

# Review of Model Defamation Provisions

**May 2019**

Review of Model Defamation Provisions  
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## The NSW Young Lawyers Communications, Entertainment and Technology Law Committee & the NSW Young Lawyers Civil Litigation Committee (the Committees) make the following submission in response to the Council of Attorney-General's Review of Model Defamation Provisions

### **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Communications, Entertainment and Technology Law Committee of NSW Young Lawyers aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property, advertising and consumer protection, confidential information and privacy, entertainment, and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly about the shape of the law and the legal profession.

The NSW Young Lawyers Civil Litigation Committee comprises of a group of over 1200 members and covers all aspects of civil litigation with a focus on advocacy, evidence and procedure in all jurisdictions. Our activities, direction and focus are very much driven by our members, which include barristers, solicitors and law students. The Committee seeks to improve the administration of justice, with an emphasis on advocacy, evidence and procedure.

## Introduction

The NSW Young Lawyers Civil Litigation Committee and NSW Young Lawyers Communications, Entertainment and Technology Law Committee (the **Committees**) welcome the opportunity to comment on the Model Defamation Provisions (**MDP**) on behalf of NSW Young Lawyers.

The Committees note that a key outcome of this review is to determine whether the policy objectives of the MDP remain valid, and/or whether the MDP could benefit from some amendment or modernisation. In particular, the Committees appreciate that there needs to be an appropriate balance between freedom of expression and the protection of reputation.

The Committees have responded to the selected questions outlined below, and have otherwise not made submissions on the remaining questions. The Committees have outlined considerations that they recommend the Defamation Working Party (**DWP**) take into account when reviewing these issues. The Committees hope that these considerations provide helpful guidance to the DWP in conducting this review.

## Question 2 – Rights of Corporations

### **2: Should the Model Defamation Provisions be amended to broaden or to narrow the right of corporations to sue for defamation**

1. Clause 9 of the MDP currently provides that a corporation generally has no cause of action for defamation unless it is an ‘excluded corporation’ at the time the defamatory matter is published.
2. For the reasons set out below, the Committees do not see a need to broaden the right of larger corporations to sue for defamation given the alternative avenues already available to address corporate reputational issues.

#### Right of corporations to protect their reputation

3. Corporations have a variety of alternative options available to defend their reputations without resorting to a defamation action. For example, they may bring actions in respect of the tort of injurious falsehood, provisions under the Australian Consumer Law,<sup>1</sup> breach of confidence, and, in some instances, complaints to applicable regulatory bodies.
4. The Committees acknowledge some of these remedies are often difficult to procure. For example, to make out a claim of injurious falsehood, a party needs to prove malice, and damage or loss. A breach of the Australian Consumer Law will only be

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<sup>1</sup> Schedule 2, *Competition and Consumer Act 2010* (Cth)

applicable if it can be established that the statements were made in relation to trade and commerce, and are not subject to an information providers' exception (as most media entities / publishers are).<sup>2</sup>

5. However, larger corporations in particular will typically have the ability to engage in public relations or marketing campaigns to enhance their image and control their reputations.
6. Bearing in mind the desirability of protecting freedom of speech, the Committees recommend that larger corporations be left to such methods, as well as the existing legal remedies, rather than being given the right to sue in defamation.

#### 'Excluded corporations'

7. In saying the above, the Committees acknowledge (and agree with the policy underlying the MDP) that not all corporations are large enterprises readily able to bear the cost of public relations campaigns or pursuing the other legal remedies outlined above, such that smaller companies should remain able to sue in defamation as 'excluded corporations'.
8. In that respect, as an administrative matter and for consistency from a national perspective, the Committees note that other national laws define 'small businesses' by reference to greater numbers of employees than the current defamation laws (which is currently fewer than 10<sup>3</sup>).
9. For example, the Small Business Fair Dismissal Code<sup>4</sup> applies to businesses that employ under 15 employees. Under the Australian Consumer Law, a contract is considered to be a 'small business contract' if, at the time the contract is entered into, at least one party to the contract is a business with under 20 employees<sup>5</sup>. It could be fairly said that companies of such sizes are not 'large' companies of the kind that can be expected to readily fund public relations campaigns or similar reputation management measures.
10. Having regard to the above, the Committees consider that if the 'excluded corporation' threshold were extended, it should be extended corporations with either 15 or 20 employees to reflect legislative provisions which deal with issues affecting smaller companies.

