THE UNIVERSITY OF WESTERN AUSTRALIA

26 February 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By Email: legcon.sen@aph.gov.au

Dear Committee Secretary

Submission on the Social Media (Anti-Trolling) Bill 2022 [Provisions]

Thank you for the invitation to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) inquiry into the Social Media (Anti-Trolling) Bill 2022 [Provisions] (**Bill**).

The Bill considered by the Committee is substantially in the same form as the exposure draft that was considered by the House of Representatives Select Committee on Social Media and Online Safety, and the Commonwealth Attorney-General's Department's parallel consultation.

I made detailed submissions to those previous inquiries; I **attach** my submission of 22 January 2022 (**Previous Submission**).

Summary of my position

I oppose the Bill for the reasons given in my Previous Submission, as well as the following Additional Reasons.

Additional reasons for my position

First, the reasons offered for the necessity of this legislation are flawed. In his second reading speech of 10 February 2022, Minister Fletcher said the following:

> *"Following Voller, it is clear that Australians who maintain an ordinary social media page could be liable for defamatory material posted by someone else—even if they do not know about the material."*

That is not correct. The Minister has conflated *publication* of defamation with *liability* for defamation. Publication does not entail liability. A person who publishes defamation may avoid liability via the innocent dissemination defence that has been a part of Australian law for more than 15 years; see, for example, *Defamation Act 2005* (NSW) s 32(1):

> *(1) It is a defence to the publication of defamatory matter if the defendant proves that--*
>
> > *(a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and*

(b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and

(c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

It is notable that the High Court in *Voller* did not consider the operation of this defence. The impact of this decision has been overstated by those unfamiliar with defamation law.

Second, the Bill is held out as directed to somehow preventing, or responding to, online harm. This is also incorrect. To the contrary: if enacted, this law would lead to more online harm for ordinary Australians. It would mean that those with the power to moderate comments—owners of social media pages, including those at major news organisations that derive significant revenue from engagement with social media—no longer have any incentive to moderate and remove harmful content. Even accepting the Government's stated policy objectives, this Bill would actually undermine those objectives. This Bill has nothing to do with either 'trolling' or keeping people safe online.

Third, the policy of this Bill is incoherent. Why should the likes of News Corp be immunised from defamation which they publish, while other institutions—like libraries or even universities—lack no such protection? The cynical response is that the former has been better at lobbying for legislative change.

Fourth, the vast majority of experts on the subject matter of this Bill oppose it. It is almost impressive that a Bill with such universal condemnation has made it all of the way to the Senate. If the Government is not interested in hearing expert views on why this law is terrible, why ask us in the first place?

This Bill is terrible and belongs in the bin.

Yours faithfully

Michael Douglas*
Senior Lecturer
UWA Law School

*****Michael Douglas is a Senior Lecturer at the University of Western Australia, where he teaches and researches media law (including defamation law and privacy law), and private international law, among other things. His views on media law have been quoted by courts and law reform bodies in Australia and overseas and are featured regularly in popular media, including television (eg Channel 10 news, ABC Media Watch), print (eg *The Australian*) and online (eg *The New York Times*). He is a Consultant at Bennett + Co, a litigation firm with a specialisation in defamation and media law. Views are his own.

THE UNIVERSITY OF WESTERN AUSTRALIA

21 January 2022

Defamation Task Force
Attorney-General's Department
Australian Government
By Email: Defamation@ag.gov.au

Select Committee on Social Media and Online Safety
House of Representatives
By Email: smos.reps@aph.gov.au

To Whom It May Concern

Submission on the Exposure Draft of the Social Media (Anti-Trolling) Bill

I write to make a submission with respect to the Exposure Draft of the Social Media (Anti-Trolling) Bill (**Draft Bill**). This submission is in addition to my previous submissions to the Select Committee on Social Media and Online Safety, and submissions to the Commonwealth Attorney-General's Department on related issues: submissions on the Issues Paper and the Discussion Paper of the Privacy Act Review, and the Online Privacy Bill Exposure Draft.

