

Submission to the Select Committee on Social Media and Online Safety

28 February 2022

By web form

Dear Secretary,

EFA welcomes the opportunity to comment on the draft Social Media (Anti-Trolling) Bill 2022.

EFA's submission is contained in the following pages.

About EFA

Established in January 1994, EFA is a national, membership-based, not-for-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context.

EFA members and supporters come from all parts of Australia and from diverse backgrounds. Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political, and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Paul Ruberry

Board Member
Electronic Frontiers Australia

Introduction

The “Anti-trolling” bill will do nothing to stop abuse, and a great deal to allow powerful individuals to bully those who attempt to criticise them.

Australia’s defamation laws are already malfunctioning, allowing powerful individuals to bully those who raise concerns about corruption¹, foreign interference², election security risks³, covid misinformation⁴, and sexual assault.⁵ (Note that we are not alleging that any of these accusations were true.) The “anti-trolling” bill will allow anyone who *claims to be* defamed by someone else to apply for a court order to extract the commenter’s “contact details” and “country location information,” neither of which is well-defined, and either of which could include highly personal information including home address.

Instituting defamation action is costly, and available in practice to only a powerful and well-funded few. The “Anti-trolling” bill will further increase the opportunity for the already-powerful to threaten those who criticise them, and provide a mechanism for extracting personal information that could, in turn, be used to apply further pressure.

Why the draft law will not work

Much of the public discussion of the draft bill has centred around online trolling and bullying. The draft bill itself even claims in its title to be an “anti-trolling” law. It is not. The draft bill is an amendment to existing defamation law and it makes no substantive changes beyond that.

The draft law would do the following:

- Protect certain parties from being found liable as publishers of defamatory material.
- Create a framework for unmasking anonymous users who make defamatory comments on social media.

Defamation law is the wrong tool to use to combat trolling and the draft law therefore cannot succeed as an anti-trolling or anti-abuse law.

1. Most online abuse is not defamation and is therefore not covered by the law.
2. A large volume of online abuse is not anonymous⁶ and therefore the disclosure provisions are unnecessary.

¹ Leonie Lamont, ‘Obeid Awarded \$162,000 for Defamation’, *The Sydney Morning Herald* (13 October 2006) <<https://www.smh.com.au/national/obeid-awarded-162-000-for-defamation-20061013-gdol7g.html>>.

² ‘Businessman Chau Chak Wing Wins Defamation Case against ABC’, *ABC News* (online, 1 February 2021) <<https://www.abc.net.au/news/2021-02-02/chau-chak-wing-wins-defamation-case-against-abc/13111934>>.

³ ‘Konnech Australia - Announcements’ <<https://www.konnech.com.au/Announcements.html>>.

⁴ ‘Clive Palmer Suing WA Premier for “Injury to His Feelings”, Court Documents Reveal’, *ABC News* (online, 1 September 2020) <<https://www.abc.net.au/news/2020-09-01/clive-palmer-defamation-claim-says-mark-mcgowan-brought-ridicule/12616826>>.

⁵ *Porter v Australian Broadcasting Corporation (No 2)* [2021] Federal Court of Australia 1036.

⁶ ‘Are Anonymous Accounts Responsible for Most Online Abuse?’, *New Statesman* (21 October 2021) <<https://www.newstatesman.com/social-media/2021/10/are-anonymous-accounts-responsible-for-most-online-abuse>>

3. Most Australians cannot afford to bring defamation actions⁷ and certainly cannot afford to bring a defamation action and lose. And not even a win guarantees that the defamed party will not be left out of pocket.

In short, the draft law probably won't apply to the scenarios that ordinary Australians consider trolling, nor to other forms of online abuse, and even in the cases where the law would apply, most Australians would never consider availing themselves of it.

On the other hand, the law will make it cheaper and easier for powerful elites to harass their critics into silence.

Trolling, bullying and defamation are different

When Australians think of online 'trolling', they tend to think of abuse, harassment and name-calling. As a general rule, these behaviours do not cross the line into actionable defamation. Specifically, the following objectionable behaviours which people commonly regard as trolling will not be covered by this 'anti-trolling' law.

- General bullying and abuse
- Doxxing
- Racist or sexist attacks
- Personal attacks by politicians and journalists who have been trained to step right up to the line of defamation without crossing it.

On the other hand, members of the public who lack the legal support and training enjoyed by the powerful few will be placed even more at risk by this proposal, should they dare to make a poorly phrased comment about their betters.

Bringing a defamation action can be ruinously expensive

Defamation is a tool for prominent figures to defend their reputations, and not a tool for average Australians to protect themselves against online trolling. There are good reasons that parents do not typically sue their children's bullies under defamation law.