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<sup>2</sup> Clauses 19 and 38 of the Australian Consumer Law (Schedule 2, *Competition and Consumer Act 2010* (Cth)).

<sup>3</sup> Clause 9(2)(b) *Defamation Act 2005* (NSW).

<sup>4</sup> Clause 388(1) *Fair Work Act 2009* (Cth).

<sup>5</sup> Clause 23(4)(b) and (5) Australian Consumer Law (Schedule 2, *Competition and Consumer Act 2010* (Cth)).

### Requirement for serious harm

11. While the Committees' primary position is that larger corporations should not be able to bring actions in defamation, if there is to be a change to that limitation, the Committees note a number of other common law jurisdictions (for example, the UK and NZ) have a requirement to prove 'serious harm' to make out a defamatory action.
12. The *Defamation Act 2013* (UK), in particular, specifically provides that, 'harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss.'<sup>6</sup>.
13. If the DWP explores the option of broadening larger corporations' right to sue in defamation, the Committees recommend that the DWP consider whether there should, at least, be a requirement that larger corporations prove 'serious harm' as part of any action.

### **Question 4 - Offers to make amends**

**4 (a): Should the Model Defamation Provisions be amended to clarify how clauses 14 (when offer to make amends may be made) and 18 (effect of failure to accept reasonable offer to make amends) interact, and, particularly, how the requirement that an offer be made 'as soon as practicable' under clause 18 should be applied?**

14. Yes. The current lack of certainty caused by the unfortunate interaction of these provisions should be rectified. The defence in clause 18(1)(a) of the MDP is confined to 'as soon as practicable after becoming aware that the matter is or may be defamatory.' As noted in the discussion paper, the Law Council of Australia has raised a number of concerns to the effect that the defence is too restrictive. The Committees echo those concerns and note that the clauses as drafted cause great uncertainty and are overly subjective. This is particularly the case as publishers are likely to require time to make extensive enquiries into the complaint, and obtain legal advice or other stakeholder input.
15. In particular, the words 'or may be' in clause 18(1)(a), might force publishers to issue an offer to make amends regardless of the degree or extent of any doubt as to whether the material is in fact defamatory, without having a proper opportunity to make further investigations as to the material or alternatively, the appropriateness of any terms of an offer to make amends in the circumstances.
16. Conversely, there may be publishers who choose not to issue an offer to make amends straight away, but with the benefit of time to investigate the complaint, subsequently discover that they should have issued an offer to make amends, and

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<sup>6</sup> Clause 1(2) *Defamation Act 2013* (UK).

instead proceed with the litigation at the chance of a success, having lost the clause 18 defence.

17. Parties should be afforded more certainty with respect to the availability of this defence and the implications of any refusal of an offer to make amends, including clarity on timing. The Committees suggest the phrasing in clause 18(1)(b) should commence a timeframe by reference to the raising of a complaint, either by a concerns notice or the commencement of proceedings. Rather than using the phrase 'as soon as practicable' this may involve allowing publishers to have a valid defence if an offer to amends is made within the 28-day period prescribed by clause 14 (or another concrete period of time considered appropriate).
18. In any event, the provisions should be amended to afford consistency and certainty with respect to how the defence may apply in each case without the current subjective regulation. The Committees submit that this would promote the use of offers to make amends and in doing so assist parties resolves matters at an early stage of litigation (or avoid it altogether).

**4 (b): Should the Model Defamation Provisions be amended to clarify clause 18(1)(b) and how long should an offer of amends remain open for in order for it to be able to be relied upon as a defence, and if so, how?**

19. Yes. The MDP should be amended to confirm the amount of time an offer to make amends is open for in order for the defence to be relied upon. The DWP may wish to consider the operation of Division 4, Part 20 of the *Uniform Civil Procedure Rules* 2005 (NSW) regarding Offers of Compromise for guidance as to timeframes which may also be considered reasonable in these circumstances.