Summary

Generally speaking, I oppose the Draft Bill. In particular, I oppose the wholesale removal of the effect of the High Court's judgment in *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767 (***Voller***).[1]

The Draft Bill will be of great benefit to some. It will benefit commercial media companies that wield considerable power within the Australian political system, like those comprising the News Corp empire. It will also benefit those transnational corporate groups—including multi-billion-dollar companies in the United States—behind online platforms like Facebook.

The Draft Bill will do very little for the vast majority of ordinary working Australians other than to diminish their rights. It will do nothing to better protect children online.

There are certain aspects of the Draft Bill that advance policies I do support; I support those policies but not the way the Draft Bill has sought to achieve them.

The policy issues on which I believe defamation law reform is warranted include improved low-cost alternative dispute resolution for smaller claims; and compelling internet intermediaries, including entities behind social media platforms, to remove defamatory content from their platforms.

Unfortunately, the Draft Bill is flawed to such an extent that it ought to be abandoned.

If the Government is serious about reforming defamation law, it ought to make a broad referral to the Australian Law Reform Commission, committing to a rigorous, expert-led process that consults with a broad range of stakeholders—not just commercial media companies. I make further suggestions below.

[1] Draft Bill clause 14(1).

Submissions on discrete issues

The remainder of this submission is structured as follows.

1. The misrepresentation of the Draft Bill as being about 'trolling' or 'safety'

My written submission to the Select Committee explained the difference between 'trolling', 'defamation', and other online harms.[2]

The Draft Bill is not about trolling at all. It is about defamation law, and thus addresses only a narrow band of online harms comprising serious[3] damage to reputation.

Contrary to rhetoric from the Government, the Draft Bill would do little to address online harm, including reputational harm suffered by Australians online. To the contrary, it would remove the ability of those who suffer reputational harm online to obtain meaningful remedies in important circumstances.

2. The impact of the Draft Bill on *Voller*

Part 2 of the Draft Bill would undermine the effect of the High Court's recent judgment in the Dylan Voller case (***Voller***), which affirmed a mechanism for holding certain persons (including media companies) responsible for reputational harm they cause through social media.[4] The unravelling of *Voller* is really the centrepiece of the Draft Bill, despite language that has focused on 'trolling' and 'online safety'.

To understand why this unravelling is not desirable, one should consider *Voller* and its effect.

2.1 What the High Court decided in *Voller*

The effect of *Voller* has been misunderstood by some. In my view, it did not change the law of Australia.[5] The majority simply confirmed a proposition that has been a part of our common law for at least a century:[6] any 'person who has been instrumental in, or contributes to any extent to, the publication of defamatory matter is a publisher. All that is required is a voluntary act of participation in its communication'.[7]

The decision came as a surprise to some members of the Australian media, although it should not have been so. As the High Court recently explained, the law as to publication of defamation is 'tolerably clear. It is the application of it to the particular facts of the case which tends to be difficult'.[8]

The particular facts of the *Voller* case included the fact that media companies shared their stories about Mr Voller on their public Facebook pages in order to drive 'engagement'—such as likes, comments and shares—which in turn supported their business models. Driven by profit, media companies have historically sought engagement of third parties (ie, the public at large) with their socials, irrespective of the quality of discourse represented by that engagement. 'Spicy' content is good for engagement. Readers familiar with the comments sections of Facebook pages of News Corp media brands would know that impolite and indeed defamatory commentary is not unexpected. Two of the unsuccessful media appellants—Nationwide News Pty Ltd (behind *The Australian*) and Australian News Channel Pty Ltd (behind *Sky News*)—were and remain a part of that global media empire.

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[2] Written submission of 12 January 2022.
[3] See *Defamation Act 2005* (NSW) s 10A; *Thornton v Telegraph Media Group* [2011] 1 WLR 1985; *Kostov v Nationwide News Pty Ltd* (2018) 97 NSWLR 1073.
[4] *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767.
[5] See generally Michael Douglas, 'Suing Google, Facebook or Twitter for Defamation' (2021) 40(2) *Communications Law Bulletin* 53; Michael Douglas and Martin Bennett, '"Publication" of Defamation in the Digital Era' (2020) 47(7) *Brief* 6.
[6] See *Webb v Bloch* (1928) 41 CLR 331.
[7] *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767, [32] (Kiefel CJ, Keane and Gleeson JJ).
[8] *Trkulja v Google LLC* (2018) 263 CLR 149, [39].