The cost of bringing a defamation action in Australia is between \$20,000 and \$800,000⁸. It is prohibitively expensive for most Australians, and the amount recovered is unlikely to justify the costs and risks of litigation. And if the defendant cannot pay, or if full costs are not awarded⁹, then despite winning, a successful plaintiff may still end up out of pocket.

And if they lose, they could end up paying their tormentor's legal costs as well as their own. Even wealthy and prominent Australians have famously found the cost of bringing defamation actions to be unaffordable

⁷ "It's a couple hundred grand to go to court and, you know, it's a big distraction. I think it is clearly defamatory but..." - Peter Dutton, <https://www.smh.com.au/politics/federal/our-hard-ball-next-pm-peter-dutton-signed-up-to-play-tackle-not-touch-20220211-p59vsh.html>

⁸ <https://www.thelawproject.com.au/defamation-law-in-australia>

⁹

<https://www.theguardian.com/australia-news/2021/dec/08/peter-dutton-wont-receive-full-legal-costs-as-defamation-case-could-have-been-fought-in-lower-court>

without the generous assistance of their anonymous supporters. What hope do average Australians have of being able to afford taking such an action?

Defending a defamation action can be ruinously expensive

Most Australians cannot afford to defend themselves against a defamation action. The threat of legal action by a litigious public figure with deep pockets is likely to result in rapid and complete surrender regardless of merits. The effect of the draft bill would be to encourage this sort of aggressive legal action by making it faster and cheaper, and impose a chilling effect on online speech as people self-censor in response to legal intimidation.

Anonymity is important

All Australians should have the democratic right to fully participate in public discourse. Some people, because of their jobs or other circumstances, cannot speak freely under their own name. This applies both to people who offend powerful Australians, and also to people who speak critically, from Australia, about powerful individuals in other countries. The very people anonymous users most fear discovering their identity are exactly the people most likely to try to use the powers under the draft to unmask their anonymous critics. Even if the complaint is subsequently found to be meritless, the consequences of being unmasked could be potentially career-ending or similarly catastrophic.

Location information is unreliable

Many people use Virtual Private Networks (VPNs), which obscure their exact location on the Internet. This may be for entirely legitimate security and privacy reasons, such as accessing work documents while travelling, or obscuring location from advertisers. It could also be adopted deliberately to avoid the provisions of this law. The unreliability of location information has two consequences:

1. a person's contact details and country location information could be mistakenly conveyed when the person is not, in fact, in Australia, or was not in Australia at the time the offending post was made, or
2. a person who wishes to make defamatory remarks could simply install a VPN, choose an exit point outside Australia, and make themselves appear to be outside Australia when the defamatory remarks were made.

The information that can be sought is broad and subject to expansion

The details to be disclosed are broad and subject to subsequent expansion.

relevant contact details of a person means:

(a) either:

(i) the name of the person; or

(ii) the name by which the person is usually known; and

(b) an email address that can be used to contact the person; and

(c) a phone number that can be used to contact the person; and

- (d) such other details (if any) as are specified in the legislative rules.

This clearly leaves open the possibility of including more detailed location data without coming back to the Parliament. Social media companies already horde substantial amounts of user data. The government should be reigning in this behaviour instead of forcing social media companies to increase the scope of collected data through legislation and subsequent executive action.

Divulging information may jeopardise a person's safety

In an effort to assuage concerns about retaliation by the complainant against the commenter, the Bill includes an option for the court to take the commenter's safety into account:

- (3) The court may refuse to make an order under this section requiring the disclosure of the commenter's relevant contact details or country location data if the court is satisfied that the disclosure of the relevant contact details or country location data, as the case may be, is likely to present a risk to the commenter's safety.

However, there is no requirement that the court give the commenter an opportunity to explain why their safety may be threatened. It possibly makes sense, in this circumstance, for the *court* to access the commenter's contact details. For example, this could give the commenter the opportunity to explain to the court why exposing their "contact information" and "country location" information could put them at risk. Otherwise, it is hard to see how the court could make an informed decision on this point.

Given the ambiguities around what information may be divulged, and the opportunity for frivolous defamation lawsuits for the purpose of extracting this information, the court's difficulty in judging likely harms could result in serious abuses.

Conclusion

Rather than addressing online abuse, the proposed 'anti-trolling' bill will instead provide additional power to the already privileged to harass their critics into silence. It appears to be a cynical attempt to use genuine and warranted community concerns about online abuse to improve the private circumstances of a privileged few.

The bill is poorly drafted, overbroad in scope, and proceeds from an inherently flawed premise. It should be completely rejected. Parliament's time would be more constructively spent engaging in good faith with those genuinely affected by abuse, both online and offline, and seeking remedies that help the powerless instead of the powerful.