

**THE DEFAMATORY NATURE OF MEMES THROUGH SOCIAL MEDIA: A CASE  
OF SOUTH AFRICAN**

by

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I dedicate this research to my late Grandmother, Emily “naMahlangu” Sindane. I know you are proud of me *naMgwenzana*. **Rhotjh’elinzima amanye ayakhanya!**

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## DECLARATION

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Exact wording of the title of the dissertation as appearing on the electronic copy submitted for examination:

“The defamatory nature of memes through social media: A case of South African Internet Regulation”.

I declare that the above dissertation is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the dissertation to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

*(The dissertation will not be examined unless this statement has been submitted.)*



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## **ABBREVIATIONS AND ACRONYMS**

ABC	Australian Broadcasting Corporation
AI	Artificial Intelligence
ARPANET	Advanced Research Project Agency Net
Art	Article
CC	Constitutional Court
CILSA	Comparative and International Law Journal of Southern Africa
Cth	Commonwealth of Australia
DARPA	Defence Advanced Research Projects Agency
ECT Act	Electronic Communications and Transactions Act
ECHR	European Convention on Human Rights
EFF	Economic Freedom Fighters
EU	European Union
ICT	Information and Communication Technology
ISP	Internet Service Provider
GIF	Graphics Interchange Format
IP	Internet Protocol
J	Judge
Law Journal	LJ
MULR	Melbourne University Law Review
PELJ	Potchefstroom Electronic Law Journal
POPI Act	Protection of Personal Information Act
S	Section
SA	South Africa
SABC	South African Broadcasting Corporation
SAIPLJ	South African Intellectual Property Law Journal
SALJ	South African Law Journal
SCA	Supreme Court of Appeal

SMMEs	Small, Medium and Micro Enterprises
SMS	Short Message Service
TCP	Transmission Control Protocol
URLR	University of Richmond Law Review
URL	Uniform Resource Locator
USB	Universal Serial Bus
USA	United States of America
WIFI	Wireless Fidelity
WLR	Wayne Law Review

## **KEY TERMS**

Internet, protection from harassment; social media; right to privacy; right to good name; right to freedom of expression; *memes*; defamation.

## SUMMARY

With the introduction of various social media platforms in the twenty-first century, social media grew at an exponential rate. Social media platforms have become an integral part of our everyday lives, playing an important role in our social environment by helping individuals to stay in touch with others and keeping us informed about global events.

However, with the advent of social media, content aggregation sites, and online discussion, the potential of defamatory content and false comments reaching a large audience has increased dramatically in recent years. Social media sites are designed to encourage and incentivise the dissemination of sensational material without any fact-checking or control.

Despite many of the advantages of social media platforms, they also provide opportunities for abuse and can bring out the worst in people, who are often unconcerned about the consequences of their actions. In today's digital age, it is easier and more rewarding than ever for social media users to spread false information about a person or business. The abuse and misuse are frequently done through *memes*, and while *memes* are now recognised as a form of practice and storytelling, they have a tendency to result in defamation.

The study analyses the defamatory nature of *memes* on social media. Nonetheless, the Internet has made *meme* spreading a very public behaviour, and the phrase has become an intrinsic part of netizen vocabulary. *Memes* are among the several kinds of communication used by social media users. *Memes*, defined as cultural units that spread from person to person were disputed long before the Internet era. Furthermore, the study will consider the following aspects of *memes*: their global and regional characteristics; their role in Internet communication; and their societal connotation. The study will also look at the impact of Internet *memes* on one's personality and constitutional rights such as the right to a good name, freedom of expression, and privacy. Finally, the study will include a comparative component that will examine Australian law on the regulation of *memes*.

## CHAPTER 1

### INTRODUCTION

#### 1.1 BACKGROUND

The world is changing rapidly, and as such, individuals are living between digital domains and offline reality with the use of connected technology to enable and manage their lives.<sup>1</sup> Individuals use the Internet,<sup>2</sup> which has revolutionised information and communication realities worldwide. This has introduced an accessible market<sup>3</sup> for the sale of products and the exchange of ideas and has given birth to social media<sup>3</sup> platforms. These social media platforms include Twitter (now known as X),<sup>4</sup> Instagram,<sup>5</sup> YouTube,<sup>6</sup> and Facebook.<sup>7</sup> With

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<sup>1</sup> Denisova A *Internet Memes and Society: Social, Cultural and Political Contexts* (Taylor and Francis 2019) 13.

<sup>2</sup> The “Internet” is “an electronic communications network that connects computer networks and organizational computer facilities around the world, used with *the* except when being used attributively” See Merriam Webster “Internet” available at <https://www.merriam-webster.com/dictionary/Internet> (Date of use:14 August 2022); and Tladi SEM *The Regulation of Unsolicited Electronic Communications (Spam) in South Africa: A Comparative Study* (LLD thesis University of South Africa 2017) South Africa 1.

<sup>3</sup> Social media is defined as “numerous online applications which permit the creation and exchange of personal information such as text, photos and videos. Social media facilitates mass individual communications to the global community”, see Davidson A *Social Media and Electronic Commerce Law* 2<sup>nd</sup> ed (Cambridge University Press 2016) Australia 38; Skosana MT *The Right to Privacy and Identity on Social Networking Sites: A Comparative Legal Perspective* (LLM thesis University of South Africa 2016) South Africa 4; and Luttrell R *Social Media: How to Engage, Share, and Connect* 3<sup>rd</sup> ed (Rowman and Littlefield 2019) United Kingdom 19.

<sup>4</sup> Twitter/X is described as: “A powerhouse on the social sphere. People clamour to connect with one another, update their statuses, learn about new products, share ideas, and create connections.” See Luttrell *Social Media* 111; and Lomic PV *Social Media and Internet Law: Forms and Precedents* (LexisNexis 2014) Canada 3.

<sup>5</sup> Instagram is: “The ability to create, manipulate, and share photos with family, friends, co-works, and anyone else interested in taking a peek at those sepia-tinted, vintage-style, toaster hued digital images.” See Luttrell *Social Media* 129; and Lomic *Social Media and Internet Law* 4.

<sup>6</sup> YouTube is a “promotional platform, social network, and community site with a loyal viewership. One unique feature that YouTube boasts is the ability to create branded channels.” See Luttrell *Social Media* 134; and Lomic *Social Media and Internet Law* 4.

<sup>7</sup> Facebook is “one of the most influential social networking sites in the world. Facebook provides users with the ability to share information and to communicate with family and friends, while also promoting openness and connectivity.” See Luttrell *Social Media* 106; Lomic *Social Media and Internet Law* 4; Kerner SM “Facebook” available at <https://whatistechtarget.com/definition/Facebook> (Date of use: August 2023); Cassim F “Regulating Hate Speech and Freedom of Expression on the Internet: Promoting Tolerance and Diversity” (2017) 28(3) *South African Law Journal* 305; and Roos A and Slabbert M “Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)” (2014) 17 *Potchefstroom Electronic Law Journal* 2852.

the arrival of these platforms, lives have been altered and this has led to legal issues regarding defamation and privacy on social media platforms.

For this reason, social media is at the centre of many public policy debates, but the role that it plays in relation to human behaviour has not been settled.<sup>8</sup> It can no longer be argued that social media is not on the rise, and the fact of the matter is that it is expeditiously growing. Social media has therefore become a vital and accessible platform that is used in communication worldwide. Internet users interact with one another on various social media platforms utilising a variety of communication methods, including but not limited to: FaceApp,<sup>9</sup> Graphics Interchange Formats,<sup>10</sup> Deep fakes<sup>11</sup> and *memes*.<sup>12</sup> However, for the dedication of the study, it has been restricted to *memes*.

*Memes* are a form and practice of storytelling. Although *memes* have been in existence well before the digital era, the Internet by sheer virtue of its instant communication enables users to spread modern *memes* to each other within seconds.<sup>13</sup> This is pertinent in the listed social media platforms above as they continue to lead the pack for instantly viral *memes*. They have become digital artefacts that permit users to showcase their creativity and connect with others. As stated in the preceding paragraph, Internet users communicate in a variety of ways, and one of the common examples include a

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<sup>8</sup> Nelson LS *Social Media and Morality: Losing our Self Control* (Cambridge University 2018) United Kingdom 1.

<sup>9</sup> FaceApp is a “free-to-download app which uses artificial intelligence to digitally alter photos which are uploaded to it. The Russian-developed app, which has been around since 2017, can make users look younger or older or change genders as well as add smiles to unsmiling snaps or alter make-up” – see Westbrook C “What is FaceApp And Why Are People Concerned About It?” available at <https://metro.co.uk/2019/07/18/faceapp-people-concerned-10413997/> (Date of use: 18 July 2023).

<sup>10</sup> Graphics Interchange Formats or GIFS are “a series of images or soundless video that will loop continuously and doesn’t require anyone to press play. This repetition makes GIFs feel immediately familiar, like the beat of a song.” See Lepard C “What are GIFs and How to Effectively Use Them on Social Media” available at <https://www.wix.com/blog/2017/11/gifs-in-social-media> (Date of use: 16 November 2022); and Merriam Webster “Internet” available at <https://www.merriam-webster.com/dictionary/GIF> (Date of use: 6 September 2022).

<sup>11</sup> Deep fakes are a “usage of a real images and videos and edits them to make it appear as if someone said or had done something completely different from what actually happened”; see Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 424.

<sup>12</sup> The term *meme* is defined below, see footnote 21.

<sup>13</sup> Gil P “What is a Meme?” available at <https://www.lifewire.com/what-is-a-meme-2483702> (Date of use: 6 May 2023); and Mandiberg M *The Social Media Reader* (New York University 2012) United States of America 120-122.

signature,<sup>14</sup> with a Chuck Norris quote, or Floyd Mayweather struggling to read the Harry Potter book.<sup>15</sup> As mentioned above, *memes* form part of communication that Internet users employ to communicate on all possible topics.<sup>16</sup> However, *memes* are not only part of everyday vocabulary, but they also represent symbolic rhetorical arguments because they can change sides and connotation through their journey in digital space.<sup>17</sup>

A *meme* is a Greek word for *mimema*, which means “an element of a culture or a system of behaviour passed from one individual to another by imitation or other non-genetic means”.<sup>18</sup> In an online environment, this takes the form of “an image, video, piece of text etcetera, typically humorous in nature that is copied and spread rapidly by Internet users, often with slight variation”.<sup>19</sup> The term “*meme*” is defined by a number of authors in various ways.<sup>20</sup> For the purpose of this study, a definition provided by Lantagne who defines a *meme* as “a more specific subset of Internet behaviour that involves pasting captions onto other people’s photos” is preferred.<sup>21</sup> This definition acknowledges the developments and transitions in meanings of Internet *memes* such as Artificial Intelligence (AI).<sup>22</sup> AI has a

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<sup>14</sup> E-mail signature is “a block of text that is appended to the end of an e-mail message you send. Generally, a signature is used to provide the recipient with your name, e-mail address, business contact information, or Website Uniform Resource Locator (URL). Some people, however, will use a signature to sign off their e-mail message with a closing statement, funny quote or other message.” See Beal V “E-Mail Signature” available at <https://www.webopedia.com/definitions/e-mail-signature/> (Date of use: 9 November 2022).

<sup>15</sup> Lantagne SM “Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication” (2017) 52 *University of Richmond Law Review* 387; Gil P “What is a Meme?” available at <https://www.lifewire.com/what-is-a-meme-2483702> (Date of use: 6 May 2023); Mandiberg *The Social Media Reader* 120-122.

<sup>16</sup> Denisova *Internet Memes and Society* 2.

<sup>17</sup> *Idem* 3.

<sup>18</sup> Mandiberg *The Social Media Reader* 120; Shifman L “Memes in a Digital World: Reconciling with a Conceptual Troublemaker” (2013) 18 *Journal of Computer-Mediated Communication* 120; also Dictionary.com “Meme” available at <https://www.dictionary.com/browse/meme> (Date of use: 20 March 2023).

<sup>19</sup> Mandiberg *The Social Media Reader* 120; Shifman (2013) *Journal of Computer-Mediated Communication* 120. See also Sguazzin A “Ramaphosa Train Farce, Corruption Woes Mocked in Memes” available at <https://www.fin24.com/Economy/ramaphosa-train-farce-corruption-woes-mocked-in-memes-20190321-2>. (Date of use: 21 March 2023).

<sup>20</sup> Shifman (2013) *Journal of Computer-Mediated Communication* 363; and Mandiberg *The Social Media Reader* 120 and Nissenbaum A and Shifman L “Internet Memes as Contested Cultural Capital: The Case of 4chan’s /b/ Board” (2017) 19(4) *New Media and Society* 484.

<sup>21</sup> Lantagne (2017) *URLR* 389.

<sup>22</sup> Artificial Intelligence (AI) is defined as a “broad branch of computer science that create systems that can mimic or function intelligently and independently. In other words, AI is a constellation of various technologies that work together to assist machines to sense, comprehend, act, and learn

bearing on the creation and distribution of *memes*.<sup>23</sup> However, for the dedication of this study, we will not discuss AI.

*Memes*, as captions, may be interpreted differently amongst users. As a result, some *memes* that feature individuals or public figures may be defamatory<sup>24</sup> in nature, for instance, posting an image of an over-weight person with a caption “value self-control instead of gobbling junk food day in and day out” as demonstrable in the below image.

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Me leaving the house for the first time in  
3 days to go get some junk food at the  
store and then go back to my  
depression hibernation



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with a level of intelligence that compares to that of humans.” See Mhlanga D “The Role of Artificial Intelligence and Machine Learning Amid the COVID-19 Pandemic: What Lessons are We Learning on 4IR and the Sustainable Development Goals” (2022) 19(3) *International Journal of Environmental Research and Public Health* 8.

<sup>23</sup> Priyadarshini I, Chatterjee JM, Sujatha R, Jhanjhi N, Karime A and Masudet M “Exploring Internet Meme Activity During Covid-19 Lockdown Using Artificial Intelligence Techniques” (2022) 36(1) *Applied Artificial Intelligence* 1382.

<sup>24</sup> Defamation is “the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name or reputation.” See Neethling J, Potgieter JM and Visser PJ *Law of Delict* 7<sup>th</sup> ed (LexisNexis 2015) South Africa 3522; and Nel S “Defamation on the Internet and Other Computer Networks” (1997) 30 *Comparative and International Law Journal of Southern Africa* 155.



These Junk Food Memes Will Make Your Mouth Water – Practice Self-Control.<sup>25</sup>

*Memes* as captions and *memes* without captions are further discussed in Chapter 3 under “Defining and analysing social media platforms”.<sup>26</sup> The study will thus analyse the defamatory nature of Internet *memes*, through social media. Furthermore, the study will consider the following regarding *memes*: Their common features around the globe and their regional traits, role in Internet communication and connotation in society.

The study will also discuss on the impact of Internet *memes* as they invade one’s personality and constitutional rights such as the right to a good name,<sup>27</sup> the right to freedom of expression<sup>28</sup> and the right to privacy.<sup>29</sup> The defamatory nature of Internet *memes* is at the heart of this study. The study focuses on defamatory *memes* that cause injury to personality (*iniuria*) through the usage of social media. An *iniuria* to personality arises when a personality right is intentionally and wrongfully infringed.<sup>30</sup> The *actio iniuriarum* protects certain personality rights such as the right to a good name and the right to privacy. As a result, a person may claim for infringement of personal rights under the *actio iniuriarum*. Injury to the corpus (bodily integrity), *fama* (good name or reputation), and *dignitas* (all personality interests other than the corpus or *fama*) are all protected under the *actio iniuriarum*.<sup>31</sup> The rights to privacy and identification are therefore included into the larger idea of *dignitas*. Personality rights exist for both natural and legal persons,<sup>32</sup>

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<sup>25</sup> Gentile L “These Junk Food Memes Will Make Your Mouth Water – Practice Self-Control” available at <https://memes.com/blog/these-junk-food-memes-will-make-your-mouth-water> (Date of use: 20 August 2023).

<sup>26</sup> See para 3.2.2.

<sup>27</sup> Snyman CR *Criminal Law* 6<sup>th</sup> ed (LexisNexis 2014) South Africa 468; Burchell J *Principles of Criminal Law* 5<sup>th</sup> ed (Juta 2016) South Africa 640; Neethling J, Potgieter JM and Roos A *Neethling on Personality Rights* 2<sup>nd</sup> ed (LexisNexis 2019) South Africa 197.

<sup>28</sup> Section 16 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

<sup>29</sup> Section 14 of the Constitution; and Snail ka Mtuze S and Papadopoulos S “Privacy and Data Protection” in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 307; and Roos A “Privacy in the Facebook Era: A South African Legal Perspective” (2012) 129 *SALJ* 395.

<sup>30</sup> Neethling J, Potgieter JM and Visser PJ *Law of Delict* 7<sup>th</sup> ed (LexisNexis 2015) South Africa 341; Nel S “Freedom of Expression” in Van der Merwe D, *Information and Communications Technology Law* 3<sup>rd</sup> ed (LexisNexis 2021) South Africa 533.

<sup>31</sup> Neethling et al *Law of Delict* 341.

<sup>32</sup> *Ibid.*

however, for the dedication of this study, it has been restricted to the personality rights of natural persons.

Lastly, the study will include a comparative component to analyse a foreign law from different jurisdictions on the regulation of *memes*. The study commenced during the Corona-Virus Pandemic, and the proliferation of Internet *memes* was at its pinnacle.<sup>33</sup> During the first outbreak of the pandemic, Internet *memes* provided a necessary outlet while also providing a platform for the public to share their opinion, although in a humorous manner, on the measures imposed, the people involved in the fight against the virus, and basically on everything that determined their daily lives.<sup>34</sup> It was also during this pandemic that the Protection of Personal Information Act (POPI Act)<sup>35</sup> had come into force, of which fulfils the constitutional obligation to the right to privacy.<sup>36</sup>

## 1.2 SCOPE OF STUDY

### 1.2.1 Problem statement

The use of Internet *memes* through social media platforms may possibly infringe on personality rights of both ordinary and famous people. The infringements can commence by affecting these victims' revenue generation, or their good name in society. This has been demonstrated in situations where defamed persons have lost endorsement deals or job security because of posts on social media that have not been discovered and dealt with in a court of law or where legal action has been taken.<sup>37</sup> As noted above, these infringements include the right to a good name, the right to freedom of expression and

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<sup>33</sup> Priyadarshini et al (2022) *Applied Artificial Intelligence* 1382.

<sup>34</sup> Cheshmedzhieva D "The General Said": Challenges in Understanding Covid-19 Memes" (2023) 11(2) *The European Journal of Humour Research* 49.

<sup>35</sup> Protection of Personal Information Act 4 of 2013 (hereinafter referred to as the POPI Act).

<sup>36</sup> Section 14 of the Constitution. The POPI Act will later be discussed in Chapter 4 (Legislation Regulating the Internet).

<sup>37</sup> See, e.g., television presenter Katlego Maboe, an award-winning host, who lost an endorsement arrangement with OUTsurance as a result of an alleged infidelity scandal publicised on social media. See Mueni P "Nikita Murray: Everything We Have Found Out About Katlego Maboe's Mistress" available at [Nikita Murray: Everything we have found out about Katlego Maboe's mistress - Briefly.co.za](https://www.briefly.co.za/nikita-murray-everything-we-have-found-out-about-katlego-maboe-s-mistress/) (Date of use: 26 October 2020).

the right to privacy. Personality rights are mainly protected in terms of the common law.<sup>38</sup> Over and above this protection that is accorded in terms of the common law, they also find protection in terms of section 10 and 14 of the Constitution.<sup>39</sup> It is unclear whether these laws provide adequate protection within the online environment. In South Africa, there are various laws that regulate the online environment namely: the Electronic Communications and Transactions Act (ECT Act)<sup>40</sup> which provide for facilitation of electronic transactions and communications, and section 2 of the POPI Act<sup>41</sup> which deals with balancing the right to privacy against other rights. However, these statutes; the ECT Act,<sup>42</sup> the Cybercrimes Act,<sup>43</sup> the Films and Publications Amendment Act<sup>44</sup> and the Social Media Charter<sup>45</sup> do not provide adequate regulation of the defamatory nature of *memes* through social media.<sup>46</sup> The Constitution<sup>47</sup> similarly do not provide sufficient protection from defamatory social media online matters.

### 1.2.2 Aims and objectives of the study

The objective of this study is to evaluate whether the use of *memes* via social media platforms may defame and infringe on personality rights and the dignity of other social media users. The aims of the study seek to give an account of the development of Information and Communication Technology (ICT) regarding Internet *memes*. The laws regulating the Internet in South Africa, as mentioned above, will be discussed to ascertain whether it regulates adequately the defamatory nature of Internet *memes*.

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<sup>38</sup> Neethling et al *Personality rights* 9; and *O’Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954 (3) SA 244 (C); and *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).

<sup>39</sup> Sections 10, 14 of the Constitution, and *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294.

<sup>40</sup> Electronic Communications and Transaction Act 25 of 2002 (hereinafter referred to as the ECT Act).

<sup>41</sup> Act 4 of 2013.

<sup>42</sup> Act 25 of 2002.

<sup>43</sup> Act 19 of 2020.

<sup>44</sup> Act 17 of 2019.

<sup>45</sup> The Charter was publicly launched on 14 March 2023, as part of the Social Harmony National Effort (SHINE), which is aimed at developing social harmony through self-reflection and positive dialogue. See South African Human Rights Commission *Summary of the Social Harmony Through National Effort (SHINE)* (SAHRC 2023) 1-3.

<sup>46</sup> This will be later discussed in Chapter 4 and 5 (Legislation Regulating the Internet in Australia and South Africa).

<sup>47</sup> Section 10, 14 and 16 of the Constitution.

Finally, the study seeks to determine whether the Internet Service Provider (ISP),<sup>48</sup> the publisher, platform moderator, or even users who share the content may be held accountable in situations of suspected infringement through the use of Internet *memes*.

### 1.2.3 Research question

The questions in this study are as follows:

1. Does the South African legislation on defamation adequately regulate the defamatory use of Internet *memes*?
2. Does the South African common law on defamation adequately regulate the defamatory use of Internet *memes*?
3. Can ISPs be held liable for defamatory posts?
4. Can South African law draw lessons from Australia to address the defamatory nature of Internet *memes* through social media?

### 1.2.4 Parameters (demarcation) of the study

Firstly, the study will focus on the defamatory nature of Internet *memes* on social media platforms. It is also worth noting that traditional *memes* are beyond the focus of the study.

Secondly, there will be specific emphasis on the infringement of the following personality rights: the right to a good name, the right to freedom of expression and the right to privacy.

Thirdly, certain legislation in South Africa will be discussed including, the Constitution,<sup>49</sup> ECT Act,<sup>50</sup> the Cybercrimes Act,<sup>51</sup> the Films and Publications Amendment Act,<sup>52</sup> the POPI Act.<sup>53</sup> The Social Media Charter will be used as a guideline for social media users. The aim of analysing the aforementioned legislations is to find challenges and gaps in the legislation. It will do so in order to determine whether South African legislation has met its

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<sup>48</sup> ISP is defined as “a company that provides individuals and organizations access to the internet and other related services”, see Gillis AS “ISP (Internet Service Provider)” available at <https://www.techtarget.com/whatis/definition/ISP-Internet-service-provider> (Date of use: 14 December 2023).

<sup>49</sup> The Constitution.

<sup>50</sup> Act 25 of 2002.

<sup>51</sup> Act 19 of 2020.

<sup>52</sup> Act 11 of 2019.

<sup>53</sup> Act 4 of 2013.

duties and commitments to safeguard and promote the constitutional rights of all South African citizens.

Lastly, the study has a comparative component, wherein the relevant South African law is compared to the law in Australia. The comparative component aims to illustrate how Australia has regulated the use of Internet *memes*. Furthermore, the study will examine the Australian jurisprudence where several decisions concerning defamation through the usage of Internet *memes*, have been handed down.<sup>54</sup> For example, an Australian court has passed a recent judgment wherein social media publishers have been held liable.<sup>55</sup>

### 1.2.5 Research methodology

The research methodology that is applied in the study is qualitative in nature. The reason for choosing qualitative research is because it aids in the discovery of underlying meanings and patterns of interactions.<sup>56</sup>

The study is largely desktop and library based. It will draw primarily from existing literature and use a holistic body of data which comprises primary and secondary sources of law. As such, it involves analysing the Constitution, legislation, journal articles, books, case law, reports, and foreign law, as well as Internet sources that provide insight on the regulation of *memes* on the Internet.

Furthermore, the study adopted a comparative approach because comparative law may assist in comprehending the South African national legislation and making suggestions for improvements.<sup>57</sup> In addition, the goals of legal comparison as a science, are to identify

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<sup>54</sup> New South Wales Caselaw “Memes” available at <https://www.caselaw.nsw.gov.au/search?query=memes&pagenumber=> (Date of use: 16 January 2023).

<sup>55</sup> *Fairfax Media Publications Ltd v Dylan Voller; Nationwide News Pty Limited v Dylan Voller; Australian News Channel Pty Ltd v Dylan Voller* (2021) HCA 27.

<sup>56</sup> Babbie E *The Basics of Social Research* 4<sup>th</sup> ed (Thomson Wadsworth 2005) United States of America 415.

<sup>57</sup> Fairgrieve D *Comparative Law In Practice: Contract Law in a Mid-Channel Jurisdiction* (Hart Publishing 2019) United Kingdom 4.

the differences between legal models and to contribute to the knowledge of these models.<sup>58</sup>

### **1.3 DISSERTATION OUTLINE**

This dissertation consists of six chapters. The chapters will be divided into various topics.

#### *Chapter one: Introduction and scope of study*

This chapter outlines the scope of study including: problem statement, research objective and aims; research questions; parameters; research methodology and chapter outline.

#### *Chapter two: Conceptual and Historical Overview of Defamation in South Africa*

This chapter focuses on how defamation and looks at defamation under common law, as well as the requirements for liability. The term defamation will be defined and a background on defamation in the context of *memes* will be provided. This chapter will also discuss remedies in the context of defamation.

#### *Chapter three: An Overview of Defamation in the 21<sup>st</sup> Century*

This chapter focuses on defamation on how defamation has evolved with technological advancements, including social media. The background of the Internet will be provided and how social media platforms came to be. One platform will be the focus in this chapter, namely Twitter/X. The regulation of memes through community guidelines will be addressed. Therefore, the chapter will give a case analysis of *memes* on Twitter/X.

#### *Chapter four: The Regulation of Internet Defamation through Social Media: The Australian Perspective*

This chapter focuses on how the Australian legal system regulates the Internet and recent legislation which has been enforced to protect Internet users, especially in the social

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<sup>58</sup> Fairgrieve *Comparative Law In Practice* 4; and Adams A and Heirbaut D *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Bloomsbury Academic 2015) United Kingdom 38.

media context. This chapter will also examine the law of defamation in Australia as well as available remedies.

*Chapter five: The Regulation of Internet Defamation through Social Media: The South African Perspective*

This chapter considers whether Internet users have been afforded sufficient protection within the Internet space by the South African law. This chapter also interrogates and analyses the existing laws that governs the Internet in South Africa.

*Chapter six: Summary, Conclusion and Recommendations*

In this chapter, a summary, concluding remarks and recommendations will be provided.

## **1.4 CONCLUSION**

The study's starting premise is that this is a legal subject worth investigating. Academic study must be conducted to address the defamatory character of *memes* propagated through social media.

The problem statement which is the pillar of this study has been identified. Moreover, the research questions have been listed alongside the purpose of study. The framework of the study has been outlined in order to ascertain the order in which the study will follow.

## CHAPTER 2

### CONCEPTUAL AND HISTORICAL OVERVIEW OF DEFAMATION IN SOUTH AFRICA

#### 2.1 INTRODUCTION

Defamation and privacy exist in an era where freedom of speech is exercised and encouraged, which is also known as “more speech”.<sup>1</sup> This chapter focuses on the conceptual and historical overview of defamation. The term defamation will be defined and a background on defamation in the context of *memes* will be provided. This chapter will specifically look at the impact that *memes* have on personality rights and thereafter discuss remedies afforded. In conclusion, it is worth noting that South Africa has a hybrid system comprising of legislation, case law and common law.

