Committee Secretary,
Senate Standing Committee on Legal and Constitutional Affairs,
Department of the Senate,
P.O. Box 6100,
Parliament House,
Canberra, A.C.T., 2600.

By email: legcon.sen@aph.gov.au.

28 February 2022

Dear Committee Secretary,

Submission on Social Media (Anti-Trolling) Bill 2022 (Cth)

I appreciate the opportunity to provide feedback on the Social Media (Anti-Trolling) Bill 2022 (Cth). I note that some changes have been made in response to my earlier submission on the exposure draft of this bill. However, the bill in its current form is largely the same as the exposure draft, with the consequence that many of my comments and concerns apply equally to the bill as it now stands. As such, I have attached my earlier submission and incorporate those comments and concerns as part of this submission.

I strongly recommend against proceeding with this bill. The principal reasons for this recommendation are as follows:

- The bill is not concerned with combatting 'trolling' on social media. It is a bill concerned with substantive defamation law reform. Even if one were to accept that the bill is concerned with addressing 'trolling' on social media, it is doubtful that the bill achieves this aim. The effect of conferring an immunity on social media page owners and administrators is to alleviate them entirely from any responsibility for content moderation. The desirability of removing content moderation responsibilities is not explained. It is difficult to see how such an effect will lead to a decrease in 'trolling'. Indeed, the likely effect would surely be the opposite.
- The reforms, if enacted, may have unintended consequences. The bill and the accompanying explanatory materials do not adequately consider how the proposed reforms may affect other substantive and procedural aspects of defamation law. Hasty law reform produces unintended consequences. It will increase the cost and complexity of an area of law already notorious for cost and complexity.
- The bill pre-empts the current defamation law reform process being undertaken by the States and Territories. The explanatory materials assert that the bill complements that existing process without explaining how this is so. (I disclose that I am a member of the Defamation Expert Panel advising the New South Wales Department of Communities and Justice on the review of the Model Defamation Provisions, so I am well-acquainted with the content and progress of that law reform process.) It is not clear why Commonwealth intervention at this time and in this way is necessary or desirable, when the same issues are currently under active consideration by the States and Territories.
- The approach proposed for dealing with the real or perceived impact of the High Court of Australia's decision in *Fairfax Media Publications Pty Ltd v Voller* (2021) 392 ALR 540; [2021] HCA 27 ('*Voller*')

is not adequately explained. It is not clear why a complete immunity for social media page owners and administrators is necessary or desirable. It is not explained why this category of publisher requires or deserves special treatment, quite unlike that shown to any other category of publisher under Australian defamation law. It is not explained why online conduct is protected more extensively than similar offline conduct. It is not explained why less radical solutions to overcoming the effect of *Voller* were not adopted.

Some changes to the exposure draft, now embodied in the bill, may introduce new problems. For instance, the bill now clarifies, in cl 6, that an 'Australian court' includes a court of a State or Territory. The bill seeks to confer jurisdiction on Australian courts, such as the making of an 'end-user information disclosure order'. It should be noted that it is not only Australian courts which can exercise jurisdiction over defamation claims. Some State and Territory tribunals may exercise some jurisdiction over defamation claims. See, for example, *Bottrill v Bailey* [2018] ACAT 45. See further Kim Gould, 'Small Defamation Claims in Small Claims Jurisdictions: Worth Considering for the Sake of Proportionality?' (2018) 41 *University of New South Wales Law Journal* 1222. The bill in its current form does not seek to confer the power to make orders on those tribunals which may exercise jurisdiction over defamation claims. Yet allowing tribunals to exercise jurisdiction over small defamation claims should arguably be encouraged, as this would promote access to justice. However, the Commonwealth Parliament is constrained in this regard because it cannot confer the judicial power of the Commonwealth on State and Territory tribunals. There would be no impediment on a State or Territory Parliament conferring such powers on its own State or Territory tribunal. This potential problem does not appear to have been identified and therefore has not been addressed. This reinforces the desirability for not proceeding with this reform in its current form and for not pre-empting the defamation law reform process currently being undertaken by the States and Territories.

Unfortunately, the bill in its current form is not ready to be enacted as a law of the Commonwealth. Further, more detailed consideration of the bill, its underlying policy and its implications would be required, if it were to be progressed. Otherwise, the bill, if enacted in its current form, is liable to cause more problems than it solves.

I am happy to have my submission made public.

