Submission on the issues raised in the Law Commission's 'The New Media meets "New Media"' Issues Paper, Nov 2011

I Introduction

1.1 This submission is made on behalf of the Human Rights division of the University of Auckland's Faculty of Law's Equal Justice Project. As an organization, we aim to advocate equal access to justice for all citizens, and complete pro bono research and community work in our attempts to further this aim. In this context, we considered the Law Commission's recommendations from the perspective of law students with a focus on ensuring that adequate consideration of human rights issues was made. We are also contributing from the view of university students who necessarily interact and engage regularly with the 'new media' discussed in the recommendations.

1.2 The underlying human rights tension in dealing with the issues discussed in the paper is between freedom of speech and perhaps the intangible interest that the government recognises in protecting its citizens from defamation, discrimination and hate speech. In a modern day environment, where the media is becoming increasingly decentralised and diverse, incidents of cyber abuse and defamation are becoming more prevalent than ever. We are thus pleased that the Law Commission has recognised the pressing need to provide some publicly accessible means of challenging the publications of these 'new media' organisations. Overbearing all of our considerations was also the need to ensure that the media is able to access the privileges necessary to carry out its vital role in our democratic state: providing a check on the government's powers and distributing necessary information to the wider population.

II Regulation

A. Proposal for a single regulatory body to oversee all news media

2.1 The proposal for a single regulatory body is one which we consider to be essential in order to streamline the administrative process and provide equal and fair standards to be adhered to by all media organisations.

2.2 We are concerned by the current inconsistencies which arise between the lack of powers possessed by the Press Council in contrast with the Broadcasting Authority, given the increasing amount of overlap in the publications work which media organisations undertake. No longer are newspapers confined to printed text or broadcasters to our radios or television screens. The inconsistencies which result between the varying regulatory standards to which these organisations are respectively held can no longer be justified, and the proposed new regulatory body is an adequate tool for dealing with this problem. More importantly, we believe that it deals with the current lack of regulation for new media. From an equal justice perspective, we support the regulatory body due to the increased simplicity, certainty and ease of access which it will provide to those seeking to make complaints. We also hope that it will ensure that citizens wishing to raise

complaint against these new media organisations will now have an accessible forum through which to do so.

B. Who should be subject to this regulation?

2.3 We are in favour of option 2 in the Issues Paper which requires membership by large, traditional media organisations and voluntary membership by smaller 'new media' outlets.[1] Our concern is that these larger news corporations may not be willing to commit to a regulatory body, which they would be required to partially fund and which would subject them to further oversight and monitoring. We doubt that traditional media outlets such as TVNZ, TV3 or the NZ Herald would be denied entrance to courtrooms (many of which they can access as members of the public anyway) or press conferences. We also deem unlikely that the government would be extremely hesitant to hold them subject to privacy laws and deny them the usual privileges allowed for the news media. In fact, if they were denied some of these privileges through a failure to voluntarily submit to the regulatory body's requirements, we would be concerned that this would undermine the efficacy of the role which the media can play in dispersing information and providing a democratic check on the actions of the state. In light of this, we would favour compulsory membership on behalf of traditional media.

C. A limit on 'new media' outlets to join the regulatory body?

2.4 Our society places a lot of value on freedom of speech and thus we consider it to be important that corporations or individuals operating as new media should also be granted the ability to avail themselves of the journalistic privileges from which traditional media can benefit. While there is a concern that this will result in an array of very small and potentially irresponsible outlets gaining these privileges, they will also be subjected to the regulatory and disciplinary powers of the body. Given that it is often these media forms that publish the most controversial news, we deem it to be a great benefit to provide a forum for the public to address their concerns under the auspices of the regulatory body. For this reason, we would not support an imposition of any minimum standard or limit to entry other than the relatively broad definition provided by the Law Commission. This is to ensure that as many media outlets as possible may be subject to both the privileges and the regulatory powers of the governing body.

2.5 Finally, we deem it to be important that the governing body be independent of government or media influence, which could potentially undermine the integrity of the mechanism, and threaten the freedom of speech. We thus support the mechanisms to ensure independence outlined in the Law Commission's recommendations.

[1] Law Commission "Free Speech Abuses: Quantifying the Harms and Assessing the Remedies" The News Media Meets "New Media" Rights, Responsibilities, and Regulation in the Digital Age (New Zealand, 2011) at 10.

III Legal Reform

A. How effective are the non-legislative remedies that operate within online communities, including the systems of online reporting employed by social media sites such as Facebook?

3.1 There are problematic limitations to the non-legislative remedies that operate within online communities. The central issue lies in the self-regulatory nature to which most major online entities operate in respect to content appropriateness. While sites like Google and Facebook claims to be largely responsive to official letterheads, removal of any offensive content is contingent on the discretion of the hosts, assessed against their operational constitution.[2] This issue draws from the inherent tension between the need for corporate accountability and the right of private commercial sectors to self-regulate within the operation of the law. The issue is not simply an academic one. In 2011, the official user count for Facebook was reported to be at a monumental 854 million (monthly users);[3] more populated than the average nation-state, yet the entity is largely free to determine guidelines and balances considerations for multiple jurisdictions against its own (user) interests. This observation does not purport to be a pretext to suggest active online-forum or corporate regulation, yet it points to an eerie lack of uniformed regulatory governance for such online mediums.