#### 2.2 DEFAMATION UNDER COMMON LAW

The law of defamation dates back to the times of the Twelve Tables and Praetorian Reform,<sup>2</sup> where the primary aim was on the body or the physical person,<sup>3</sup> and the punishments in the Twelve Tables for *occentare*<sup>4</sup> and *mala carmina incantare*<sup>5</sup> where beatings could be so aggravated that they sometimes led to death.<sup>6</sup> However, as the

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<sup>1</sup> Kenyon A *Comparative Defamation and Privacy Law* (Cambridge University 2016) United Kingdom 1-16.

<sup>2</sup> The Twelve Tables and Praetorian Reform was “a set of laws inscribed on 12 bronze tablets created in ancient Rome in 451 and 450 BCE. They were the beginning of a new approach to laws which were now passed by the government and written down so that all citizens might be treated equally before them. Although not perhaps a fully codified system, the Twelve Tables was a first step which would allow the protection of the rights of all citizens and permit wrongs to be redressed through precisely worded written laws known to everybody. Consequently, the Roman approach to law would later become the model followed by many subsequent civilizations right up to the present day”, see Cartwright M “Twelve Tables” available at [https://www.worldhistory.org/Twelve\\_Tables/](https://www.worldhistory.org/Twelve_Tables/) (Date of use: 11 April 2023).

<sup>3</sup> Neethling et al *Personality Rights* 62.

<sup>4</sup> *Occentare* is “a form of public defamation”: see Burchell J *The Law of Defamation in South Africa* (Juta 1985) South Africa 3.

<sup>5</sup> *Mala carmina incantare* is “magical incantations”: see Burchell *Law of Defamation in SA* 3.

<sup>6</sup> Burchell *Law of Defamation in SA* 3.



Roman culture became more sophisticated, the praetor replaced the fixed penalties in the Twelve Tables by introducing the *actio injuriarum aestimatoria*.<sup>7</sup>

The praetor not only introduced the *actio injuriarum aestimatoria* but also provided a remedy for *injuria* to the owner of a slave who had been beaten or tortured contrary to good morals.<sup>8</sup> With the introduction of the action *injuriarum aestimatoria* and the Praetorian Edict Codification, an offence could be committed against the personality of a free man, as the Romans placed great emphasises on reputation.<sup>9</sup>

The intertwinement of Roman-Dutch and English law influenced and shaped the South African law.<sup>10</sup> For 150 years, South African courts regarded the *iniuria* of defamation as a kind of attempt to do a particular and/or a unique kind of harm.<sup>11</sup> The *iniuria* of defamation is done through making an assertion about another's character or conduct to one or more third parties, in order to get them to think less of him/her than they ought to.<sup>12</sup> However, two conditions had to be satisfied, namely, publication<sup>13</sup> and *animus iniuriandi*.<sup>14</sup> According to Fagan, the South African Appellate Division rejected the second condition but kept the first one, and further added two conditions to the approach of understanding defamation namely: wrongfulness and intention.<sup>15</sup> The reason for the rejection of the first understanding was that the *animus iniuriandi* could only be inferred

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<sup>7</sup> *Actio injuriarum aestimatoria* is "the object which was used to secure the payment of an amount of damages to the party injured or the protection of an individual's dignity, reputation and also their physical integrity". See Neethling et al *Personality Rights* 246; and Burchell *Law of Defamation in SA* 5.

<sup>8</sup> Neethling et al *Personality Rights* 246, and Burchell *Law of Defamation in SA* 5.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Idem* 13.

<sup>11</sup> Fagan A "The Gist of Defamation in South African Law" in Descheemaeker E and Scott H *Iniuria And The Common Law* (Hart Publishing 2013) North America 169; and also Fagan A *Undoing Delict: The South African Law of Delict Under the Constitution* 156.

<sup>12</sup> Fagan *Gist of Defamation in SA Law* 169; and also, Fagan *Undoing Delict* 156.

<sup>13</sup> Fagan *Undoing Delict* 158, and also Fagan *Gist of Defamation in SA Law* 170.

<sup>14</sup> *Animus iniuriandi* is "the mental disposition to will the relevant consequences, with the knowledge that the consequences will be wrongful" Neethling et al *Law of Delict* 363; and Neethling et al *Personality Rights* 66.

<sup>15</sup> Fagan *Undoing Delict* 158, and also Fagan *Gist of Defamation in SA Law* 171.

from external circumstances.<sup>16</sup> In this regard, it was to be presumed that a party's worth was based on their character or performance of the conduct they had attributed.<sup>17</sup>

Currently, in 2022, defamation is widely regarded as the intentional infringement of another's right to his good name, or, more comprehensively, the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermine his/her status, good name, or reputation.<sup>18</sup>

## 2.3 REQUIREMENTS FOR LIABILITY

### 2.3.1 Introduction

As alluded above, defamation occurs when a person's good name, status or reputation is infringed. However, even though a person is a member of a society and, by essence, a social creature, the regard in which he or she is viewed by those with whom he or she comes into contact is extremely essential to him/her.<sup>19</sup> As a result, a person's good name needs to be protected as an autonomous part of personality. However, there are a few requirements that must be satisfied in order to prevail in a defamation claim. These requirements are the act (publication of words or behaviour), wrongfulness (the infringement of a person's right to a good name or reputation) and intention.<sup>20</sup>

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Lyer D "An Analytical Look into the Concept of Online Defamation in South Africa" (2018) 32 *Speculum Juris* 126; Neethling et al *Personality Rights* 199; Neethling et al *Law of Delict* 352; Snyman *Criminal Law* 468; Kemp G, Walker S, Palmer R, Baqwa D, Gevers C, Leslie B and Steynberg A *Criminal Law in South Africa* 3<sup>rd</sup> ed (Oxford University Press 2018) South Africa 319; Burchell *Principles of Criminal Law* 640; Nel (1997) *CILSA* 195.

<sup>19</sup> Neethling et al *Personality Rights* 200; and Neethling et al *Law of Delict* 352.

<sup>20</sup> *Khumalo v Holomisa* 2002 ZACC 12; 2002 (5) SA 401 (CC) para 18; Neethling et al *Personality Rights* 199; and Neethling et al *Law of Delict* 352; and Swales L and Snail ka Mtuze S "Freedom of Expression and the Internet" in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 391; Nel (1997) *CILSA* 195; Milo D and Stein P *A Practical Guide to Media Law* (LexisNexis 2013) South Africa 20; and Davey R and Dahms-Jansen L *Social Media in the Workplace* (LexisNexis 2017) South Africa 101; and *Gwe v De Lange and Another* (2020) 1 BLLR 92 (ECP) para 51.

### 2.3.2 Publication

Publication is the dissemination of defamatory words or conduct in the form of drawings, digital pictures, or *memes*.<sup>21</sup> Regardless of how one perceives themselves, or the status they enjoy in society, it is self-evident that a defamatory statement or behaviour must be published or conveyed to at least one person other than the complainant.<sup>22</sup> This is illustrated by the case of *Vermaak v Van der Merwe*,<sup>23</sup> wherein the court held that even if the third party who the defendant communicated the defamatory words to does not grasp the defamatory significance of the statement, the defamer will still be liable for his defamation of the plaintiff's reputation. This was further supported in the case of *Moepi v Ratlhagane*, wherein the court said, "Publication means the communication or making known of the defamatory matter to at least one person other than the person defamed."<sup>24</sup> Therefore, publication is a vital prerequisite to be followed for defamation to occur and without publication, the reputation of the person concerned cannot be infringed.<sup>25</sup>

In order for the requirement to be fulfilled, there are two components to be met. The first component is, if the person to whom the defamatory material is communicated does not comprehend its defamatory nature, there is no publication. This also applies to a person who is deaf or to a statement made in a foreign language.<sup>26</sup> This is further explained in *Vermaak v Van der Merwe*,<sup>27</sup> wherein Mrs Vermaak had phoned Mr van der Merwe and asked to speak to his wife to which she received the reply: "*Het jy nie gehoor dat sy bly by daardie donnerse lesbian nie?*" (Haven't you heard that she is staying with that bloody

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<sup>21</sup> Nel *Freedom of Expression* 534; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 395.

<sup>22</sup> Davey and Dahms-Jansen *Social Media in the Workplace* 104; Milo and Stein *Practical Guide to Media Law* 20; Neethling et al *Personality Rights* 200; Neethling et al *Law of Delict* 352; Kemp et al Criminal Law in SA 340; Burchell *Principles of Criminal Law* 642; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 395; *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); *Whittington v Bowles* 1934 EDL 142 145; and Nel *Freedom of Expression* 534.

<sup>23</sup> *Vermaak v Van der Merwe* 1981 (3) SA 78 (N).

<sup>24</sup> *Moepi v Ratlhagane* (2019) ZAGPPHC 493 para 21.

<sup>25</sup> Neethling et al *Personality Rights* 201; Neethling et al *Law of Delict* 353; Kemp et al Criminal Law in SA 340; Burchell *Principles of Criminal Law* 642; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 395.

<sup>26</sup> Nel *Freedom of Expression* 536; Neethling et al *Personality Rights* 201; and Neethling et al *Law of Delict* 353; Kemp et al Criminal Law in SA 340; Burchell *Principles of Criminal Law* 643.

<sup>27</sup> *Vermaak v Van der Merwe* 1981 (3) SA 78 (N) paras 79-80.

lesbian?). Mrs Vermaak did not know what a lesbian was and later asked her husband what was meant by these words, of which he (husband) made her aware of the defamatory meaning of the words. In conclusion, the lapse of time in grasping the meaning of the word is irrelevant and the first requirement will be met once the meaning is grasped.<sup>28</sup>

The second component is that the defamatory remarks made or communicated regarding a third party by one spouse to another does not constitute publication.<sup>29</sup> However, this second component does not apply to defamatory statements posted on social media platforms, such as *memes*, because the audience is not restricted to one spouse.<sup>30</sup>

Upon establishing that publication occurred, the plaintiff becomes obligated in showing that the defendant is responsible for the publication in question.<sup>31</sup> It is a general rule that the defendant is held accountable for the publication if he or she knew or could have reasonably expected that an outsider would notice the defamation.<sup>32</sup> The primary question is whether the outcome in question was predicted or reasonably foreseeable.

It is worth noting that it is not only the person who made the defamatory comment (the original *meme* creator), but anyone who repeats, supports, or otherwise gets the attention to the defamatory statement, is in principle accountable for its publication.<sup>33</sup> This is demonstrable in *Tsedu and Others v Lekota and Another*,<sup>34</sup> wherein the court held that:

“a newspaper that publishes a defamatory statement that has made by another is as much the publisher of the defamation as the originator is. Moreover, it will be no defence for the newspaper to say that what was published was merely repetition.”

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<sup>28</sup> Neethling et al *Personality Rights* 201; Neethling et al *Law of Delict* 353; Kemp et al *Criminal Law in SA* 340; Burchell *Principles of Criminal Law* 643.

<sup>29</sup> Neethling et al *Personality Rights* 201; Neethling et al *Law of Delict* 353.

<sup>30</sup> Nel *Freedom of Expression* 536; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 391.

<sup>31</sup> Nel *Freedom of Expression* 537; Neethling et al *Personality Rights* 201; Neethling et al *Law of Delict* 353, Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 391.

<sup>32</sup> Neethling et al *Personality Rights* 201; Neethling et al *Law of Delict* 353; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 391.

<sup>33</sup> Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 395.

<sup>34</sup> *Tsedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA) para 5.

The case of *Tsedu*,<sup>35</sup> was further supported in the *Isparta* judgment,<sup>36</sup> where it was noted that a person does not have to be the originator of the defamatory content to be held accountable. It was also held that simply repeating or "sharing" a defamatory post is enough to constitute defamation, and that a person may be equally liable for another person's posts if that person knows they have been tagged in the other person's post and allows their name to be used while failing to take steps to distance themselves from the defamatory post.<sup>37</sup>

One of the basic concepts of South African defamation law is that each publication, such as the distribution of *memes*, gives rise to a unique cause of action.<sup>38</sup> The publication of *memes* on social media occurs where and when the content is viewed by numerous social media users. This implies that it is irrelevant where publication takes place, as long as the defamatory statement of the *meme* is communicated to the viewer.

### 2.3.3 Wrongfulness

A wrongful statement is a statement that is unfair, unjustified and unlawful and once defamation has been published, it is deemed that the defendant acted wrongfully in defaming, and whether or not the plaintiff's good reputation has indeed been infringed is irrelevant.<sup>39</sup> This is also demonstrable in *Le Roux v Dey*,<sup>40</sup> wherein Harms J said:

"...I do not believe that knowledge of wrongfulness requires familiarity with the existence of a particular delict. Just as much as it will be no defence in a criminal trial to plead ignorance of a crime called *crimen iniuria*, ignorance of the name of the particular delict is simply no answer to delictual liability. What is more, it was never suggested by or on behalf of the applicants that their knowledge of wrongfulness, which was found to exist, only pertained to issues of morality. Ultimately, it must be borne in mind that the applicants bore the onus to

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Isparta v Richter and Another* 2013 (6) SA 529 (GNP).

<sup>37</sup> *Ibid.*

<sup>38</sup> Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 395.

<sup>39</sup> *Economic Freedom Fighters and Others v Manuel* (2021) 1 All SA 623 (SCA) para 36; Neethling et al *Personality Rights* 204; Neethling et al *Law of Delict* 354; Burchell *Principles of Criminal Law* 642; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 393; and Davey and Dahms-Jansen *Social Media in The Workplace* 102.

<sup>40</sup> *Le Roux v Dey* (2010) ZASCA 41 para 137.

establish their defence of absence of knowledge of wrongfulness on a preponderance of probabilities. In my view, they simply failed to rebut this onus."

As a result, courts usually equate wrongfulness to content that would offend the *boni mores*<sup>41</sup> of society and for the publication to be regarded wrongful defamation, it must not only injure the individual's good name but also be objectively irrational or put differently,<sup>42</sup> *contra bonos mores*.<sup>43</sup> However, an objective test is utilised to evaluate wrongfulness; an application of the reasonable person test, which evaluates if the hypothetical legal construct of a reasonable person would find the information defamatory.<sup>44</sup>

In determining if a publication is defamatory and therefore *prima facie*<sup>45</sup> wrongful, courts have adapted a two-stage enquiry in accordance with the case of *Le Roux v Dey*,<sup>46</sup> wherein the court explained the test as follows:

"Where the plaintiff is content to rely on the proposition that the published statement is defamatory per se, a two-stage enquiry is brought to bear. The first is to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory. In establishing the ordinary meaning, the court is not concerned with the meaning which the maker of the statement intended to convey. Nor is it concerned with the meaning given to it by the persons to whom it was published, whether or not they believed it to be true, or whether or not they then thought less of the plaintiff. The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test, it is

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<sup>41</sup> *Boni mores* is "good behaviour; A term broadly denoting good public policy, proper moral sentiment, or accepted customary practices that do not by themselves rise to the level of legal obligations." See Sharp M *Critical Analysis of the Role of the Boni Mores in the South African Law of Contract and its Implications in the Constitutional Dispensation* (LLM thesis University of KwaZulu-Natal 2014) South Africa 7; Neethling et al *Law of Delict* 34.

<sup>42</sup> *SKJ v PJ and Another* (2016) ZAKZDHC 33 para 74; Neethling et al *Personality Rights* 204; Neethling et al *Law of Delict* 354; Burchell *Principles of Criminal Law* 642; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 393.

<sup>43</sup> *Contra bonos mores* is "against good morals: harmful to the moral welfare of society", see Neethling et al *Personality Rights* 83.

<sup>44</sup> *Le Roux v Dey* (2010) ZASCA 41 para 89; and *Mthembu-Mahanyela v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) para 25.

<sup>45</sup> *Prima facie* is "at first sight; sufficient to establish a fact or raise a presumption unless disproved or rebutted." See Cornell Law "*Prima Facie*" available at [https://www.law.cornell.edu/wex/prima\\_facie](https://www.law.cornell.edu/wex/prima_facie) (Date of use: 4 January 2023).

<sup>46</sup> *Le Roux v Dey* (2010) ZASCA 41 para 89.

accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied."

This was also supported in the case of *Mthembi-Mahanyela v Mail & Guardian*,<sup>47</sup> wherein the court said:

"...the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining this natural and ordinary meaning the Court must take account not only of what the words expressly say, but also of what they imply."

In conclusion, even though the onus is on the defendant to refute the presumption of wrongfulness, it is nevertheless conceivable for the defendant to escape liability, even if wrongful, provided that he or she is able to explain or justify the statement of the *meme* on the basis of one of the grounds of justification.<sup>48</sup>

#### **2.3.4 Intention**

In order for a defendant to be held accountable for the defamatory content of the *meme*, the defendant's publication must be knowing and intentional.<sup>49</sup> To satisfy the elements of intention, the defendant must have *animus iniuriandi*, which is the subjective term used to intentionally defame or injure.<sup>50</sup> It was also emphasised in *Le Roux v Dey*,<sup>51</sup> wherein the court said that:

"...the defence raised by the applicants that they lacked *animus iniuriandi* or intent. Broadly stated for present purposes, *animus iniuriandi* is the subjective intent to injure or defame. It is the equivalent of *dolus* in criminal law. It does not require that the defendant was motivated

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<sup>47</sup> *Mthembi-Mahanyela v Mail & Guardian* (2004) 3 All SA 511 (SCA) paras 25-26.

<sup>48</sup> Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 394.

<sup>49</sup> *Universal Church of The Kingdom of God v Bongani* (2022) ZAGPJHC 518 para 19.

<sup>50</sup> *EFF and Others v Manuel* (2021) 1 All SA 623 (SCA) para 36; *Pieterse v Clicks Group Ltd t/a Clicks Stores and Another* (2015) (5) SA 317 para 92; Kemp et al *Criminal Law in SA* 341; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 394; and Davey and Dahms-Jansen *Social Media in the Workplace* 103.

<sup>51</sup> *Le Roux v Dey* (2010) ZASCA 41 para 129.

by malice or ill-will towards the plaintiff. It includes not only *dolus directus* but *dolus eventualis* as well.”

*Animus iniuriandi* is unconcerned with the defendant's motive. Even if the defendant did not expressly intend to hurt with their humorous *memes*, intention will still exist if objectively examined, particularly if the defendant might have reasonably expected that the publication would be defamatory.<sup>52</sup> It is also emphasised in *Le Roux v Dey*,<sup>53</sup> wherein the court noted:

“...our law dictates that motive to raise a laugh and not to injure, in itself, would not exclude *animus iniuriandi*. This is so because in our law motive does not necessarily correlate with intent. A defendant who foresaw the possibility that his attempt at humour might be defamatory of the plaintiff, but nonetheless proceeds with the attempt, will have *animus iniuriandi* or intent in the form of *dolus eventualis*.”

It was further noted in *Le Roux v Day*,<sup>54</sup> that intention, like wrongfulness, can be deduced if the plaintiff can prove the existence of defamatory material that pertains to him or her, and a defendant who claims a lack of intention as a defence to an action for defamation carries the burden of demonstrating that defence on a preponderance of probabilities.

Upon discussing the requirements of defamation, it is essential to emphasise that the plaintiff does not need to establish every element of defamation in order to prevail in a defamation claim.<sup>55</sup> The following section discusses the grounds of justification or a defence to counter the presumption of wrongfulness and intention.

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<sup>52</sup> Kemp et al *Criminal Law in SA* 341; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 394.

<sup>53</sup> *Le Roux v Dey* (2010) ZASCA 41 para 131.

<sup>54</sup> *Idem* para 85.

<sup>55</sup> *Pieterse v Clicks Group Ltd t/a Clicks Stores and Another* (2015) (5) SA 317 para 46-49; Kemp et al *Criminal Law in SA* 341; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 394.



## 2.4 GROUNDS OF JUSTIFICATION

### 2.4.1 Introduction

As mentioned above in the requirements of liability, once defamation is published, which referred to the plaintiff, there is a presumption that the defendant acted wrongfully and intentionally in defaming.<sup>56</sup> This means that the defendant bears the onus of rebutting the defamatory allegation made by the plaintiff, by proving the existence of a ground of justification for his or her conduct.<sup>57</sup> For a successful rebuttal of the presumption relating to wrongfulness and intention, the defendant must prove on a balance of probabilities that the defence should succeed.<sup>58</sup> A mere denial of either wrongful conduct or intention will not suffice, the defendant has to prove that the statement was privileged;<sup>59</sup> truth in the public interest;<sup>60</sup> fair comment (protected comment)<sup>61</sup> and consent was given.<sup>62</sup>

### 2.4.2 Privilege

Privilege arises when someone has a right or duty to make certain defamatory claims and the person or individuals to whom the claims are made have a matching right or duty to learn about, or an interest in learning of, such claims.<sup>63</sup> Privilege as a justification may be used to justify the defendant's publication of the defamatory words or behaviour while ignoring the defendant's *prima facie* wrongdoing.<sup>64</sup> Privilege is divided into two groups;

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<sup>56</sup> *Le Roux v Dey* (2010) ZASCA 41 para 85; *Khumalo v Holomisa* 2002 ZACC 12; 2002 (5) SA 401 (CC) para 18; Neethling et al *Personality Rights* 217; Neethling et al *Law of Delict* 357; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 397.

<sup>57</sup> Nel *Freedom of Expression* 541; Neethling et al *Personality Rights* 217; Neethling et al *Law of Delict* 357; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 397.

<sup>58</sup> *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) paras 34-36; Nel *Freedom of Expression* 541; Neethling et al *Personality Rights* 217; Neethling et al *Law of Delict* 357; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 397.

<sup>59</sup> *Clover SA (Pty) Limited and Another v Sintwa* (2016) 12 BLLR 1265 (ECG).

<sup>60</sup> *Flocutt (Pty) Ltd v Eisenberg* [2016] ZASCA 33; and *EFF and Others v Manuel* (2021) 1 All SA 623 (SCA).

<sup>61</sup> *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC).

<sup>62</sup> Nel *Freedom of Expression* 541; Neethling et al *Personality Rights* 217; Neethling et al *Law of Delict* 358; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 397.

<sup>63</sup> Milo and Stein *Practical Guide to Media Law* 42-43; Neethling et al *Personality Rights* 217; Neethling et al *Law of Delict* 358; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 399; and Nel *Freedom of Expression* 542.

<sup>64</sup> Neethling et al *Personality Rights* 217; Neethling et al *Law of Delict* 358; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 399.

absolute privilege and relative privilege. For instance, utterances made during parliamentary sessions (including the National Assembly and the National Council of Provinces) are protected by absolute privilege against any form of defamatory liability.<sup>65</sup> Relative privilege refers to instances within which the nature of the situation gives birth to the privilege, however the privilege is restricted, and the defendant only receives provisional or conditional protection.<sup>66</sup> This protection ends when the plaintiff establishes that the defendant overstepped the limitations of the privileged occasion.<sup>67</sup>

Relative privilege is divided into two occasions, which are the discharge of a duty or furtherance of an interest and judicial or quasi-judicial proceedings.<sup>68</sup> These two occasions of relative privilege are explained in *Clover SA (Pty) Limited v Sintwa*.<sup>69</sup> In regard to the discharge of a duty or furtherance of an interest, the court said:<sup>70</sup>

“Discharge of a duty or furtherance of an interest is present where a person has a legal, moral or social duty or a legitimate interest in making defamatory assertions to another person who has a corresponding duty or interest to learn of the assertions. Consequently, the key question is whether such a duty or interest is present in the case of both the defamer and the bystander. In the event of it being proved (by means of the reasonable man test) that both parties had a corresponding duty or interest, the defendant must prove that he acted within the scope or limits of the privilege. This is done by proving that the defamatory assertions were relevant to, or reasonably connected with, the discharge of the duty or furtherance of the interest.”

The second occasion, which relates to judicial or quasi-judicial proceedings, the court in *Clover SA (Pty) Limited v Sintwa* said that:<sup>71</sup>

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<sup>65</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 10; Neethling et al *Personality Rights* 218; Neethling et al *Law of Delict* 358; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 399; Nel *Freedom of Expression* 542; and *Rapp van Zyl Incorporated and Others v FirstRand Bank and Others* (2022) 3 All SA 437 (WCC) 63.

<sup>66</sup> Davey and Dahms-Jansen *Social Media in the Workplace* 109; Neethling et al *Personality Rights* 218; Milo and Stein *Practical Guide to Media Law* 42; Neethling et al *Law of Delict* 358; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 399.

<sup>67</sup> Neethling et al *Personality Rights* 218; Neethling et al *Law of Delict* 358; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 399.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Clover SA (Pty) Limited and Another v Sintwa* (2016) 12 BLLR 1265 (ECG) paras 15-17.

<sup>70</sup> *Idem* para 15.

<sup>71</sup> *Clover SA (Pty) Limited and Another v Sintwa* (2016) 12 BLLR 1265 (ECG) para 16.

“In an instance of defamatory statements made during the course of judicial or quasi-judicial proceedings, however, the position is slightly (but significantly) different. To enjoy provisional protection, the defendant need only prove that the statements were relevant to the matter at issue. Once that is achieved a duty is cast on the plaintiff to prove that, notwithstanding the statements’ relevance, the statements were not supported by reasonable grounds. The onus resting on the defendant to establish that the statements were relevant has been held to be a full onus, as opposed to an evidentiary burden, and the required quantum of satisfaction is therefore on a balance of probabilities.”

In conclusion, it is unclear if privilege will be a viable defence for social media users, due to the dissemination of *memes* wherein the defamatory *memes* is republished, reshared or retweeted via WhatsApp or Facebook, as noted in *Tsedu and Others v Lekota and Another*,<sup>72</sup> wherein the court quoted and approved a well-known publication:

“...[a] person who repeats or adopts and re-publishes a defamatory statement will be held to have published the statement. The writer of a letter published in a newspaper is *prima facie* liable for the publication of it but so are the editor, printer, publisher and proprietor. So too a person who publishes a defamatory rumour cannot escape liability on the ground that he passed it on only as a rumour, without endorsing it.”

### 2.4.3 Truth for the public interest

Truth for the public interest as a ground of justification may be applicable to justify the publication of defamatory remarks that are true and are within the interest of the public.<sup>73</sup> The *prima facie* presumption of wrongfulness falls away once the defendant can prove this defence of truth for the public interest and it is not necessary that the content be absolutely true.<sup>74</sup> All that is required for the defendant to prove is that the defamatory remark or statement is partially true. This is illustrated in *Flocutt (Pty) Ltd v Eisenberg*,<sup>75</sup> wherein the court notes that:

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<sup>72</sup> *Tsedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA) para 4.

<sup>73</sup> Davey and Dahms-Jansen *Social Media in the Workplace* 108; Neethling et al *Personality Rights* 226; Neethling et al *Law of Delict* 360; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 398; *EFF and Others v Manuel* (2021) 1 All SA 623 (SCA) para 37.

<sup>74</sup> Neethling et al *Personality Rights* 226; Neethling et al *Law of Delict* 360; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 398.

<sup>75</sup> *Flocutt (Pty) Ltd v Eisenberg* (2016) ZASCA 33 para 33.

“The prima facie wrongfulness of the Respondent's conduct will be cancelled if he proves that the defamatory remarks were true and in the public interest. A Respondent need only prove that the remarks are substantially (and not literally) true, i.e., that the "sting" of the charge is true, as the Respondent alleged in his opposing affidavit. But that is the case only if the allegations do not allege fraudulent conduct, dishonesty or criminal conduct as a fact, as the Respondent does in the instant matter. When such is the nature of the allegations every aspect of such an allegation must be true.”

As a result, a substantially factual defamatory comment is insufficient to hold one accountable and this was further supported in the case of *Economic Freedom Fighters (EFF) and Others v Manuel*,<sup>76</sup> wherein it was noted that:

“Truth and public interest and fair comment are two defences that have long been recognised as rebutting the presumption of wrongfulness. A defendant relying on truth and public interest must plead and prove that the statement is substantially true and was published in the public interest.”