Defamatory comments made in response to Facebook posts by these companies are to be expected. What the majority confirmed in *Voller* was that these companies could not turn a blind eye to the harm they were causing by seeking public engagement, then failing to moderate.

The majority reasons in *Voller* signal to media companies that they can no longer ignore the defamatory externalities of their social media-driven business models. As Gageler and Gordon JJ opined, '[h]aving taken action to secure the commercial benefit of the Facebook functionality, the appellants bear the legal consequences'.[9]

2.2 What the High Court did not decide in *Voller*

The High Court's decision considered whether the media companies were publishers of comments made by third parties on the companies' public social media pages. But 'publication' is not enough for a person to be liable in defamation; it is just one element of the cause of action.

Just because these companies failed in the High Court does not necessarily mean they will have to pay Mr Voller damages—although they might. The companies may yet enjoy the benefit of defences, like the innocent dissemination defence that already exists in statute:[10]

> *(1) It is a defence to the publication of defamatory matter if the defendant proves that--*
>
> *(a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and*
>
> *(b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and*
>
> *(c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.*

This defence will protect many people from being liable for comments made by third parties in response to content posted on social media.

The scope of the *ratio decidendi* in *Voller* is also debatable. It will affect commercial media companies, hence the reaction of CNN in relation to its Facebook page.[11] It might affect others who seek social media engagement to make profit—like review websites (eg, Zomato),[12] certain small businesses, and perhaps even social media influencers.[13]

Whether it will make every person who facilitates online communication 'publisher' is an open question. For example, the judgment may or may not mean that a moderator of a subreddit, who moderates for no compensation as a hobby, 'publishes' content authored by other redditors that appears in the subreddit. The commercial motive underlying the decision to seek engagement was part of the reason why Gageler and Gordon JJ held that the media companies were publishers of third-party comments;[14] not-for-profit forum administrators are arguably distinguishable.

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[9] *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767, [102].
[10] See *Defamation Act 2005* (NSW) s 32(1).
[11] See <https://www.smh.com.au/business/companies/cnn-disables-facebook-pages-in-australia-after-voller-decision-20210929-p58vq2.html>.
[12] In this respect nothing has changed; see, eg *KT v Google LLC* [2019] NSWSC 1015.
[13] See discussion in *Law Report with Damien Carrick*, 'Media impact of High Court defamation ruling, and NT youth bail laws' <abc.net.au/radionational/programs/lawreport/voller-defamation-and-nt-youth-bail-laws/13540770>.
[14] *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767, [100]–[102].

2.3 The societal impact of *Voller*

Still, I accept that *Voller* may have a chilling effect on freedom of speech by making hosts of online fora believe they could be liable for defamatory matter authored by third parties, and by making media lawyers advise their plaintiff clients as to possibility of suing forum hosts and moderators as 'publishers' of defamation authored by others.[15]

Voller should also impact the behaviour of media companies and journalists by making them conscious of the defamation risk of failing to moderate their social media pages. In my view, that is a good thing. Some media companies have historically turned a blind eye to the impact of their comments sections on certain individuals; *Voller* may persuade them to be more responsible. It is in the public interest that media companies employ capable people to properly moderate their social media engagement.

This could mean that Australians lose the ability to comment on certain news stories published by certain media companies on their preferred social media platform, after companies either disable comments functionality or moderate a comment into oblivion. This is not an inherently bad thing. Individual social media users can still vent their opinions on their own pages and to people they know.

'Freedom of speech' is not synonymous with 'freedom to spout harmful nonsense in the comments section of *The Australian's* Facebook page'. The policy of Australian law has never been the same as that of the First Amendment of the United States, and that is a good thing.

3. Commercial media companies should continue to be treated as 'publishers' of third party comments on social media

If the Government wants to reduce online harms inflicted on Australians, then it should incentivise those with the power to moderate social media comments to do a better job. This Draft Bill would do the opposite as regards Australia's media companies behind the likes of *The Australian*, *Sky News* and *The Sydney Morning Herald*. It would remove any incentive for them to moderate; or for executives in those companies to implement systems that invest human resources in moderation.

