

# All Eyes on the Anti-Trolling Bill, But What About the Online Safety Act?

**David Kim**, Banki Haddock Fiora, comments on why the eSafety Commissioner's expanded remit is on a collision course with the world of defamation.

## Introduction

The last few months have seen a flurry of activity around the *Social Media (Anti-Trolling) Bill 2022* (Cth) (**Bill**), which was accepted in all quarters as being in fact an attempt, at the federal level, to make sweeping changes to defamation law, specifically as it applies to material posted to social media platforms. The Bill lapsed upon Parliament being prorogued on 11 April 2022, but not before it was thoroughly excoriated by an ensemble of defamation practitioners and experts, a judge, and various other stakeholders. With the recent change in government, it is likely that the Bill will not be passed without substantial amendments, if it is passed at all.<sup>1</sup>

## The Online Safety Act

The excitement and consternation around the Bill have overshadowed another piece of federal legislation with ramifications for the world of defamation, namely the *Online Safety Act 2021* (Cth) (**OSA**). The OSA overhauls and replaces, in its entirety, the *Enhancing Online Safety for Children Act 2015* (Cth) (**EOSCA**), and significantly expands the powers and responsibilities of the eSafety Commissioner. Previously, under the EOSCA, the eSafety Commissioner's role was focused on the investigation and regulation of "cyber-bullying material targeted at an Australian child". That remit has now been expanded to include the investigation and regulation of "cyber-abuse material targeted at an Australian adult".

The OSA provides that if the eSafety Commissioner is satisfied that material is "cyber-bullying material targeted at an Australian child" or "cyber-abuse material targeted

at an Australian adult" it may issue a removal notice to a social media service provider, a designated internet service provider, the provider of a relevant electronic service, a hosting services provider or (in the case of cyber-abuse material) an end-user.<sup>2</sup> Removal notices issued by the eSafety Commissioner must be complied with within 24 hours, with non-compliant persons being liable to civil penalties, formal warnings and being named by the eSafety Commissioner in public statements.<sup>3</sup> A complainant may apply to have the Administrative Appeals Tribunal review a decision to refuse to issue a removal notice,<sup>4</sup> and, conversely, a relevant provider or an end-user who posted the alleged problematic material may apply to have the Administrative Appeals Tribunal review a decision to issue a removal notice.<sup>5</sup>

## An overlap with defamation law?

On their face, the concepts of "cyber-abuse material targeted at an Australian adult" and "cyber-bullying material targeted at an Australian child" seem expansive enough to encompass at least some kinds of online defamation. Already, it has been suggested that the OSA can and should be used to rapidly remove online defamatory material.<sup>6</sup> The current eSafety Commissioner, Julie Inman Grant, however, has advocated for the contrary view that the eSafety Commissioner's powers should not be understood as extending to matters that fall within the sphere of defamation law.<sup>7</sup> In evidence given to the Senate Standing Committee for Legal and Constitutional Affairs (**LACA**), the eSafety Commissioner explained that Parliament had dealt with the overlap issue by building into the definitions of cyber-abuse material a threshold that screens out defamatory material.<sup>8</sup>

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- 1 Senate Standing Committee for Legal and Constitutional Affairs, Parliament of Australia, *Social Media (Anti-Trolling) Bill 2000 [Provisions]* (Report, March 2022) 65-6 [1.65]-[1.66].
  - 2 *Online Safety Act 2021* (Cth) ss 65-6 and 88-90.
  - 3 *Online Safety Act 2021* (Cth) ss 67-8, 71-3 and 91-3.
  - 4 *Online Safety Act 2021* (Cth) s 220(4)-(5).
  - 5 *Online Safety Act 2021* (Cth) s 220(2)-(3).
  - 6 Meta, Submission No 7 to the Senate Standing Committee for Legal and Constitutional Affairs, *Social Media (Anti-Trolling) Bill 2000 [Provisions]* 10.
  - 7 Evidence to the Senate Standing Committee for Legal and Constitutional Affairs, Parliament of Australia, Canberra, 10 March 2022, 12-5 (Ms Julie Inman Grant, eSafety Commissioner).
  - 8 Ibid 19. It is unclear what the Office of the eSafety Commissioner's current position is. In LACA's examination of the eSafety Commissioner on 10 March 2022, the eSafety Commissioner indicated that 33 percent of the cyber-abuse material complaints received by her office "concern potentially defamatory material and therefore do not meet the threshold for serious adult cyberabuse under our scheme". On the other hand, Mr Toby Dagg, an Executive Manager at the Office of the eSafety Commissioner, acknowledged that "there may be some matters that reach the threshold of adult cyberabuse that could also be considered potentially defamatory, but we are dealing with that as adult cyberabuse, not as defamation, through the act". Also, the website of the Office of the eSafety Commissioner has a page that discusses the differences between serious online abuse and defamation and notes that the threshold for cyber abuse material is high, but acknowledges that "in some cases material posted which might be defamatory could ALSO meet the threshold of adult cyber abuse... this means an Australian could come to eSafety to have content removed, and or also elect to take defamatory action": <https://www.esafety.gov.au/newsroom/blogs/difference-between-serious-online-abuse-and-defamation>.