#### **2.4.4 Fair comment**

This ground of justification is closely linked to the defence of the publication of truth for the public interest. Fair comment, which is also referred to as protected comment,<sup>77</sup> is considered as commentary that is based on truthful facts and is based on an honest opinion.<sup>78</sup> Fair comment maintains a delicate balance between the right to freedom of speech and human dignity as noted in *The Citizen 1978 (Pty) Ltd v McBride*,<sup>79</sup> wherein the court said:

“...the requirement of fair comment is consistent with the need to respect and protect dignity. It maintains a delicate balance between the need to protect the right of everyone, including the press, to freedom of expression and the need to respect human dignity. This is the balance that the Constitution requires be struck. I do not, therefore, share the view expressed by Cameron J that the word “fair” is misleading. It must now be understood in the light of our Constitution, in particular the foundational values of human dignity and freedom

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<sup>76</sup> *EFF and Others v Manuel* (2021) 1 All SA 623 (SCA) para 37.

<sup>77</sup> *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) para 83-84.

<sup>78</sup> Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 398; and Milo and Stein *Practical Guide to Media Law* 38.

<sup>79</sup> *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) para 158.

upon which our constitutional democracy rests and the need to strike a balance between ensuring that freedom of expression is not stifled and insisting on the need to respect and protect human dignity.”

The right to freedom of expression is an important fundamental right in a democratic society,<sup>80</sup> as will be discussed in detail in Chapter 5, and citizens should be free to comment publicly without fear of prosecution or persecution. However, in order for the defendant to succeed with the defence of fair comment, the defendant’s comments must comply with four requirements which are: the defamatory statement must amount to comment or opinion; it must be fair; the factual allegations on which the comment is based must be true; and the comment must be related to a matter of public interest.<sup>81</sup>

Although fair comment is a justifiable defence and promotes the right to freedom of expression under section 16 of the Constitution,<sup>82</sup> social media users should use caution when posting, tweeting and sharing content, as they do not have a blanket right to say and post (*memes*) whatever they want,<sup>83</sup> as the right to freedom of expression is also limited under section 36 of the Constitution.<sup>84</sup> This is illustrated by the case of *Heroldt v Wills*,<sup>85</sup> wherein Willis J concluded that:

“The background to the posting, together with the words themselves, indicates that the respondent acted out of malice when she posted the offending comments.”

Therefore, the reliance of fair comment failed.

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<sup>80</sup> Section 16 of the Constitution.

<sup>81</sup> Davey and Dahms-Jansen *Social Media in the Workplace* 109; Nel *Freedom of Expression* 544; Neethling et al *Personality Rights* 232; Neethling et al *Law of Delict* 362; Swales and Snail ka Mtuzze *Freedom of Expression and the Internet* 399; Milo and Stein *Practical Guide to Media Law* 42; and *EFF and Others v Manuel* (2021) 1 All SA 623 (SCA) para 38.

<sup>82</sup> The Constitution s 16.

<sup>83</sup> Nel *Freedom of Expression* 548.

<sup>84</sup> The Constitution s 36.

<sup>85</sup> *Heroldt v Wills* 2013 (2) SA 530 (GSJ) para 28.

### 2.4.5 Consent

Consent, legally referred to as *consensus ad idem*,<sup>86</sup> is the process by which the parties inform each other of their intentions. Communication is often accomplished via the use of spoken or written words.<sup>87</sup> If a person lawfully consents to the infringement of his or her good name, such defamation is justified under the concept of *volenti non fit iniuria*.<sup>88 89</sup> However, one cannot consent to the causing of harm that is considered *contra bonos mores*. Consent to harm that offends the *boni mores* will be wrongful and thus invalid.

## 2.5 REMEDIES

Given that digital material may be disseminated via *memes*, and *memes*, as indicated in Chapter 1, are part of the communication that Internet users use to communicate quickly on social media, it facilitates the rapid spread of defamatory materials, sometimes known as "the grapevine effect"<sup>90</sup> of social media. In order to limit one's reputational damage, the South African legal system has provided specific remedies to any individual whose personality rights have been infringed on social media as a result of publication. These are the following remedies provided: retract/apology; interdict; and damages.

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<sup>86</sup> *Consensus ad idem* is defined as "the meeting of the minds". See Hutchison D, Pretorius C, Naude T, Du Plessis J, Eiselen S, Floyd T, Hawthorn L, Kuschke B, Maxwell C and De Stadler E *The Law of Contract in South Africa* 3<sup>rd</sup> ed (Oxford University Press 2017) South Africa 14; and Scott J, Cornelius S, Baqwa D, De Stadler E, Eiselen S, Evans R, Humby T, Kelly-Louw M, Konyon I, Kopel S, Naude T, Schoeman H, Scott S, Smit N, Sutherland P, Van der Bijl C and Woker T *The Law of Commerce in South Africa* 2<sup>nd</sup> ed (Oxford University Press 2014) South Africa 45.

<sup>87</sup> Hutchison et al *Law of Contract in SA* 45; and Scott et al *Law of Commerce in SA* 14.

<sup>88</sup> *Volenti non fit iniuria* means "to a willing person, it is not a wrong." This legal maxim holds that a person who knowingly and voluntarily risks danger cannot recover for any resulting injury. This principle was the "common-law basis for the assumption of the risk doctrine." See Bachman G "'Volenti Non Fit Iniuria' – How to Make a Principle Work" (2003) 10(4) *German Law Journal* 1033; and *Waring and Gillow Ltd v Sherborne* 1904 TS 340 344.

<sup>89</sup> Nel *Freedom of Expression* 544; Neethling et al *Law of Delict* 362; and also Neethling et al *Personality Rights* 237.

<sup>90</sup> *Mickle v Farley* (2013) NSWDC para 21.

### 2.5.1 Retract/apology

Prior to social media, retraction or apology was achieved by way of an application called *amende honorable*.<sup>91</sup> In this said application, the plaintiff would lodge a claim to the court, seeking an order against the defendant to make a suitable apology and in the case of verbal or literal injuries withdraw the words or expressions complained of.<sup>92</sup>

Now, with the birth of social media platforms, many complainants whose personality rights have been violated on social media typically request an apology and for the perpetrator to remove the offensive post they posted on a specific social platform. Their primary concern is the restoration of their good name and dignity. This was illustrated in the case of *Manuel v EFF*,<sup>93</sup> wherein the respondent posted a defamatory statement about the applicant. In the said post, the respondents had accused the applicant of nepotism, corruption and contrary to the spirit of openness and transparency. The court found the post made by the respondent to be defamatory and further ordered the removal of the content as well as costs. This decision was further supported in the appeal court.<sup>94</sup>

In a subsequent case of *Hanekom v Zuma*,<sup>95</sup> wherein the respondent (former President of South Africa, Jacob Zuma) made a false and defamatory statement about the applicant (former South African Minister of Science and Technology, Derek Hanekom) accusing the applicant of being an enemy agent “@Derek\_Hanekom is a known enemy agent”. The court found in favour of the applicant and ordered the respondent to apologise to the applicant on the social media platform utilised. The respondent was ordered, within 24 hours, to publish on a message on his then Twitter account (@PresJGZuma) containing the following apology:<sup>96</sup>

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<sup>91</sup> *Amende honorable* is defined as “honourable amends, which provided for a retraction of defamatory words by the defendant, an acknowledgement of their falsity and an apology”, see Burchell *Law of Defamation in SA* 315.

<sup>92</sup> McKerron RG *The Law of Delict: A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 4<sup>th</sup> ed (Juta 1952) South Africa 423.

<sup>93</sup> *Manuel v EFF and Others* (2019) ZAGPJHC para 73.

<sup>94</sup> *EFF and Others v Manuel* (2021) 1 All SA 623 (SCA) para 132.

<sup>95</sup> *Hanekom v Zuma* (2019) ZAKZDHC para 1.

<sup>96</sup> *Idem* para 4.

“On 25 July 2019, I published a tweet which alleges that Derek Hanekom is a known enemy agent. I unconditionally withdraw this allegation and apologise for making it as it is false.”

This is further proved in the *Cawood* case,<sup>97</sup> wherein the first applicant requested the respondent to delete her defamatory remark as well as requesting Facebook to remove the comments made by the respondent. The second applicant further said:<sup>98</sup>

“It is just unfortunate that we had to launch court proceedings before Facebook was prepared to adhere to our reasonable request to have the publications removed.”

It is worth noting that, in most cases, an apology will be more appropriate for rebuilding the plaintiff's reputation than monetary compensation,<sup>99</sup> as noted in the case of *Le Roux v Dey*,<sup>100</sup> wherein the court said:

“...That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and apology for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation, but it should create the best conditions for making it possible. We can see no reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another.”

Additionally, it is crucial to note that occasionally requiring an apology or retraction from a media defendant may unjustifiably restrict their right to freedom of expression.<sup>101</sup> As a result, an apology or retraction is not the sole remedy available to the complainant; if that fails, they can always seek an interdict.

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<sup>97</sup> *Cawood and Another v Mthimunye and Others* (2020) ZAMPMBHC 13.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Isparta v Richter and Another* 2013 (6) SA 529 (GNP) paras 39-40.

<sup>100</sup> *Le Roux v Dey* (2010) ZASCA 41 para 202.

<sup>101</sup> Milo and Stein *Practical Guide to Media Law* 47-48.



## 2.5.2 Interdict

An individual or an organisation who has been confronted with a threatening or a continuous infringement of their personality right, can obtain an interdict. However, for one to succeed in an application for an interdict, one has to prove on a balance of convenience that such a publication will be made.<sup>102</sup> It is important to take note that an interdict may take the form of prohibition<sup>103</sup> or a mandate<sup>104</sup> and that it may be final<sup>105</sup> or temporary (interim).<sup>106</sup>

In order to obtain a final interdict, the following requirements need to be met, and the applicant bears the onus to meet them:<sup>107</sup>

1. The applicant must have a clear right.
2. There must be an injury actually committed or reasonably apprehended.
3. There must not be a similar protection available to the applicant by any ordinary remedy.

The third requirement was also emphasised in the case of *Setlogela v Setlogela*<sup>108</sup> which laid down the requirements for a final interdict, namely, that a clear right must exist; an injury must have actually been committed or must be reasonably apprehended; and there must be an absence of another suitable remedy.

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<sup>102</sup> *Herbal Zone (Pty) Limited and Others v Infitech Technologies (Pty) Limited and Others* (2017) 2 All SA 347 (SCA) para 40; Van Blerk P *Precedents for Applications in Civil Proceedings: Interdicts* (Juta and Company (Pty) Ltd 2019) South Africa 24; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 402; Milo and Stein *Practical Guide to Media Law* 46-47; and Nel *Freedom of Expression* 554.

<sup>103</sup> Prohibitory interdict is "an interdict sought to prevent or stop a party from acting or acting in a certain way", see Neethling et al *Personality Rights* 250.

<sup>104</sup> Mandating interdict is "an interdict sought to compel a party to act", see Neethling et al *Personality Rights* 249.

<sup>105</sup> Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 402; a final interdict is "granted when there are no dispute of facts", see Van Blerk *Interdicts* 23.

<sup>106</sup> Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 402; an interim interdict "is granted when there are dispute of facts relating to the entitlement of an applicant to final interdictory relief", see Van Blerk *Interdicts* 24.

<sup>107</sup> Van Blerk *Interdicts* 23; and Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 402.

<sup>108</sup> *Setlogelo v Setlogelo* 1914 AD 221 227.

With due regard to the above, courts will also consider the potential prejudice to the party seeking the interdict should it not be granted and weigh this against the potential prejudice to be suffered by the other party should it be granted.<sup>109</sup> Furthermore, courts may grant interim interdicts should they be applied for. An interim interdict is not final, it allows the interdict (whichever interdict) to apply during the period in which the interim interdict is granted until the court makes a final order.<sup>110</sup>

To obtain an interim interdict, the applicant must prove the following:<sup>111</sup>

1. The right which is the subject matter of the main proceedings, and which is sought to be protected is *prima facie* established.
2. There is a well-grounded apprehension that the applicant will suffer irreparable harm should the interim interdict not be granted.
3. The balance of convenience favours the grant of interim belief.
4. There is no other available remedy.

Interdicts, however severe, remain a viable means to defend one's personality rights, especially within the social media context. As emphasised in the case of *Heroldt v Wills*,<sup>112</sup> it gives prompt and effective redress to persons whose rights have been infringed.

However, one is able to see the balancing of rights; the right to freedom of expression and the right to privacy in the case of *RM v RB*,<sup>113</sup> wherein the respondent posted a defamatory statement on her Facebook, criticising the applicant's parenting skills and also referring to the applicant's use of drugs and alcohol. The applicant applied for an interdict, which requested the respondent to refrain from posting any defamatory content about the applicant on any social media platform. Chetty J held the following:<sup>114</sup>

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<sup>109</sup> Van Blerk *Interdicts* 25.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Idem* 24 and *Halewood International South Africa (Pty) Ltd v Van Zyl and Another* (2023) ZAGPJHC 262 para 34.

<sup>112</sup> *Heroldt v Wills* 2013 (2) SA 530 (GSJ) para 31. An interdict was sought against the defendant for a Facebook post suggesting that the plaintiff was not a "proper" man for allegedly failing to care of his daughters because of "the alcohol, the drugs, the church". The court found that the post defamed the plaintiff and ordered the defendant to remove all posts involving the plaintiff.

<sup>113</sup> *RM v RB* 2015 (1) SA 270 (KZP).

<sup>114</sup> *Ibid.*

“...although courts may order a person to remove defamatory messages from social media, they should not order such a person to refrain from posting future defamatory statements via social media, or in any other way, because not every defamatory statement would necessarily be actionable in court and relief in the form of an interdict or damages is always available to the defamed person. This reasoning appears to be an appropriate balancing of the constitutionally enshrined right to freedom of expression and the right to dignity.”

### 2.5.3 Damages

“Damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law”,<sup>115</sup> and the purpose of damages<sup>116</sup> is mainly compensation for financial loss or emotional loss or defamation. This is noted in *Lawrence v Mitha*,<sup>117</sup> where the court quoted with approval a synopsis from the law of South Africa:

“The successful plaintiff in a defamation action is entitled to an award of general damages as a *solatium* to compensate the plaintiff for the impingement on his or her dignity and reputation... The court has a wide discretion in determining the award of general damages *ex aequo et bono*, having regard to all the circumstances of the case and the prevailing attitudes of the community... There is no formula for the determination of general damages.”

In determining damages, there are four factors to be considered, which are:<sup>118</sup>

- (a) the seriousness of the defamation.
- (b) the nature and extent of publication.
- (c) the reputation, character and conduct of the plaintiff.

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<sup>115</sup> Neethling et al *Law of Delict* 222; Milo and Stein *Practical Guide to Media Law* 43.

<sup>116</sup> Damages is defined as “either a breach of contract or from a delict which is in essence, conduct by a wrongdoer which wrongfully causes loss or damage to a person (the innocent party) for which the wrongdoer is compelled to make monetary reparation to the innocent party for such wrongful conduct. Also germane to the law of damages are principles of law which curtail or limit, not only the merits of the claim, but importantly in this context, the actual quantum of damages”. See Potgieter JM, Steynberg L and Floyd TB *Visser and Potgieter: Law of Damages* 3<sup>rd</sup> ed (Juta and Company (Pty) Ltd 2012) South Africa 2; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 402.

<sup>117</sup> Laws is the Law of South Africa; see *Lawrence and Others v Mitha and Another* (2019) ZAGPJHC 343 para 36.

<sup>118</sup> *Manyi v Dhlamini* (2018) ZAGPPHC 563 para 22.

(d) the motives and conduct of the defendant.

It was further pointed out in regard to damages in the case of *Dikoko v Mokhatla*.<sup>119</sup>

“It is therefore important that all relevant factors be taken into account when assessing damages for defamation. Also important is to strike an equitable balance in the determination of the gravity of the damage. It is for this reason too that a trial court must show that it has considered those relevant factors which not only aggravate but also mitigate the seriousness of the damages. In *Hulley v Cox*, considering quantum in a different context, emphasised the importance of equity in the assessment of damages and held: “The amount ... should be estimated on an equitable basis on a consideration of all the circumstances”.

After considering the four factors in establishing damages, it is critical to note the awards of damages. A court can make two types of damage awards: quantum and crude. The quantum of damages is discussed in *Manyi v Dhlamini*,<sup>120</sup> wherein the court held:

“The determination of quantum in respect of sentimental damages is inherently difficult and requires the exercise of discretion, more properly called a value judgment, by the judicial officer concerned. Right-minded persons can fairly disagree on what the correct measure in any given case is... The Supreme Court also held that ‘awards in defamation cases do not serve a punitive function and are, generally, not generous.’ In the matter of *Tsedu and Others v Lekota and Another*, the Supreme Court held that that monetary compensation for harm of this nature is not capable of being determined by an empirical measure.”

The second award, which is the crude of damages, is discussed in *Isparta v Richter and Another*,<sup>121</sup> where it was held that:

“An apology in the same medium (Facebook) would have gone a long way towards mitigating the plaintiff’s damages. In fact, there is much to be said for the proposition that orders for damages for defamation are inappropriate. Nugent JA, in a minority judgment in *Media 24 v Taxi Securitisation* referred to a 1995 report of the New South Wales Law Commission, referred to by Willis J in *Mineworkers Investment Co (Pty) Ltd v Modibaneu*

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<sup>119</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 74.

<sup>120</sup> *Manyi v Dhlamini* (2018) ZAGPPHC 563 para 25; and *Gqubule-Mbeki and Another v EFF and Another* (2020) ZAGPJHC 2 para 83.

<sup>121</sup> *Isparta v Richter and Another* 2013 (6) SA 529 (GNP) para 40. The *Isparta v Richter and Another* 2013 (6) SA 529 (GNP) case will later be discussed in Chapter 5 (South African legislative Framework).

which called damages as the sole remedy for defamation ‘remedially crude’. Nugent JA said in para [72]: ‘As it is an order that damages are payable implicitly declares that the plaintiff was unlawfully defamed, thereby clearing his or her name, and there can be no reason why a plaintiff should be forced to have damages as a precondition for having the declaration.’”

In conclusion, a claim for damages is non-exhaustive as mentioned in the *Dikoko v Mokhatla* case,<sup>122</sup> which may be a useful remedy for infringement of personality via *memes* through social media platforms.

#### 2.5.4 Criminal defamation

Criminal defamation is defined as the unlawful and intentional impairment of another person’s reputation.<sup>123</sup> There are similarities between civil defamation and criminal defamation excluding the standard of proof wherein in civil defamation, the standard of proof is based on the balance of probabilities, and in criminal defamation the onus of proof lies with the state, which is beyond reasonable doubt.<sup>124</sup> The offence of criminal defamation has raised a lot of uncertainty and that it limits the right to freedom of speech, it has also raised questions of whether it is extant or it has been abrogated by disuse.<sup>125</sup> This uncertainty was clarified in the case of *S v Hoho*,<sup>126</sup> wherein a constitutional challenge had been brought by Luzuko Kerr Hoho, a former parliamentary researcher, who had been convicted by the Bisho High Court on 22 charges of criminal defamation and sentenced to three years’ imprisonment, suspended for five years, and three years’ correctional supervision. It was held by the Supreme Court of Appeal (SCA) that the criminal offence of defamation is not unconstitutional.<sup>127</sup> Observing that respect for human dignity and the preservation of freedom of expression are equally considered, the court

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<sup>122</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 71.

<sup>123</sup> Snyman CR *Snyman's Criminal Law* 7<sup>th</sup> ed (LexisNexis 2020) South Africa 412; Kemp et al *Criminal Law in SA* 318; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 406; Milo and Stein *Practical Guide to Media Law* 48; and *S v Hoho* 2009 (1) SACR 276 (SCA) para 23.

<sup>124</sup> Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 405; and Kemp et al *Criminal Law in SA* 322.

<sup>125</sup> Snyman *Snyman's Criminal Law* 413; Kemp et al *Criminal Law in SA* 322; Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 406; and *S v Hoho* 2009 (1) SACR 276 (SCA) para 9.

<sup>126</sup> *S v Hoho* 2009 (1) SACR 276 (SCA) para 1.

<sup>127</sup> *Idem* para 36.

noted that the criminal law had safeguards built into it that made it very difficult for a prosecution to succeed, and that the present case concerned exactly the kind of circumstances in which a criminal prosecution had been necessary.<sup>128</sup>

In a similar vein, in the case of *Motsepe v S*,<sup>129</sup> the court recognised that the crime of defamation is not inconsistent with the Constitution and that it is a viable remedy:

“...even though the defamation crime undoubtedly limits the right to freedom of expression, such limitation is reasonable and justified in an open and democratic society and consistent with the criteria laid down in Section 36 of the Constitution.”

## 2.6 CONCLUSION

This chapter focused on the conceptual and historical overview of defamation. The chapter looked at defamation under common law, as well as well as the requirements for liability. The chapter further explored the infringement of these personality rights in the context of *memes* and the possible grounds of justification in this regard. The chapter addressed the procedural challenges where either privacy or reputation has been infringed in the context of defamatory nature of *memes* and finally identified possible remedies available to a plaintiff whose personality has been infringed on social media. The next chapter, a discussion on the overview of defamation in the 21st century will be outlined.

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<sup>128</sup> *Idem* paras 29-30.

<sup>129</sup> *Motsepe v S* (2) SACR 125 (GP) para 50.

## CHAPTER 3

### AN OVERVIEW OF DEFAMATION IN THE 21ST CENTURY

#### 3.1 INTRODUCTION

For centuries, in various cultures across the world, a person's reputation was regarded as having great importance and laws were created to protect a person against character assassination. In this regard, the law of defamation seeks to find a workable balance between two equally important rights: an individual's right to an unimpaired reputation (good name), and the right of freedom of expression (or society's right to be informed).<sup>1</sup>

However, with the advancement of technology and the various forms of communication, the right to a good name have become besieged and there are not enough remedies provided as compared to the right to freedom of expression.<sup>2</sup> The abuse of the right to freedom of speech by Internet users through the usage of *memes* in social media may result in the defamation of other individuals.

Before social media, the South African Broadcasting Corporation (SABC) was the leading platform for reaching and influencing a wide audience and public discourse.<sup>3</sup> Established in 1936, the SABC has been a key player in the country's radio and television services, traditionally holding a significant role in South Africa's media landscape.<sup>4</sup> The SABC reached a diverse audience nationwide through its radio and TV broadcasts, distributing news, entertainment, and cultural information to South Africans.<sup>5</sup>

Although the law of defamation aims to find a workable balance between these competing rights, it is important to note that they are not absolute and may override each other as

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<sup>1</sup> Burchell *Principles of Criminal Law*; and Nel (1997) *CILSA* 190.

<sup>2</sup> Garry PM "The Erosion of Common Law Privacy and Defamation: Reconsidering the Law's Balancing of Speech, Privacy, and Reputation" (2020) *Wayne Law Review* 279.

<sup>3</sup> The South African Broadcasting Corporation, hereinafter referred to SABC is "a public broadcaster with a mandate to inform, educate and entertain the public of South Africa", see South African Broadcasting Corporation "About Us" available at <https://www.sabc.co.za/sabc/about-us/> (Date of use: 12 September 2022).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

there are other competing constitutional rights such as the right to a good name. This chapter will discuss how the Internet works as well as the emergence of social media platforms. The chapter will highlight on defamation in an online environment in the context of social media platforms, where *memes* are used as a mode of communication. The chapter will conclude with a discussion on community guidelines for social media platforms.

In the next section, a discussion is made on the historical background of the Internet and social media platforms.

## **3.2 DEFAMATION ON THE INTERNET**

### **3.2.1 A brief historical background of the Internet**

The Internet represents the key factor of the growing information knowledge society.<sup>6</sup> In the 21<sup>st</sup> century, a life without the Internet seems impossible as it provides the most effective means of communication known to humankind. The genesis of the Internet commenced in 1969 as part of an experimental project of the United States of America (USA) by the Advanced Research Project Agency Net (ARPANET).<sup>7</sup> The network was first owned by the military and university laboratories and later on researchers across the USA were allowed access to the supercomputers located in various key universities and laboratories.<sup>8</sup> The ARPANET evolved to be called the Defence Advanced Research Projects Agency (DARPA) Internet, and to what is now known as the “Internet”.<sup>9</sup>

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<sup>6</sup> Homann *The Legal Implications of Defamatory Statements on Social Media Platforms in South Africa* (LLM thesis North-West University 2015) 9.

<sup>7</sup> Gahtan A, Kratz M and Mann J *Internet Law: A Practical Guide for Legal Business Professionals* (Carswell Legal Publications 1998) United States of America 3; and Papadopoulos S "An Introduction to Cyberlaw" in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 1; and Tladi *The Regulation of Unsolicited Electronic Communications* 19.

<sup>8</sup> Gahtan et al *Internet Law* 3; Van der Merwe D "Telecommunications Law" in Van der Merwe D (ed), *Information and Communications Technology Law* 3<sup>rd</sup> ed (LexisNexis 2021) South Africa 16; Papadopoulos "An Introduction to Cyberlaw" 2.

<sup>9</sup> Gahtan et al *Internet Law* 3.



It has been more than 25 years since the first Internet connection was established in South Africa.<sup>10</sup> This occurred on 12 November 1991, when the first Internet protocol packets started flowing out of South Africa onto the leased circuit.<sup>11</sup> In 1988, a group of three pioneers, Francois Jacot Guillarmod, Dave Wilson, and Mike Lawrie established a long-term email link to the Internet.<sup>12</sup> Randy Bush and Pat Terry were among those who assisted with this practice. The link was constructed between Rhodes University in Grahamstown, South Africa, and Randy Bush's residence in Portland, Oregon (USA). Although email was flowing via at least two Fido Net lines in 1988, the email link went into production for the general campus at Rhodes University in February 1989.<sup>13</sup>

When instant messaging apps like Mxit<sup>14</sup> were created, the South African Internet usage and culture surged. Mxit is a pioneering South African chat programme that rode the immediate wave before BlackBerry Messenger and WhatsApp took off with the introduction of smartphones.<sup>15</sup> This is relevant as Mxit was a huge platform for communication among especially the youth. This platform saw the inception of Mxit Chat Rooms where discussion topics were developed that ranged from pop culture at the time

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<sup>10</sup> NewsCentral Media “The Internet in South Africa Turns 25” available at [Latest News - The Internet in South Africa turns 25 \(ru.ac.za\)](#) (Date of use: 17 February 2023); and Mybroadband “The History of Internet Access in South Africa” available at <https://mybroadband.co.za/news/internet/114645-the-history-of-internet-access-in-south-africa.html> (30 November 2022).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Mxit was a “free instant messaging application that ran on over 8000 devices, including feature phones, Symbian S60, Android, Blackberry, iPhone, iPad, Windows Phone and tablets. Mxit is from Stellenbosch, a South African university town. Swist Group Technologies was founded in 1997 by Herman Heunis, who concentrated largely on the mobile telecommunications business, building software and providing system support to big Telcos. Clockspeed Mobile, a Swist Group Technologies research and development branch, created Arya, a Massive Multiplayer Mobile game, in 2000. The game was SMS-based and failed owing to the high cost of SMS at the time, as GPRS was not extensively used. The game was evaluated in 2003, and Herman devised the MXit concept that same year; MXit has since evolved to become a key IM player in the South African arena. Clockspeed Mobile became independent in April 2004, and MXit on July 1, 2006, became MXit Lifestyle (Pty) Ltd.” See Wikipedia “Mxit” available at <https://mybroadband.co.za/news/software/331336-the-rise-and-fall-of-mxit-in-south-africa.html> (Date of use: 19 May 2022).