Yours faithfully,

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General comments

The need for coherence and unintended consequences. Any person embarking on defamation law reform would do well to heed the wise counsel of Lord Sumption at the outset of his judgment in *Lachaux v Independent Print Ltd*, wherein his Lordship observed that:

> 'The tort of defamation is an ancient construct of the common law. It has accumulated, over the centuries, a number of formal rules with no analogue in other branches of the law of tort. Most of them originated before freedom of expression acquired the prominent place in our jurisprudence that it enjoys today. Its coherence has not been improved by attempts at statutory reform. Statutes to amend the law of defamation were enacted in 1888, 1952, 1996 and 2013, each of which sought to modify existing common law rules piecemeal, without always attending to the impact of the changes on the rest of the law. The Defamation Act 2013 is the latest chapter in this history.'[1]

In this case, Lord Sumption was specifically dealing with the proper construction of the 'serious harm' threshold under the *Defamation Act 2013* s 1, an analogue of which has recently been adopted by most Australian jurisdictions,[2] but his remarks are of obvious, wider application. Any attempt at defamation law which does not carefully consider the impact on the whole of the tort of defamation is likely to increase incoherence and to have unintended consequences.

Given that publication is the gist of the action in defamation[3] and is a term of art[4] with a settled meaning, a proposed reform directed at altering it, as this exposure draft is, should be given careful consideration, particularly for the consequences such a reform may have on other aspects of the tort. This is particularly so where the proposed reform involves a radical, rather than a narrow and targeted, alteration of the existing law.

Prematurity of the proposed reforms. To the extent that the proposed reform seeks to override in part and to clarify the High Court of Australia's decision in *Fairfax Media Publications Pty Ltd v Voller* (2021) 392 ALR 540; [2021] HCA 27 ('*Voller*'), the proposed reform may be premature. This is because *Voller* itself was concerned solely with the issue of publication as an element of the plaintiff's cause of action. There has been no determination of whether the comments are defamatory and whether they identify the plaintiff. There has been no determination of the availability of any defence, including a defence of innocent dissemination at common law or under statute. There has been no determination of the effect, if any, of the *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91 on the media companies' liability.[5] There has been no assessment of damages. There has been no indication whether the media companies will seek to exercise any right of contribution or indemnity that they may have under the apportionment legislation against Facebook or the commenters or both.[6] The media companies' liability in defamation has not been finally determined. The High Court's decision in *Voller* may have a bearing on the resolution of at least some of these issues. It may

[1] [2020] AC 612, 616-17; [2019] UKSC 27.
[2] *Civil Law (Wrongs) Act 2002* (ACT) s 122A; *Defamation Act 2005* (NSW) s 10A; *Defamation Act 2005* (Qld) s 10A; *Defamation Act 2005* (SA) s 10A; *Defamation Act 2005* (Vic) s 10A.
[3] *Powell v Gelston* [1916] 2 KB 615, 916 (Bray J). See generally David Rolph, 'The concept of publication in defamation law' (2021) 27 *Torts Law Journal* 1.
[4] *Tom & Bill Waterhouse Pty Ltd v Racing New South Wales* (2008) 72 NSWLR 577, 585 (Palmer J).
[5] As to the possible arguments, see *Fairfax Media Publications Pty Ltd v Voller* (2020) 105 NSWLR 83, 87-92; [2020] NSWCA 102.
[6] See *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 5(1)(c) and the cognate provisions in the other States and Territories.

be premature to intervene to legislate to address the effect of *Voller*, when the full effect of that decision is not yet known. If legislative reform were to be undertaken to address the effect of *Voller*, it should be narrow and targeted, rather than the more radical approach proposed in the exposure draft.

The impact of 'serious harm' as an element of the cause of action in defamation. At various points in the exposure draft, reference is made to a right to relief in defamation. For instance, the prescribed requirements of a complaints scheme of a social media service under clause 16(1) is dependent upon a complainant having a reason to believe that there may be a right to obtain relief against a commenter. The making of an 'end-user information disclosure order' under clause 18(1) is dependent upon a complainant reasonably believing that there may be a right to relief against the commenter in defamation. It should be noted that now, in all Australian jurisdictions except the Northern Territory and Western Australia, a plaintiff is required to establish serious harm to reputation as an element of the cause of action in defamation.[7] It is not yet clear what impact this additional element will have. It has yet to be considered in the context of the Federal Court of Australia's existing power under the *Federal Court Rules 2011* (Cth) r 7.22, which covers similar ground to the proposed 'end-user information disclosure order'.[8] The purpose of the statutory 'serious harm' threshold is to exclude trivial or marginal defamation claims at the outset. The legislative intent is to make it more difficult for plaintiffs to commence defamation proceedings, departing from the common law, which, historically, presented few doctrinal obstacles for plaintiffs wishing to sue for defamation. The English experience has been that the statutory 'serious harm' threshold under the *Defamation Act 2013* s 1, which served as the model for the Australian provision, has lifted the requirements for what defamation claimants had to establish above what was required at common law.[9] It is likely that this will be the case in Australia. This is particularly because the Australian 'serious harm' threshold makes proof of serious harm to reputation a free-standing element of the plaintiff's cause of action, as opposed to the English approach, which treats serious harm as a superadded, albeit negative, test for what is defamatory.