I thus oppose clause 14(1) of the Draft Bill as regards commercial media entities.

4. The position of other businesses and not-for-profit pages

Certain other businesses might be distinguishable. Consider, for example, a family-owned coffee shop. If the company[16] behind the shop has few employees and relatively little turnover, investing into consistent social media moderation may be a disproportionate imposition. The same might be said for an 'influencer' that derives some freebie products via advertising on Instagram or TikTok, but does not make a great deal of money.

Consider also the example of the Reddit moderator, considered above, who is in a somewhat similar position to the admin of a community Facebook group. People take on these roles for all sorts of reasons (eg, as a hobby; or due to a need for validation from strangers on the internet). The law should encourage these people to moderate responsibly. Clause 14 of the Draft Bill would do the opposite by providing them with effective immunity from defamation liability.

[15] See, eg, *Goldberg v Voigt* [2020] NSWDC 174; <https://www.theguardian.com/technology/2019/nov/22/sydney-facebook-group-shut-down-defamation-threats-rose-bay>.
[16] Acknowledging there are various ways to structure a small business.

Professor David Rolph has explained as follows in a recent article that considers the impact of this specific proposal; I agree with his comments:

> *The effect of this bill, if implemented, would be that any administrator of a social media page has complete immunity from defamation, whether or not they have actual notice of defamatory comments by third parties and irrespective of whether they have the capacity to remove those comments. The bill alleviates administrators of social media pages from any obligations to monitor content on their social media pages. It goes further than Australian defamation law has otherwise gone in relation to any other form of publisher. For instance, lending libraries and newsagencies are still presumptively publishers, who need to rely upon the defence of innocent dissemination to avoid liability. Australian defamation law has not deemed such entities not to be publishers for the purposes of defamation law. Yet administrators of social media pages – from mainstream media outlets to private individuals – would be deemed not to be publishers. The approach to publication in the bill does not seem particularly principled or coherent…*[17]

In my view, the innocent dissemination defence will do a good enough job to stop most small businesses and not-for-profit moderators from being liable in defamation for content authored by others. The new serious harm threshold means that fewer cases should be brought against Facebook page administrators (for example) over trivial things written by third parties.[18]

Considered in light of protections for 'publishers' that are already a part of Australian defamation law, like the serious harm threshold and a mandatory concerns notice process,[19] the effect of *Voller* is not as deleterious for freedom of expression as it may appear.

5. Providers of social media services as 'publishers'

While undermining the effect of *Voller* as regards 'page owners', clause 14 purports to treat providers of social media services as 'publishers', in clauses 14(1)(d) and 14(2), in cases where the relevant comment was made in Australia.

These clauses are unnecessary. Providers would already be publishers of comments on their platforms at general law.[20] They would be so irrespective of whether the comment was made in Australia or otherwise.

The clauses' reference to 'where the comment was made' runs contrary to choice-of-law principles affirmed by the High Court and also reflected in Australian statutes. At general law, a comment made (eg, composed) in one jurisdiction then read in another is 'published' in the second jurisdiction. Ordinarily, the law of that second jurisdiction will supply the applicable (substantive) defamation law in accordance with the *lex loci delicti* rule.[21] But where the comment is read in more than one Australian jurisdiction, the defamation law of the Australian jurisdiction to the closest connection to the harm occasioned by the comment will apply.[22]

If this Draft Bill purports to be about keeping Australians safe online, then clauses 14(1)(d) and 14(2) are futile. Social media providers are already publishers of third party comments. The clauses

[17] David Rolph, 'Liability for third party comments on social media pages' [2022] *Journal of Media Law* 1, 12–3.
[18] See, eg, *Defamation Act 2005* (NSW) s 10A(1).
[19] See, eg, *Defamation Act 2005* (NSW) pt 3 div 1.
[20] Apply *Fairfax Media Publications Pty Ltd v Voller* (2021) 95 ALJR 767; *Webb v Bloch* (1928) 41 CLR 331; but see *Tamiz v Google Inc* [2013] 1 WLR 2151 (publication occurred upon the provider being informed; runs contrary to *Voller*); see also *Murray v Wishart* [2014] 3 NZLR 72, [117].
[21] *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.
[22] See, eg, *Defamation Act 2005* (NSW) s 11.

undermine the rights of Australians to sue the provider of a social media platform where a comment is composed overseas then consumed, and so published, in Australia.