**4(c): Should the Model Defamation Provisions be amended to clarify that the withdrawal of an offer to make amends by the offeror is not the only way to terminate an offer to make amends, that it may also be terminated by being rejected by the plaintiff, either expressly or impliedly (for example, by making a counter offer or commencing proceedings), and that this does not deny a defendant a defence under clause 18?**

20. Yes. The Committees submit that the MDP should be clarified in the light of *Nationwide News v Vass* [2018] NSWCA 259 to remove uncertainty regarding the circumstances where an offer to amends may be terminated, including by withdrawal or rejection by the plaintiff (and potentially the means of rejection), and the availability of the defence in clause 18 in such circumstances.

## **Question 6 – Other issues relating to offers to make amends**

### **6(a): Should amendments be made to the offer to make amends provisions in the Model Defamation Provisions to require that a concerns notice specify where the matter in question was published?**

21. Yes. A concerns notice should specify the location (as well as any other key information) with sufficient specificity to allow the publisher to identify where the matter in question was published. This certainty is imperative for a publisher to be able to quickly assess, and if relevant address, the matter complained of. However, the Committees note that should a publisher be unsure, there is an existing mechanism available to issue a further particulars notice.
22. The Discussion Paper points out that '[t]here is no requirement for an aggrieved person to list the URL of the alleged defamatory material in a concerns notice.' While providing the publisher the exact URL certainly makes sense, the Committees note that making this an absolute requirement will be problematic in circumstances where the website's URL does not remain static. The Committees submit it cannot be an absolute requirement and should therefore not be mandatory.

### **6(b): Should amendments be made to the offer to make amends provisions in the Model Defamation Provisions to clarify that clause 15(1)(d) does not require an apology?**

23. Yes. Given the unequivocal language in the Second Reading Speech for the *Defamation Act 2005* (NSW) that an apology is not a mandatory component in any offers to make amends, to promote certainty and minimise confusion, the Committees generally support further clarification in the MDP.
24. The Committees do not make a submission on the issue of whether the underlying position (i.e. that an apology is not mandatory in an offer to make amends) is appropriate.

### **6(c): Should amendments be made to the offer to make amends provisions in the Model Defamation Provisions to provide for indemnity costs to be awarded in a defendant's favour where the plaintiff issues proceedings before the expiration of any period of time in which an offer to make amends may be made if, in the event the court subsequently finds that in offer of amends made to the plaintiff after proceedings were commenced was reasonable?**

25. The Committees do not support an amendment of this kind.
26. While the Committees see the benefit in rewarding parties for early attempts to resolve proceedings, there may be certain cases where the early commencement of proceedings is justified, particularly if an injunction was reasonably sought.

27. The Committees also submit that while the legislation may provide guidelines for the award of costs, these should not override judicial discretion to awarding costs. A fixed rule may not suit the circumstances of every case.

## **Question 15 – Innocent dissemination**

### **Summary**

**15 (a): Does the innocent dissemination defence require amendment to better reflect the operation of Internet Service Providers, Internet Content Hosts, social media, search engines, and other digital content aggregators as publishers? Yes**

**15(b): Are existing protections for digital publishers sufficient? No**

**15 (c): Would a specific ‘safe harbour’ provision be beneficial and consistent with the overall objectives of the Model Defamation Provisions? Yes**

**15 (d): Are clear ‘takedown’ procedures for digital publishers necessary, and, if so, how should any such provisions be expressed? Yes** (subject to careful consideration with stakeholders and conflict of laws experts).

### Reasoning

28. The Committees submit that the existing innocent dissemination defence is insufficient in its application to internet content hosts, Digital Platforms and internet service providers (**ISPs**) under the *Broadcasting Services Act 1992* (Cth) (collectively '**the Entities**').
29. In principle, the Committees support a takedown process as a measure that is more desirable over a formal ‘safe harbour’ provision. Amendments to the relevant clauses of the MDP are therefore appropriate, but must be guided by:
- a) independent expert evidence on the technical operations and capacities of the Entities (e.g. on the extent to which the algorithms employed by Digital Platforms can and do ‘curate’ or filter content);
  - b) policy considerations based on the expert evidence — in particular, reflection on the circumstances in which any of the Entities ought to be protected by the defence, or potentially bear a burden to supervise defamatory material published online; and
  - c) the lessons from concurrent attempts to reform digital media regulation (e.g. in relation to privacy law), with a view to ensuring consistency between regimes and the efficacy of new approaches.