The explanatory materials do not advert to the impact of the new 'serious harm' requirement under Australian defamation law on the proposed reform. They do not recognise that it will now be harder for plaintiffs to establish a right to relief, or a reasonable belief as to such a right, in defamation. In many cases, plaintiffs will no longer be able to rely upon the defamatory tendency of what has been published and will need to adduce some evidence to establish of serious harm to reputation to satisfy this new element. In revising the exposure draft, careful consideration should be given to the likely effect of the new 'serious harm' requirement in Australian defamation law on the proposed reform.[10] It may, however, be prudent to defer this proposed legislation until the actual effect of the new statutory 'serious harm' threshold is known.

The need for uniformity. Although the proposed reform is not the first intervention by the Commonwealth in substantive defamation law,[11] it is a significant one which will have a profound effect on basic principles of publication and which will affect the substantive

[7] *Civil Law (Wrongs) Act 2002* (ACT) s 122A; *Defamation Act 2005* (NSW) s 10A; *Defamation Act 2005* (Qld) s 10A; *Defamation Act 2005* (SA) s 10A; *Defamation Act 2005* (Tas) s 10A; *Defamation Act 2005* (Vic) s 10A.
[8] See further below in the discussion under 'Clause 18: End-user information disclosure orders'.
[9] *Lachaux v Independent Print Ltd* [2020] AC 612, 623-24 (Lord Sumption); [2019] UKSC 27.
[10] The implications of the new 'serious harm' threshold are examined in David Rolph, 'A Serious Harm Threshold for Australian Defamation Law' (2022) 51 *Australian Bar Review* (forthcoming).
[11] See, for example, *Broadcasting Services Act 1992* (Cth) s 206.

defamation law administered by State and Territory courts. Perhaps the most significant development in the Australian defamation law was the introduction by the States and Territories of the national, uniform defamation laws in 2005 and 2006 respectively.[12] Given how long it took to achieve substantially uniform defamation laws in Australia, all defamation law reform processes should seek to advance, rather than detract from, the uniformity of Australian defamation law.

As this proposed reform will affect the defamation law applied by State and Territory courts, it should, at a minimum, incorporate the objects of the national, uniform defamation laws.[13] This will go some way to ensuring that the proposed reform is interpreted and applied in a manner consistent with those objects, particularly the promotion of the uniformity of Australian defamation law.[14] Moreover, there are intimations in the explanatory materials that the policy underlying the proposed reform is consistent with the other objects of the national, uniform defamation laws, being the avoidance of unreasonable burdens on freedom of expression, the provision of fair and effective remedies and the promotion of speedy and non-litigious methods of resolving defamation disputes. If this is correct, there would be no impediment, and indeed there would be a positive benefit, to including the objects of the national, uniform defamation laws in this proposed reform. (I note that clause 26 refers to the implied freedom of political communication but the centrality of freedom of expression as an interest protected by the tort of defamation, balanced against the protection of reputation, is broader than speech relating to government or political matters.)

It may be, however, that proceeding with this proposed reform at this time may be both premature and liable to detract from the uniformity of Australian defamation law. This is because the proposed reforms pre-empts many of the issues being considered in Stage 2 of the review of the Model Defamation provision currently being undertaken by the States and Territories and led by New South Wales. I should disclose that I am a member of the Defamation Expert Panel advising the New South Wales Department of Communities and Justice on the review of the Model Defamation Provisions.

I would observe that the Commonwealth has an interest in promoting the uniformity of Australian defamation law, beyond this proposed reform. The Full Federal Court's decision in *Crosby v Kelly* established a basis for the Federal Court to hear and determine pure defamation claims.[15] Since that time, the Federal Court has developed a substantial jurisdiction over defamation. The Commonwealth should give consideration to participating actively in the defamation law reform process already underway and to enacting the national, uniform defamation laws as federal legislation.

Issues of terminology. There are some issues of terminology in the exposure draft, which should be addressed. The exposure draft uses the term, 'comment', presumably derived from its use in many social media services. However, a 'comment' is also a term of art in defamation law and is contrasted to a statement of fact.[16] To avoid unnecessary legal argument, it would be appropriate either to select a more neutral word like 'statement' or, at a minimum, to include a definition of the term, 'comment', to make it clear that it is intended to be include a statement of fact.

[12] David Rolph, 'A critique of the national, uniform defamation laws' (2008) 16 *Torts Law Journal* 207, 207.
[13] See *Defamation Act 2005* (NSW) s 3 and the cognate provisions in the other States and Territories.
[14] *Defamation Act 2005* (NSW) s 3(a) and the cognate provisions in the other States and Territories.
[15] (2012) 203 FCR 451; [2012] FCAFC 96.
[16] *Clarke v Norton* [1910] VLR 494, 499 (Cussen J).

The exposure draft is also cast in terms of social media 'pages'. Some social media services currently have 'pages', such as Facebook. However, other social media services, such as Twitter, do not have 'pages'. Presumably, the intention of the exposure draft is to apply to all forms of social media services, so a more appropriate, neutral term should be used in preference to a technology- or service-specific one.