Clauses 14(1) and (2) ought to be deleted.

6. The new defence for providers of social media services is a bad idea

The provision of the new defence for providers of social media services in clause 15 is unnecessary. Legislation could mandate that providers have a complaints scheme even if the provider did not enjoy any defence. Why simply 'incentivise' providers to do the right thing, when you could compel them to do the right thing?[23]

The defence is also undesirable, in that it removes one of the more effective avenues for Australians to protect themselves from harm caused by social media.

In my experience, persons who have their reputations harmed on social media generally just want the content removed ASAP. They rarely sue to make money; the costs of decent lawyers taking a matter through to judgment will exceed most damages awards. This is especially the case where a defendant does not suffer identifiable economic harm, given that statutes cap the availability of general damages.[24]

The motivation of victims who suffer reputational harm via social media is rational. The longer the comment remains online, the greater its propensity to spread via 'the grapevine', which can result in substantial magnification to the reputational harm caused by the defamatory matter[25]. The spread of the 'sting' may also be accompanied by greater economic harm to the victim, as well as greater distress. The spread of defamatory stings via social media will then sound in greater awards of damages after a defamation trial.[26]

Going after the provider of the social media service as 'publisher' of a defamatory comment authored by another social media user can be a cost effective way to have the content removed without a trial. Faced with a writ (or originating application), the social media provider may be motivated to remove the comment. At that point, many plaintiffs may cease to litigate altogether as the harm to their reputation has been minimised, and the costs of litigating may outweigh and further damages award.

The new defence thus undermines a fundamental object of Australia's Defamation Acts: 'to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter'.[27]

The desirability of the defence is undermined further by the fact that the primary beneficiaries of the defence are foreign companies that pay little or no tax in Australia, despite earning significant revenue from Australian consumers. At the very least, these entities ought to be held accountable for the reputational harm they facilitate via their business models.

This defence would undermine one of the key objects of the Select Committee on Social Media and Online Safety: to investigate 'the transparency **and accountability** required of social media platforms and online technology companies regarding online harms experienced by their Australians users' (emphasis added).[28]

[23] Cf Detailed Explanatory Notes, 8.
[24] See, eg, *Defamation Act 2005* (NSW) s 35.
[25] See *Cairns v Modi* [2013] 1 WLR 1015, [27].
[26] See Michael Douglas, '"Their evil lies in the grapevine effect": Assessment of Damages in Defamation by Social Media' (2015) 20(4) *Media and Arts Law Review* 367.
[27] See, eg, *Defamation Act 2005* (NSW) s 3(d).
[28] Terms of Reference, Select Committee on Social Media and Online Safety, (e).

7. Critique of the proposed complaints scheme

The fact that the Draft Bill includes a complaints scheme, which purports to resolve disputes over putatively defamatory content outside of litigation, is a good thing. Unfortunately, the complaints scheme proposed in clause 16 is flawed in several respects. It will exacerbate harm caused to Australians online and ought to be entirely abandoned.

7.1 Notifying a commenter that their comment is the subject of a complaint

Clause 16(1)(b) and (c) require the providers to notify persons who make certain comments that their comments are the subject of a complaint.

This functionality is unnecessary. A complainant may notify the commenter themselves, and faster than within 72 hours as proposed. Defamation can go viral well before the 72-hour limit expires.

7.2 Disclosure of country location data

As explained above, social media providers should be treated as publishers in accordance with long-settled general law, irrespective of where a comment is 'made'.

If that imposition on *Voller* is abandoned, as it should be, then being informed of 'country location data'[29] of commenters is of no value to victims.

First, country location data will not be enough to identify many commenters who commented anonymously or through use of a pseudonym. (See further Parts 8 and 9, below.) If the Draft Bill is enacted, this leaves an Australian who suffers serious reputational harm with no one to sue: they can't sue the commenter because they can't identify them; and they can't sue the provider (or at least, not successfully) because it will enjoy the benefit of the defence criticised above.

