7 The committee thanks the former Attorney-General for this response.

2.8 As the bill lapsed at dissolution of the 46th Parliament the committee makes no further comment.

Mr Josh Burns MP

Chair