Specific comments

The title of the bill. The title of the bill is a misnomer. The bill is concerned with defamation law, as the long title makes clear. The exposure draft is not really concerned with 'trolling'. There is no definition of the concept of 'trolling' in the exposure draft. The provisions of the exposure draft are not limited to conduct where a commenter engages in 'trolling'. It is possible to 'troll' a person without defaming them. Trolling may be abusive, insulting, offensive, harassing, humiliating or intimidating without being defamatory. The cause of action with which the exposure draft is wholly concerned is the tort of defamation. I note that, on the top of page 2 of the Detailed Explanatory Notes, the bill is styled the 'Social Media (Defamation) Bill 2021'. This seems to be a more appropriate title for this bill, better reflecting its actual contents.

Clause 14: Liability for defamation – publisher. Clause 14(1) of the exposure draft purports to deem that the administrator or owner of a page on a social media service is not a publisher of a third party comment and that the social media service is a publisher of such a comment. The Detailed Explanatory Notes indicate that the purpose of this subclause is to override in part and to clarify aspects of the High Court's decision in *Voller*.

There are a number of problems with the subclause as drafted.

The Detailed Explanatory Notes indicate that a purpose of clause 14(1) is to clarify *Voller* by providing that a social media service is a publisher of a third party comment on a social media page. The law on this issue is not unclear, whether as a result of *Voller* or more generally by reference to the general principles of publication in defamation law. *Voller*, of course, did not determine directly whether Facebook was itself a publisher of the third party comments because Facebook itself was not a party to the proceedings. Voller did not sue Facebook and the media companies did not join Facebook as a party to the proceedings with a view to seeking contribution from it. However, the High Court in *Voller* confirmed the breadth and strictness of the common law principles of publication. Their Honours confirmed that any voluntary participation in the dissemination of defamatory matter constitutes publication for the purposes of defamation law. In particular, their Honours held that any facilitation, encouragement or assistance of the dissemination of defamatory matter will amount to publication for the purposes of defamation law. It is much easier to state what constitutes publication at common law than it is to state what does not. Applying the settled common law principles of publication, it seems uncontroversial that a social media service would qualify as a publisher for the purposes of defamation law. What deters prospective plaintiffs from suing social media services for defamation is not uncertainty about whether social media services are in fact publishers for the purposes of defamation law but more difficult issues of jurisdiction and enforcement, which increase the cost and complexity of defamation litigation. The proposed statutory deeming of social media services as publishers of third party comments seems unnecessary.

In relation to the position of commenters, the proposed reform does not deal expressly with whether they are publishers for the purposes of defamation law. Clearly, they would be, by the ordinary application of the basic principles of defamation law. However, given that the drafting of the proposed reform adopts the approach of deeming the social media page owner or administrator not to be a publisher and deeming the social media service to be a publisher, the position of the commenter should be stated, for the avoidance of doubt.

The position of the social media page owner or administrator is the most problematic. If the purpose of this reform is to override the effect of *Voller* in part, the legislative means proposed seem excessive and are likely to cause incoherence and anomalies. Moreover, the proposed reform is likely to increase, rather than decrease, poor online behaviour. What is proposed is that a particular category of publisher – social media page owners and administrators – should be granted a complete immunity from liability in defamation. A social media page owner or administrator will not be liable in defamation even if they have actual notice of the defamatory third party comment and have the power to remove the comment. The explanatory materials do not explain the policy behind conferring a blanket immunity from liability for defamation on social media page owners and administrators, nor do they explain whether and why less radical reforms were considered but rejected. There are a number of reasons why such an immunity is inappropriate.

The danger of immunities generally. The common law recognises immunities from legal liability in limited circumstances. The reason for this approach is not difficult to discern. If a person has the benefit of an immunity, then the person does not have any exposure to legal liability acting as an incentive towards conducting themselves reasonably and appropriately. A person with the benefit of an immunity can act as negligently, irresponsibly or maliciously as they please without fear of any legal consequences. Because of the nature of an immunity, the common law tends to recognise immunities only where there is a compelling public interest justifying the need for an immunity prevailing over other legal rights and interests.[17] Of course, it is always open to the legislature to confer an immunity on a broader basis than the common law. However, it would seem prudent to explain why an immunity was the preferred means of addressing the problem.

The anomalous treatment of publishers. The legislative means selected for protecting social media page owners and administrators from the perceived effect of *Voller* is to confer a blanket immunity upon them. It should be appreciated that this is an anomalous way to deal with the liability in defamation of a potential publisher, not replicated either at common law or under statute. In Australia, at common law, there would be few, if any, instances where persons involved in the dissemination of defamatory matter are deemed not to be a publisher for the purposes of defamation. This is unsurprising, given that the High Court in *Voller* affirmed that the common law's approach to what amounts to publication is broad and strict and that any voluntary participation in the dissemination of defamatory matter constitutes publication for the purposes of defamation law.[18] The common law is clear as to what conduct constitutes publication but is much less clear about what conduct, if any, does not constitute publication.