<sup>15</sup> BusinessTech “Mxit is Officially Dead” available at <https://businesstech.co.za/news/mobile/139225/mxit-is-officially-dead/> (Date of use: 4 December 2019).

to specific events or persons in regional chatrooms, where people and events were discussed. Slander and defamation of persons were common, especially in schools.<sup>16</sup>

Today, the Internet is a series of networks or a giant network which interconnects countless computer networks around the world through a software known as Transmission Control Protocol (TCP)<sup>17</sup> or Internet Protocol (IP).<sup>18</sup> The Internet allows millions of people to instantly exchange, interact and generate knowledge collectively, establishing user networks with common aims that share and disseminate information.<sup>19</sup>

Internet access is gained through or provided by an ISP<sup>20</sup> which charges a monthly service fee, sourcing from cellular network companies such as MTN, Cell C, Vodacom and Telkom being mobile centric.<sup>21</sup> However, with the latest technology advancements, there are several ways to acquire Internet access such as Broadband<sup>22</sup> and Wireless Fidelity (WIFI).<sup>23</sup> Internet access is no longer restricted to personal computers, but smartphones are the newest ways of accessing the Internet.<sup>24</sup> Electronic tools have transformed the way people communicate with one another through mobile Internet access.<sup>25</sup>

These devices have been part of the advancement of technology in the past decade, making it possible to communicate and socialise through electronic tools, which have

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<sup>16</sup> *Ibid.*

<sup>17</sup> TCP means the “Transmission Control Protocol ... used by an information system to connect to the Internet”, see s 1 of the Electronic Communications and Transaction Act 24 of 2002 (hereinafter referred to as the ECT Act).

<sup>18</sup> IP means “the Internet Protocol used by an information system to connect to the Internet”, see s 1 of the ECT Act.

<sup>19</sup> Gahtan et al *Internet Law* 3.

<sup>20</sup> *Idem* 5.

<sup>21</sup> *Ibid.*

<sup>22</sup> Broadband is described as “a high capacity transmission technique using a wide range of frequencies, which enables a large number of messages to be communicated simultaneously”, see Dictionary.com “Broadband” available at <https://www.lexico.com/en/definition/broadband> (Date of use: 29 May 2023).

<sup>23</sup> WIFI is described as “a facility allowing computers, smartphones, or other devices to connect to the Internet or communicate with one another wirelessly within a particular area”, see Dictionary.com “WI-FI” available at <https://www.lexico.com/en/definition/wi-fi> (Date of use: 29 May 2023).

<sup>24</sup> Homann *Legal Implications* 12.

<sup>25</sup> *Idem* 11.

created social network applications.<sup>26</sup> The Internet has completely globalised the form of communication and international borders no longer hinder the flow of communication.<sup>27</sup> However, with these advancements in technology, the Internet regulatory system needs to be modified to keep up with the technological innovations<sup>28</sup> and to also deal with modern problems as noted in Chapter 1 in paragraph 1.2.1 (problem statement).

The following discussion constitutes a continuation of Chapter 1's exploration of social media.

### **3.2.2 Defining and analysing social media platforms**

Social media has been incorporated into the daily lives of individuals in every way imaginable.<sup>29</sup> A decade ago, phrases such as “Poke me” and “Hashtag” contained their original, plain meaning only. However, they have become a part of an everyday online vernacular/slang/lingo, especially if a person is creating or enforcing a particular brand.<sup>30</sup> It is therefore critical to have a better understanding of what social media is. It is important for one to first provide separate explanations of the two words ‘social’ and ‘media’.

On the one hand, the term ‘social’ designates being: marked by or passed in pleasant companionship with friends or associates of or relating to human society, the interaction of the individual and the group, or the welfare of human beings as members of society tending to form cooperative and interdependent relationships with others.<sup>31</sup>

On the other hand, the term ‘media’ refers to:

"Communication channels through which news, entertainment, education, data, or promotion messages are disseminated. Media includes every broadcasting and narrowcasting medium such as newspapers, magazines, TV, radio, billboards, direct mail,

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<sup>26</sup> Skosana *Right to Privacy and Identity* 12.

<sup>27</sup> Homann *Legal Implications* 11.

<sup>28</sup> Ehrlich EV *A Brief History of Internet Regulation* (Progressive Policy Institute 2014) 17.

<sup>29</sup> Nel (1997) *CILSA* 183.

<sup>30</sup> Lomic *Social Media and Internet Law* 1.

<sup>31</sup> Luttrell *Social Media* 19.

telephone, blog, and Internet. Media is the plural of medium and can take a plural or singular verb, depending on the sense intended."<sup>32</sup>

Having separated the two concepts, and while there is no common definition of the term social media,<sup>33</sup> according to the Films and Publications Amendment Act 11 of 2019 and Safko and Brake, social media means: “activities, practices, and behaviour among communities of people who gather online to share information, knowledge and opinions using conversational media.”<sup>34</sup>

However, Nancy and Boyd offer an alternative definition and describe social media as follows:<sup>35</sup>

“It is thus not the ability to use technology toward these objectives that is new with social media, but the scale at which people who never had access to broadcast media are now doing so on an everyday basis and the conscious strategic appropriation of media tools in this process.”

The definition offered by Safko and Brake and the Films and Publications Amendment Act 11 of 2019 is referred to in this study as it accommodates other digital platforms, such as photo and video-driven media such as Instagram, YouTube, and Pinterest. These social media platforms may be easily shared on a large scale in ways that were previously only available to professional broadcasters such as the SABC.

In contrast to the SABC, social media is easily accessible and is used to share and exchange information, knowledge, and ideas through social communication or conversational media.<sup>36</sup> As highlighted in the chapter 1, social media has several platforms such as Facebook, Twitter/X (the platform mainly focused on in this research),

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<sup>32</sup> *Ibid.*

<sup>33</sup> Wolf M, Sims J and Yang H “Social Media? What Social Media?” (2018) UK Academy for Information Systems Conference Proceedings 2.

<sup>34</sup> Safko L and Brake DK *The Social Media Bible: Tactics, Tools and Strategies for Business Success* (John Wiley & Sons 2009) Canada 3-4; and Section 1 (u) of the Films and Publications Amendment Act 11 of 2019.

<sup>35</sup> Nancy K, Boyd B and Boyd D “Socially Mediated Publicness: An Introduction” (2012) *Journal of Broadcasting & Electronic Media* 321.

<sup>36</sup> Nel (1997) *CILSA* 183; Davidson *Social Media and Electronic Commerce Law* 38; and Homann *Legal Implications* 13.

Instagram, and LinkedIn.<sup>37</sup> These platforms allow users to gather and exchange online photos, videos, audio files and content as well as to build and cultivate relationships and promote exposure.<sup>38</sup>

Social media permits individuals to interact in a virtual community or communications portal to share thoughts, ideas and messages in various forms such as *memes* and GIFs.<sup>39</sup> With the vast increase of mobile devices exceeding personal computers, and social media outlets taking over the traditional media, this allows more and more individuals the experience of being continuously engaged in the many forms of networked communications.<sup>40</sup> There is no denying that social media is a catalyst for global change, and it is currently unfolding and progressing at a rapid pace.

However, like many things in life, there is a downside to the use of social media, because it can be misused and abused.<sup>41</sup>

Below is a discussion on the substantial problems experienced while utilising Twitter/X: its abuse and misuse.

### **3.2.3 Social Media platform: Twitter/X**

Due to the flow of information across international borders where the content of Internet communications has been increasing, governments have identified the need to protect its citizens from hate speech and online defamation.<sup>42</sup>

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<sup>37</sup> LinkedIn is described as “the fastest growing professional network platform, enabling users to upload their resumes and connect with other professionals across the globe. Its professional network spans 200 countries with more than 100 million users”. See Lomic *Social Media and Internet Law* 4.

<sup>38</sup> Davidson *Social Media and Electronic Commerce Law* 38.

<sup>39</sup> See Chapter 1, footnote 10.

<sup>40</sup> Nel (1997) *CILSA* 186.

<sup>41</sup> *Ibid.*

<sup>42</sup> Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 389; and Nel *Freedom of Expression* 547.

In addition to words (spoken or written), new capabilities on the Twitter/X and Instagram platforms dubbed "Twitter Spaces" (post-dating Periscope)<sup>43</sup> and "Instagram Live" were released, respectively. Even though periscope was discontinued in 2015, the app is now owned by Twitter/X, which still allows immediacy with the Twitter/X followers to participate in what is occurring in one's Periscope broadcasts.<sup>44</sup> However, given the live nature of broadcasts, it is important to recognise that it may be difficult to avoid at least defamatory words from being communicated. The combination with Twitter/X makes it much easier to reach a global audience immediately.<sup>45</sup> Twitter/X has a large fan base and has also changed the way controversial subjects are addressed.

However, with the constant advancement as well as an increase in the reliance on technology,<sup>46</sup> the applicability of these protections is no longer clear. Defamatory matters published via the Internet have increased drastically and have resulted in a global audience of indeterminate size and inflicting on the reputation of its target.<sup>47</sup> The challenge that most people are currently facing is the use of *memes* and how they amount to defamation.

Internet users can no longer communicate or share personal information without the risk of it resulting into a *meme*. The challenging nature of *memes* is that they are not used in a universal way because they are subject to various meanings or contexts that affect how the society and the law perceive them, which might result in different interpretations. As mentioned in Chapter 1, *memes* can change sides and connotations as they travel across the digital domain, culminating into defamation

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<sup>43</sup> Periscope is "an app that lets you share and experience live video streams direct from your smartphone or tablet. It can be used to capture the atmosphere among fans at an important match, to broadcast an unfolding news story or to experience what it's like to walk down the streets of New York or Dubai". See Webwise "Explainer: What is Periscope?" available at <https://www.webwise.ie/parents/explainer-what-is-periscope/> (Date of use: 14 October 2022).

<sup>44</sup> Webwise "Explainer: What is Periscope?" available at <https://www.webwise.ie/parents/explainer-what-is-periscope/> (Date of use: 14 October 2022); and Nel *Freedom of Expression* 547.

<sup>45</sup> *Ibid.*

<sup>46</sup> Cascio WF and Montealegre R "How Technology Is Changing Work and Organizations" (2016) 3 *Annual Review of Organizational Psychology and Organizational Behavior* 349.

<sup>47</sup> Collins M *The Law of Defamation and the Internet* 1<sup>st</sup> ed (Oxford University 2001) United Kingdom 21.

Furthermore, Internet use has evolved into an active pursuit of popularity or validation in the following ways — likes on a user's post, retweets, or reposts of content, and an increase in followers or friends on the premise that the content that received high engagement is a standard that the user has set, and thus they "dedicate" that profile to specific content, also known as "clout chasing or trolling."<sup>48</sup>

This traction in engagement can lead to Internet users leaning on “trolling” to create more likes or followers which also contributes to defamation of character as being a *modus operandi*.

Despite many of the positive aspects of social media platforms such as better communication and information sharing, they also create possibilities for abuse and may bring out the worst in people, often without regard for the repercussions of their actions.<sup>49</sup> Words and images, frequently referred to as *memes*, are mainly designed for humour and to poke, however, they are difficult to delete once they are posted online, raising the possibility of defamation.<sup>50</sup> *Memes* are blank channels or layouts that may be filled with meaning or comments by anybody.<sup>51</sup>

While Twitter/X and other social media platforms have emerged as the most efficient and rapid means of communication, many people are unaware of a significant risk: once something is posted on social media platforms, it is considered "published," and thus

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<sup>48</sup> Clout chasing is “a person who hangs around with famous people for the sake of gaining popularity by either cloning their style or copying their signature moves”, see Dictionary.com “Clout chasing” available at <https://www.dictionary.com/e/slang/clout/> (Date of use: 28 January 2023). Trolling is “the deliberate act, of making random unsolicited and/or controversial comments on various Internet forums with the intent to provoke an emotional reaction from unsuspecting readers to engage in a fight or argument”, see Urbandictionary.com “Trolling” available at <https://www.urbandictionary.com/define.php?term=Trolling> (Date of use: 3 January 2023), and Nel *Freedom of Expression* 548.

<sup>49</sup> Bregman Moodley Attorneys “Social Media and the Law” available at <https://www.bregmans.co.za/social-media-and-the-law/> (Date of use: 26 October 2022), also Robinson L, Smith M *Social Media and Mental Health* (HelpGuide 2023) 4.

<sup>50</sup> McGovern A and Milivojevic S “Social Media and Crime: The Good, The Bad and The Ugly” available at <https://theconversation.com/social-media-and-crime-the-good-the-bad-and-the-ugly-66397> (Date of use: 16 October 2022).

<sup>51</sup> Kitchen K “What Do You Meme it is Illegal to Share Meme?” available at “<https://www.kisch-ip.com/article/what-do-you-meme-it-illegal-share-memes> (Date of use: 26 March 2023).

subject to the same rules that apply to traditional media, such as newspapers.<sup>52</sup> As a result, lawsuits for defamation of *memes* through social media, as well as dismissal or disciplinary action for misbehaviour on social media, have become very real possibilities.<sup>53</sup>

Due to the remarkable ease and speed with which information may be conveyed across borders and to enormous audiences, the South African legal system is tasked with adjusting its thinking to the issues of social media defamation.<sup>54</sup> As a *meme* content sharer or creator, one must always guarantee that any information about a person or entity is correct, and consent is given especially if it could be considered damaging to their reputation.<sup>55</sup>

Below is an image which helps understand *meme* definitions and their online success, particularly on Twitter. The below image provides an insight into the prevalence of *memes* that integrate photos of sensitive situations. These images are often isolated from their original context to establish a new and distinct and sometimes irrelevant message and



<sup>52</sup> Lyer (2018) *Speculum Juris* 133, and also Le Roux MB “Social Media and the South African Law” available at <https://www.cch.co.za/news/social-media-the-south-african-law/> (Date of use: 10 July 2023).

<sup>53</sup> See, e.g., the case of *Halewood International South Africa (Pty) Ltd v Van Zyl and Another* (2023) ZAGPJHC 262 para 1. An interdict was sought against the respondent who published a post on social media, accusing the applicant of fraudulently pretending to be a South African company and said that the applicant should be ashamed of itself. The court granted an Interim interdict and ordered that the respondent is restrained from publishing any defamatory statements, posts, *memes*, comments, video clips or sound clips, to or on any platform, referring to the applicant; and *Meyer/Onelogix (Pty) Ltd* (2018) 11 BALR 1232 (CCMA) para 9.

<sup>54</sup> Singh A “Social Media and Defamation Online: Guidance from Manuel v EFF” available at <https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff/> (Date of use: 31 May 2023).

<sup>55</sup> Nel Freedom of Expression 628.



meaning. These *memes* depict the rejection of suffering represented in such images, often for the sake of amusement.<sup>56</sup>

Nandos are Already on Malusi Gigaba's Case<sup>57</sup>

The *meme* above illustrates the influence of social media platforms. What we post can affect our thoughts, expression, and aspirations. With hundreds of thousands of Facebook status updates, tweets, and overly filtered Instagram photos being posted every second of the day, it is vital to be mindful of the rights of other individuals or organisations who may be adversely affected by such sharing.<sup>58</sup>

Social media users have the freedom to "offend, defame, and harass people" without fear of being identified by others. In this context, many *meme* creators disguise their identities by using anonymous usernames.<sup>59</sup>

Below follows a discussion on the community guidelines for Twitter/X users.

### 3.3 TWITTER/X

According to the world meter, the population rate in South Africa is 60.72 million.<sup>60</sup> Of this total population, 25.8 million are social media users and 4.69 are Twitter/X users.<sup>61</sup>

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<sup>56</sup> Man's NOT Barry Roux (@AdvoBarryRoux) "Nando are Already on Malusi Gigaba's Case" available at <https://twitter.com/AdvoBarryRoux/status/1056525134130044928> (Date of use: 28 October 2022).

<sup>57</sup> Man's NOT Barry Roux (@AdvoBarryRoux) "Nando are Already on Malusi Gigaba's Case" available at <https://twitter.com/AdvoBarryRoux/status/1056525134130044928> (Date of use: 28 October 2022).

<sup>58</sup> See Nel *Freedom of Expression* 629-620.

<sup>59</sup> How C "What Do They Really "Meme"? A Multimodal Study on 'Siakap Langkawi' Memes as Tools for Humour and Marketing" (2022) 28(2) *The Southeast Asian Journal of English Language Studies* 161.

<sup>60</sup> See Worldometer "South African Population" available at <https://www.worldometers.info/world-population/south-africa-population/> (Date of use: 3 January 2024).

<sup>61</sup> Statista "Number of Users of Twitter in South Africa 2019-2028" available at <https://www.statista.com/statistics/558415/number-of-twitter-users-in-south-africa/> (Date of use: 24 November 2023).

As mentioned in chapter 1,<sup>62</sup> Twitter/X is a social media platform that allows users to send and read short messages called "tweets". Tweets are limited to 280 characters and the platform's purpose is to share information quickly and connect people easily through a public communication channel.<sup>63</sup> The company prioritises freedom of speech and has rules in place to enhance and implement this freedom, while also prohibiting impersonation accounts.<sup>64</sup> Twitter/X's purpose is to facilitate open and safe public conversation. It has rules in place to prevent violence, harassment, and other harmful behaviours that can discourage people from expressing themselves and diminish the value of global public discourse. Twitter/X's goal is to ensure that everyone can participate in the public conversation freely and safely.<sup>65</sup>

Below is a discussion of the general guidelines for Twitter/X users.

### 3.3.1 General guidelines for Twitter/X users

It is worth noting that social media users must have an active e-mail address or registered cell phone number in order to register or obtain an account on Twitter/X. Users must agree to the "terms of service" and "privacy policies" of the social media platform. They may only use the social media platform and establish a profile after they have consented to these rules.<sup>66</sup>

Once enrolled on Twitter/X, users must establish a profile by providing some personal information. While users are not obligated to offer their real name or image on their profiles, their accounts should not use fake profile information to portray themselves as a person or entity unrelated to the account owner, since this may mislead others who use Twitter/X.<sup>67</sup> The privacy settings of a user will influence how much personal information

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<sup>62</sup> See paragraph 1.1.

<sup>63</sup> X Help Centre "About Different Types of Posts" available at <https://help.twitter.com/en/using-x/direct-messages> (Date of use: 23 April 2023).

<sup>64</sup> *Ibid.*

<sup>65</sup> X Help Centre "The X Rules" available at <https://help.twitter.com/en/using-x/direct-messages> (Date of use: 23 April 2023).

<sup>66</sup> O'Reilly T and Milstein S *The Twitter Book* 2<sup>nd</sup> ed (O'Reilly Media Inc 2011) United States of America 21.

<sup>67</sup> *Ibid.*; and X Help Centre "Misleading and Deceptive Identities Policy" available at <https://help.twitter.com/en/rules-and-policies> (Date of use: 23 April 2023).

other users on the same social media platform may access. Users can update their profiles on a frequent basis. When individuals update their profiles, automatic alerts are sent to their followers. This information is reflected in a user's "timeline" function.<sup>68</sup>

Following the creation of a profile, the next step is to establish a network of friends by "following". When users follow someone, they will receive notifications whenever the person updates. Following on Twitter/X is referred to as asymmetric by geeks. That is, one does not have to agree to follow each other to view each other's messages.<sup>69</sup>

A user can initiate a private message, which is also known as direct message with anybody who follows them. Anyone has the ability to send a direct message if the user has opted in to receiving direct messages from anyone (whether the user follows the person or not).<sup>70</sup> This also enables anyone participating in a conversation to send direct messages to the group, even if everyone in a group does not follow each other, everyone can read all the messages. A direct message can also be delivered to other users without being publicly visible on the timeline.<sup>71</sup>

Users can also post photos, videos, links, *memes*, and other items to their timeline for followers to make comments on.<sup>72</sup> The timeline function displays any material posted by friends or groups to whom a user's profile is following or has an interest in following. When a user logs into Twitter/X, the timeline feature is presented as the user's homepage.<sup>73</sup>

The following section discusses the rules and policies as well as timelines.

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<sup>68</sup> *Ibid.*

<sup>69</sup> O'Reilly and Milstein *The Twitter Book* 23, and Kriel K, Manyathi N and Sedutla M "Social Networking for Attorneys" (2012) *De Rebus* 32.

<sup>70</sup> X Help Centre "About Direct Messages" available at <https://help.twitter.com/en/using-x/direct-messages> (Date of use: 23 April 2023).

<sup>71</sup> *Ibid.*

<sup>72</sup> O'Reilly and Milstein *The Twitter Book* 33.

<sup>73</sup> X Help Centre "About Your For Your Timeline on X" available at <https://help.twitter.com/en/using-x/x-timeline> (Date of use: 23 April 2023).

### 3.3.2 Rules and policies

As previously stated, when a person signs up for Twitter/X, their posts are made public by default, which means that anybody may access and interact with what they have written. They may protect their postings by going into their account settings.<sup>74</sup>

Twitter/X is reflective of real conversations happening in the world, which may contain viewpoints that are hurtful, provocative, and/or discriminatory to others. While it encourages everyone to express themselves about their service, it will not accept harassment, threats, or the use of fear to stifle the voices of others.<sup>75</sup> Twitter/X has rules in place to help ensure everyone feels safe expressing their beliefs and striving to enforce them with uniform consistency.

In terms of data protection practises, Twitter/X notes it uses the information it collects to improve and personalise its products and services so that users have a better Twitter/X experience, such as showing users more relevant content and advertisements, suggesting people and topics to follow, and enabling and assisting users in discovering affiliates, third-party apps, and services.<sup>76</sup>

### 3.3.3 Timelines

The timeline gives a user space for all the stories they wish to share. Users may post updates or share content with their followers on their timeline. This is then displayed on the timeline, but also in their followers' timeline.<sup>77</sup> Once posted, posts (formerly known as Tweets) are pushed into the follower's timeline, which results in a continuous stream of Tweets from one's followers. To facilitate the consumption of the large amount of real

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<sup>74</sup> X Help Centre "About Public and Protected Posts" available at <https://help.twitter.com/en/safety-and-security/public-and-protected-posts> (Date of use: 23 April 2023).

<sup>75</sup> X Help Centre "X Privacy Policy" available at <https://twitter.com/en/privacy#update> (Date of use: 23 April 2023).

<sup>76</sup> *Ibid.*

<sup>77</sup> X Help Centre "About Your For Your Timeline on X" available at <https://help.twitter.com/en/using-x/x-timeline> (Date of use: 23 April 2023).

time information, each user's timeline is displayed in a way that new arrivals are presented on the top of the screen, replacing the older ones.<sup>78</sup>

Users can, however, limit access to their timelines from public posts to protected posts. They may categorise their contacts by utilising their account settings to control who can view the content on their timeline.<sup>79</sup> It is also feasible for a user to grant access to timeline material. Only a user's followers will be able to see the material in their posts if their posts are protected. It is important to note that their followers have the ability to download or re-share links to material that a user shares in protected posts. Links to media on Twitter/X are not encrypted, anyone who has the link can access the content.<sup>80</sup>

The timeline feature allows a user to be kept informed of what is happening in the lives of his or her followers and to be informed on what is happening around the world.<sup>81</sup> It is no longer necessary to phone or talk to a friend in person to remain up to date on his or her life.

### 3.4 CONCLUSION

This chapter focused on the challenges highlighted in Chapter 2. This chapter defined and provided examples of defamation, social media and *memes*. The chapter pointed out the complexities of social media that arises with the increase in Internet usage across the globe. Social media usage has a rapid prosperity on both national and international levels, and with its increased usage, legal problems such as defamation came to the fore. The chapter concluded by discussing the community guidelines for social media platforms, more in particular Twitter/X. In the next chapter, a discussion will be made on the Australian jurisdiction and how it deals with defamation on the Internet.

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<sup>78</sup> *Ibid.*

<sup>79</sup> X Help Centre "About Public and Protected Posts" available at <https://help.twitter.com/en/safety-and-security/public-and-protected-posts> (Date of use: 23 April 2023).

<sup>80</sup> X Help Centre "About Your For Your Timeline on X" available at <https://help.twitter.com/en/using-x/x-timeline> (Date of use: 23 April 2023).

<sup>81</sup> *Ibid.*

## CHAPTER 4

### THE REGULATION OF INTERNET DEFAMATION THROUGH SOCIAL MEDIA: THE AUSTRALIAN PERSPECTIVE

#### 4.1 INTRODUCTION

According to the world meter, the population rate in Australia is 25.64 million. Of this total population, 22.82 million are Internet users and 20.50 million are social media users.<sup>1</sup> Internet users frequently find themselves caught between the need to protect their reputation and the need to support their right to freedom of expression.

Whereas in South African law,<sup>2</sup> defamation is a delict, in Australian law, this civil wrong is named a tort.<sup>3</sup> As a background, the chapter presents an outline of the Australian legal system, including the existing Constitution and common law views on reputation and freedom of speech. Although in Chapter 2 the focus was as regards to defamation in South African law under common law, in this chapter, attention is not only paid to Australian tort law; it also examines the Australian legislation regulating the Internet in regard to *memes and defamation*.

#### 4.2 OVERVIEW OF THE AUSTRALIAN LEGAL SYSTEM

Australia takes pride in its distinctive political system, which comprises of six states and two territories.<sup>4</sup> Each Australian state has its own government and laws, allowing them to address the specific needs and concerns of their residents. However, it is critical to

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<sup>1</sup> Kemp S “Digital 2021: Australia” available at <https://datareportal.com/reports/digital-2021-australia> (Date of use: 9 February 2023), and World Population Review “Australia” available at <https://worldpopulationreview.com/countries/australia-population> (Date of use: 12 October 2022); and Hanks J “What Happens on The Internet Stays on The Internet? Defamation Law Reform and Social Media” (2022) *LSA Legal Briefs* 1.

<sup>2</sup> This is covered in Chapter 4.

<sup>3</sup> Rolph D “The Concept of Publication in Defamation Law” (2021) 27 *Torts Law Journal* 1. This will be discussed in depth later in the chapter.

<sup>4</sup> Hardy K *Law in Australian Society: An Introduction to Principle and Process* (Allen & Unwin 2019) Australia 53.

recognise that, despite these differences, Australia has a strong federal legal system that unites the country.<sup>5</sup>

The Australian states, namely New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia, each have their own parliament and are responsible for making decisions in areas such as education, healthcare, transport, and infrastructure.<sup>6</sup> This decentralised approach ensures that policies can be tailored to meet the diverse requirements of local communities. For the dedication of this study, we will focus on the Federal Law and the state of New South Wales. The federal government has constitutional authority to act in the best interests of all Australians by establishing standard legal frameworks that apply across the country.<sup>7</sup>

Federal law is an important tool for reconciling competing interests among states. It fosters fairness and equality among all Australians, regardless of their geographical location, by creating consistent standards in areas such as criminal justice or consumer protection rights across the country.<sup>8</sup> Furthermore, federal legislation guarantees effective coordination among states by promoting collaboration on matters needing collective action, such as natural disaster management or responding to public health emergencies.<sup>9</sup>

To summarise, while Australian states have significant autonomy in administering their various areas based on local interests and preferences, they collaborate under the canopy of federal legislation to promote national cohesiveness.<sup>10</sup> This one-of-a-kind balance allows for both regional freedom and national unity, which benefits all Australians. Australia has established a strong and resilient political system that responds to the demands of its diverse population by combining the capabilities of state governments' localised decision-making with the overall direction offered by federal legislation.<sup>11</sup>

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Idem* 57.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

In the next section, a discussion will be made on the Australian tort of defamation and the requirements for defamation.

#### 4.2.1 Australian tort of defamation

Tort law is defined as a legal wrong which one person or entity (the tortfeasor)<sup>12</sup> commits against another person or entity and for which the usual remedy is an award of damages.<sup>13</sup> In essence, this constitutes what a delict is in South Africa.

A tort may amount to a crime,<sup>14</sup> however, claims in tort are generally civil claims brought by people seeking compensation from the tortfeasor for injury or loss. Tort liability includes both personal liability and vicarious liability (for torts committed by employees or agents).<sup>15</sup>

Torts also include assault, battery, false imprisonment, trespass to land or goods, conversion of goods, private and public nuisance, intimidation, deceit, and the very expansive tort of negligence.<sup>16</sup> The central interest by the tort of defamation is the protection of personal reputation from untruthful attacks.<sup>17</sup> Defamation in Australia is described as a tort of “strict liability”,<sup>18</sup> as also affirmed by the court in *Dow Jones & Co Inc v Gutnick* who stated that the tort of defamation is a tort of strict liability in the sense that a defendant may be liable even though no injury to reputation was intended, and the defendant acted with reasonable care.<sup>19</sup>

In Australian law, defamation can be defined as the “publication of words or images to a person that damages the reputation of another [‘slander’ if spoken words, ‘libel’ if written

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<sup>12</sup> A tortfeasor is “a person who commits a tort”, see Merriam Webster “Tortfeasor” available at <https://www.merriam-webster.com/legal/tortfeasor> (Date of use: 31 July 2022).