## A matter of definitions

Section 6 of the OSA essentially provides that material will be “cyber-bullying material targeted at an Australian child” if an ordinary reasonable person:

- a) would conclude that the material was intended to have an effect on a particular Australian child; and
- b) would be likely to have the effect on the Australian child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child.<sup>9</sup>

Section 6 screens out some but not all kinds of defamatory material. Section 6 screens out defamatory material that is not intended to have an effect on a particular Australian child, and defamatory material which is unlikely to have certain effects on an Australian child. It is, however, possible to conceive of defamatory material that would come within the ambit of section 6.

The definition of “cyber-abuse material targeted at an Australian adult” is set out in section 7 of the OSA and is comprised of four separate integers (each a necessary integer). The two integers that are most relevant for present purposes are as follows:

An ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult (s 7(1)(b)); and

An ordinary reasonable person in the position of the Australian adult would regard the material as being, in all the circumstances, menacing, harassing or offensive (s 7(1)(c)).

The first of the above integers focusses on the likely intention of the material. It also builds on the concept of “serious harm”, a term that is defined in section 5 of the OSA as “serious physical harm or serious harm to a person’s mental health, whether temporary or permanent”. The term “serious harm to a person’s mental health” is, in turn, defined as “including (a) serious psychological harm; and (b) serious distress; **but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger**”.

It is unclear whether the reference to a threshold by the eSafety Commissioner in her evidence to LACA is a reference to the bolded words above, or to the combined effect of the two ordinary reasonable person integers. However, in either case, and with respect to eSafety Commissioner, it does not appear to be the case that the definition of either cyber abuse material contains a threshold that

effectively excludes all defamatory material. It is possible for defamatory material to be intended to have an effect of causing serious distress (and, for that matter, serious psychological harm), and, at the same time, menacing, harassing or offensive.<sup>10</sup>

In the case of an Australian adult, what is screened out by the definition of cyber-abuse material is defamatory material that was not intended or likely intended to cause serious physical harm or harm to a person’s mental health. It follows that defamatory material that only causes reputational damage or only causes reputational damage and economic loss would appear to be screened out.

Cyber abuse material also does not include defamatory material that is intended or likely intended to cause mere ordinary emotional reactions and nothing more.

Finally, the definition of cyber-abuse material also screens out defamatory material that is not menacing, harassing or offensive.

The definitions in the OSA do not, in their terms, exclude defamatory material from the regulatory framework administered by the eSafety Commissioner. The better view is that there is a partial overlap between material regulated by the OSA and material actionable under defamation law.<sup>11</sup>

## Takedown fast track

This overlap is potentially significant.

At present, apart from the OSA, there is no quick or simple method for achieving the removal of online defamatory material. Interlocutory injunctions to restrain defamations are rarely granted, and there is anecdotal evidence to suggest that social media services providers are reluctant to take down material posted on their platforms in the absence of a vindicatory court judgment.

A complaint to the eSafety Commissioner may however achieve a takedown result in a matter of days, and may obviate the need to commence defamation proceedings entirely. The eSafety Commissioner may also use their powers to issue removal notices to various persons along the “publication chain”, avoiding the problems associated with enforcing injunctions against entities based outside Australia.

Moreover, approaching the eSafety Commissioner is a particularly attractive option if a person targeted by defamatory material is more concerned with securing the prompt take down of that material than with achieving vindication, receiving an apology or obtaining monetary compensation.