At common law, subordinate distributors, such as newsagents and libraries, are not deemed not to be publishers for the purposes of defamation law. They are treated as publishers and are

[17] Such as a parliamentarian during the course of parliamentary proceedings or a judge, advocate, witness or juror during the course of judicial proceedings.
[18] *Fairfax Media Publications Pty Ltd v Voller* (2020) 392 ALR 540, 546-48 (Kiefel CJ, Keane and Gleeson JJ), 553-54 (Gordon and Gageler JJ).

therefore in need of a defence. Under statute,[19] and, as the High Court confirmed in *Voller*, at common law,[20] subordinate distributors may rely upon a defence of innocent dissemination.[21] They are not granted the benefit of an immunity, either at common law or under statute. In the United Kingdom, an internet service provider which does no more than provide a third party with an internet connection is treated as a 'mere passive facilitator', rather than a publisher, for the purposes of defamation law.[22] The position at common law in Australia on this issue has not been finally determined. What is clear is that neither at common law nor under statute has there been a tendency in Australian law to confer immunity on particular categories of putative publishers.

It may be that internet technologies necessitate a rethinking of the basic principles of publication. If so, this should be done holistically, rather than in a piecemeal fashion. In this regard, I would point to the significant and thoughtful work done by the Law Commission of Ontario in its report, *Defamation Law in the Internet Age*.[23]

Conferring greater protection on the online world than the physical world. The effect of the proposed reform as drafted is to confer a complete immunity on social media page owners and administrators in respect of third party comments, even if they are aware of those comments and have the power to remove them. It should be appreciated that this exceeds the legal protection available in the physical world in similar circumstances. Following on from the English Court of Appeal's decision in *Byrne v Deane*,[24] a person who has a physical noticeboard may become liable as a publisher of third party comments posted on it if they become aware of the presence of those comments and, having the power to remove them, fail to do so within a reasonable period of time. If the proposed reform is to be enacted as it currently stands, the explanatory materials would need to provide a compelling policy justification for the disconformity between the legal protection afforded in the online and physical worlds.

Desirability of content moderation. By conferring a blanket immunity on social media page owners and administrators, the proposed reform alleviates them of all moderation responsibilities. Because the proposed reform deems social media page owners and administrators not to be publishers for the purposes of defamation law, the risk of liability for defamation does not provide any incentive to moderate content. The explanatory materials do not identify this as a clear consequence of the current form of this proposed reform and thus do not explain the policy rationale for this significant and arguably undesirable change. If the underlying policy of the exposure draft is to discourage 'trolling' and to promote greater civility online, it is unclear how relieving social media page owners and administrators of all moderation responsibilities will further that objective. Indeed, it would seem to be inimical to it.

The need for an effective remedy. By granting an immunity to social media page owners and administrators, the proposed reform may make it more difficult for plaintiffs to obtain an

[19] See *Defamation Act 2005* (NSW) s 32 and the cognate provisions in the other States and Territories.
[20] *Fairfax Media Publications Pty Ltd v Voller* (2020) 392 ALR 540, 549, 551 (Kiefel CJ, Keane and Gleeson JJ), 556-57, 559-60 (Gordon and Gageler JJ).
[21] *Emmens v Pottle* (1885) 16 QBD 354; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170.
[22] *Bunt v Tilley* [2007] 1 WLR 1243; [2006] EWHC 407 (QB).
[23] Law Commission of Ontario, *Defamation Law in the Internet Age*, March 2020, Ch VIII, Recommendation 35, https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf.
[24] [1937] 1 KB 818. For an analysis of this case and its implications, see David Rolph, 'The concept of publication in defamation law' (2021) 27 *Torts Law Journal* 1, 17ff.

effective remedy. Because the proposed reform contemplates that social media page owners and administrators are not publishers of third party comments under any circumstances, an aggrieved person will need to take steps against either the social media service or the commenter or both. This may be costly and time-consuming and, for the reasons outlined below, will likely involve litigation. Many people who are aggrieved by what has been posted online may simply want the material taken down promptly. If a social media page owner or administrator has some exposure to liability as a publisher and is notified of the presence of a defamatory comment on their page, the page owner or administrator would have an interest in promptly dealing with the defamatory comment. In many instances, that would effectively resolve an aggrieved person's concerns. Such an approach would be consistent with a page owner or administrator's obligation to exercise some moderation over content on their social media pages. Compelling aggrieved persons to seek a remedy from the social media service or the commenter to the exclusion of the page owner or administrator is likely to increase the time, cost and complexity of resolving online defamation disputes.