<sup>13</sup> Australian Law Reform Commission “What is a Tort” available at <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/17-immunity-from-civil-liability/what-is-a-tort/> (Date of use: 31 July 2023).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Rolph (2021) *Torts LJ* 3.

<sup>17</sup> Rolph (2019) *Australian Feminist Law* 353.

<sup>18</sup> Rolph (2021) *Torts LJ* 3.

<sup>19</sup> *Dow Jones & Co Inc v Gutnick* (2002) HCA 56, 210 CLR 575, 194 ALR 433, 77 ALJR 255.



words or images].<sup>20</sup> A defamatory comment is one that is likely to make ordinary or reasonable people think less of the individual whose words or images have been published. An inference that casts a defamatory imputation is sufficient to launch an action”.<sup>21</sup> For the purposes of this chapter, the emphasis will be on libel (written words or images) rather than slander (spoken words).

As stated above, defamation is a tort of strict liability, and a plaintiff's culpability for defamation simply requires that defamatory content which directly or indirectly identifies the plaintiff be published, in the sense that it is conveyed to at least one person other than the plaintiff.<sup>22</sup> There are numerous standards for what is defamatory, one of which is the publishing of anything that has the potential to expose the plaintiff to 'hatred, scorn, or contempt' and another being the publication of a false assertion to a person's dishonour.<sup>23</sup> However, one of the most prevalent contributors to defamation is the use of *memes* as they have the potential to release information that tends to degrade the plaintiff's standing in the eyes of “right-thinking members of society”.<sup>24</sup> *Mememes* are a significant or common aspect in the 21<sup>st</sup> century and as stated in the introduction, *mememes* can change sides and connotation as they travel throughout the digital domain, resulting in defamation. This is demonstrable in the below picture of Ali Ziggi MossImani:

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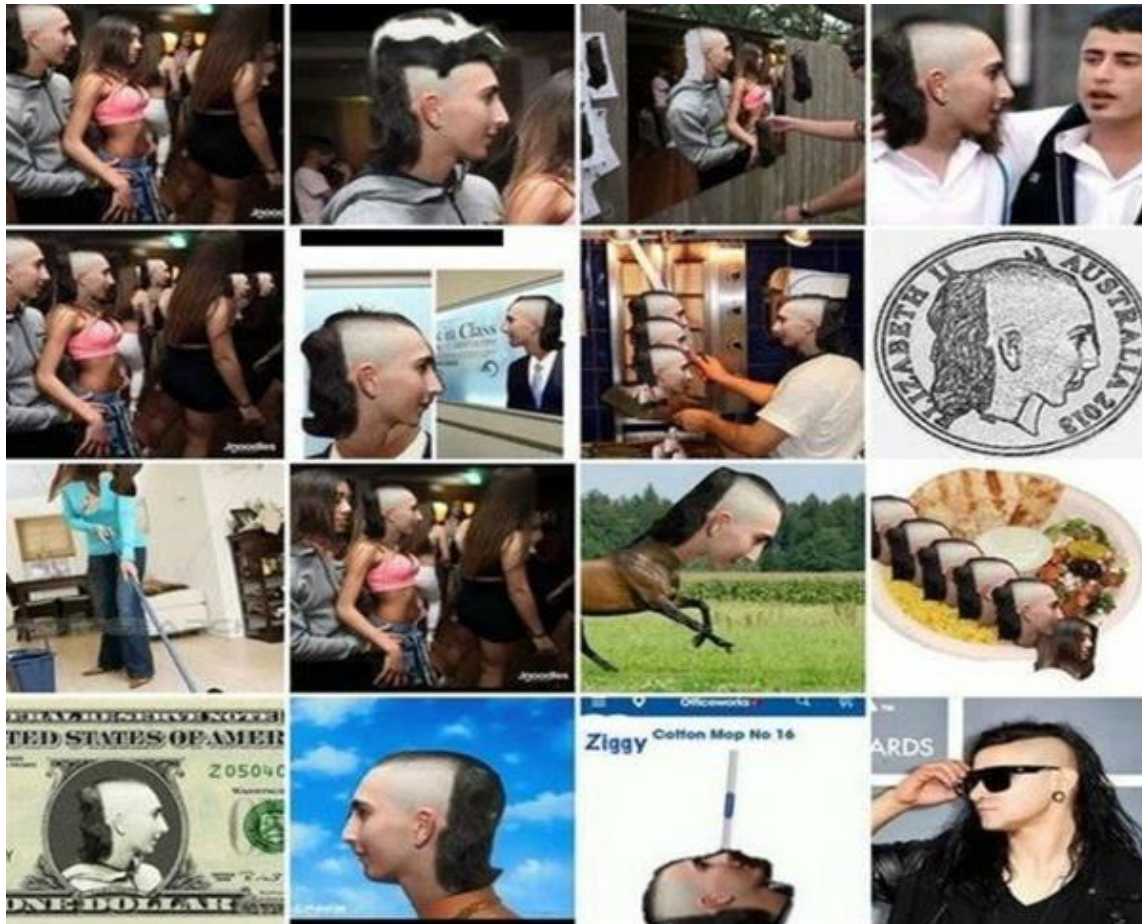
<sup>20</sup> Etheringtons Solicitors “Be Careful What You Say On Social Media” available at <https://etheringtons.com.au/defamation-on-social-media/> (Date of use: 27 July 2023).

<sup>21</sup> Mendelson *New Law of Torts* 763; Steele *Tort Law* 761.

<sup>22</sup> Mendelson *New Law of Torts* 760; Rolph (2021) *Torts LJ* 3; and Baker R “Defamation and the Moral Community” (2008) 13 *Deakin Law Review* 1.

<sup>23</sup> Rolph (2019) *Australian Feminist Law* 352; and Rolph *Reputation, Celebrity and Defamation Law* 62.

<sup>24</sup> Rolph (2019) *Australian Feminist Law* 352; and Rolph *Reputation, Celebrity and Defamation Law* 62.



The Australian Teen Suing Over Mullet Memes<sup>25</sup>

In the case of *Mosslmani by his tutor Karout v Australian Radio Network Pty Ltd*,<sup>26</sup> the plaintiff Ali Ziggi Mosslmani filed defamation suits against the Daily Mail, Sydney's Daily Telegraph, and the Australian Radio Network for publishing a photograph and mocking his unconventional haircut, which featured a shaved front and long back. The photo rapidly went viral, garnering over 11,000 comments and 10,000 replies, culminating into a *meme*.<sup>27</sup> Mosslmani instituted a defamatory case and was unsuccessful due to the post satisfying the requirements of defence, Gibson J said:<sup>28</sup>

<sup>25</sup> BBC Trending "The Australian Teen Suing Over Mullet Memes" available at <https://www.bbc.com/news/blogs-trending-37838197> (Date of use: 3 November 2022).

<sup>26</sup> *Mosslmani by his tutor Karout v Australian Radio Network Pty Ltd* (ACN 065 986 987) (2016) NSWDC 264.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

“Mosslmani’s case was overpleaded and appeared to be designed to claim as many imputations as possible while simultaneously avoiding a defence of honest opinion or justification.”

Regardless of the outcome of the case, it is noticeable that *memes* can be funny, inventive, and completely spontaneous, while they also tend to be defamatory. As illustrated by the above *meme*, exposing someone to ridicule may be defamatory but the law of defamation is complex and contentious with the goal of balancing freedom of speech and protecting persons’ reputation.

### **4.3 REQUIREMENTS FOR DEFAMATION**

#### **4.3.1 Introduction**

As mentioned in the previous section, a defamatory comment is one that is likely to lead ordinary or reasonable people to label the individual whose words or photographs were published negatively. One defamatory benchmark is the publishing of anything that has the potential to expose the plaintiff to "hatred, scorn, or contempt", while another is the publication of an untrue allegation to a person's dishonour.<sup>29</sup> There are, nevertheless, a few elements that must be met in order to succeed in a defamation action. These are the following requirements: the matter conveys a defamatory imputation or imputations; the matter identifies, or is capable of identifying, the plaintiff as the person defamed; and the matter has been published by the defendant to at least one person other than the plaintiff.<sup>30</sup> These elements will be focussed on below.

#### **4.3.2 The matter conveys a defamatory imputation or imputations**

Often, the defamer will not state clearly what they intend, such as "you are a fraud." Instead, they will infer the meaning, which is known as imputation. However, the individual who claims to have been defamed cannot be imagining it. The material must truly infer

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<sup>29</sup> Rolph (2019) *Australian Feminist Law* 352; Baker (2008) Deakin LR 3; and Rolph *Reputation, Celebrity and Defamation Law* 62.

<sup>30</sup> See Mendelson *New Law of Torts* 769.

what the person believes it does, through its publication.<sup>31</sup> Defamation does not, however, just defend the element of reputation; it is also possible if the information disparages the plaintiff's trade, or professional, official, or business reputation.<sup>32</sup> This is also demonstrable in the case of *Radio 2UE Sydney Pty Ltd v Chesterton*,<sup>33</sup> wherein it was stated that “a person's reputation may therefore be said to be injured when the esteem in which that person is held by the community is diminished in some respect” and “whether a person’s standing in the community, or the estimation in which people hold that person, has been lowered or simply whether the imputation is likely to cause people to think the less of a plaintiff.”

However, it should be noted that in assessing whether the subject matter is defamatory two procedures are required.<sup>34</sup> The first procedure is the identification of the potentially defamatory meaning that is conveyed in the matter and the second procedure is the determination of whether the matter is in fact defamatory of the plaintiff.<sup>35</sup>

In order for the first procedure to be met, the identification of the material must be of or concerning the plaintiff. This is demonstrable in the case of *Knupffer v London Express Newspaper*,<sup>36</sup> wherein the court stated that:

“The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the Plaintiff. It is irrelevant that the words are published of two or more persons if they are proved to be published of him: and it is irrelevant that the two or more persons are called by some generic or class name.”

The second procedure to be met is unequivocally confirmed as a need in all defamatory cases.<sup>37</sup> It is the determination of whether the plaintiff’s reputation has indeed been

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<sup>31</sup> Ibid; *Wagner & Ors v Harbour Radio Pty Ltd & Ors* (2018) QSC 201 and see also *Hardie v Herald & Weekly Times Pty Ltd* (2016) VSCA 103.

<sup>32</sup> See Mendelson *New Law of Torts* 768.

<sup>33</sup> *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) HCA 16 paras 3 and 36.

<sup>34</sup> See Mendelson *New Law of Torts* 769.

<sup>35</sup> *Ibid*; and Baker R *Defamation Law and Social Attitudes: Ordinary Unreasonable People* (Edward Elgar Publishing 2011) United Kingdom 20; Collins M *Collins on Defamation* 1<sup>st</sup> ed (Oxford University 2014) United Kingdom 60; and Collins *Law of Defamation and the Internet* 79.

<sup>36</sup> *Knupffer v London Express Newspapers Ltd* (1944) AC 116.

<sup>37</sup> *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) HCA 16 paras 4-7 and 35-50.

damaged, and that the imputation will likely cause people to think less of the plaintiff.<sup>38</sup> The case of *Mirror Newspapers Ltd v World Hosts Pty Ltd*<sup>39</sup> serves as a good example, wherein the Australian newspaper published an article with the heading “CARPICE OWNER DECLARED BANKRUPT BY COURT”. However, the newspaper made an error. The restaurant owner did not go bankrupt, instead the restaurant manager went bankrupt. The article did specify that it was the manager that went bankrupt, however, a person that read the heading may think it was the owner. The restaurant owner sued for defamation with the imputation that he was financially unsound. The High Court held that the imputation was defamatory.<sup>40</sup>

It was further confirmed in the case of *Radio 2UE Sydney Pty Ltd v Chesterton*<sup>41</sup> wherein the court said: “a person's reputation may therefore be said to be injured when the esteem in which that person is held by the community is diminished in some respect”, furthermore, the court said: <sup>42</sup>

“...whether a person's standing in the community, or the estimation in which people hold that person, has been lowered or simply whether the imputation is likely to cause people to think the less of a plaintiff.”

In conclusion, it should be noted that whether or not the plaintiff's reputation has been harmed does not necessarily imply that the plaintiff's moral standing has been harmed. This is demonstrable in the case of *Radio 2UE Sydney Pty Ltd v Chesterton*,<sup>43</sup> wherein the court made reference in the general test to a plaintiff being lowered:

“...the hypothetical referee does not imply the exercise of a moral judgment, on their part, about the plaintiff because of what is said about that person. It does not import particular standards, those of a moral or ethical nature, to the assessment of the imputations. It simply conveys a loss of standing in some respect.”

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<sup>38</sup> See Mendelson *New Law of Torts* 776.

<sup>39</sup> *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) HCA 16 para 3.

<sup>42</sup> *Idem* para 36.

<sup>43</sup> *Idem* para 37.

### 4.3.3 The matter identifies, or is capable of identifying the plaintiff as the person defamed

Identification is one of three key elements in determining whether a publication is defamatory. Furthermore, there are a few factors to take into account when determining if a plaintiff's identification has been established, such as whether the plaintiff was identified directly or indirectly.<sup>44</sup>

Direct identification is easier to establish in comparison to indirect identification. A plaintiff's direct identification in a publication indicates that they would be recognised with the publication's natural and usual meaning. This is demonstrable in the case of *Consolidated Trust Co Ltd v Browne*,<sup>45</sup> wherein the plaintiff was identified in the publication by his title in office as the "Prime Minister of Australia", without further naming him. Indirect identification on the other hand occurs when the plaintiff is not named in the publication but there is some inference to the plaintiff where he or she may be recognised. In such cases, in order to prove identity, the publisher must make an innuendo connection to the plaintiff.<sup>46</sup>

This was illustrated in the case of *Lord McAlpine of West Green v Sally Bercow*,<sup>47</sup> wherein Sally Bercow published a message to her 56,000 Twitter/X followers on 4 November 2012 against a backdrop of heated social media speculation about the identity of an anonymous top Conservative member of the Thatcher Government who had been accused of child abuse. The Tweet read "Why is Lord McAlpine trending? Innocent face".<sup>48</sup> Lord McAlpine, the former Conservative Party Deputy Chairman, filed a libel suit. His case claimed that Ms Bercow used the words 'innocent face' insincerely or ironically to draw readers' attention to an answer that a reasonable reader would understand she

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<sup>44</sup> See Collins *Law of Defamation and the Internet* 79.

<sup>45</sup> *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86.

<sup>46</sup> *Bruce v Odhams Press Ltd* (1936) 1 KB 697. Slessor LJ held that in such a case as the present, the plaintiff, not being actually named in the libel, will have to prove an innuendo identifying her in the minds of some people reasonably reading the libel with the person defamed, for there is no cause of action unless the plaintiff can prove a publication of and concerning her of the libellous matter.

<sup>47</sup> *Lord McAlpine of West Green v Sally Bercow* (2013) EWHC 1342 (QB).

<sup>48</sup> *Ibid.*

already thought she knew that Lord McAlpine was a paedophile who sexually abused boys in care.<sup>49</sup> In reality, the charges against Lord McAlpine were wholly false, and he was completely innocent of any of the extremely serious offences brought against him. Ms Bercow disputed that her tweet was intended to be derogatory of Lord McAlpine. Her argument was that the question she posed in her Tweet was merely a query, and that “Innocent face” was used truly to indicate she did not know the answer.<sup>50</sup>

Mr Justice Tugendhat ruled for Lord McAlpine on the preliminary issue of meaning, holding that in circumstances where Ms Bercow was telling her followers that she did not know why Lord McAlpine was trending and there was no other explanation, the reader would infer that Ms Bercow had 'provided the final piece in the jigsaw', and that the answer to Ms Bercow's question was that Lord McAlpine was trending.<sup>51</sup>

It is worth emphasising, however, that the individual does not have to be directly named in the article. If identifying was required, the publisher would only have to leave out the name.<sup>52</sup> As a result, a defamer does not avoid defamation by failing to expressly name a person. Instead, it permits the plaintiff to be identified indirectly in the publication, such as by their address, title, or portrait.<sup>53</sup> This is not an exhaustive list. It is debatable if naming a plaintiff and posting their photograph or image without naming them are the same thing. This is illustrated in the case of *Dwek v Macmillan Publishers Ltd*,<sup>54</sup> wherein the claimant complained of a photograph in a book which depicted him next to a woman said to be a prostitute.<sup>55</sup> It was erroneously said in the caption to be a photograph of Dodi Fayed and the defendant applied to strike out the claim. It was held that there is no difference in logic or fact that plaintiff be identified by photograph or name.

Similarly, a defendant who publishes material pertaining to a fake persona or *meme* may be held accountable if the publication identifies a real plaintiff. The plaintiff can effectively

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Collins *Law of Defamation and the Internet* 79.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Dwek v Macmillan Publishers Ltd* (1999) EWCA Civ 2002.

<sup>55</sup> This is similar to the Floyd Mayweather discussion in Chapter 1 and 5.

summon a witness to present evidence of identifying the plaintiff with the publication. The case of *E Hulton & Co v Jones*<sup>56</sup> is a good example of fictitious character or fake persona, wherein the plaintiff was a barrister named Thomas Artemus Jones and was given the nickname "Artemus". A newspaper produced a story on a fictitious character with the same name who "misbehaved" with another lady while married at a festival. While the publisher of the article supplied proof that the character was not a reference to the barrister, the barrister was able to prove that the character was a reference to him by bringing five witnesses to establish that they had recognised the barrister as the character in the article. In addition, the lawyer was a regular writer to the newspaper. The court granted the plaintiff damages after ruling that the defendant's publishing was irresponsible.<sup>57</sup>

In conclusion, whether a defendant intended to identify the plaintiff or not is immaterial. The argument for this is that, whether a defendant meant to refer to a plaintiff or not, a plaintiff's reputation will be damaged if he or she is named in a publication directly or indirectly. Whether a defendant is accountable is determined by whether a personal reputation is harmed as in the case of *Reid v Dukic*,<sup>58</sup> wherein Ms. Reid was the CEO of Capital Football and Mr. Dukic was a local football coach. Mr. Dukic had posted about Ms. Reid on his Facebook, insinuating that Ms. Reid is dishonest, a national disgrace, gender biased, a liar, grossly incompetent, a despicable person, similar to a communist dictator, and a whole host of other defamatory insinuations.<sup>59</sup> Ms. Reid sued him for defamation and claimed that his Facebook posts were "ridiculous" and completely false.<sup>60</sup> However, she said that she became concerned that people were starting to believe him and that she was hurt by the people who 'liked' his posts.<sup>61</sup> She also said that she became so emotionally distraught that it started to affect her home life with her partner. A witness in the case said that Ms. Reid was starting to become worn-down and was losing self-confidence. She eventually resigned as CEO; however, she said her resignation was not

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<sup>56</sup> *E Hulton & Co v Jones* (1910) AC 20.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Reid v Dukic* (2016) ACTSC 344.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*



related to Mr. Dukic's Facebook posts. Mr. Dukic did not turn up for court and so he had no defence. He was ordered to pay Ms. Reid \$182,700 and he was banned from posting about her on Facebook again.

#### **4.3.4 The matter has been published by the defendant to at least one person other than the plaintiff**

The plaintiff must show that the defendant actually published the matter. In the legal sense, 'publishing' is the act of conveying defamatory content – in whatever form (words, gestures or *memes*) – from one person to another.<sup>62</sup> A publisher is any person or organisation that engages in the distribution of libellous material, this includes publication to the plaintiff's agent such as an employee.<sup>63</sup>

A defendant who repeats the defamatory matter which originated from another source can also be liable as a publisher. This is illustrated by the case of *John Fairfax Publications Pty Ltd v Rivkin*,<sup>64</sup> wherein McHugh J said:

“The general rule is that a person who publishes the defamatory statement of a third party adopts the statement and has the same liability as if the statement originated from the publisher. Accordingly, it is not the law that a person reporting the defamatory statement of another is only liable if he or she adopts the statement or reaffirms it.”

One of the first social media defamation cases is *Mickle v Farley*,<sup>65</sup> which involves defamation on social media and the Internet. In this case, the defendant (Mr Farley) posted a defamatory statement on Twitter/X about the plaintiff (Ms Mickle), that the plaintiff played a role in the defendant's father's exodus as Head of Music and Arts at a high school in 2008.<sup>66</sup> It was held that “the effect of the publication was devastating for Ms Mickle who had established a widespread reputation for herself in the country area regarding her capacity as a teacher and who had been terribly hurt by the suggestion that

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<sup>62</sup> See Mendelson *New Law of Torts* 784.

<sup>63</sup> *Ibid.*

<sup>64</sup> *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 para 83.

<sup>65</sup> *Mickle v Farley* (2013) NSWDC 295.

<sup>66</sup> *Ibid.*

she may have been responsible for any harm to or ill health of the defendant's father, forcing her to take immediate sick leave after the defendant's comments".<sup>67</sup>

After taking note of the *Mickle v Farley* case, one cannot ignore the power of social media and how much damage it can cause to one's reputation. The most significant changes to addressing the issues in the Defamation Act of 2005<sup>68</sup> are the impact of social media and the publication of defamatory matter on social media has on society.

In conclusion, a defamatory matter concerning the plaintiff will be actionable only where the matter has been published in a comprehensible form to at least one person. As mentioned above, publication is the act of making the defamatory matter known to others.<sup>69</sup> The following section deals with the defences provided against defamation.

#### **4.4 DEFENCES PROVIDED AGAINST DEFAMATION**

The defences in defamation law seek to strike an appropriate balance between the protection of the plaintiff's reputation and freedom of speech. While not all consequences of tortious conduct result in an award of damages, generally people have a right to legal redress if they can prove, on the balance of probabilities, that they have been the victim of a tort. In some cases, the affected person may seek an injunction from the courts to prevent the tort happening or continuing.<sup>70</sup> The defences an affected person may utilise include truth, privilege, honest opinion, triviality and public documents. These defences will subsequently be discussed.

##### **4.4.1 Truth**

One of the best defences in defamation is truth. If truth of defamatory meaning can be established, then the intention of the defendant in making a defamatory publication is

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<sup>67</sup> *Ibid.*

<sup>68</sup> Defamation Act 77 of 2005 (New South Wales). See para 4.6.3 for more information.

<sup>69</sup> See Mendelson *New Law of Torts* 786.

<sup>70</sup> Rolph (2019) *Australian Feminist Law* 366; Grant D "Defamation and the Internet: Principles for a Unified Australian (and World) Online Defamation Law" (2002) *Journalism Studies* 127.

irrelevant.<sup>71</sup> In order to mount a defence, the defendant must prove that the alleged defamatory matter is true. In other words, the imputations conveyed by the matter complained of must show that they are substantially true.<sup>72</sup> The defence of truth relies on addressing the specific meanings or imputations conveyed by the defamatory statement. Therefore, accurately determining these imputations is crucial for the success or failure of the defence.<sup>73</sup>

This is demonstrable in the case of *Howden v Truth and Sportsman Ltd*,<sup>74</sup> wherein the defendant published a statement to the effect that the plaintiff had been convicted of the crime of conspiracy to defraud and had been sentenced to a term of imprisonment of fifteen months.<sup>75</sup> That conviction and sentence had indeed been imposed, but the conviction had been quashed before the date of the publication. The plaintiff appealed to the High Court in New South Wales who held that the defence of justification was not available to the defendant.<sup>76</sup> The sting of the defamatory matter was that the plaintiff had been found guilty of the crime of conspiracy to defraud and served a substantial term of imprisonment. This was not true, as both the conviction and sentence had been quashed.<sup>77</sup>

This was further supported in the case of *Fairfax Media Publications Pty Ltd v Kermode*,<sup>78</sup> wherein the defendants made a number of publications that implied that the plaintiff had obtained a \$20 million windfall for his companies by improperly influencing public servants and politicians in his favour by conferring benefits upon them and had acted improperly in that he had caused large donations to be made to the Labour Party and thereby

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<sup>71</sup> Steele *Tort Law* 768; Arts Law Centre of Australia *Defamation Law* 4; and George *Defamation in Australia* 354.

<sup>72</sup> *Zunter v John Fairfax Publications Pty Ltd and Another* (2005) NSWSC 119 para 46, *Wagner & Ors v Harbour Radio Pty Ltd & Ors* (2018) QSC 201 para 3, *Howden v Truth and Sportsman Ltd* (1937) 58 CLR 416, Kenyon A “Perfecting Polly Peck. Defences of Truth and Opinion in Australian Defamation Law and Practice” (2007) 29 (4) *Sydney Law Review* 654.

<sup>73</sup> *Howden v Truth and Sportsman Ltd* (1937) 58 CLR 416, and Gillooly M *The Law of Defamation in Australia and New Zealand* (The Federation Press 1998) Sydney 105.

<sup>74</sup> *Howden v Truth and Sportsman Ltd* (1937) 58 CLR 416.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Howden v Truth and Sportsman Ltd* (1937) 37 SR (NSW) 521-529 (this is a federal case).

<sup>77</sup> *Howden v Truth and Sportsman Ltd* (1937) 37 SR (NSW) 521-522; *Mendelson New Law of Torts* 805; *Steele Tort Law* 783; and also *Chakravarti v Advertiser Newspapers Ltd* (1998) HCA 37.

<sup>78</sup> *Fairfax Media Publications Pty Ltd v Kermode* (2011) NSWCA 174.

maintained his companies' rights in approximately \$11 million worth of free taxi plates.<sup>79</sup> The defendants pleaded the defence of contextual truth and suggested alternative contextual imputations to those alleged by the plaintiff. The New South Wales court held that the defence of contextual truth could not be established because there was a requirement for the defendant to plead alternate imputations but failed to do so.<sup>80</sup>

#### 4.4.2 Privilege

There are exceptions where certain statements ought to be made with so much confidence that absolute protection should be granted to defamatory matter even if the defendant knew the statements to be false and published them with the express intention of harming the plaintiff.<sup>81</sup> These statements are protected by privilege, however, there are two kinds of privilege; absolute privilege and qualified privilege. Absolute privilege are parliamentary proceedings, judicial and quasi-judicial proceedings, and ministerial communications.<sup>82</sup> In terms of the *Adam v Ward* case, qualified privilege is defined as “an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it”.<sup>83</sup>

#### 4.4.3 Honest opinion

The statutory defence of honest opinion defence protects statements of opinions that are not facts. The material must be phrased and presented in such a way that it would reasonably be understood to be a commentary, analysis, conclusion, inference, observation, or criticism rather than a factual statement.<sup>84</sup> The test is not what the

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> Mendelson *New Law of Torts* 805; Steele *Tort Law* 783; and also *Chakravarti v Advertiser Newspapers Ltd* (1998) HCA 37, and Gillooly *The Law of Defamation in Australia and New Zealand* 169.

<sup>82</sup> Mendelson *New Law of Torts* 805; Steele *Tort Law* 783; and also *Chakravarti v Advertiser Newspapers Ltd* (1998) HCA 37; Gillooly *The Law of Defamation in Australia and New Zealand* 169; George *Defamation in Australia* 408; and Collins *Law of Defamation and the Internet* 113.

<sup>83</sup> *Adam v Ward* [1917] AC 309 at 334 as per Lord Atkinson.

<sup>84</sup> Gillooly *The Law of Defamation in Australia and New Zealand* 169.

defendant intended, but the objective construction that would be placed on the material by the reasonable recipient.<sup>85</sup>

#### 4.4.4 Innocent Dissemination

Anyone involved in publishing defamatory statements can be held legally liable, including authors, editors, publishers, booksellers, newsagents, and carriers. Liability extends to anyone who plays a role in disseminating the defamatory content.<sup>86</sup> The defence of innocent dissemination is not available to the author and primary publisher of the material. These people have “primary liability” for what is written and published.<sup>87</sup> Their role in the publication process means they know, or can be expected to take responsibility for reviewing, the content of the material being published. They are therefore able to control that content and prevent the publication of defamatory material.<sup>88</sup>

The defence of innocent dissemination is available to subordinate publishers (those who disseminate content created by someone else).<sup>89</sup> Indicators of whether someone is a primary publisher, or a subordinate publisher include the opportunity to prevent publication and the editorial control over the publication process. In order to qualify for this defence, the defendant must show that:<sup>90</sup>

- they neither knew, nor ought reasonably to have known, that the matter was defamatory; and
- was a “subordinate” or “secondary” distributor of the material in question.