Second, country location data can be easily fabricated with little technological savvy. Many Australians are familiar with the use of proxies.[30] If a person wants to cause harm online anonymously, they can do so without much difficulty.

7.3 Removal of a defamatory comment with the commenter's consent

Clause 16(1)(e) provides that a provider may remove a comment the subject of a complaint if the commenter consents. This mechanism is toothless in two respects.

First, a commenter can simply withhold consent. It is easy to foresee that many people would do this; they may only be prompted to act, if at all, when the threat of litigation is imminent (eg, once they receive a concerns notice). If the commenter is still effectively anonymous, there is even less incentive for the commenter to provide consent.

Second, the language provides the provider with a discretion to not remove the comment even if consent is provided. US-based entities may defer to be laissez-faire, and keep harmful content online, even where consent is provided by the commenter, out of First Amendment concerns.

[29] Clause 16(1)(d).
[30] See <https://privacyaustralia.net/what-is-a-proxy-server/>.

7.4 Disclosure of relevant contact details

Clause 16(1)(g) provides consequences for where a complainant is dissatisfied with the handling of their complaint, where the comment was made in Australia. This aspect of the Draft Bill is important, given that, as predicted above, complainants may often be dissatisfied.

The gist is that the provider may provide the complainant with the contact details of the commenter. But this outcome is unlikely to occur, for the same reasons that removal of the complaint via clause 16(1)(e) is unlikely to occur. The commenter may deny consent to disclosure of their contact details, and the provider retains a discretion to withhold those details even if consent is provided, as indicated by the language of 'may'.[31]

The discretion is further conditioned by clause 16(h), which provides that a provider may not disclose country location data or the commenter's contact details if they reasonably believe that the complaint 'does not genuinely relate to the potential institution by the complainant of a defamation proceeding against the commenter'.

If the discretion is exercised and contact details are disclosed, they may be of no value to the victim. It is incredibly easy to spoof contact details. For example, an email address is easily generated by websites specifically designed so that people can supply 'contact details' without disclosing their real contact details.[32]

Clause 16(h) is particularly problematic. How does a provider form a 'reasonable belief' as to the complainant's intentions? And why is the potential institution of litigation the condition for the provider to act, in circumstances where a key purpose of Australia's defamation law is to avoid the commencement of litigation?[33]

The remaining sub-clauses[34] simply gift providers—ie, multi-billion dollar foreign companies—with rights to avoid liability from causing harm to Australians, seemingly in exchange for no practical benefit to Australians.

Once again, this clause of the Draft Bill would undermine one of the key objects of the Select Committee on Social Media and Online Safety: to investigate 'the transparency **and accountability** required of social media platforms and online technology companies regarding online harms experienced by their Australians users' (emphasis added).[35]

8. Critique of the 'unmasking trolls' aspects of the Draft Bill

Part 3 of the Draft Bill provides for 'end-user disclosure orders', by which a person can apply for an order disclosing a commenter's contact details.

This Part should be abandoned for two reasons. First, the scheme will not be effective. Second, more effective tools to 'unmask trolls' (ie, to identify anonymous persons who are potential defamation defendants) already exist in Australian procedure.

[31] Clause 16(1)(g)(iii).
[32] See the results of this Google search: <https://www.google.com/search?q=email+generation+website&rlz=1C1SQJL_en&oq=email+generation&aqs=chrome.0.69i59j69i57.2208j0j9&sourceid=chrome&ie=UTF-8>.
[33] See, eg, *Defamation Act 2005* (NSW) s 3(d).
[34] Clause 16(2)–(5).
[35] Terms of Reference, Select Committee on Social Media and Online Safety, (e).

8.1 The inefficacy of the proposed end-user disclosure orders

If a defamed person goes through the motions and obtains one of these orders, they will receive the 'relevant contact details of the commenter'.[36] Clause 6 provides:

> ***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.*

In many cases, these details will be useless. A social media user can simply use a pseudonym, then spoof an email address or phone number by use of the kind of website mentioned above.

Further, some social media platforms do not require entities to collect these details. For example, once upon a time, Reddit did not require users to even provide an email address to obtain an account.