<sup>9</sup> *Online Safety Act 2021* (Cth) s 6.

<sup>10</sup> Whether material is “offensive” is to be determined by having regard to matters set out in s 8 of the *Online Safety Act 2021* (Cth).

<sup>11</sup> The explanatory memorandum to the *Online Services Bill 2021* (Cth) notes (on page 70) that the definition of “cyber-abuse material targeted at an Australian adult” “is not intended to capture ‘reputational harm’ caused by defamatory material” but acknowledges that “defamatory material may be determined to be ‘cyber-abuse material targeted at an Australian adult’ where an intent to cause serious mental or physical harm to a person can be established”.

<sup>12</sup> *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32; *Sullivan v Moody* (2001) 207 CLR 562; *Tame v New South Wales* (2002) 211 CLR 317.

That said, the usefulness of the removal notice regime set out in the OSA is likely to be limited to so-called “backyarder disputes”, particularly those that involve a level of harassment or an ongoing campaign intended to cause serious distress or psychological or physical harm. The removal notice is unlikely to be an appropriate vehicle to seek, for example, takedowns in respect of online news articles. This is because it will generally be difficult to satisfy the eSafety Commissioner that the ordinary reasonable person would conclude that such material had the requisite intention or (in the case of an Australian adult) the requisite likely intention.

### Possible teething problems

The overlap also poses more questions than answers. Two questions in particular come to mind.

First, there is a line of authority that states (or arguably states) that the appropriate cause of action for reputational damage is defamation, and that the defences developed over time in defamation cannot be sidestepped by using another cause of action as a vehicle to obtain remedies in respect of reputational damage.<sup>12</sup> Is that line of authority a basis for actionable defamatory material being excluded from the operation of the OSA? The tentative view of the author is that it does not, as there are points of distinction here that make any application of that line of authority doubtful. For example, standing to lodge a complaint with the eSafety Commissioner is not equivalent to a cause of action, and the eSafety Commissioner exercising its discretion to issue a person with a removal notice is not really a remedy either. Moreover, the OSA does not create liability for publication on the part of a person publishing cyber-abuse or cyber-bullying material. Finally, and perhaps most importantly, the regulatory framework administered by the eSafety Commissioner is a statutory one and the legislature is not inhibited from enacting a regulatory framework that overlaps with defamation law.<sup>13</sup>

The second question is whether the eSafety Commissioner can or should, in issuing removal notices, have regard to the principles governing the granting of interlocutory injunctions in defamation cases. Various cases suggest that those principles cannot be circumvented by a litigant bringing what is in effect a defamation action in the guise of some other cause of action.<sup>14</sup> However, again, there are points of distinction here that make the application of those principles uncertain. If those principles are applied to the removal notice regime set out in the OSA, they will generally require the eSafety Commissioner to be satisfied of the falsity of imputations conveyed by cyber-bullying or cyber-abuse material, and the eSafety Commissioner has already indicated that her office does not have the resources to undertake such a fact-finding exercise.<sup>15</sup>

### Conclusion

Whether by default or by design, the OSA has potentially significant implications for defamation practice. The OSA does not reform defamation law but it does create an expedited route to achieving take down outcomes in respect of at least some kinds of defamatory material. The OSA also raises the spectre of defamatory material being taken down without regard to whether the publisher is able to justify the imputations conveyed by that material, or rely successfully on any of the other defences enshrined in defamation law. It remains to be seen to what extent, if any, established defamation law principles can and will guide the eSafety Commissioner’s exercise of her extensive powers under the OSA.

<sup>13</sup> *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82; *TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd* (2002) 71 NSWLR 323.

<sup>14</sup> *Service Corp International plc v Channel Four Television Corp* [1999] EMLR 83; *Swimsure (Laboratories) Pty Ltd v McDonald* [1979] 2 NSWLR 796; *Church of Scientology of California Inc v Reader’s Digest Services Pty Ltd* [1980] 1 NSWLR 344.

<sup>15</sup> Evidence to the Senate Standing Committee for Legal and Constitutional Affairs, Parliament of Australia, Canberra, 10 March 2022, 19 (Ms Julie Inman Grant, eSafety Commissioner).

## Contributions & Comments

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