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<sup>85</sup> Defamation Amendment Act 2020 No 16 s 31(5).

<sup>86</sup> Gillooly *The Law of Defamation in Australia and New Zealand* 246, and Arts Law Centre of Australia Defamation Law.

<sup>87</sup> *Ibid.*

<sup>88</sup> Arts Law Centre of Australia *Defamation Law*.

<sup>89</sup> Rolph D “Publication, Innocent Dissemination And The Internet After Dow Jones & Co Inc V Gutnick” (2010) 33 UNSW Law Journal 574, *McPhersons Ltd v Hickie* (1995) Aust Torts Report, and *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 588.

<sup>90</sup> Arts Law Centre of Australia Defamation Law, and Gillooly *The Law of Defamation in Australia and New Zealand* 247.

#### 4.4.5 Consent

Communications made with a person's consent are protected from defamation claims. Consent is a limited defence to defamation and must be clearly established. If the defendant can prove that the plaintiff consented to the publication in question, then the defendant has a lawful excuse for the publication, also known as "*volenti non fit injuria*".<sup>91</sup>

- However, in order to qualify for this defence:<sup>92</sup> the consent must be real, in other words, the plaintiff implicitly or expressly consented;
- the consent must relate to the particular publication complained of;
- proof of consent must be clear, convincing and unequivocal.

#### 4.5 REMEDIES

An award of damages is the most common remedy sought by a plaintiff who has been defamed in general and social media in particular. In some restricted situations, a plaintiff may get an injunction to prevent the publication or republication of the defamatory content.<sup>93</sup> The limitation period for a defamation action in Australia is generally one year from the publication of the defamatory material, but that period may be extended to a maximum of three years if a court is satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action within the one-year limit.<sup>94</sup> These are the following remedies provided: damages and injunction.

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<sup>91</sup> Gillooly *The Law of Defamation in Australia and New Zealand* 261, *Austen v Ansett Transport Industries (Operations) Pty Ltd* (1993) FCA 403 at 44; and *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443 at 449.

<sup>92</sup> Gillooly *The Law of Defamation in Australia and New Zealand* 261-262, and *Syms v Warren* (1976) 71 DLR (3d) 558.

<sup>93</sup> Balkin and Davis *Law of Torts* 591.

<sup>94</sup> *Ibid.*

#### 4.5.1 Damages

The purpose or aim of a defamation award is to compensate the plaintiff for the harm done to his or her reputation. This is demonstrable in the case of *Uren v John Fairfax & Sons Pty Ltd*,<sup>95</sup> wherein Windeyer J stated that:

“...compensation by damages operates in two ways — as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.”

A plaintiff may also be compensated for the demonstrable harm done to his or her earning potential as a result of the defamatory publication.

The determination of the amount to be awarded is regulated by the Uniform Defamation Laws of 2006, of which contains the two limits on the amount of damages that can be awarded and restrict of damages that are available.<sup>96</sup> The first limitation is for the court to ensure that there is ‘an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded’ and secondly, unless the court orders otherwise, the damages for non-economic loss are not to exceed a statutory cap set at \$250,000.<sup>97</sup> The courts retain the discretion to make an award of aggravated damages if satisfied that the circumstances of the publication of the defamatory matter warrant additional compensation for exceptional harm resulting from the defamatory publication.<sup>98</sup>

In determining the sum to be awarded as damages, there are various factors which may be relevant in mitigation of the amount, for instance, a reduction in income that can be attributed to the damage a plaintiff’s reputation suffered.<sup>99</sup> According to the Uniform Defamation Laws, factors that might reduce (‘mitigate’) the available damages are:<sup>100</sup>

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<sup>95</sup> *Uren v John Fairfax & Sons Pty Ltd* (1966) HCA 40; 117 CLR 118; (1967) ALR 25 para 6.

<sup>96</sup> Balkin and Davis *Law of Torts* 591; and Arts Law Centre of Australia *Defamation Law* 15

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> Balkin and Davis *Law of Torts* 592.

<sup>100</sup> *Ibid.*; and Arts Law Centre of Australia *Defamation Law* 15

- the defendant has made an apology, or
- the defendant has published a correction of the defamatory matter, or
- the plaintiff has already recovered damages or compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter.

#### 4.5.2 Injunction

Defamation actions can be expensive and difficult to defend. However, if the plaintiff is successful, large monetary damages can be granted, and in some situations, a court order known as an "injunction" can be obtained that prohibits any further communication of the offending publication or material.<sup>101</sup>

However, it is worth noting that, the overarching principle applied by the court in deciding whether to make such an order is that the power will be exercised only in very clear cases, so as not to interfere unduly with either the defendant's right to free speech or the public's right to engage in open and fully informed debate.<sup>102</sup> In elaborating on that overarching principle, there are three prima facie tests to which the court will have regard:<sup>103</sup>

- whether the matter is on its face so clearly defamatory that a finding at a subsequent trial of no libel would be highly unlikely;
- whether there is any real ground on which the defendant's pleas of justification, privilege or comment would succeed; and
- whether the plaintiff would be likely to recover more than a nominal sum in damages

In the next section, a discussion is made on the Australian legislative framework.

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<sup>101</sup> Arts Law Centre of Australia *Defamation Law* 15.

<sup>102</sup> Balkin and Davis *Law of Torts* 594.

<sup>103</sup> *Ibid.*



## 4.6 THE AUSTRALIAN LEGISLATIVE FRAMEWORK

In the preceding sub-heading of this study,<sup>104</sup> it has been demonstrated that Australia is a federation of six states, each of which has its own parliament and government. However, the Federal Constitution has the authority to act in the best interests of all Australians by establishing standard legal frameworks that apply across the country. The Australian government, among other things, enacted legislation to address defamation. The legislative framework is addressed in further detail below.

### 4.6.1 The Constitution of the Commonwealth of Australia and the protection of basic human rights

The Constitution<sup>105</sup> of Australia is the supreme law of the country, and a framework for the federal Government and its relationship with the states and territories of Australia.<sup>106</sup> It defines the boundaries of law-making powers between the Commonwealth and the six States.<sup>107</sup> However, it is important to take note that the Australian Constitution does not contain a Bill of Rights protecting fundamental human rights such as freedom of speech. However, the majority of the jurisdictions in Australia contain a mixture of statute and common law regarding defamation.<sup>108</sup>

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<sup>104</sup> Paragraph 4.2

<sup>105</sup> Commonwealth of Australia Constitution Act, 1900. See Australian National University “The Australian Legal System” available at <https://libguides.anu.edu.au/c.php?g=634887&p=4547083> (Date of use: 15 March 2023).

<sup>106</sup> George P *Defamation Law in Australia* 3<sup>rd</sup> ed (LexisNexis 2017) Australia 59-63.

<sup>107</sup> New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia – see Australian National University “The Australian Legal System” available at <https://libguides.anu.edu.au/c.php?g=634887&p=4547083> (Date of use: 15 March 2023); and Parliament of Australia “The Constitution” available at <https://www.aph.gov.au/infosheets/13> (Date of use: 15 March 2023).

<sup>108</sup> Rolph D, Varuhas J, Crossley P and Douglas M *Balkin & Davis Law of Torts* 6<sup>th</sup> ed (LexisNexis 2021) Australia 536-540.

Within its legislative framework, Australia, as a democratic nation, supports the ideals of freedom of expression,<sup>109</sup> reputation, and privacy.<sup>110</sup> The right to freedom of expression is essential in every democratic society, as it allows people to freely express their views and opinions without fear of censorship or punishment.<sup>111</sup> Citizens have the freedom to express themselves, participate in public discourse, and criticise government actions without intervention.<sup>112</sup>

It is worth noting that these statutory rights are not absolute and must be balanced with other factors such as preserving social order and safeguarding individual reputations. While Australians enjoy a high amount of free speech protection, there are certain legal constraints.<sup>113</sup> For instance, defamation laws exist to protect an individual's reputation from false statements that might harm their social position. These laws strike a balance between protecting one's reputation and allowing free speech.<sup>114</sup>

In regards to the right to privacy, it is acknowledged and valued. Individuals have the expectation that their personal information will be protected from unauthorised access or disclosure.<sup>115</sup> The Privacy Act regulate how personal data can be collected, used, stored, and shared by both private entities and government agencies. This ensures that citizens' privacy is respected while also acknowledging legitimate needs for public safety or investigation into criminal activities.<sup>116</sup>

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<sup>109</sup> The Australian Constitution has no Bill of Rights which prevents a legislature from passing laws that infringe on basic human rights, such as freedom of speech. A such, freedom of expression is not explicitly protected. However, the High Court has held that an implied freedom of political communication exists as an indispensable part of the system of representative and responsible government created by the Constitution; see *National News Pty Ltd v Wills* HCA 46, (1992) 177 CLR 1 and *Australia Capital Television Pty Ltd v Commonwealth* HCA 45, (1992) 177 CLR 106.

<sup>110</sup> Hardy Law in Australian Society 53.

<sup>111</sup> *National News Pty Ltd v Wills* HCA 46, (1992) 177 CLR 1 and *Australia Capital Television Pty Ltd v Commonwealth* HCA 45, (1992) 177 CLR 106

<sup>112</sup> Hardy Law in Australian Society 53.

<sup>113</sup> Balkin PR and Davis JLR *Law of Torts* 5<sup>th</sup> ed (LexisNexis 2013) Australia 532; Rolph D “Defamation, Race and Racism” (2019) *Australian Feminist Law* 352; Kenyon *Comparative Defamation and Privacy Law* 1; Mendelson D *The New Law of Torts* 2<sup>nd</sup> ed (Oxford University 2010) Australia 760.

<sup>114</sup> Balkin PR and Davis JLR *Law of Torts* 5<sup>th</sup> ed (LexisNexis 2013) Australia 532; Rolph D “Defamation, Race and Racism” (2019) *Australian Feminist Law* 352; Kenyon *Comparative Defamation and Privacy Law* 1; Mendelson D *The New Law of Torts* 2<sup>nd</sup> ed (Oxford University 2010) Australia 760.

<sup>115</sup> Privacy Act of 1988.

<sup>116</sup> *Ibid.*

The right to privacy and the right to freedom of speech have equal standing however, the protection of reputation is a legitimate reason to restrict freedom of speech.<sup>117</sup> This restriction is only permissible when it is necessary, proportionate, and clear, as in the *Reynolds* case.<sup>118</sup>

In the next section, a discussion is made on the right to freedom of expression, examining two case laws, the case of *National News Pty Ltd v Wills*, wherein the High Court ruled that implied freedom of expression exists as an essential component of the Constitution's system of representative and responsible governance.<sup>119</sup> The second case, is the case of *National News Pty Ltd v Wills* and *Australia Capital Television Pty Ltd v Commonwealth*<sup>120</sup> where the injection of freedom of speech into constitutional discourse was concretised.<sup>121</sup>

#### **4.6.1.1 A critical analysis of the right to freedom of speech in the National News Pty Ltd v Wills case**

In the case of *National News Pty Ltd v Wills*,<sup>122</sup> which involved an article in *The Australian* in November 1989 that criticised the integrity and independence of the federal Industrial Relations Commission. Nationwide News, the publisher of *The Australian*, was prosecuted under the Industrial Relations Act 1988 (Cth)<sup>123</sup> for “bringing the Commission into disrepute”.<sup>124</sup> The Industrial Relations Act 86 of 1988 criminalised discrediting the

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<sup>117</sup> Rolph (2019) *Australian Feminist Law* 352; Kenyon *A Comparative Defamation and Privacy Law* (Cambridge University 2016) 1; Mendelson *The New Law Of Torts* 760.

<sup>118</sup> *Reynolds v Times Newspaper* [2001] 2 AC 127; [1999] 3 WLR 1010; [2000]. It was held that reputation is an integral and important part of the dignity of the individual. Further, that reputation is a matter of importance, and the protection of reputation is conducive to the public good. In conclusion, the court also opined that the human rights conventions recognise that freedom of expression is not an absolute right.

<sup>119</sup> *National News Pty Ltd v Wills* HCA 46, (1992) 177 CLR 1 and *Australia Capital Television Pty Ltd v Commonwealth* HCA 45, (1992) 177 CLR 106.

<sup>120</sup> *National News Pty Ltd v Wills* HCA 46, (1992) 177 CLR 1 and *Australia Capital Television Pty Ltd v Commonwealth* HCA 45, (1992) 177 CLR 106.

<sup>121</sup> See Yeo A “Reminder: Australia Does Not Have Freedom of Speech” available at <https://www.lifehacker.com.au/2021/01/australia-does-not-have-freedom-of-speech/> (Date of use: 7 January 2022).

<sup>122</sup> *National News Pty Ltd v Wills* HCA 46, (1992) 177 CLR 1.

<sup>123</sup> Industrial Relations Act 86 of 1988.

<sup>124</sup> *National News Pty Ltd v Wills* HCA 46, (1992) 177 CLR 1.

Australian Industrial Relations Commission. Nationwide News argued that the Act violated the implied freedom of political communication, while the Commonwealth contended that the Act fell under Section 51(xxxv) (powers of mediation and arbitration) and Section 51(xxxix) (clarification of incidental rights) of the Constitution.<sup>125</sup> The High Court agreed, stating that freedom of public discussion of political and economic matters is essential for a representative democracy, but it also acknowledged that there are limits to this freedom.<sup>126</sup>

The right to freedom of expression is not expressly guaranteed by the Australian Constitution, therefore the case of *Nationwide News Pty Ltd v Wills*<sup>127</sup> addressed the right to freedom of expression and how it was implicit in Australia's Constitution.<sup>128</sup> The court held that it is the nature of a democratic society to require freedom of political speech.<sup>129</sup> This entails that the voices of those individuals who are elected to represent the interest of the citizens should be heard in order to develop informed opinions.<sup>130</sup> The High Court of Australia subsequently ruled that this implied freedom of speech can only protect against laws, regulations and policies that infringe upon political speech, which is restricted to matters that may influence voters' decisions at the poll.<sup>131</sup>

#### 4.6.1.2 Developments following the Nationwide News Pty Ltd case

In the case of *Lange v Australian Broadcasting Corporation (ABC)*,<sup>132</sup> David Lange, the former Prime Minister of New Zealand, sued the ABC for defamation, and the ABC raised

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<sup>125</sup> See Constitution of Australia s 51 'Legislative powers of the Parliament' (xxxv) 'Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State', and (xxxix) 'Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.'

<sup>126</sup> *Nationwide News Pty Ltd v Wills* HCA 46, (1992) 177 CLR 1.

<sup>127</sup> *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1 (30 September 1992) (Canberra and Melbourne).

<sup>128</sup> Section 7 and 24 of the Commonwealth of Australia Constitution.

<sup>129</sup> *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1 (30 September 1992) paras 8, 20, 23.

<sup>130</sup> *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1 (30 September 1992) paras 18-20. See also Yeo A "Reminder: Australia Does Not Have Freedom of Speech" available at <https://www.lifehacker.com.au/2021/01/australia-does-not-have-freedom-of-speech/> (Date of use: 7 January 2022).

<sup>131</sup> *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1 (30 September 1992) para 27.

<sup>132</sup> *Lange v Australian Broadcasting Corporation* HCA 25, (1997) 189 CLR 520.

the implied freedom of political speech as a defence.<sup>133</sup> The implied freedom of political speech cannot be used as a defence to defamation, and that is precisely what the unanimous judgement of the High Court stated through the decision by McHugh J:<sup>134</sup>

“Those sections [of the Constitution that imply freedom of political speech] do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power”.

The above case was used as source for a statement made by Sir Gerard Brennan in the foreword to the first book on the freedom of speech in Australia, where he stated::

“There is no common law right to freedom of speech which trumps other legal rights but there is a general freedom of speech because of the common law principle that ‘everybody is free to do anything, subject only to the provisions of the law’. The freedom recognised by common law is confined only by limitations imposed by statute or by other rules of the common law that seek to protect the common good or those personal interests to which the common law accords priority.”<sup>135</sup>

However, this is the extent to which the implied freedom of political speech provides protection. It does not protect persons from an acquaintance shutting them down in conversation, a forum administrator deleting their comments, or an event organiser denying them a platform to speak due to their subject matter.<sup>136</sup> Even if their statements concerned political matters, they are not being rejected due to a law restricting their speech, so their implied right of political speech is inapplicable. People may say what they want, but others are under no obligation to listen to them or give them a platform.<sup>137</sup>

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<sup>133</sup> *Ibid.*

<sup>134</sup> Stone A “Lange, Levy and the Direction of the Freedom of Political Communication Under the Australian Constitution” (1998) *UNSW Law Journal* 119-123.

<sup>135</sup> Chesterman M *Freedom of Speech in Australian Law: A Delicate Plant* 1<sup>st</sup> ed (Ashgate, 2000) Australia vii. See also Meagher D “Is There a Common Law ‘Right’ to Freedom of Speech?” (2019) 43(1) *Melbourne University Law Review* 271.

<sup>136</sup> Brannon VC *Free Speech and the Regulation of Social Media Content* (Congressional Research Service Report 2019) 17-18.

<sup>137</sup> Brannon *Free Speech* 21.

The Australian government cannot legislate to restrict people’s freedom of speech, but one cannot use “freedom of speech” as a defence.<sup>138</sup>

In the following section, the Privacy Act will be discussed.

#### 4.6.2. The Privacy Act of 1988 (Federal Law)

The Australian Privacy Act safeguards individual privacy while also encouraging trust in the digital age. This comprehensive statute establishes clear guidelines for how organisations should manage personal information, promoting openness and accountability.<sup>139</sup> The Privacy Act helps citizens to make well-informed choices about who has access to their information by giving them control over their personal data. This fosters a sense of autonomy and security.<sup>140</sup>

One of the key strengths of the Australian Privacy Act is its adaptability to changing technological landscapes, such as amount of data and personal information collected, used, and shared, both in Australia and globally, this legislation provides strong safeguards against dangers.<sup>141</sup> By placing obligations on organisations to handle personal data securely and responsibly, the Privacy Act not only minimises the risk of privacy breaches but also encourages businesses to adopt best practices when it comes to data management. This not only benefits individuals but also contributes to creating a more trustworthy business environment that fosters innovation and economic growth.<sup>142</sup>

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<sup>138</sup> Australian Law Reform Commission “Laws that Interfere with Freedom of Speech” available at <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/3-freedom-of-speech/laws-that-interfere-with-freedom-of-speech/> (Date of use: 31 July 2023).

<sup>139</sup> Part 1 2A Objects of the Privacy Act of 1988.

<sup>140</sup> *Ibid.*

<sup>141</sup> Section 70 of the Privacy Act; Australian Government *Privacy Act Review Issues Paper* (Australian Information Commissioner and Privacy Commissioner 2011) 8, and Australian Government “Federal Register of Legislation” available at <https://www.legislation.gov.au/C2004A03712/2017-08-23/text> (Date of use: 23 August 2017).

<sup>142</sup> *Ibid.*

The Australian Privacy Act is critical in protecting individual privacy rights while promoting responsible handling of personal data.<sup>143</sup> Its provisions ensure that organisations are held accountable for the way they collect, use, and disclose personal information.<sup>144</sup> By fostering a culture of privacy consciousness, this legislation enhances consumer trust in both public and private sectors, ultimately benefiting society as a whole.<sup>145</sup>

#### 4.6.3 The Defamation Act 77 of 2005 (New South Wales)

The Australian Defamation Act of 2005 is a legislation that governs defamation laws in Australia. It provides the framework for individuals to seek legal recourse for damage caused by misleading statements that harm their reputation.<sup>146</sup> The Act outlines the elements of defamation, defences available, and procedures for bringing a defamation claim to court. It aims to strike a balance between protecting freedom of speech and safeguarding an individual's right to protect their reputation.<sup>147</sup>

Everyone on social media has become a publisher and everyone has the power to disseminate news, information, and comment.<sup>148</sup> However, freedom of expression has resulted in abuse and manipulation.<sup>149</sup> It is with this motivation that the discussion of defamation law reform takes place, in addition to the technical deficiencies and improvements mooted, such as social media platforms.<sup>150</sup>

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<sup>143</sup> Section 28B of the Privacy Act, Australian Government *Privacy Act Review Issues Paper* 52, and Australian Government “Privacy” available at [https://www.ag.gov.au/rights-and-protections/privacy#:~:text=The%20Privacy%20Act%201988%20\(Privacy,and%20in%20the%20private%20sector](https://www.ag.gov.au/rights-and-protections/privacy#:~:text=The%20Privacy%20Act%201988%20(Privacy,and%20in%20the%20private%20sector) (Date of use: 23 August 2017).

<sup>144</sup> Australian Human Rights Commission *Freedom of Information, Opinion and Expression* (AHRC 1986).

<sup>145</sup> Section 2A of the Privacy Act of 1988.

<sup>146</sup> Section 3 of the Defamation Act 77 of 2005.

<sup>147</sup> *Ibid.*

<sup>148</sup> Davidson *Social Media and Electronic Commerce Law* 84.

<sup>149</sup> George P “Reviewing Defamation Law for the Digital Age” available at <https://lsj.com.au/articles/reviewing-defamation-law-for-the-digital-age/> (Date of use: 1 April 2023).

<sup>150</sup> Hanks J “What Happens on The Internet Stays on The Internet? Defamation Law Reform and Social Media” (2022) *LSA Legal Briefs* 1.

This is making defamation litigants increasingly reliant on the creation of case law to regulate online behaviour, as demonstrable in the cases of such *Burrows v Houda*;<sup>151</sup> *BeautyFULL CMC Pty Ltd v Hayes*<sup>152</sup> and *Fairfax Media Publications Pty Ltd, Nationwide News Pty Limited & Australian News Channel Pty Ltd v Voller*,<sup>153</sup> expanding the role of the courts in the law-making process. *Fairfax Media Publications Pty Ltd, Nationwide News Pty Limited & Australian News Channel Pty Ltd v Voller* (2021) HCA 27,<sup>154</sup> is one of the most compelling cases in Australia, wherein the courts finding created the Voller Doctrine that makes all administrators of social media pages or accounts ‘publishers’ for the purposes of defamation, even though they may be ‘passive conduits’ simply carriers of the information, because it has appeared on their page. This means that if a third-party place a defamatory comment on a social media post created on any page, on any social media platform, the page administrator is liable to the plaintiff. Given the strict liability nature of the tort of defamation, they are still liable even if they are unaware of the existence of the comment.<sup>155</sup>

Gaps in legislation, such as the Defamations Law 2005 and the Universal Defamation Law in particular, have forced the courts to redefine the key concept of who is considered to be a publisher, as well as what the meaning of new communication methods, such as *memes*, are in creating potential issues of inequity and fairness, a theme that will continue as more new, untested challenges come before the courts.<sup>156</sup> Change in law,

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<sup>151</sup> *Burrows v Houda* (2020) NSWDC 485. This case dealt with the defamatory nature of emojis and it was held by Gibson DCJ that “...the ordinary, reasonable social media reader would infer that... the plaintiff[s] ... time... was up. The third and fourth posts add further emoji and comment to the defendant’s post... I am satisfied that, in circumstances where the tweet clearly identifies that there is to be a prosecution for false swearing of affidavits... the ordinary reasonable social media reader would infer that one of those likely to be prosecuted would be the plaintiff.” Emoji is defined as “a visual representation of human emotions, living beings, objects and even certain symbols. These are in widespread use across the internet such as in text messaging, social media platforms and pretty much any informal modes of communication. These allow you to vividly express your feelings and emotions which at times may not be possible by simple letters and texts”. See Singh R “Emoji Meanings: Types of Emojis and What Do They Mean” available at <https://www.91mobiles.com/hub/emoji-meanings/> (Date of use: 28 November 2023).

<sup>152</sup> *BeautyFULL CMC Pty Ltd v Hayes* (2021) QDC 111.

<sup>153</sup> *Fairfax Media Publications Pty Ltd, Nationwide News Pty Limited & Australian News Channel Pty Ltd v Voller* (2021) HCA 27.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> Hanks (2022) LSA Legal Briefs 1.



Defamations Law 2005 and the Universal Defamation Law, is required to assign proper accountability to those that publish defamatory information, allowing plaintiffs to seek redress more directly and minimising the number of cases before the courts.<sup>157</sup>

#### 4.6.3.1 Shortcomings of the Uniform Defamation Laws

The Uniform Defamation Laws had a major flaw in that it was focused on conventional media outlets distributing defamatory information using traditional publication techniques, such as newspapers.<sup>158</sup> It did not afford defamation protection in new media such as Twitter/X.<sup>159</sup> Several important concerns, such as a corporation having no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication,<sup>160</sup> of which the Defamation Act did not address have emerged after its passage have negatively impacted the Defamation Act, such as unfiltered comments, the lack of professional moderation by editors and legal departments material published on social media platforms,<sup>161</sup> the ability of users to be anonymous,<sup>162</sup> the anonymity of the publisher,<sup>163</sup> the reach and speed of the spread of content (the 'grapevine effect'),<sup>164</sup> the different interpretations of messages communicated on social media, the lack of a 'single publication rule' in Australia and the permanency of content,<sup>165</sup> and the freedom of the press.<sup>166</sup>

In Australia, social media interactions have widened the gap due to the inability of the Uniform Defamation Laws and the Defamation Act 2005 to effectively regulate the

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<sup>157</sup> *Ibid.*

<sup>158</sup> See Rolph (2008) *Torts LJ* 228.

<sup>159</sup> *Idem* 4.

<sup>160</sup> Section of the 9 of the Defamation Act.

<sup>161</sup> See Rolph (2008) *Torts LJ* 228 4.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Idem* 5, and *Wilson v Bauer Media Pty Ltd & Anor* (2017) VSC 356.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

widespread and rapid dissemination of defamatory online commentary, owing primarily to its foundations in pre-internet case law and legislation.<sup>167</sup>

Legislative revision was required to reflect modern societal requirements and the way social media is utilised to communicate. The previous Defamation Act 2005 and the Uniform Defamation Laws did not effectively safeguard rights or provide equitable outcomes, such as the ability of users to be anonymous.<sup>168</sup> Therefore, the Australian government passed the Defamation Amendment Bill 2022, which is designed to prevent and reduce minor defamation litigation, resolve legislative aspects that failed to function as intended, update the law to reflect the expansion of social media and publication platforms since 2005 and protect both freedom of expression and victims of defamation.<sup>169</sup> One of the amendments to the Defamation Act, is the insertion of section 32A, which is the responsibility of social media platforms, of which entails:<sup>170</sup>

- (1) A social media platform<sup>171</sup> shall be guilty of an offence where the person who published the original defamatory utterance<sup>172</sup> on the specified social media platform is unable to be identified by the social media platform administrators.
- (2) A social media platform shall be guilty of an offence under section 6 of this Act when the platform administrators are unable or unwilling to provide adequate verification of the identity of the person who made the original utterance.
- (3) Regarding proceedings for an offence under this section, it shall not be necessary for the prosecution to prove that—

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<sup>167</sup> Section 3 of the Defamation Act 77 of 2005; see also Rolph (2008) *Torts LJ* 245-248; Hanks (2022) *LSA Legal Briefs* 1.

<sup>168</sup> Hanks (2022) *LSA Legal Briefs* 1.

<sup>169</sup> Defamation Amendment Bill 2022 Preamble, see also Martin Bullock “Law Reform on Digital Defamation” available at <https://mblawyers.com.au/law-reform-on-digital-defamation/> (Date of use: 27 January 2021).

<sup>170</sup> Defamation Amendment Bill 2022 s32A.

<sup>171</sup> The Act does not necessarily define social media; however, it defines privately operated social media platform, which refers to any third party which is hosting a publicly available, interactive website which allows users to produce, post and interact through text, images, video and audio to inform, share, promote, collaborate or network, section 1 of Defamation Amendment Bill 2022

<sup>172</sup> Defamatory utterance refers to a defamatory statement as outlined under section 2 of the Principal Act, section 1 of Defamation Amendment Bill 2022.