30. The Committees echo the issues previously raised by the Law Council of Australia regarding the scope and utility of the existing defence, in particular the:
- a) ambiguity around the meaning of ‘originator’ and whether ISPs that publish content uploaded to their servers are captured by the term; and
  - b) particular usage agreements used by ISPs which permit them to delete or modify content stored on their servers, such that the ISPs arguably have ‘capacity to exercise editorial control’.<sup>7</sup>
31. These issues illustrate that the terms used in clause 32 such as ‘publish’, ‘author’, ‘originator’ and ‘distributor’ are arguably vague in their application to defamatory content that is uploaded and appears online. In addition to website users themselves, one or several of the Entities may be implicated as ‘authors’, ‘originators’ or ‘primary distributors’ in the case of defamatory content being made available to the public online. This is because there are several Entities involved in *effecting* the ‘bilateral act’ of internet publication, ‘in which the publisher makes [a defamatory publication] available and a third party has it available for his or her comprehension’.<sup>8</sup>
32. The High Court held in the unanimous single judgment in *Trkulja v Google LLC* [2018] HCA 25 at [40],<sup>9</sup> ‘all degrees of participation in publication are publication’.<sup>10</sup> The High Court also referred to the judgment of Isaacs J in *Webb v Bloch* (1928) 41 CLR 331 where His Honour held:

*‘The term published is the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; since, if he has intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show a publication by him.’<sup>11</sup>*

33. An Entity may assert that it is not an ‘author’, ‘originator’ or ‘primary distributor’ of defamatory matter. However, given the wide interpretation of the meaning of ‘publish’ in the common law, it is uncertain whether the terms in the legislation as it stands might be construed similarly widely in the context of publication on the Internet and the innocent dissemination defence. The proposition that ISPs might be ‘originators’

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<sup>7</sup> The Law Council of Australia Submissions to the NSW Department of Justice statutory review of the *Defamation Act 2005* (NSW) pp. 21-23 as cited in Defamation Working Party, Council of Attorneys-General, *Review of the Model Defamation Provisions* (Discussion Paper, February 2019) 34–5 [5.51] – [5.52].

<sup>8</sup> *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [26]; *Poniatowska v Channel Seven Sydney Pty Ltd (No 4)* [2016] SASC 137; *Johnson v Aldridge* [2018] SADC 68, [172].

<sup>9</sup> In the joint judgment of Kiefel CJ, and Bell, Keane, Nettle and Gordon JJ.

<sup>10</sup> *Trkulja v Google LLC* [2018] HCA 25, [40].

<sup>11</sup> *Webb v Bloch* (1928) 41 CLR 331 at 363-364 per Isaacs J, referred to in *Trkulja v Google LLC* [2018] HCA 25 at [40].

when they publish content uploaded to their servers demonstrates the reach in the current definitions may extend too far by way of analogy in the absence of express provisions to take the nature of ISPs and other Entities into account. The Committees submit that this indicates the terms of the MDPs are not sufficiently adapted to the Internet environment at present and further clarity is needed.

34. A further example of the ambiguity that arises in this context emerges from the debate about the characterisation of Digital Platforms as mere ‘platforms’ or as publishers themselves.<sup>12</sup> In an 2018 Washington Monthly essay, technology venture capitalist and former mentor to Mark Zuckerberg, Roger McNamee argued that, ‘Facebook and Google make millions of editorial choices every hour and must accept responsibility for the consequences of those choices’.<sup>13</sup> McNamee expanded on this in relation to Facebook:

*[t]he problem is that Facebook really is a media company. It exercises editorial judgment in many ways, including through its algorithms. Facebook’s position has always been that users choose their friends and which links to view, but in reality, Facebook selects and sequences content for each user’s News Feed, an editorial process that has led to criticism in the past ...<sup>14</sup>*

35. On this assessment of their operations, some Digital Platforms appear to fall outside the definition of ‘subordinate distributors’ because that definition includes only persons who, with respect to certain defamatory matter, ‘did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published’.<sup>15</sup> However, the same may not be true for all Digital Platforms.
36. The question of whether Google published an allegedly defamatory matter was considered in *Trkulja v Google LLC* [2018] HCA 25. In a joint judgment, the High Court held:

*‘McDonald J was correct to hold that it is strongly arguable that Google’s intentional participation in the communication of the allegedly defamatory results to Google search engine users supports a finding that Google published the allegedly defamatory results ...<sup>16</sup>*

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<sup>12</sup> See Sam Levin, ‘Is Facebook a Publisher? In Public it Says No, but in Court it Says Yes’, *The Guardian* (online at 3 July 2018) <<https://www.theguardian.com/technology/2018/jul/02/facebook-mark-zuckerberg-platform-publisher-lawsuit>>.