The inefficacy of these orders is further undermined by the fact that an order cannot be made if the comment was not made in Australia.[37] The same does not apply with respect to existing procedural mechanisms that may be used to 'unmask trolls'.

8.2 Existing mechanisms to 'unmask trolls' are superior to end-user disclosure orders

Defamation lawyers are well practised in obtaining court orders to compel the companies behind online platforms – like Facebook, Twitter and Google – to reveal the identities of anonymous users.

Discovery

They can do so via processes of several superior courts, known as either preliminary or pre-action discovery. For example, rule 7.22 of the *Federal Court Rules 2011* (Cth) allows a 'prospective applicant' (someone who wants to sue) to apply to the Court for an order against a person (eg, a company like Google LLC) to reveal the identity of a 'prospective respondent' (the person the prospective applicant wants to sue). The information produced by such an order may include the equivalent of 'relevant contact details', as well as useful information by which an anonymous person's identity may be revealed, like IP addresses.

In the last year or so, the Federal Court has issued several orders to this effect in the context of anonymous online defamation. These orders may even bind those platforms based overseas.[38]

Subpoenas

In a given defamation case, there may be several publishers of the same defamatory matter,[39] especially where the content is online. For example, Porter sued both Louise Milligan and the ABC; Barilaro sued both friendlyjordies and Google.

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[36] Draft Bill clause 18(2)(e).
[37] Draft Bill clause 18 (2).
[38] See, eg, *Kandola v Google LLC (No 2)* [2021] FCA 1412; *Musicki v Google LLC* [2021] FCA 1393, [3].
[39] '[A]ll persons who procure or participate in the publication of a libel, and who are liable therefor, are jointly and severally liable for the whole damage suffered by the claimant': A Mullis and R Parkes (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) [6.11].

If you commence litigation against one of those publishers but don't know the identity of others, you can then seek a subpoena to uncover the anonymous 'trolls'. News organisations and journalists are protected from this stratagem via special shield laws (among other things), but others are not. In certain circumstances, a provider could be subpoenaed.

Injunctions / orders to protect against abuse of process

These existing processes are nothing new. In 1974, the House of Lords decided a case that recognised a type of order now known as a *Norwich Pharmacal* order.[40]

If a person gets mixed up in the tortious acts of some other anonymous person (eg, by facilitating publication of defamation), then a court may compel the person to reveal the identity of that other anonymous person. In my view this development was grounded in literally centuries of case law. A court of equity will act in aid of legal rights (ie, to enable vindication of defamation – a legal cause of action) in equity's auxiliary jurisdiction.[41]

Moreover, Australian superior courts may issue orders in either their inherent or implied jurisdiction to prevent an abuse of process,[42] perhaps even where proceedings were not extant before an application for in specie relief.[43]

The territoriality issue

These orders are not bound by the prospect of the defamation being 'made' in Australia. Australian courts may exercise powers that can uncover the identities of wrongdoers, wherever they happen to be.[44] Apart from the longstanding principles noted above, this was recently confirmed by a decision of the High Court that affirmed the power of Australian courts to issue orders with extraterritorial effect, in relation to assets based on foreign jurisdictions.[45]

As Australians' wellbeing online may depend on people and entities outside of Australia, it is illogical and unnecessary to frame legislation designed to protect Australians online with respect to harmful comments 'made' in Australia.

9. Nominated entities

Part 4 of the Draft Bill concerns 'nominated entities', which are effectively representatives of foreign companies behind social media platforms that may be held somewhat accountable on behalf of that foreign company.

The concept of a nominated entity is a good idea but the way that this concept has been deployed in the Draft Bill is not ideal.

9.1 Requiring providers to collect users' contact details

Clause 20(1)(f)(i) requires providers to ensure that their nominated entities have access to contact details of end users of social media platforms.

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[40] *Norwich Pharmacal Company v Customs And Excise* [1974] AC 133.
[41] See generally discussion in *Meagher, Gummow & Lehane – Equity: Doctrines and Remedies* (LexisNexis Butterworths. 5th ed, 2015).
[42] See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.
[43] See *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24, cf *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1.
[44] See generally Michael Douglas, 'Extraterritorial Injunctions Affecting the Internet' (2018) 12(1) *Journal of Equity* 34.
[45] *DCT v Huang* [2021] HCA 44.

