16 September 2022

Review of Model Defamation Provisions Stage 2
Email: defamationreview@justice.nsw.gov.au

Dear Members of the Working Party,

Re: REVIEW OF MODEL DEFAMATION PROVISIONS STAGE 2 – Submission of Dr Daniel Joyce in response to draft Part A MDAPs and paper

Thank you for progressing this second stage of the review into the current Defamation Provisions. Thank you also for the short extension allowed. I will target my submissions to those areas I am most concerned with in Part A. I make these submissions as an academic who teaches media law and defamation law.

Recommendation 1

I think overall this is a useful clarification, though it may now also parallel the position taken in the case law.

Recommendation 2

I am concerned that offering a conditional, statutory exemption for standard search engine functions, whilst seeming to address the growth of cases in this area, may leave plaintiffs unable to practically address the damage to their reputations online. It is concerning, and I think highly inappropriate, to underpin this move by reference to 'the significant social and economic value of search engines'.

Defamation law is about balancing the protection of reputation as against speech. Whilst clearly that balance is not achieved in Australia, giving digital platforms further protection on account of their economic power and significance is extremely problematic. No such protection has been afforded the traditional media in the development of defamation law on account of its 'significant social and economic value'. I do not think this recommendation should proceed.

Safe harbour provisions are to be avoided, especially when offered to the most powerful of actors within the media law landscape. There is increasing concern within US scholarship and policy about the effects of such an approach.[1]

[1] See Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019) pp 97-101.

Recommendations 3A and 3B

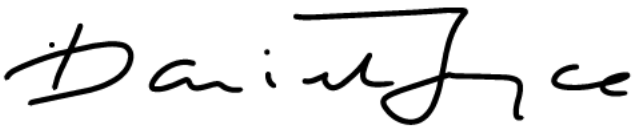
Of the two options, I have a preference for Recommendation 3B. One concern with 3B is that it might encourage the removal of material by digital intermediaries which in fact has some public and social value. I note the phrase 'that were reasonable for the defendant to take in the circumstances' may play a role here as some form of check on a 'remove first' approach to avoid liability. However, a better and I believe simpler path than 3B, would be to reform the existing statutory defence of innocent dissemination to achieve a similar result. Defamation law is already quite messy and technical. Streamlining and strengthening existing provisions to allow them to better apply to new digital contexts is preferable to adding a further defence. The problem with defamation law defences is not that there are too few of them, but that the courts have tended to interpret them restrictively while the net of liability is cast broadly.

Definitional Concerns

It would be useful to have further clarification regarding whether traditional media when engaging with the digital media landscape would be afforded the same kinds of protections proposed here as for other digital platforms/intermediaries (who by contrast do not usually recognise their role and responsibility as publishers). There is a danger that by recognising the distinctiveness of new actors like search engines we may entrench a media/digital platform divide rather than considering their various and sometimes overlapping roles within the digital media ecology. Practically speaking it may still be necessary to pursue an action against a digital intermediary to protect reputation in the digital era.

Thank you very much for the opportunity to be involved in this constructive and important process of defamation law reform.

Yours sincerely,



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