<sup>13</sup> Roger McNamee, ‘How to Fix Facebook — Before It Fixes Us’, *Washington Monthly* (online at 5 January 2018) <<https://washingtonmonthly.com/magazine/january-february-march-2018/how-to-fix-facebook-before-it-fixes-us/>>.

<sup>14</sup> Roger McNamee, *Zucked: Waking Up to the Facebook Catastrophe* (Penguin, 2019) ch 9 [2].

<sup>15</sup> Model Defamation Provisions cl 32(2)(c) [emphasis added].

<sup>16</sup> *Trkulja v Google LLC* [2018] HCA 25, [38].

37. The High Court also considered the Court of Appeal had made purportedly definitive findings of mixed fact and law, relying extensively on Google's affidavit evidence regarding the 'world wide web', search engines, and the systems and processes by which Google claimed that its computer search engines are generated. The High Court found that:

*'That was not an appropriate way to proceed. In point of principle, the law as to publication is tolerably clear. It is the application of it to the particular facts of the case which tends to be difficult, especially in the relatively novel context of internet search engine results. And contrary to the Court of Appeal's approach, there can be no certainty as to the nature and extent of Google's involvement in the compilation and publication of its search engine results until after discovery.'*<sup>17</sup>

38. Though this statement was made in the context of an application for summary judgment, the Committees consider that the High Court's judgment should guide the DWP's approach to proposed reform of the innocent defamation defence in relation to the Entities. The Committees submit that the DWP should consider the actual nature and extent of involvement in the publication of material by Entities in the context of the innocent dissemination defence.

### **Alternative approaches in other regulatory contexts**

39. Other areas where there has been an assignment of responsibility for material published online to inform reforms to the innocent dissemination defence should be considered by the DWP. For example, businesses advertising on social media have previously been held liable by the Advertising Standards Board (**ASB**) for breaches of the Advertiser Code of Ethics for user comments posted on the business Facebook pages.<sup>18</sup> In the view of the ASB:

*'The Facebook site of an advertiser is a marketing communication tool over which the advertiser has a reasonable degree of control and that the site could be considered to draw the attention of a segment of the public to a product in a manner calculated to promote or oppose directly or indirectly that product. The Board determined that the provisions of the Code apply to an advertiser's Facebook page. As a Facebook page can be used to engage with customers,*

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<sup>17</sup> *Trkulja v Google LLC* [2018] HCA 25, [38].

<sup>18</sup> Advertising Standards Board, *Case Report No. 0271/12 re: Fosters Australia, Asia & Pacific* (11 July 2012) <<https://adstandards.com.au/cases/2012/July?ref=0271/12>>; Advertising Standards Board, *Case Report No. 0272/12 re: Diego Australia Ltd* (11 July 2012) <<https://adstandards.com.au/cases/2012/July?ref=0272/12>>.

*the Board further considered that the Code applies to the content generated by the page creator as well as material or comments posted by users or friends.*<sup>19</sup>

40. The ASB did not, in either case, consider the advertiser's awareness (or lack thereof) of the offending user comments when determining its responsibility for the comments. The decisive factor in both cases was that an advertiser 'has a reasonable degree of control' over its Facebook site. Therefore it logically flows that advertisers can be held liable for the contents of a Facebook user comment on its Facebook page (in this context), whether or not it is in fact aware of the material. The Australian Competition and Consumer Commission (**ACCC**) was supportive of the ASB's position in this regard. At the time, the ACCC stated larger, well-resourced companies should conceivably remove offending material within 24 hours while small to medium enterprises should act as soon as they become aware.<sup>20</sup> The ACCC appears to generally approve of this view of responsibility on social media in its current guidance, and emphasises that the amount of time that a company should spend monitoring its social media pages will depend on the size of the company and the number of fans or followers it has.<sup>21</sup>

### **Takedown procedures**

41. Any consideration of takedown procedures for digital publishers in relation to allegedly defamatory material is likely to be complex and controversial, potentially involving a balancing exercise between contending policy and commercial considerations to determine the appropriate extent and form of such procedures.