For the reasons explained above, the quality of that identifying information may be questionable. Facebook, for example, already requires users to use 'the name they go by in everyday life'.[46] Still, thousands of users utilise pseudonyms and fake details to protect their privacy, among other reasons.

Where individuals do the right thing and provide legitimate contact details, the provision of that information pursuant to law may result in unintended harms.

9.2 Requiring providers to collect users' contact details will have a negative impact on freedom of expression and legitimate whistleblowers

Requiring providers to collect contact details of social media users via nominated entities may have a chilling effect on freedom of expression. Individuals who wish to blow the whistle on misconduct—like sexual misconduct in the workplace, or corporate misconduct—may refrain from doing so out of fear of being identified by the person or persons the subject of the blown whistle.

If nominated entities have this information on hand, then those on the receiving end of anonymous criticism—like a dodgy law firm,[47] or a bank—could commence litigation to uncover the identity of the commenter, in order to sue the commenter or, in the case of an employer, fire the commenter.

If nominated entities are to collect legitimate identifying information with respect to end users, then the law ought to be amended further to ensure that vulnerable people who are aware of wrongdoing in society can speak out where it is in the public interest.

10. Ways to improve the law to minimise harm caused to Australians online

The Draft Bill ought to be abandoned. When I proposed this in the 20 January 2022 hearing of the Select Committee, the Chair asked me, 'what do you propose in the alternative?'

In addition to the ideas posed in my previous submissions, here are six ideas to reform defamation law and to make Australians safer online.

First, put some more effort into the proposed right to erasure contemplated by the Privacy Act reform.[48] You could extend it into a right for defamation to be forgotten.[49] Most plaintiffs just want content gone—but damages are all they can get, if anything.[50]

Second, create a statutory tribunal to deal with small-time backyard defo in a no-costs jurisdiction, where the result is an injunction, not damages.[51] This would relieve the unnecessary burden on courts.

Third, require the transnational groups behind online platforms to keep cash in nominated entities incorporated in Australia, and attribute Australians with the capacity to sue those entities for causes of action notionally committed by foreign parent companies. This removes the need to enforce an Australian judgment in the United States, which may be difficult to achieve.[52]

Fourth, remove the ability of federal politicians like Dutton, Porter and Laming to sue while they are in office. If Parliamentarians cannot exercise your rights to reputation nicely then you should not have

[46] See <https://www.facebook.com/help/112146705538576>.
[47] See, eg, *X v Twitter Inc* (2017) 95 NSWLR 301.
[48] Privacy Act Review – Discussion Paper (October 2021) 115–23.
[49] See further Michael Douglas, 'Suing Google, Facebook or Twitter for Defamation' (2021) 40(2) *Communications Law Bulletin* 53.
[50] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.
[51] See Kim Gould, 'Small Defamation Claims in Small Claims Jurisdictions: Worth Considering For The Sake Of Proportionality?' (2018) 41(4) *UNSW Law Journal* 1222.
[52]

them anymore. If you want to legislate on cyberbullying, then maybe your own parties should stop bullying critics through lawyers like me.

Fifth, abandon the Religious Discrimination Bill (and related bills) so you don't contribute to LGBTIQ+ youth suffering even more harm online and even more violations of their human rights.

Sixth, wait and see how the *Online Safety Act 2021* (Cth) works in progress. A referral to the Australian Law Reform Commission would be a better vehicle for meaningful reform than this inquiry, which was dropped over a summer during which many experts couldn't make a meaningful contribution to the conversation.

Finally, **commit to abandoning the Draft Bill. It is bad law.**

Thank you for considering this submission.

Yours faithfully

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*****Michael Douglas is a Senior Lecturer at the University of Western Australia, where he teaches and researches media law (including defamation law and privacy law), and private international law, among other things. His views on media law have been quoted by courts and law reform bodies in Australia and overseas and are featured regularly in popular media, including television (eg Channel 10 news, ABC Media Watch), print (eg *The Australian*) and online (eg *The New York Times*). He is a Consultant at Bennett + Co, a litigation firm with a specialisation in defamation and media law. Views are his own.