Anomalous outcomes. It should be appreciated that the proposed reform creates anomalous outcomes for different online publication of the same matter and only seeks to overcome *Voller* in respect of a certain category of online publication. For instance, under the proposed reform, if a media outlet posted an article on its public Facebook page, the media outlet would not be liable for any third party comments posted in response, irrespective of whether the media outlet was actually aware of those third party comments and had the power to remove them. However, as a result of *Voller*, if the media outlet posted the same article on its own website and permitted comments to be left under it, as often occurs, the media outlet would be liable for those third party comments from the time they were posted, regardless of whether the media outlet was actually aware of those third party comments. It is unclear why, as a matter of policy, such an anomaly is desirable.

An alternative proposal. In my view, the real undesirable effect of the High Court's decision in *Voller* is that it may expose those who own or administer social media pages to liability for defamation in respect of third party comments in circumstances where such owners or administrators do not have actual notice of those comments. It is this aspect of *Voller* which may inhibit individuals and entities from using social media services, a concern which the explanatory materials indicate that the Commonwealth wishes to address. Because the effect of *Voller* is to make the owner or administrator of a social media page a publisher, for the purposes of defamation law, from the time the third party comment has been posted, irrespective of the owner's or administrator's actual awareness of that comment, a consequence of *Voller* is that page owners and administrators may be subject to a duty to monitor third party comments. Such a duty would undoubtedly be onerous for many individuals and small and medium-sized businesses, in terms of time, labour and resources. Moreover, as any such duty to monitor which may arise, directly or indirectly, at common law as a consequence of *Voller*, that duty may ultimately be found in the balance of the proceedings to be inconsistent with the *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91.[25] However, unless and until this issue is raised and determined, and noting that the position is likely to be different under the *Online Safety Act 2021* (Cth), given the differences between the wording of the two Commonwealth Acts, there will continue to be uncertainty about the liability in defamation of page owners and administrators in respect of third party comments prior to actual notice of those comments. In

[25] The viability of this argument was foreshadowed by Basten JA's judgment in the New South Wales Court of Appeal in *Fairfax Media Publications Pty Ltd v Voller* (2020) 105 NSWLR 83, 87-92; [2020] NSWCA 102. Giving the different wording of the *Online Safety Act 2021* (Cth) s 235, such a conclusion may not apply under that legislation.

these circumstances, a narrow, targeted reform to overcome the identified unfairness of *Voller* seems appropriate.

I would propose a provision in the following terms to address these implications of *Voller*:

> (i) Where a person posts material to a social media service, the person is not liable for any third party engagement with that material if, at the time the third party engages with that material, the person is unaware of that third party engagement.
> (ii) A person who posts material to a social media service is unaware of third party engagement if the person does not have actual notice of that third party engagement.
> (iii) Nothing in this section affects the liability in defamation for a social media service or the third party.

A provision in this form would make clear that actual notice is required and preclude the possibility that courts would interpret a reference merely to 'notice' to include constructive notice.[26] Fixing social media page owners and administrators with constructive notice of third party comments would not overcome the undesirable effect of *Voller* already identified and would impose a duty on such owners and administrators to monitor content. Where, however, a third party comment on a social media page has in fact been brought to the attention of the page owner or administrator and the owner or administrator elects, within a reasonable time, not to remove the comment or otherwise deal with it, there seems to be no unfairness in holding the page owner or administrator liable as a publisher of that third party comment.

The balance of clause 14. Clause 14(2) deems the social media service to be a publisher of a third party comment posted on a social media page. The subclause as drafted deals only with the position of the social media service and does not address the liability of the social media page owner or administrator. The explanatory materials indicate that the intention of the subclause is that the ordinary principles of publication would apply to a social media page owner or administrator. Given that the approach adopted in this clause is to override the common law in part and to restate common law principles, the position of a social media page owner or administrator should be stated, for the avoidance of doubt. This will avoid unnecessary legal argument and thereby reduce cost and complexity. A similar approach should be adopted in relation to the inclusion of the commenter here.

Clause 15: Liability for defamation – defence for the provider of a social media service and Clause 16: Complaints scheme – prescribed requirements. The stated policy underlying clauses 15 and 16 is to try to facilitate connecting an aggrieved person with a commenter themselves. A related objective is to try to avoid involving an aggrieved person in costly court disputes directed at ascertaining information about the commenter. The difficulty with clauses 15 and 16 as drafted is that its efficacy is dependent entirely upon the consent of the commenter to having their relevant contact details disclosed to the aggrieved person. There may be some instances in which a commenter who has been anonymously defaming a person online consents to have a social media service provide their contact details to the person so defamed but it would seem unlikely that this would be a regular occurrence. If the purpose of this proposed reform is to encourage non-litigious resolution of online defamation disputes, these clauses will not necessarily achieve that, as aggrieved persons will still have to have

[26] This is the position reached by the New Zealand Court of Appeal in *Murray v Wishart* [2014] 3 NZLR 722; [2014] NZCA 461.

recourse to courts to find the relevant contact details of the person they believed defamed them online, just as they have to do now.