- (a) at any time, the person who issued the utterance had reasonable knowledge that the utterance was false or defamatory, as defined by section 6.
  - (b) at any time, the person who issued the utterance provided false or misleading contact information as part of the verification processes employed by the social media platform.
  - (c) at any time, the social media platform operated processes for the purposes of verifying a users' identity.
- (4) A social media platform found guilty of an offence under this section shall be liable on summary conviction, or conviction on indictment, to satisfy the remedies as outlined by Part 4.

With the passing of the Defamation Amendment Bill of 2023, it allows defamation judgements to be made against the social media platform on which the defamatory utterances were made, when the social media platform in question is unable to produce the identity of the person who made the utterances, and to provide for related matters.<sup>173</sup> The Defamation Amendment Bill also seeks harsher sanctions for online defamation, reflecting the speed and scale with which digital information may spread. This is aimed to dissuade people from publishing defamatory material, such as *memes*.<sup>174</sup> The proposed changes seek to strike a balance between an individual's right to safeguard their reputation and their right to freedom of speech rights in terms of commentary and humour.<sup>175</sup>

#### 4.6.4 The Australian Broadcasting Authority

The Australian Broadcasting Authority is the main agency responsible for regulating Internet content in Australia. The Australian Broadcasting Authority operates under a 'co-

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<sup>173</sup> On 17 October 2023, the Defamation Amendment Bill 2023 (NSW) was passed by both Houses and will come into effect on 1 July 2024, available at <https://lsj.com.au/articles/more-reforms-on-the-way-for-nsws-defamation-laws/#:~:text=On%2017%20October%202023%2C%20the,agreed%20to%20in%20September%202023> (Date of use: 8 December 2023).

<sup>174</sup> Schedule of the Defamation Amendment Bill of 2023.

<sup>175</sup> New South Wales Government: Public Statement on Defamation Amendment Bill of 2023, available at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au) (Date of use: 21 December 2023).

regulatory' scheme established by the Broadcasting Services Act,<sup>176</sup> which emphasises industry partnership in regulation.

The Broadcasting Services Act gives the Australian Broadcasting Authority the following functions:<sup>177</sup>:

- Investigation of complaints about Internet content;
- Encouraging development of codes of practice for the Internet industry, registering, and monitoring compliance with such codes;
- Providing advice and information to the community about Internet safety issues, especially those relating to children's use of the Internet;
- Undertaking research into Internet usage issues and informing itself and the Minister of relevant trends;
- Liaising with relevant overseas bodies.

The main goal of the Australian Broadcasting Authority is to address community concerns about offensive and illegal material on the Internet, particularly to remove defamatory content online.<sup>178</sup> This is achieved by holding ISPs accountable. Australia's legal framework for dealing with offensive content, including defamation, is found in Schedule 5 of the Broadcasting Services Act, as amended by the Broadcasting Services Amendment (Online Services) Act.<sup>179</sup>

Below is a discussion on the liability of ISP for third party content.

#### **4.6.4.1 Liability of an Internet Service Provider for third-party content**

The rise in digital communications and online publication instigated the Australian government to modernise the laws already in place, in order to change the national

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<sup>176</sup> Broadcasting Services Act 1992 (Cth).

<sup>177</sup> Schedule 5 of the Broadcasting Services Act 1992 (Cth).

<sup>178</sup> Australian Human Rights Commission *Internet Regulation in Australia* (AHRC 1986).

<sup>179</sup> *Ibid.*

approach to the reform of defamation laws,<sup>180</sup> such as the Defamation Act and Uniform Defamation Laws.<sup>181</sup>

The liability of an ISP<sup>182</sup> for third-party content is a complex issue that requires careful consideration.<sup>183</sup> While some argue that ISPs should be held accountable for the content transmitted through their networks, such a broad application of liability would have serious implications for freedom of expression and innovation on the internet.<sup>184</sup> It is important to recognise that ISPs are mere intermediaries, providing access to the vast amount of information available online.<sup>185</sup> Holding them liable for every piece of content would create an unreasonable burden and hinder the development of an open and accessible internet.<sup>186</sup>

ISPs must follow the online service provider rules outlined in the Broadcasting Services Act, which require them to prevent the publication of material that violates the National Classification Board Guidelines, including defamatory content.<sup>187</sup> The Broadcasting

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<sup>180</sup> Douglas M and Bennett M “‘Publication’ of Defamation in the Digital Era” (2020) 47 *Brief* 9; Speakman M *Review Recommends Defamation Cyber-Age Reboot* (NSW Government 2018) 1, and Pelly M “Changes to ‘Outdated’ Defamation Law Fast-Tracked for Social Media Age (*Financial Review*, 31 January 2019 available at <https://www.afr.com/companies/professional-services/changes-to-outdated-defamation-law-fasttracked-for-social-media-age-20190130-h1an29>) (Date of use: 23 November 2023).

<sup>181</sup> These laws are discussed in paragraph 4.6.3 and 4.6.3.1.

<sup>182</sup> For a definition of an ISP, see footnote 48 above. In Australian law, “if a person supplies, or proposes to supply, an internet [carriage service](#) to the public, the person is an internet service provider”. See Online Safety Act 2021 s 19(1), Telecommunications Act 1997 s 7.

<sup>183</sup> George Defamation Law in Australia 259.

<sup>184</sup> Khair M, Alameddine H and Parton W “Defamatory content online: The responsibility of online intermediaries? A comparative analysis of Australia, the United States, the European Union, and Canada’s regulatory responses” (2020) *Birchgrove Legal* 2-4.

<sup>185</sup> George Defamation Law in Australia 259.

<sup>186</sup> Khair et al (2020) *Birchgrove Legal* 4.

<sup>187</sup> Schedule 5 of the Broadcasting Services Act 1992 (amended 2018), and Leonard P “Safe Harbours in Choppy Water – Building a Sensible Approach to Liability of Internet Intermediaries in Australia” (2010) 3(2) *Journal of International Media and Entertainment Law* 221, 256.

Services Act also exempts ISPs and Internet Content Hosts from making inquiries about or keeping records of internet content,<sup>188</sup> as defined by Clause 3 of Schedule 5.<sup>189</sup>

The Australian government has recognised this by implementing legislation<sup>190</sup> that provides defence provisions and a safe harbour for ISPs, protecting them from liability if they take reasonable steps to remove or block access to unlawful material upon receiving notice.<sup>191</sup> This is demonstrable in the case of *Trkulja v Google Inc*,<sup>192</sup> wherein the plaintiff sued Google for defamation after their personal information and photos were displayed alongside pictures of known criminals in Melbourne, Australia. The plaintiff claimed that the search results created a false impression that they were involved in criminal activity.<sup>193</sup> The jury was asked to determine whether search engines are liable for publishing defamatory materials generated by their software.<sup>194</sup> The jury found that search engines, like Google, are considered publishers of defamatory material when their software produces and displays search results as intended. The judge instructed the jury to consider Google as an intentional online publisher or internet newsagent for the automated results, even before it had notice of the defamatory materials, due to the intrinsic algorithmic design of the search engine.<sup>195</sup> The borderless nature of the Internet has led to a rise in defamatory content on social media platforms. The anonymity it provides allows users to make defamatory statements without facing consequences. As a result, courts have sought to strike a balance between protecting a person's reputation through legal action and preventing trivial claims from overwhelming the legal system.

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<sup>188</sup> Internet content is defined as information that “is kept on a data storage device; and is accessed, or available for access, using an internet carriage service; but does not include ordinary electronic mail; or information that is transmitted in the form of a broadcasting service”, see Clause 3 of Schedule 5 of the Broadcasting Services Act 1992.

<sup>189</sup> Schedule 5 of the Broadcasting Services Act 1992 (amended 2018), and Alston R “The Government’s Regulatory Framework for Internet Content” (2000) 23(1) *UNSW Law Journal* 192, 194.

<sup>190</sup> Defamation Act 77 of 2005. See footnote 68 above; s 13 of Social Media (Anti-Trolling) Bill 2022; and ss 27 and 28 of the Social Media (Basic Expectations and Defamation) Bill 2021.

<sup>191</sup> Section 235(1) of the Online Safety Act 2021 (Cth), and s 32 of the Defamation Act 77 of 2005.

<sup>192</sup> *Trkulja v Google Inc & Anor* (2012) VSC 533, and *Google Inc v Trkulja* (2016) VSCA 333.

<sup>193</sup> *Trkulja v Google Inc & Anor* (2012) VSC 533.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

This helps to control the number of claims and discourage frivolous litigation. Below is a discussion on the Online Safety Act.

#### **4.6.5 The Online Safety Act 2021 (Federal)**

The "Online Safety Act 2021" is a piece of legislation that aims to improve online safety and address issues such as harassment, and harmful online content.<sup>196</sup> It was passed by the Australian Parliament and received Royal Assent on 23 June 2021. Key features of the Act include the establishment of the Office of the eSafety Commissioner, the empowerment of the Commissioner to set Basic Online Safety Expectations for social media services, the issuance of removal notices for harmful content, the introduction of a statutory scheme to address abhorrent violent material online, and the establishment of a scheme to address serious adult cyber abuse.<sup>197</sup> The Act also grants the eSafety Commissioner investigative and enforcement powers to ensure compliance.<sup>198</sup> The Online Safety Act sets out the Australian Government's expectations for online service providers, establishing a comprehensive set of Basic Online Safety Expectations. These expectations aim to make online services safer for all Australians and promote transparency in the technology industry's safety features, policies, and practices.<sup>199</sup> They cover a wide range of requirements and set a new standard for online service providers to proactively protect users from abusive conduct and harmful content.<sup>200</sup> The Act introduces a world-first Adult Cyber Abuse Scheme for Australians aged 18 and older, expands the Cyberbullying Scheme to include harms on services other than social media, and updates the Image-Based Abuse Scheme to address the sharing of intimate images without consent.<sup>201</sup> It grants eSafety new powers to require internet service providers to block access to material showing abhorrent violent conduct and gives the Online Content

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<sup>196</sup> Online Safety Act 2021 (Cth) Compilation No 1 (as amended on 23 January 2022) Part 1 s 3 'Objects of this Act'; eSafety Commissioner "Learn about the Online Safety Act" available at <https://www.esafety.gov.au/newsroom/whats-on/online-safety-act> (Date of use: 21 February 2023).

<sup>197</sup> Online Safety Act 2021 Compilation No 1 (as amended on 23 January 2022) (Cth) Part 1 s 4 'Simplified Outline of this Act'.

<sup>198</sup> Online Safety Act 2021 Compilation No 1 (as amended on 23 January 2022) (Cth) Part 2.

<sup>199</sup> Section 105 of the Online Safety Act 2021 (Cth).

<sup>200</sup> *Ibid.*

<sup>201</sup> Section 109 of the Online Safety Act 2021 (Cth) s 7.

Scheme new powers to regulate illegal and restricted content, regardless of where it is hosted.<sup>202</sup> The Act also brings app distribution services and search engines under the jurisdiction of the Online Content Scheme and reduces the time for online service providers to respond to an eSafety removal notice from 48 hours to 24 hours.<sup>203</sup>

#### **4.6.6 The Social Media (Basic Expectations and Defamation) Bill 2021 (Parliament of Australia)**

As described in Chapters 1 and 3, social media platforms have evolved into strong communication and information sharing tools. However, the Social Media Bill 2021 establishes fundamental expectations for social media platforms to impose stronger restrictions on content moderation, as well as addressing the issue of defamation, which has grown in prominence in online spaces.<sup>204</sup>

One of the most important parts of the Bill is its emphasis on basic social media platform requirements. It establishes explicit rules for appropriate online conduct, such as forbidding defamatory conduct.<sup>205</sup> By implementing these principles,<sup>206</sup> the Bill intends to build a more inclusive and courteous online community in which people may freely express themselves without fear of being exposed to harmful or offensive content.<sup>207</sup>

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<sup>202</sup> *Ibid.*

<sup>203</sup> Section 115 of Part 9 of the Online Safety Act 2021 (Cth).

<sup>204</sup> Section 8 of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth), see also Smith M and Urbas G “Evolving Legal Responses To Social Media: Litigation, Legislation And System Architecture” (2022) 3 *Australian National University Journal of Law and Technology* 22; Taxing Law “Know About Social Media Basic Expectations And Defamation Bill 2021” available at <https://www.defamationlawyersperth.com.au/blog/know-about-social-media-basic-expectations-and-defamation-bill-2021/> (Date of use: 28 December 2021); and Gill M “Holding Social Media Platforms Accountable For Trolls: What A Draft Bill In Australia Proposes” (*The Indian Express*, 30 November 2021) available at <https://indianexpress.com/article/explained/explained-australias-bill-social-media-companies-7647341/> (Date of use: 30 November 2021).

<sup>205</sup> Section 27 of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth), Smith and Urbas (2022) *Australian National University Journal of Law and Technology* 15-16 who state that: “the Bill’s innovative approach would impose an obligation on social media providers hosting the material to remove it within 48 hours of being notified, or face the consequence that the provider is statutorily declared to be co-liable for defamation.”

<sup>206</sup> Section 27 of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth).

<sup>207</sup> Section 27 and 28 of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth), and Taxing Law “Know About Social Media Basic Expectations And Defamation Bill 2021” <https://www.defamationlawyersperth.com.au/blog/know-about-social-media-basic-expectations-and-defamation-bill-2021/> (Date of use: 28 December 2021).



Furthermore, section 27 emphasises the need of openness in content moderation processes, through the Commissioner,<sup>208</sup> by ensuring that users understand how decisions about the removal or restriction of specific postings are made.<sup>209</sup>

Furthermore, the Bill addresses the problem of defamation on social media platforms. Character assassination and false allegations have become all too prevalent as internet usage has increased.<sup>210</sup> The Bill gives victims of online defamation legal redress by holding both those who publish defamatory information and the platforms that host it accountable.<sup>211</sup> This Bill strives to preserve persons' reputations while ensuring free expression within appropriate bounds by providing effective means to identify and remedy defamatory statements swiftly.<sup>212</sup>

The Social Media (Basic Expectations and Defamation) Bill 2021 (Cth) argues for stricter laws in the social media realm. These measures strive to create a safer and more responsible digital arena for everybody by establishing a clear standard for social media users conduct and tackling defamation problems straight on.<sup>213</sup> The implementation of these precautions will not only protect individuals from harm but will also build a more inclusive and respectful online community.<sup>214</sup>

#### **4.6.7 The Social Media (Anti-Trolling Bill) 2022 (New South Wales)**

The Social Media (Anti-Trolling) Bill of 2022 (Cth) represents a crucial step in safeguarding the integrity and security of social media platforms. This Bill aims to combat

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<sup>208</sup> Section 29(5) of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth).

<sup>209</sup> Section 27 and 28 of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth).

<sup>210</sup> *Ibid.*

<sup>211</sup> Section 28 of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth).

<sup>212</sup> Section 27 and 28 of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth), see also Gill "Holding Social Media Platforms Accountable For Trolls: What A Draft Bill In Australia Proposes" (*The Indian Express*, 30 November 2021) <https://indianexpress.com/article/explained/explained-australias-bill-social-media-companies-7647341/> (Date of use: 30 November 2021).

<sup>213</sup> Section 27 and 28 of the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth).

<sup>214</sup> *Ibid.* See also Smith and Urbas (2022) *Australian National University Journal of Law and Technology* 24, who in support of the Bill state that the current "piecemeal measures to regulate social media, even working in combination, will be insufficient and may in fact create further problems".

this growing menace by imposing stricter regulations on social media companies and holding them accountable for the content shared on their platforms.<sup>215</sup>

Social media users will benefit from a safer online environment that is less likely to contain defamatory content.<sup>216</sup> Furthermore, this Bill attempts to make social media companies accountable for any abuse of user privacy or mismanagement of personal data. It guarantees that organisations prioritise user safety over profits by creating explicit criteria and consequences for noncompliance.<sup>217</sup> This is demonstrable in the case of *Fairfax Media Publications Ltd v Dylan Voller*,<sup>218</sup> where it was held that social media platforms can be held for defamatory content published as they are considered publishers.<sup>219</sup>

The case of *Fairfax Media Publications Ltd v Dylan Voller* raised concerns on the right to freedom of expression,<sup>220</sup> however, it is important to note that the intention behind this Bill is not to stifle free expression but rather ensure responsible use of social media platforms.<sup>221</sup> The Social Media (Anti-Trolling Bill) of 2022 (Cth) strikes a balance between preserving individual rights while protecting society from the negative repercussions associated with unregulated content dissemination.<sup>222</sup>

## 4.7 CONCLUSION

The Australian Privacy Act of 1988, as well as the newly proposed Defamation Amendment Bill 2022, aim to regulate the spread of defamatory content on the Internet.

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<sup>215</sup> Section 13 of Social Media (Anti-Trolling) Bill 2022 (Cth); and Law Council of Australia *Social Media (Anti-Trolling) Bill 2022* (Senate Legal and Constitutional Affairs Legislation Committee 2022) 14.

<sup>216</sup> Section 15 of Social Media (Anti-Trolling) Bill 2022 (Cth), and Law Council of Australia *Social Media (Anti-Trolling) Bill 2022* (Senate Legal and Constitutional Affairs Legislation Committee 2022) 14.

<sup>217</sup> Section 14 of Social Media (Anti-Trolling) Bill 2022 (Cth).

<sup>218</sup> *Fairfax Media Publications Ltd v Dylan Voller* (2020) NSWCA 102.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Fairfax Media Publications Ltd v Dylan Voller* (2020) NSWCA 102; and Law Council of Australia *Social Media (Anti-Trolling) Bill 2022* (Senate Legal and Constitutional Affairs Legislation Committee 2022) 13.

<sup>221</sup> Law Council of Australia *Social Media (Anti-Trolling) Bill 2022* (Senate Legal and Constitutional Affairs Legislation Committee 2022) 17.

<sup>222</sup> Section 13 of Social Media (Anti-Trolling) Bill 2022 (Cth).

The Act requires organisations to have procedures in place to guarantee the responsible handling of private information. However, *memes* and certain social media posts may now fall into a legal 'grey area'. The proposed changes would make it clear that defamation laws apply to all digital communication that identifies or may reasonably be used to identify the person who made the utterances, and to provide for related matters. This suggests that *memes* that include someone's personal information and that damage their reputation may be considered defamatory.

The Social Media (Basic Expectations and Defamation) Bill 2021 (Cth) and the Social Media (Anti-Trolling) Bill 2022 (Cth) have important implications for regulating *memes* and defamation on social media platforms. The Bills aim to address concerns about misuse of social media, including defamatory content and harmful content, reflecting a global trend towards increased platform regulation.<sup>223</sup> The Bills respond to the need for legal and regulatory frameworks to govern social media usage, particularly in addressing issues such as defamation and harmful content dissemination.<sup>224</sup> The Bills seek to establish basic expectations for social media platforms, including provisions to address defamatory content and harmful content.

The Bills establish basic expectations for social media platforms and address offensive behaviour and the dissemination of defamatory content such as *memes*.<sup>225</sup>

Overall, the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth) and the Social Media (Anti-Trolling) Bill 2022 (Cth) represent a significant step towards regulating *memes* and defamation on social media platforms.

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<sup>223</sup> Bossio D, Flew T, Meese J, Leaver T and Barnet B "Australia's News Media Bargaining Code and the Global Turn Towards Platform Regulation" (2022) 14 *Policy Internet* 146.

<sup>224</sup> Matamoros-Fernández A, Rodriguez A and Wikström P "Humor That Harms? Examining Racist Audio-Visual Memetic Media on TikTok During Covid-19" (2022) 10(2) *Media and Communication* 180.

<sup>225</sup> Al-Natour R "The Digital Racist Fellowship Behind the Anti-Aboriginal Internet Memes" (2020) 57(4) *Journal of Sociology* 780; Matamoros-Fernández et al (2022) *Media and Communication* 180; and Bishop J "The Thin-Blue Web: Police Crime Records of Internet Trolling Show Chivalrous Attitudes That Can Be Resolved through Transfer of Powers" in Thomas PE, [Srihari](#) M, Kaur S (eds) *Handbook of Research on Cultural and Economic Impacts of the Information Society* 68.

In summary, Australian laws are evolving to provide clearer guidelines around how *memes* and defamation are regulated online. The focus is on protecting individuals from the misuse of their privacy or the spread of false statements while preserving the ability to share humour and commentary.

The federal government and its relationship with the New South Wales highlight different approaches to addressing a particular problem as well as providing numerous solutions, which may be a factor to be considered by the South African law.

In the next chapter, we will examine the position in regard to South African legislation in regulating the defamatory nature of Internet *memes* through social media.

## **CHAPTER 5**

### **THE REGULATION OF INTERNET DEFAMATION THROUGH SOCIAL MEDIA: THE SOUTH AFRICAN PERSPECTIVE**

#### **5.1 INTRODUCTION**

The previous chapter provided an overview of the Australian legal system as well as Internet and social media regulation. It further examined defences against defamation, which is known as tort in Australian law.

This chapter will analyse whether South African Internet users have received appropriate protection and whether South African legislation adequately protects these personality rights, such as the right to freedom of speech, good name and the right to privacy, particularly in the context of social media.

The publishing and information transmission processes in South African society have been reinvented with the introduction of the Internet. With the introduction of the Internet, South Africa enacted legislation geared specifically at regulating the Internet and social media. Amongst the host of prescripts and regulations are the ECT Act, POPI Act, Cybercrimes Act and Films and Publications Amendment Act. However, unlike Australia, South Africa does not have federal law despite it having provinces.

In this chapter, focus will be on the abovementioned personality rights, as explained in Chapter 2 that when users publish or transmit information on social media, whether about themselves or others, these rights are impacted.

Finally, the chapter concludes by considering how case law recognises and protects these personality rights, especially on social media. In addition, the chapter focuses on the procedural considerations that govern who can file a case and who can be held liable for the infringement of personality rights on social media platforms.

## 5.2 THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK

As mentioned above,<sup>1</sup> South African has a hybrid system. South Africa's legal system is based on a unitary state, which means that all of the country's laws apply uniformly across all nine provinces.<sup>2</sup> South Africa does not have a separation of powers between federal and state legislation, unlike federal systems like Australia. This means that the national government has the power to enact laws that apply to the entire country, including all provinces.<sup>3</sup> South Africa's legal structure is principally governed by the Constitution. The Constitution outlines the framework of government, governance ideals, and individual rights. It also establishes the division of legislative and executive power between the national and provincial levels of government.<sup>4</sup>

The Parliament of South Africa, which consists of two houses: the National Assembly and the National Council of Provinces, has national legislative authority. In topics within its legislative competence, the Parliament's power surpasses that of the provincial legislatures.<sup>5</sup> Provincial legislatures, on the other hand, have the authority to enact laws and regulations within their jurisdictions as outlined by the Constitution and national legislation. However, these laws, must not contradict national legislation or the Constitution.<sup>6</sup> The Constitution also establishes provincial executive authorities to carry out and execute provincial legislation within their respective provinces. While provinces have some legislative autonomy, the supremacy of national legislation implies that there is no separate body of state laws that operate independently from the larger national legal system.<sup>7</sup> This separates South Africa's legal system from federal systems in which states have their own legislative powers and can adopt laws independent of the central government.<sup>8</sup>

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1 Paragraph 2.1.  
2 Section 103 of the Constitution.  
3 *Ibid.*  
4 Section 2 of the Constitution.  
5 Section 42 of the Constitution.  
6 Section 44 of the Constitution.  
7 *Ibid.*  
8 Section 43 of the Constitution.

Finally, South Africa's legal system is distinguished by the applicability of national laws throughout all provinces, rather than a separate corpus of state laws as in federal systems such as Australia. The legal system's unitary nature promotes uniformity and consistency in the implementation of legislation throughout the country.<sup>9</sup>

In order to regulate the Internet and social media, the South African government, among other things, has enacted provisions to address the electronic communications, publication and social media. The legislative framework is discussed more below.

### 5.2.1 The Constitution of the Republic of South Africa

The Constitution of South Africa reflects the nation's ambitions and aspirations. It also reflects the unique history and yearning for democracy and freedom, as the country transitioned from an oppressive Apartheid state<sup>10</sup> (a system based on parliamentary sovereignty) to a constitutional democracy dedicated to building a society based on democratic values, social fairness, and fundamental human rights.<sup>11</sup> In *Minister of Finance v Van Heerden*,<sup>12</sup> the Constitutional Court confirmed that:

“The role of the right to equality in our new dispensation cannot be overstated. Apartheid was not merely a system that entrenched political power and socio-economic privilege in the hands of a minority, nor did it only deprive the majority of the right to self-actualisation and to control their own destinies. It targeted them for oppression and suppression. Not only did apartheid degrade its victims, it also systematically dehumanised them, striking at the core of their human dignity. The disparate impact of the system is today still deeply entrenched.”

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<sup>9</sup> De Wet E “South Africa” in Shelton D *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University 2011) United States of America 567.

<sup>10</sup> Apartheid is an Afrikaans word which means: “apartness. It was a system of legislation that upheld segregationist policies against non-white citizens of South Africa”, see History.Com “Apartheid” available at <https://www.history.com/topics/africa/apartheid>. (Date of use: 3 March 2023).

<sup>11</sup> Currie I and De Waal J *The Bill of Rights Handbook* 6-7; Davey and Dahms-Jansen *Social Media in the Workplace* 4-5.

<sup>12</sup> *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) para 71.

Human rights are closely linked to constitutions and constitutionalism. Rights are frequently enshrined in a section of a constitution known as the Bill of Rights.<sup>13</sup> The Bill of Rights is a cornerstone of democracy: it upholds democratic values such as human dignity, equality, and freedom.<sup>14</sup> A few of the fundamental human rights enshrined in the Bill of Rights that will be explored are section 10, 14, 16 and 36. Firstly, the study will discuss section 10, which states:<sup>15</sup>

"Everyone has inherent dignity and the right to have their dignity respected and protected."

The right to human dignity is a recognised fundamental right, and a personality right deserving of protection. The right to dignity is one of the most essential rights as emphasised in the case of *S v Makwanyane*,<sup>16</sup> wherein the court recognised in agreement the opinions of the three judges in the *Kindler v Canada* case,<sup>17</sup> who said:

"It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity."

The right to human dignity is inclusive of the right to a good name, and although the right to a good name is not enshrined in the Constitution, it is still a legally recognised fundamental right that is safeguarded by the courts.<sup>18</sup> The protection of the right to a good name involves the well-known area of the law of defamation.<sup>19</sup>

Human dignity embodies the essence of what it means to be a human; and as a human right, it legitimises the idea that humanity's essence must be recognised and valued in equal measure. The Constitutional Court in *Le Roux v Dey* explained as follows:<sup>20</sup>

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<sup>13</sup> Section 1 of the Constitution.

<sup>14</sup> Section 7(1) of the Constitution.

<sup>15</sup> The Constitution s 10.

<sup>16</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 60.

<sup>17</sup> *Kindler v Canada* (1992) 6 CRR (2d).

<sup>18</sup> Section 10 of the Constitution; and *Khumalo and Others v Holomisa* (2002) ZACC 12.

<sup>19</sup> Neethling et al *Personality Rights* 197.

<sup>20</sup> *Le Roux and Others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as amicus curiae) 2011 (3) SA 274 (CC) para 91(c).



“...Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity, our aim to create a better society may come to nought. It is the foundation of our young democracy.”

This was further confirmed in the case of *Hoffmann v South African Airways*,<sup>21</sup> wherein the Constitutional Court said:

“At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against.”

Human dignity includes the right to privacy and the right to privacy is founded on human dignity.<sup>22</sup> Section 14 of the Constitution deals with the right to privacy, which states:<sup>23</sup>

Everyone has the right to privacy, which includes the right not to have—

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

Privacy is a fundamental human right and it is a right that cannot be separated from the individual. There is no exact definition of privacy, however, for the purposes of this study, the definition as provided by Neethling will be used as it is accepted by the courts.<sup>24</sup> According to Neethling, privacy is: <sup>25</sup>

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<sup>21</sup> *Hoffmann v South African Airways* (2000) 12 BLLR 1365 (CC) para 27.

<sup>22</sup> Floridi L “On Human Dignity as a Foundation for the Right to Privacy” (2016) *Philosophy & Technology* 308.

<sup>23</sup> The Constitution s 14.