3.2 In line with a more practical discussion, the non-legislative remedies employed by online communities needs to be used in conjunction with judicial and legislative remedies. The nature of the interaction that is to take place between the two will no doubt elicit contentious arguments. But whatever form this coexistence may take, users need a complaint body that is direct and accountable. In turn, for that channel to be substantive, it needs to have the power to demand negotiations.

B Creation of new offences: malicious impersonation

3.3 The intention in creating a new offence is led on by the view that the civil actions available in the form of defamation and breach of privacy associated to impersonation is apparently insufficient. The Law Commission made clear that the element of harm and malice is pivotal in the constitution of the offence, directing to include intimidating and fear for safety.[4] It is undeniable that users should be protected against threats of harm and should have the availability to claim their right in civil or criminal law. But what is puzzling is that there is a perceived need to create a new offence.

3.4 These two factors to which the element of harm is proposed to direct to are already included in our criminal code.[5] While there might be benefit in specificity, malicious intent to cause harm is in itself a crime; as contained in s21 of the Summary Offences Act 1981[6], regardless of the form and method through which

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[2] Law Commission, above n 1, at [7.154].

[3] "Facebook Statistics" Facebook <www.newsroom.fb.com>

[4] Law Commission, above n 1, at [8.28].

[5] See Summary Offences Act 1981, s 21; Crimes Act 1961, s 306.

it is demonstrated or achieved. Is the requirement for intimidation to be lower in the new offence than what is required when prosecuting under stand-alone intimidation? This seems to be the implication since the Issue Paper is eager to address the concern that much of the behaviour that take place online falls short of being criminal. Unless there is substantial difference in the degree of severity required to qualify for the offence, the criminalisation of impersonation would be but a symbolic redress to the hurt felt by the victim; in having the arsenal to label the impersonator criminal. Should there be a need to create new offences, it should be minded that it should not be created for this purpose alone.

IV Remedies

A. Time and cost efficiency: realistic?

4.1 One of the primary purposes for proposing these new judicial forums is to potentially establish alternative mechanisms which allows for speedy, low-cost and effective remedy for harms caused by communications in media of all kind. However, aside from the usual delays characteristic to traditional court proceedings, this proposal essentially does not address the issue of complexity in this area of law itself.

4.2 Expected actions arising from online harm are likely to involve the tort of infringement of privacy or defamation. As observed in the Paper, these actions are traditionally time-consuming and require considerable monetary input, ultimately making this an issue of accessibility.[7] While the Tribunal and Commissioner may solve delays (and hence the financial demand) from the procedural point-of-view, it is only a partial solution to the problem. The length of the process is more often than not contributed to by the complexity in the law in itself. In other words, these are difficult actions to bring.

4.3 The consideration for a low-cost, speedy trial must also reach a compromise with the defendant's right to raise defences. In the area of defamation for example, it may well be quite time consuming to establish enough evidentiary basis to support the defences such as truth and opinion. Even if the cost of representation may be coverable by legal aid, and the administration relatively stream-lined due to its speciality, in terms of the issues being address, there is the potential that the proposed methods would only provide a limited alleviation given the highly technical nature of the area.

C Underlying crimes

4.4 There is also much to be said about the impact of incorporating these alternative remedies into the current judicial system, particularly in the area of criminal procedures. As previously mentioned, some of the claims could potentially coincide with criminal charges or at least lead to a possible investigation. It must be considered whether the defendant's choice to offer defence in the Tribunal could be detrimental to his/her criminal defence should the defendant be later

[7] Law Commission, above n 1, at [7.127].

called upon to answer criminal allegations. This is a point worthy of serious contemplation as the causing of systematic detriment could lead to encroachment of the privilege against self-incrimination.[8] Further, in the case where the claim brought before the Tribunal and the underlying criminal charge overlaps to a sufficient extent, it is conceivable that any later criminal trials would be committing double jeopardy.[9] In those circumstances, the defendant could essentially be tried, and potentially punished, twice for the same offence.

4.5 In cases where the claim contains underlying criminal element, one then must consider the standard of proof that is required as well as how that is to compare to one that is required in criminal trial in court.

D Yes or Nay

4.6 The proposal for a new, cost-effective and speedy remedy requires further fine-tuning. It is evident from the report that the Law Commission is also aware of the short-comings. Keeping in the mind the issues that need to be addressed, we see much credit to the proposal from the point of accessibility. We acknowledge the impracticality of the cumbersome court system to most private individuals and the need of a physical forum to which they may direct their complaints. It may also be that in the case of harm being inflicted via online communication, user-generated content forums may be more responsive to official directives with legal backings than ones established by private users. The Tribunal as well as the Commissioner should co-exist as the latter alone may be able to achieve little. A possible suggestion would be to emphasise the investigatory and complaint resolution powers of the Commissioner while giving the Tribunal more judicial "teeth" to determine whether a breach of the new law has occurred and, if so, what remedies, if any, are appropriate.

[8] International Covenant on Civil and Political Rights (ICCPR) (opened for signature 16 December 1966, entered into force 23 March 1976), art 14(3)(g).
[9] ICCPR, Article 14(7).