Clause 18: End-user information disclosure orders. There are some issues with the 'end-user information disclosure orders' provision as drafted, which should be addressed.

Interaction with existing court powers. The proposed reform seeks to create a new form of order to assist prospective applicants to ascertain from the nominated entity of a social media service the information necessary to commence defamation proceedings against anonymous commenters. Like other courts around Australia, the Federal Court of Australia already has the power to order discovery against a person to ascertain the description of a prospective respondent.[27] This power has already been used by prospective applicants in the Federal Court of Australia to ascertain the description of persons who have allegedly defamed them online anonymously with a view to commencing defamation proceedings against those persons.[28] The exposure draft states that the proposed power is in addition to, not instead of, existing powers of the court. This raises a number of issues.

If a power already exists under the *Federal Court Rules 2011* (Cth) as well as under the rules of court in the States and Territories, which allows prospective applicants to obtain orders from the court to compel persons to provide information about prospective respondents and this power is already being used by prospective applicants to 'unmask' those who have allegedly defamed them anonymously online, it is unclear why a specific, additional powers is necessary.

Under the proposed reform, the court may refuse to make an end-user information disclosure order if it is satisfied that the disclosure is likely to present a risk to the commenter's safety. The existing power of the Federal Court to order discovery to ascertain the description of a prospective respondent is not subject to this condition. Given that the proposed reform expressly contemplates the availability of alternative means of obtaining relief, it is unclear why a prospective applicant would elect to pursue an end-user information disclosure order, with the additional ground upon which it can be denied.

The likelihood of a risk to the commenter's safety. There are also problems with the concept of the likelihood of a risk to a commenter's safety. First, the test is cast in terms of likelihood. There may be some question as to the relevant standard by which the term, 'likely', needs to be assessed. This is particularly so in defamation law, where 'likely' can mean 'tending to' or 'calculated to'. If the term, 'likely', here is intended to mean 'more probable than not', the proposed reform sets too high a standard to refuse to make an end-user information disclosure order. It may be preferable to cast the statutory test in terms of the court being satisfied that the making of such an order would present a real risk to the commenter's safety. The concept of a real risk would be understood to mean which is not far-fetched or fanciful and would be contrasted with a remote possibility.

How risk to a commenter's safety may be raised before the court. There is a problem as to how the issue of risk to the commenter's safety could arise before a court and how the court could satisfy itself that such a risk exists. The person best placed to know about the risk to the

[27] *Federal Court Rules 2011* (Cth) r 7.22.
[28] For recent examples, see *Heath v LawTap Pty Ltd* [2021] FCA 485; *International Wushu Federation v Google LLC* [2021] FCA 904; *Lin v Google LLC* [[2021] FCA 1113; *Kandola v Google LLC* [2021] FCA 1262; *Musicki v Google LLC* [2021] FCA 1393; *Kandola v Google LLC (No 2)* [2021] FCA 1412; *Mount v Dover Castle Metals Pty Ltd* [2021] FCA 1356; *Turnbull trading as Berry Family Law v Google LLC* [2021] FCA 1589.

commenter's safety is the commenter themselves. Yet the proposed reform does not require notice of the making of the end-user information disclosure order to be given to the commenter; does not confer standing on a commenter to be heard prior to the making of such an order; does not confer standing on a commenter to seek review of such an order or to appeal against such an order once made; and does not otherwise provide for mechanisms by which a court may be informed of a risk to a commenter's safety. These deficiencies in the exposure draft would need to be addressed.

Definition of a risk to a commenter's safety. To avoid unnecessary legal argument, it would be prudent to include a non-exhaustive definition of what may constitute a risk to a commenter's safety, indicating that it is intended to extend to risks not only to physical safety but also psychological safety. There may be other types of risks to safety that the Commonwealth wishes to include or to exclude. It would be appropriate for the proposed legislation to provide some further guidance on this issue.

Limitation of risk to the commenter's safety. The proposed reform is limited to a risk being posed to a commenter's safety. It is not clear why the risk should be so limited. A commenter may have a fear of a threat posed by the prospective applicant to a person other than the commenter themselves. For instance, in a situation of family or domestic violence, where a prospective applicant seeks an end-user information disclosure order, the commenter may want to oppose the making of such an order not because the commenter fears a risk to their own safety but rather a risk to the safety of their children. Consideration needs to be given to a commenter being able to resist the making of such an order on the basis that a risk is posed to the safety of a person other than the commenter themselves.

Other grounds upon which a court can refuse to make an end-user information disclosure order. Clause 18(4) states that the other grounds upon which a court may refuse to make an end-user information disclosure order are not limited to a risk to a commenter's safety. It would seem prudent for the Commonwealth to turn its mind to what other grounds should or should not be relevant, rather than conferring an open-ended discretion on a court to refuse to grant such relief. Should privacy be a proper ground to refuse to make such an order, or investigative journalism, the protection of whistleblowers, freedom of speech or the public interest more generally?

