Submission to the NSW Department of Communities and Justice

on the exposure draft of the Model Defamation Amendment Provisions (Part A)

16 September 2022

Digital Rights Watch is a charity organisation founded in 2016 whose mission is to ensure that people in Australia are equipped, empowered and enabled to uphold their digital rights. We stand for Privacy, Democracy, Fairness & Freedom in a digital age. We believe that digital rights are human rights which see their expression online. We educate, campaign, and advocate for a digital environment where individuals have the power to maintain their human rights.[1]

[1] Learn more about our work on our website: https://digitalrightswatch.org.au/

General remarks

Digital Rights Watch (DRW) welcomes the opportunity to submit comments to the New South Wales Department of Communities and Justice National Defamation Reform Team concerning the draft Part A Model Defamation Amendment Provisions.

DRW has been actively following the role that defamation law has been playing with regard to public understanding, norms and expectations, and in turn, the development of technology and internet policy and legislation in Australia. For example, the recent case involving YouTube personality, Jordan Shanks ("FriendlyJordies"), and the former deputy premier of NSW, John Barilaro, prompted public discussion of the role that digital platforms should play in removing and moderating possibly defamatory content. Similarly, when Twitter agreed by consent order to provide details of anonymous account under the pseudonym "PRGuy" as a result of alleged defamation of a social media personality, Avi Yemini, this sparked heated debate regarding the value of anonymity online.

We also note the *Fairfax v Voller* case in 2021 in which the High Court held that media companies were the publishers of third party comments on their Facebook pages, and the subsequent draft *Social Media (Anti-Trolling) Bill 2021* proposed by the former Coalition government in response. Had this Bill passed it would have offered social media platforms an avenue to avoid defamation liability for comments posted on their platforms by "unmasking" anonymous users. We have previously made a submission regarding the so-called "anti-trolling" bill in which we highlight our concerns regarding the interplay between defamation proceedings and the protection of anonymity online.[2] In particular, we highlighted that incentivising digital platforms, including social media platforms, to collect additional personal information would create significant privacy and security risks and play directly into the hands of companies reliant on harmful surveillance capitalism business models. We are pleased to see the National Defamation Reform Team is *not* suggesting a similar approach.

These examples highlight how defamation law is playing a significant role in shaping the public and political opinion regarding policy and regulation of digital platforms which has flow-on effects for privacy, anonymity, content moderation and digital security. These are significant areas of debate which stand to impact the ways that Australians use and enjoy internet services and platforms, as well as the ways that human rights are realised in the digital age. We recognise that there are unique and complex challenges posed by the ubiquitous nature of the internet and digital platforms, and the legitimate interest of the Australian government to provide meaningful legal pathways for those suffering harm caused by defamation online. However, we urge the National Defamation Reform Team to strongly consider the normative consequences of defamation law for internet and tech policy in Australia, and the flow on effects for Australians' digital rights.

Preliminary discovery orders about anonymous or pseudonymous originators

While we appreciate that the proposed reform would require courts to take privacy, safety and public interest considerations into account when ordering intermediaries to provide identifying details of the originator, we remain concerned that it may be possible to use defamation proceedings to reveal personal information about anonymous users to the detriment of freedom of speech, expression and democratic participation. Without a high threshold for revealing identifying information of anonymous users, there is a risk that preliminary orders may be abused as a mechanism to "unmask" anonymous or pseudonymous users for personal or political reasons beyond strictly defamation proceedings

[2] Digital Rights Watch, Submission to the Attorney-General on the proposed Social Media (Anti-Trolling) Bill 2021, available here: https://digitalrightswatch.org.au/2022/01/21/submission-anti-trolling-bill/

purposes. For instance, reports of Twitter providing subscriber details of an anonymous account in response to social media personality Avi Yemini showing intention to commence defamation proceedings repeatedly emphasised that defamation was being used as a legal pathway to publicly "unmask PRGuy", including on Yemini's own YouTube Channel.[3] This was arguably an abuse of court processes. The ability to use defamation law in this way could lead to a chilling effect on freedom of speech and expression, a weakening of online political debate and discussion, as well as whistleblower disclosures.

DRW has written at length about the merit and value of anonymity online on both an individual level for safety, security and privacy, as well as a societal level with regard to political debate and democratic processes.[4] We will not repeat those arguments here, save to say that anonymity online is a fundamental enabler of other human rights in the digital age, and for many, a vital safety mechanism. The ability to restrict the amount of information that one shares online has immense value, and should be protected. Any mechanisms which may undermine people's ability to access and enjoy anonymity online should be critically examined on balance with the purported benefits.

This is not to say that individuals should be able to avoid the consequences of defaming people under the protection of anonymity. We appreciate that the model provisions include a requirement to balance privacy, safety and public interest considerations, however we remain concerned that the process may still be subject to actions brought by plaintiffs that are speculative or represent an abuse of process. Respectfully, we think that this reform process should consider how this problem could be addressed.

We suggest that the National Defamation Reform Team consider whether a higher threshold for revealing identifying details of anonymous online users should be established to prevent unintended consequences. For instance, we would support providing courts with the capacity to reject preliminary discovery orders against an anonymous online account where such orders would be contrary to the public interest, compromise democratic participation, risk of an abuse of process, even in circumstances where a plaintiff might have an arguable case. We would also support powers for the court to dismiss an application where it appears that the plaintiff is motivated by malice. At the very least, we would encourage the National Defamation Reform Team to require courts to consider these factors when determining an application for preliminary discovery orders. Alternatively, applicants could be required to show an arguable case of defamation against the prospective respondent *before* identifying details are provided, rather than merely being required to show intention to commence proceedings against an anonymous or pseudonymous originator.

When the threshold for revealing identifying information of anonymous users is too low, it acts as a deterrent to criticism and political debate online, causing people to self-censor out of fear of defamation lawsuits. It may also exacerbate the existing power imbalances in Australia's defamation system. This is an especially pertinent concern given that Australia is widely perceived as a friendly jurisdiction for defamation plaintiffs, and there are recent examples of powerful individuals making use of this in ways that cast a chill over freedom of expression in this country. For example former

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[3] *The Guardian,* 'Twitter Ordered to hand over PRGuy17's personal information as part of a defamation suit' https://www.theguardian.com/technology/2022/jun/07/twitter-ordered-to-hand-over-prguy17s-personal-information-as-part-of-defamation-suit; Rebel News, 'Avi Yemini files lawsuit to unmask PRGuy' https://www.youtube.com/watch?v=HMVfW1Ji1iU

[4] See pages 5-6 of the Digital Rights Watch submission to the Parliamentary Inquiry into Social Media and Online Safety, available here: https://digitalrightswatch.org.au/2022/01/13/submission-inquiry-into-social-media-and-online-safety/; Explainer: Anonymity online is important, available here: https://digitalrightswatch.org.au/2021/04/30/explainer-anonymity-online-is-important/

Attorney-General Christian Porter sued the public broadcaster in defamation and resolved the matter before verdict, and the Minister for Defence Peter Dutton sued a refugee activist in a widely criticised move.

In our view, defamation is increasingly becoming a tool for political censorship, whether intentionally or otherwise. In such circumstances, courts should be given the discretion to reject applications that may be problematic for a variety of reasons, and actively encouraged to consider the broader public policy implications that may arise from a particular application.

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