42. The Committees submit that the DWP should be mindful of similar developments in other areas of regulation in Australia, including:

- a) the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) (recently assented to in response to the Christchurch massacre) which requires that the providers of content and hosting services ensure the 'expeditious removal' of abhorrent violent material upon notification by the eSafety Commissioner;<sup>22</sup>

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<sup>19</sup> Advertising Standards Board, *Case Report No. 0271/12 re: Fosters Australia, Asia & Pacific* (11 July 2012) <<https://adstandards.com.au/cases/2012/July?ref=0271/12>>.

<sup>20</sup> Cara Waters, 'ACCC Gives Big Business 24 Hours to Fix Facebook Comments, but SMEs get More Time', *SmartCompany* (online at 13 August 2012) <<https://www.smartcompany.com.au/business-advice/legal/accc-to-gives-smes-more-time-to-remove-false-and-misleading-comments-on-facebook/>>; Wenlie Ma, 'ACCC Backs ASB's Facebook Ruling', *AdNews* (online at 13 August 2012) <<http://www.adnews.com.au/adnews/accc-backs-asb-s-facebook-ruling>>.

<sup>21</sup> ACCC Website, Monitoring Social Media Pages, <<https://www.accc.gov.au/business/advertising-promoting-your-business/social-media>> (online at 25 April 2019).

<sup>22</sup> Schedule 1, Item 1, *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth).

- b) the proposed changes to the *Privacy Act 1988* (Cth), including the foreshadowed imposition of a requirement for social media and online platforms to cease the use or disclosure of an individual's personal information upon request;<sup>23</sup> and
  - c) the outcome of the Digital Platforms Inquiry, which is considering defamation law and the liability of Digital Platforms for defamatory material posted online.<sup>24</sup>
43. The Committees submit that any implementation of takedown procedures in the context of defamation should be the product of a separate and specific consultation with stakeholders, and should form part of a comprehensive policy response that is mindful of the Commonwealth Constitution, s 51(v) power, competing considerations in defamation law and privacy law, 'fake' news and hate speech online.<sup>25</sup> As Justice Judith Gibson stated, '[r]edrafting the uniform defamation law requires more than rearranging the deckchairs on the Titanic ...'<sup>26</sup>
44. Further, in considering the extent to which takedown procedures have the potential to inhibit freedom of expression, common assumptions about the nature of online communication should also be examined. Digital spaces are often portrayed as necessarily democratic, in that their existence inherently facilitates a decentralised space<sup>27</sup> which enhances the voices of private individuals in public discussions, including the possibility of engagement in collective action.<sup>28</sup>
45. When digital spaces are considered in this way, takedown procedures could appear to unduly restrict freedom of expression — and not only because of the possibility of abuse of the procedures by bad-faith actors.<sup>29</sup> It is acknowledged there are differing

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<sup>23</sup> Attorney-General Christian Porter, 'Tougher Penalties to Keep Australians Safe Online' (Media Release, 24 march 2019) <<https://www.attorneygeneral.gov.au/Media/Pages/Tougher-penalties-to-keep-australians-safe-online-19.aspx>>.

<sup>24</sup> Australian Competition and Consumer Commission, 'Digital Platforms Inquiry' (Preliminary Report, 10 December 2018) 144–6.

<sup>25</sup> Justice Judith Gibson, 'Adapting Defamation Law Reform to Online Publication' (Discussion Paper, Faculty of Law, University of New South Wales, 21 March 2018) 7.

<sup>26</sup> Justice Judith Gibson, 'Adapting Defamation Law Reform to Online Publication' (Discussion Paper, Faculty of Law, University of New South Wales, 21 March 2018) 26.