Need for harmonisation. A real issue relating to these types of orders which is not addressed by the proposed reform is the need for harmonisation. Rules of court around Australia already provide for mechanisms where a prospective plaintiff can seek information about a prospective defendant with a view to commencing proceedings against that defendant. Those rules of court vary as to what considerations can and cannot be taken into account. This does not assist in the promotion of the uniformity of Australian defamation law and can lead to disparate outcomes. There may be considerations specific to defamation, particularly online defamation, which the Commonwealth, States and Territories think would be appropriate for a court to have regard to when making such an order compelling a person to disclose information about a prospective defendant. It would seem appropriate, in the interests of promoting the uniformity of Australian defamation law, to have a harmonised approach to this issue and to have one type of order, rather than relying upon existing rules of court or allowing prospective plaintiffs to choose between existing rules of court and the proposed new court order.

Clause 20: Nominated entities. A useful aspect of the proposed reform is the requirement of social media services to have a nominated entity in Australia. The real difficulty prospective

plaintiffs face in suing social media services for defamation is not uncertainty as whether social media services are publishers for the purposes of defamation law but rather the more difficult issues of jurisdiction and enforcement. There are, however, issues with the exposure draft, which require redrafting as well as fuller explanation in the supporting materials.

The relationship between the nominated entity and the social media service. It is not entirely clear whether the elements of the exposure draft are intended to cohere as a single legislative scheme and, if they are, whether they in fact do so. The relationship between the nominated entity and the provider of the social media service highlights this. Clause 20(1) requires a social media service which is a body corporate incorporated in a foreign country and which has at least 250,000 Australian persons holding accounts with it to have a nominated entity in Australia. The nominated entity is required, *inter alia*, to have access to relevant contact details and country location data of Australian commenters on social media pages. It can then be ordered to disclose such information under the new order proposed in clause 18 of the exposure draft, as can the provider of the social media service.

Under clause 20(1)(c) of the exposure draft, the nominated entity is an agent of the provider of the social media service. It is unclear in what sense and for what purposes the nominated entity is an 'agent' of the provider of a social media service. The term, 'agent', is a notoriously difficult and slippery one. The exposure draft needs to set out precisely what is meant by its use here.

For instance, it is unclear whether the exposure draft intends to use the agency relationship to overcome the problems of jurisdiction and enforcement by seeking to hold the nominated entity liable for the social media service's deemed liability as a publisher under clause 14. If that is the intention, then the exposure draft in its current form does not achieve this and would require substantial reworking in order to do so.

If that is not the intention, then significant and difficult issues of jurisdiction and enforcement against foreign social media services faced by defamation plaintiffs in Australia remain unaddressed by the exposure draft. If this is the case, considering this in light of clause 14(1) as proposed, it is foreseeable that a potential plaintiff who believed that they had been defamed by a comment posted on a social media page:

- may have no claim in defamation against the social media page owner or administrator because they have a complete immunity under clause 14(1)(c);
- may have a claim in defamation against the provider of a social media service at common law and under clause 14(1)(d) but cannot pursue it because the social media service may not be amenable to jurisdiction in Australia or a defamation judgment of an Australian court may not be enforceable in a jurisdiction where the social media service is located;
- the nominated entity of the social media service is not liable for the provider of the social media service's liabilities in defamation; and
- the commenter cannot be identified or located.

This would leave such an aggrieved person without a remedy in defamation and in a worse position than Australian law currently provides. It is difficult to see then how a proposed draft which operates in this way could further the stated policy of this reform.

Privacy concerns. There are understandable concerns about large social media companies aggregating personal information about users. The proposed reform requires nominated entities of social media companies to collect and retain detailed information about individual users but makes no provision for protecting the privacy of such users, by limiting the purposes to which the social media companies, which would be legally obliged to collect and retain, could put such information. At a minimum, some discussion of this would be required in the explanatory materials but it may be preferable to state expressly what privacy constraints the Commonwealth thinks should apply to social media companies in the proposed legislation.

Absence of the power to remove content. What is striking in the proposed reform is the absence of any power conferred on a court to order the removal of content from a social media service. Clause 16(1)(e) contemplates that the provider of a social media service may remove a comment with the consent of the commenter but, beyond this, the proposed reform does not seek to confer any greater power to remove defamatory content. It is unclear why such a power to remove defamatory content is absent, as this may be a more effective remedy for a plaintiff than an award of damages, particularly given the capacity of online material to stay online and to be readily shared and circulated. Such a power would seem to be necessary for a coherent and effective scheme to deal with defamatory material online. Inferior courts would need such an express power, given that many lack the power to grant mandatory injunctive relief. In this regard, I would direct your attention to the *Defamation Act 2013* s 13 as a potential model for such a power.