<sup>27</sup> Petros Iosifidis, 'The Public Sphere, Social Networks and Public Service Media' (2011) 14(5) *Information, Communication & Society* 619, 623. See also John Bertot, Paul Jaeger and Justin Grimes, 'Using ICTs to Create a Culture of Transparency: E-Government and Social Media as Openness and Anti-Corruption Tools for Societies' (2010) 27 *Government Information Quarterly* 264, 265–7.

<sup>28</sup> Petros Iosifidis, 'The Public Sphere, Social Networks and Public Service Media' (2011) 14(5) *Information, Communication & Society* 619, 623. See also John Bertot, Paul Jaeger and Justin Grimes, 'Using ICTs to Create a Culture of Transparency: E-Government and Social Media as Openness and Anti-Corruption Tools for Societies' (2010) 27 *Government Information Quarterly* 264, 265–7.

<sup>29</sup> See, e.g., the concern raised in Defamation Working Party, Council of Attorneys-General, *Review of the Model Defamation Provisions* (Discussion Paper, February 2019) 36 [5.55]–[5.56]. See also the novel problems for defamation law and the internet, some of which may apply to takedown procedures, identified in Justice Judith Gibson, 'Adapting Defamation Law Reform to Online Publication' (Discussion Paper, Faculty of Law, University of New South Wales, 21 March 2018) 24–5.

views amongst academics as to the nature and the benefit of digital spaces, but their shortcomings have been said to include:

- a) lack of structure to guide democratic, rather than anarchic, participation;
- b) lack of equal access to the internet;
- c) threat of censorship;
- d) apparent absence of extensive dialogue and critical discussion;
- e) partisan nature of political contribution online; and
- f) nature of the internet being a mere distribution medium.<sup>30</sup>

46. The well-documented ‘filter bubble’ or ‘echo chamber’ effect caused by the algorithms utilised by Digital Platforms diminishes the democratic potential of digital spaces,<sup>31</sup> since it creates ‘a fertile ground for polarisation and misinformed opinions’.<sup>32</sup> Balancing the need for freedom of expression without placing unreasonable limits upon it and without facilitating the publication of defamatory matter online must necessarily also take into account legislative provisions overseas due to the globally accessible nature of the Internet. Any legislative measures introduced in an effort to strike a balance, whether by takedown processes or otherwise, must seek to avoid a conflict of laws, particularly if the relevant Entities have legal obligations overseas also.

47. The Committees consider takedown procedures (that are limited in scope) should be considered carefully in consultation with appropriate stakeholders and conflict of laws experts. If properly implemented in practice, such limited takedown procedures may relieve some of the substantial burden on Australian courts as a direct result of defamation proceedings,<sup>33</sup> especially given most defendants are ordinary members

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<sup>30</sup> Petros Iosifidis, ‘The Public Sphere, Social Networks and Public Service Media’ (2011) 14(5) *Information, Communication & Society* 619, 624–6; see also James Curran, ‘Reinterpreting the Internet’ in James Curran, Natalie Fenton and Des Freedman (eds), *Misunderstanding the Internet* (London: Routledge) 3, 11.

<sup>31</sup> See Tristan Harris, ‘Making Technology Less Manipulative’ (Speech, Stanford University, 3 November 2017) <<https://ecorner.stanford.edu/video/making-technology-less-manipulative-entire-talk/>>.

<sup>32</sup> Dimitar Nikolov et al, ‘Measuring Online Social Bubbles’ (2015) 1(38) *PeerJ Computer Science* DOI 10.7717/peerj-cs.38.

<sup>33</sup> For sources on the proliferation of defamation proceedings in Australia and in particular NSW — ‘the libel capital of the world’ — refer to Justice Judith Gibson, ‘Adapting Defamation Law Reform to Online Publication’ (Discussion Paper, Faculty of Law, University of New South Wales, 21 March 2018) 15 n 50.

of the public, many litigants are self-represented and much of the alleged defamation occurs on social media.<sup>34</sup>

## Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission.

Please note that the views and opinions expressed in this submission are on behalf of the Committees and their contributors and do not reflect the views or opinions of any employer or company related to the contributors.

If you have any queries or require further submissions, please contact the undersigned at your convenience.

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<sup>34</sup> Justice Judith Gibson, 'Adapting Defamation Law Reform to Online Publication' (Discussion Paper, Faculty of Law, University of New South Wales, 21 March 2018) 11–12, 12 n 39–40.