<sup>24</sup> *National Media Ltd v Jooste* 1996 (3) SA 262 (A) 271; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 384; *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* (612/90) [1993] ZASCA 3; 1993 (2) SA 451 para 29; *Bernstein v Bester* 1996 (2) SA 751 (CC) 789.

<sup>25</sup> Papadopoulos and Snail ka Mtuze *Privacy and Data Protection* 32; and Neethling et al *Law of Delict* 371.

"...an individual condition of life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private."

The right to privacy is one of the essential and foundational rights in an open and democratic society. The right to privacy is critical for ensuring an individuals' independence, facilitating the development of their sense of self, and enabling them to form relationships with others.<sup>26</sup> However, in order to form relations and build a sense of self, one has to exercise the right to freedom of expression.<sup>27</sup> The right to freedom of expression is important for diverse cultural expression, creativity and innovation, and the development of one's personality through self-expression. Section 16 states that:<sup>28</sup>

- (1) Everyone has the right to freedom of expression, which includes—
  - a. freedom of the press and other media;
  - b. freedom to receive or impart information or ideas;
  - c. freedom of artistic creativity; and
  - d. academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to—
  - a. propaganda for war;
  - b. incitement of imminent violence; or
  - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Freedom of expression is a fundamental human right. The right to freedom of expression encourages people to freely express themselves, exchange ideas freely and speak their

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<sup>26</sup> Privacy International "What is Privacy?" available at <https://privacyinternational.org/explainer/56/what-privacy> (Date of use: 23 October 2022).

<sup>27</sup> Human Rights Guide "Freedom of Expression & Media" available at <https://www.cilvektiesibugids.lv/en/themes/freedom-of-expression-media> (Date of use: 18 August 2023).

<sup>28</sup> The Constitution.

mind, which is important for societal change.<sup>29</sup> In order for democracy, accountability, and good government to thrive, freedom of expression must be recognised and protected. Although freedom of expression is a constitutional right, it is not an absolute right. If what one says or publishes via social media platforms has a negative impact on the rights of another, then one's right to freedom of expression may be limited in terms of section 36. The abuse of freedom of expression is demonstrable in the case of *Penny Sparrow*,<sup>30</sup> wherein the respondent (Penny Sparrow) went on a Twitter/X rant on 4 January 2016 and published a defamatory post in which she compared black people to monkeys. The Equality Court confirmed that the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>31</sup> cannot be viewed in a vacuum but must be considered in the light of the devastating effects of initial colonialism and subsequently the inhumane and degrading system of apartheid, which included the power to humiliate, denigrate and to remove the self-confidence, self-esteem and dignity of its millions of victims.<sup>32</sup> The Umzinto magistrate court found the respondent guilty of hate speech. This is further confirmed in the case of *Khumalo and Others v Holomisa*,<sup>33</sup> wherein Corbett CJ said:

“I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (i.e., truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is *prima facie* defamatory.”

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<sup>29</sup> Index on Censorship “Why is Free Speech Important?” <https://www.indexoncensorship.org/2016/04/free-speech-important/> (Date of use: 13 April 2023).

<sup>30</sup> *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016).

<sup>31</sup> Act 4 of 2000; see also Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 414; and Nel *Freedom of Expression* 591.

<sup>32</sup> Davey and Dahms-Jansen *Social Media in the Workplace* 15.

<sup>33</sup> *Khumalo and Others v Holomisa* (2002) ZACC 12 para 26.

In relation to *memes* as a form of freedom of expression, we need to first note that there are two genres of *memes*: *memes* for “view”<sup>34</sup> also known as *memes* without caption, and *memes* for “use”<sup>35</sup> also known as *memes* with captions as mentioned in Chapter 1 of the study.<sup>36</sup> What a “*meme* for view” and “*meme* for use” have in common is that they are offensive and defamatory in nature. For instance, as mentioned in Chapter 1, the *memes* of Floyd Mayweather in a pseudo-satirical way. Mayweather is widely regarded as one of the best athletes of all time, yet he also suffers from dyslexia.<sup>37</sup> These *memes* mock his dyslexia and, as a result, his good name and reputation. It might be claimed that these *memes* offend not only Mayweather's person, but all dyslexic persons around the world.<sup>38</sup> Another example is of the former South African Minister of Home Affairs, Malusi Gigaba, where he was performing a sexual act.<sup>39</sup> It was not long before Nando's<sup>40</sup> took the regrettable behaviour of the former Minister to social media with a *meme* written “imagine this inside your mouth, the gigabyte meal”.<sup>41</sup>

This was emphasised in *Qwelane v South African Human Rights Commission*,<sup>42</sup> wherein it was said:

“...that dignity is the threshold by which the impugned words must be assessed. “Harmful or to incite harm” extends beyond mere physical harm and includes psychological, emotional and social harm that adversely affects the right to dignity, as long as the harm is serious enough to pass the hate speech threshold.”

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<sup>34</sup> Meme for view is “are generally spread in their original form in order to be seen in their original text”. See Sanchez B “Internet Memes and Desentization” (2020) *Pathways: A Journal of Humanistic and Social Inquiry* 3.

<sup>35</sup> *Meme* for use is “are used by many more people through the recreation of a singular meme by a thousand of online users”, see Sanchez (2020) *Pathways* 3.

<sup>36</sup> See para 1.1 above.

<sup>37</sup> Madu Z “It’s Cruel to Laugh at Floyd Mayweather’s Reading Problems” available at <https://www.sbnation.com/2015/9/4/9213521/floyd-mayweather-reading-berto-fight-rousey> (Date of use: 26 August 2023).

<sup>38</sup> *Ibid.*

<sup>39</sup> Miya N “Malusi Gigaba Sex Tape Divides Twitter” available at <https://www.timeslive.co.za/news/2018-10-29-malusi-gigaba-sex-tape-divides-twitter/> (Date of use: 29 October 2022).

<sup>40</sup> Nando's "South Africa: Where The Fire Began" available at <https://www.nandos.co.za/work/about-us> (Date of use: 2 November 2022).

<sup>41</sup> Halim T “Gigaba Took Matters Into His Own Hands” available at <https://www.dailyvoice.co.za/opinion/current-affairs/munier-grootbek/gigaba-took-matters-into-his-own-hands-17746337> (Date of use: 2 November 2022).

<sup>42</sup> *Qwelane v South African Human Rights Commission and Another* (2021) (6) SA 579 (CC) para 42.

This was further supported by Kriegler J in the case of *S v Mamabolo*,<sup>43</sup> where the learned judge held that freedom of expression does not rank higher in constitutional adjudication than the right to dignity.

It was Oscar Wilde who said: “Give a man a mask and he will show his true face”.<sup>44</sup> This quotation is about the power that anonymity provides. People are more inclined to express comments that they actually think when they are protected by a 'mask', since their anonymity protects them from consequences. This is easily visible in nearly any social media platform when *memes* are posted without knowing who the creator of the *meme* is. It is vital to understand that there are no prerequisites for establishing a *meme*. Anyone may become a *meme* creator, and all one needs is a simple photo editor or video application to get started, which is unlike many other creative industries, *meme* production is usually free of charge.<sup>45</sup>

The Internet and social media do not change simply because the medium changes, however, issues of liability and enforceability can become more complicated in the online world.<sup>46</sup> The ever-evolving nature of online exchanges and social media constitutes a constant trial for the court's ability to address constitutional rights and online defamation.<sup>47</sup>

This is further supported in the case of *Onelogix (Pty) Ltd v Meyer and Others*,<sup>48</sup> where a truck driver was dismissed for sharing a WhatsApp message with a few of his friends. The aforementioned WhatsApp message was a *meme* depicting a young (white) child holding a can of beer and smoking a cigar. The caption read as follows “growing up in the 80's before all you pussies took over – may as well die young.” Mr Skweyiya, the truck driver's supervisor, testified that he understood the phrase “took over” in the *meme* to refer to the emergence of a democratically elected ANC government in 1994.<sup>49</sup> He (Mr

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<sup>43</sup> *S v Mamabolo* (2001) (3) SA 409 (CC) para 41.

<sup>44</sup> Heather “Give a Man a Mask and He Will Show His True Face” available at <https://mindsetmadebetter.com/2021/09/give-a-man-a-mask-and-he-will-show-you-his-true-face/> (Date of use: 2 September 2022).

<sup>45</sup> TechSmith “How To Make a Meme” available at <https://www.techsmith.com/blog/how-to-make-a-meme/> (Date of use: 11 November 2022).

<sup>46</sup> Lomic *Social Media and Internet Law* 5.

<sup>47</sup> Nwabueze (2019) *SAIPLJ* 118.

<sup>48</sup> *Meyer/Onelogix (Pty) Ltd* (2018) 11 BALR 1232 (CCMA).

<sup>49</sup> *Ibid.*

Skweyiya) considered the term "pussies" to be insulting since it refers to a female's genitalia. Mr Skweyiya added that there is no other meaning for this word and that using it is humiliating in his culture and insulting to women. Non-whites in South Africa suffered during the 1980s and the concurrent apartheid system. As a result, Mr Skweyiya concluded that the petitioner was "part of the people celebrating bad experiences of black people in the country" since the photo depicted the 1980s as superior to the current, democratic system. He saw the *meme* as exemplifying the notion of "white supremacy."<sup>50</sup>

The Honourable Mister Justice Moshwana held as follows:<sup>51</sup>

"Racism is a serious indictment given the history of this country. *Therefore, at the drop of a hat it should not be easily inferred.* Since the advent of WhatsApp (an application on social media allowing persons to chat), many jokes are shared amongst a group ... This court takes judicial notice of what happens in the social media circles around jokes about almost everything under the sun, politicians included."

Less than two months before the South African national and provincial elections in 2017, the President of the Republic of South Africa, Cyril Ramaphosa, became a target of social media *memes* when he was stuck in a train.<sup>52</sup> It was not long when Twitter/X posted *memes* of Ramaphosa with captions that read: "The year is 2025 and President Cyril Ramaphosa is still stuck in the train from Mabopane".<sup>53</sup>

Several incidents of *memes* involving local leaders and celebrities emerged throughout the COVID-19 pandemic. For instance, President Ramaphosa struggled to wear a mask while demonstrating to the public the necessity of masks and social distancing in one of the many "family gatherings" held in the previous two and a half years (the intention to educate and raise awareness during a worldwide epidemic and national state of emergency is rendered invalid).<sup>54</sup>

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<sup>50</sup> *Ibid* para 9.

<sup>51</sup> *Idem* para 23.

<sup>52</sup> Sguazzin A "Ramaphosa Train Farce, Corruption Woes Mocked in Memes" available at <https://www.fin24.com/Economy/ramaphosa-train-farce-corruption-woes-mocked-in-memes-20190321-2> (Date of use: 21 March 2023).

<sup>53</sup> *Ibid*.

<sup>54</sup> See, e.g., Nkanjeni U "Mask Off! 10 of the Best Reactions to Cyril Ramaphosa's Mask Mishap" available at <https://www.timeslive.co.za/news/south-africa/2020-04-24-mask-off-ten-of-the-best-reactions-to-ramaphosas-mask-mishap/> (Date of use: 21 March 2023).

The impacts and effects of *memes* have not been captured in legislation regulating the Internet. Notwithstanding the ECT Act and the POPI Act, Internet users have limited influence in the processing of their personal information once it has been uploaded on a social media platform. As a result, social media users generally have limited knowledge about who can access their personal information.

This is demonstrable in the case of *Trevor Manuel v the EFF*,<sup>55</sup> wherein the respondents made a defamatory publication on the then Twitter, and the court's findings established that a balance must be established between the right to freedom of expression and dignity, which includes reputation.

The right to freedom of expression as captured in section 16 of the Constitution does not only include the right of freedom of expression but also the right to receive information.<sup>56</sup> Although freedom of expression is widely acknowledged as a basic human right in terms of section 16 the Constitution, it is also generally recognised that this freedom comes with restrictions and responsibilities.<sup>57</sup>

Section 16(1) protects free speech; section 16(2) provides for the boundaries for that protection and section 36 provides for the limitation of all rights. This is illustrated in the case of *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*,<sup>58</sup> wherein the Constitutional Court said:

“We are obliged to delineate the bounds of the constitutional guarantee of free expression generously. Section 16 is in two parts: the first subsection sets out expression protected under the Constitution. It indeed has an expansive reach which encompasses freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. The second part contains three categories of expression which are expressly excluded from constitutional protection. It follows clearly that unless an expressive act is excluded by section 16(2) it is protected expression. Plainly, the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless. As Kriegler J in *S v Mamabolo* puts it:

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<sup>55</sup> *Manuel v EFF and Others* (2019) ZAGPJHC 157.

<sup>56</sup> Section 16 of the Constitution; and Nel (1997) *CILSA* 189.

<sup>57</sup> Nel (1997) *CILSA* 184.

<sup>58</sup> *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) para 47.

‘With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right’. In appropriate circumstances authorised by the Constitution itself, a law of general application may limit freedom of expression.”

The protection of fundamental rights is concentrated on the ability to be equal, to have a good name, to have privacy, and to live freely by expressing oneself. As illustrated by the case law above, fundamental rights are not absolute rights in terms of section 36 of the Constitution.<sup>59</sup> Section 36, also known as the limitation clause, is a constitutional clause that allows constitutionally protected rights to be curtailed to a certain extent and for democratically justified reasons.<sup>60</sup> The limitation clause also aims to prevent excessive restrictions on rights that may be harmful to democracy due to their purpose, nature, or scope. Section 36 states that:<sup>61</sup>

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
  - a. the nature of the right;
  - b. the importance of the purpose of the limitation;
  - c. the nature and extent of the limitation;
  - d. the relation between the limitation and its purpose; and
  - e. less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision

The promotion of using social media to exercise one's right to freedom of expression has been abused, through the usage of defamatory *memes*. The nature of social media platforms encourages the spread of sensational material without any fact-checking or

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<sup>59</sup> Section 7(3) of the Constitution.

<sup>60</sup> Ahmed D and Bulmer E *Limitation Clauses* (International Institute for Democracy and Electoral Assistance 2017) 21.

<sup>61</sup> The Constitution; Milo and Stein *Practical Guide to Media Law* 15; and Davey and Dahms-Jansen *Social Media in the Workplace* 7-8.



oversight, resulting in defamation.<sup>62</sup> As may be seen, the Internet has foreshadowed a number of difficult defamation events through the usage of social media *memes*, wherein they can frequently seem like nothing more than harmless ideas, but they can invade one's privacy and good name.

In the following section, the legislation regulating the Internet and guidelines for social media users will be elaborated on. These laws consist of the ECT Act, the POPI Act, the Cybercrimes Act, Films and Publications Amendment Act and the guidelines provided in the Social Media Charter.

## **5.2.2 The Electronic Communications and Transactions Act**

### **5.2.2.1. The scope and objectives of the Act**

The Electronic Communications and Transactions Act aims to facilitate and regulate electronic communications and transactions, develop a national e-strategy, promote universal access to electronic communications, encourage the use of electronic transactions by SMMEs, develop human resources in electronic transactions, prevent abuse of information systems, promote e-government services, and address related matters.<sup>63</sup>

The ECT Act is an important legislation that has revolutionised the way business is conducted and communicated in the digital age. This is emphasised by Eiselen, who says that the ECT Act appears to be functioning well, as there is very little case law requiring an interpretation of the Act.<sup>64</sup> Eiselen further states that the ECT Act not only covers ecommerce but also aims at dealing with privacy issues, electronic government services, domain names and cybercrime.<sup>65</sup>

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<sup>62</sup> Davey and Dahms-Jansen *Social Media in the Workplace 7*; Rainie L, Anderson J and Albright J "The Future of Free Speech, Trolls, Anonymity and Fake News Online" available at <https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/> (Date of use: 29 March 2023).

<sup>63</sup> ECT Act Preamble.

<sup>64</sup> Eiselen S "Fiddling With The ECT Act – Electronic Signatures" (2014) *Potchefstroom Electronic Law Journal* 2805.

<sup>65</sup> *Idem* 2806.

However, for the dedication of this study, we will not discuss the whole ECT Act and its objectives, however, focus will be given to Chapter XI of the Act, which deals with the “limitation of liability of service providers.

### **5.2.2.2 The role of Internet Service Provider: Intermediary liability**

As mentioned in Chapter 2, that it is not only the person who made the defamatory comment (the original *meme* creator), but anyone who repeats, supports, or otherwise gets the attention to the defamatory statement, is in principle accountable for its publication.<sup>66</sup> Among these publishers, ISP is included.

The role of ISP<sup>67</sup> intermediary liability is crucial in South Africa as it directly impacts the online landscape and user experience. ISPs act as intermediaries between internet users and content providers, ensuring reliable and uninterrupted access to online platforms.<sup>68</sup> However, with this role comes great responsibility, particularly regarding issues of liability for illegal or harmful content, it is worth noting that ISP does not complete editorial control over the service it provides, for instance, ISP may have little or no control over published content in the sense that it may decide on the duration of time the published material should be removed.<sup>69</sup>

When disputes arises and the question of whether or not liability is imposed is determined by the function or role played by the specific ISP. For instance, if the ISP distributes content on social media platforms, it is presumed that the ISP had the opportunity to examine the information and therefore may be held liable.<sup>70</sup> When the ISP controls the information, it is an intermediary that purports to examine the content of the information and takes it upon itself to prevent transmission if the content is unlawful, and failure to do

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<sup>66</sup> Chapter 2 (fair comment) para 3.

<sup>67</sup> Section 1 of the ECT Act defines a service provider as: “a subscriber to the service provider’s services or any other user of the service provider’s services or a user of information systems.”

<sup>68</sup> Nel *Freedom of Expression* 558; and Zakaria et al (2019) *International Journal of Law, Government and Communication* 68.

<sup>69</sup> Nel *Freedom of Expression* 558.

<sup>70</sup> *Idem* 559.

so will render the ISP liable.<sup>71</sup> ISP does not offer material in the context of social media platforms; the majority of the content is supplied by users. The issue arises when a plaintiff tries to sue the ISP on the grounds that it is accountable for the acts of its customers.

In terms of Chapter XI of the ECT Act, the liability of service providers is limited. However, in order for the service provider to be afforded this protection, it must be a member of a representative body.<sup>72</sup> This is demonstrable in the case of *Ketler Investments CC t/a Ketler Presentations v Internet Service Providers Association*,<sup>73</sup> wherein it was stated that:

“The scheme of ECT Act provides not only a legislative framework, including certain statutory offences, but also establishes a self-regulatory framework for information system service providers. Service providers can form a representative body (in other legislative instruments identified as an industry representative body or IRB) which may be recognised as such by the Minister of Communications by way of notice in the Gazette provided, inter alia, membership of the body is subject to adequate criteria, members are subject to a code which provides for adequate standards of conduct and the representative body is capable of monitoring and enforcing its code of conduct adequately”.

If the service provider is only serving as an information carrier "mere conduit," which is the conveying of information from one point to another without any monitoring of or control over the content, such a service provider is exempted from liability.<sup>74</sup> In the event of a service provider being distributor, as mentioned above, the said provider is presumed liable since they had the opportunity to examine the content of information before distribution. Section 74(1),<sup>75</sup> on the other hand, exempts a service provider who caches information from liability under certain conditions. A service provider that transmits data provided by a recipient of the service via an information system under its control is not liable for the automatic, intermediate and temporary storage of that data, where the purpose of storing such data is to make the onward transmission of the data more efficient

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<sup>71</sup> *Ibid.*

<sup>72</sup> Section 72 of the ECT Act.

<sup>73</sup> *Ketler Investments CC t/a Ketler Presentations v Internet Service Providers Association* 2014 (2) SA 569 (GSJ) para 71.

<sup>74</sup> Section 73 of the ECT Act.

<sup>75</sup> Section 74 of the ECT Act.

to other recipients of the service upon their request, provided that the service provider does not modify the data; complies with conditions on access to the data; complies with rules regarding the updating of the data, specified in a manner widely recognised and used in the industry; does not interfere with the lawful use of technology, widely recognised and used in the industry, to obtain information on the use of the data; and removes or disables access to the data it has stored upon receiving a take-down notice referred to in section 77.<sup>76</sup>

The ISP intermediary liability strikes a balance between freedom of expression and protecting society from harmful content. While the internet should remain an open platform for ideas and opinions, it should not serve as a breeding ground for hate speech or fake news that can incite violence or undermine democratic processes. Holding ISPs accountable ensures that these companies actively work towards fostering responsible digital citizenship while still allowing individuals to freely express themselves within legal boundaries.

### **5.2.3 The POPI Act**

#### **5.2.3.1 The scope and objectives of the Act**

The POPI Act is a crucial piece of legislation that safeguards the privacy and security of personal information in South Africa. With the rapid growth of digital technology and the increasing prevalence of data breaches, it has become imperative to have comprehensive regulations in place to protect individuals' personal information from misuse and unauthorised access.<sup>77</sup> The purpose of the POPI Act has its birth rooted in section 14 of the Constitution. This is demonstrable in the case of *Ministry v Interim Nation Medical and Dental Council*,<sup>78</sup> wherein the court developed a test as to what was deemed unlawful or lawful access and exchange of an individual's personal information.<sup>79</sup> Section 14 also

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<sup>76</sup> Nel *Freedom of Expression* 559, and s 77 of the ECT Act.

<sup>77</sup> Jordaan J and Snail ka Mtuze S "Information Security and the Law" in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 503.

<sup>78</sup> See the POPI Act Preamble; and *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127.

<sup>79</sup> The Constitution s 14; and Jordaan and Snail *Information Security and the Law* 503.

states that the right to privacy is subject to reasonable restrictions aimed at safeguarding other rights and essential interests.<sup>80</sup> Section 2(a) of the POPI Act provides that these justifiable limitations are aimed at balancing the right to privacy against other rights, particularly the right to access information and protecting important interests, such as the free flow of information within the Republic and across international borders.<sup>81</sup>

The Act requires organizations to obtain consent from individuals before collecting their personal information, ensuring that people are fully aware of how their personal information will be used. This provides persons with rights and remedies to protect their personal information from processing that is not in accordance with the Act, and establishes voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by the Act.<sup>82</sup>

As mentioned above, ISPs, social media platforms and social media users may be held liable for defamatory content published.<sup>83</sup> ISPs are responsible for the processing of personal information for all users, and social media platforms are responsible for the processing of personal information when they upload third parties' personal information.<sup>84</sup> The majority of content material, especially in the form of *memes*, shared by social media users is personal information. In light of the broad definition of processing, practically every activity performed in response to information is considered processing.

In terms of section 6 and 7,<sup>85</sup> the Act does not apply to any processing of personal information that is primarily personal or domestic in nature, or that is only for journalistic, literary, or creative reasons. The question arises as to whether social media users who process personal information of friends for personal purposes (sharing defamatory *memes*) might be exempted from the restrictions of the POPI Act under the household exception.

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<sup>80</sup> The Constitution s 14.

<sup>81</sup> Section 2 of the POPI Act.

<sup>82</sup> Section 2 of the POPI Act.

<sup>83</sup> See paragraph 5.2.2.2.

<sup>84</sup> *Ibid.*

<sup>85</sup> Section 6 and 7 of the POPI Act.

It is proposed that the issue be examined on a case-by-case basis. It is not every social media user, who uses the platform for communication. Social media is there only for social connection. Social media platforms can be used, as mentioned in previous chapters, for abuse and to defame individuals in the name of artistic purposes. In such a case, the household exception would not apply.

## 5.2.4 The Cybercrimes Act

### 5.2.4.1 The scope and objectives of the Act

The purpose of the Cybercrime Act is to properly define cybercrime by applying penalties to certain types of offences and to regulate cybercrime's jurisdiction by criminalising the distribution of harmful materials.<sup>86</sup> The Act establishes twenty new cybercrime offences as well as cybercrime sanctions. It establishes overarching legal authorities for dealing with cybercrime by defining how these crimes must be investigated, which includes looking for, acquiring access to, and seizing materials related to cybercrime.<sup>87</sup>

The Cybercrimes Act establishes the foundation for law enforcement authorities to successfully investigate and prosecute cybercriminals, ensuring that justice triumphs in the digital sphere.<sup>88</sup> This is in support of remedies provided for in Chapter 2.<sup>89</sup> The Act

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<sup>86</sup> Watney M "Cybercrime" in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 477; Van der Merwe D "Criminal Law" in Van der Merwe D, Roos A, Eiselen GTS, Nel S, Erlank W and Mabeka NQ *Information and Communications Technology Law* 3<sup>rd</sup> ed (LexisNexis 2021) South Africa 90; Cybercrimes Act 19 of 2020, Preamble; Snail ka Mtuze S and Musoni M "An Overview of Cybercrime Law in South Africa" (2023) 4 *International Cybersecurity Law Review* 306; Williams G, Fourie T and Siyaya S "The Newly Enacted Cybercrimes Act and What It Means for South Africans" available at <https://www.golegal.co.za/newly-enacted-cybercrimes-act/> (Date of use: 26 July 2023); and Michalsons "Cybercrimes Act in South Africa" available at <https://www.michalsons.com/focus-areas/cybercrime-law/cybercrimes-act-south-africa> (Date of use: 5 April 2022).

<sup>87</sup> Chapter 4 (Powers to Investigate, Search, Access or Seize) of the Cybercrimes Act 19 of 2020; and Chitimira H and Ncube P "The Regulation and Use of Artificial Intelligence and 5G Technology to Combat Cybercrime and Financial Crime in South African Banks" (2021) 24 *Potchefstroom Electronic Law Journal* 1.

<sup>88</sup> Williams et al "The Newly Enacted Cybercrimes Act and What It Means for South Africans" available at <https://www.golegal.co.za/newly-enacted-cybercrimes-act/> (Date of use: 26 July 2023); Allen K "South Africa lays down the law on cybercrime" available at <https://issafrica.org/iss-today/south-africa-lays-down-the-law-on-cybercrime> (Date of use: 9 June 2023); Swales and Snail ka Mtuze *Freedom of Expression and the Internet* 413.

<sup>89</sup> Chapter 2, paragraph 2.5.3 (Remedies: Criminal defamation).

makes it unlawful to release damaging data messages as well as data messages including personal images, such as *memes*,<sup>90</sup> and it seeks to establish an integrated cybersecurity legislative framework to combat cybercrime and handle cybersecurity challenges.<sup>91</sup>

It is important to note that the Cybercrimes Act was enacted just in time for the adoption of the POPI Act on 1 July 2020, with a 12-month grace period being provided to companies who had to comply by the end of June 2021.<sup>92</sup> One of the most important components of the Act, is its emphasis on proactive crimes, such as criminal defamation. This is seen in section 3, which defines offences involving personal information (as defined in the POPI Act), such as the abuse, misuse, and possession of another person's or entity's personal information when there is a reasonable suspicion that it was used, or may be used, to conduct a cybercrime.<sup>93</sup> Moreover, it empowers law enforcement authorities with enhanced powers to investigate and gather evidence related to cybercrimes.

The sharing personal photos, such as *memes*, without agreement is likewise illegal under the Act, regardless of whether the imagery is genuine or simulated, if it violates the victims privacy or dignity.<sup>94</sup> This is demonstrable in the case of *Kumalo v Cycle Lab (Pty) Ltd*,<sup>95</sup> wherein the defendant used the plaintiff's image for advertising without consent, falsely implying that the plaintiff endorsed their products.<sup>96</sup> The court held that using a public figure's image for commercial gain does not justify invading the plaintiff's right to privacy, especially when the image was taken during a private activity and without consent.<sup>97</sup>

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<sup>90</sup> Chapter 1 (Background).

<sup>91</sup> Swales and Snail ka Mtuzze *Freedom of Expression and the Internet* 413.

<sup>92</sup> Snail ka Mtuzze and Musoni (2023) *International Cybersecurity LR* 300, 306, 318; Williams et al "The Newly Enacted Cybercrimes Act and What It Means for South Africans" available at <https://www.golegal.co.za/newly-enacted-cybercrimes-act/> (Date of use: 26 July 2023).

<sup>93</sup> Section 3 of the Cybercrime Act 19 of 2020.

<sup>94</sup> *S v Hoho* 2009 (1) SACR 276 (SCA) para 29-31; and Snail ka Mtuzze and Musoni (2023) *International Cybersecurity LR* 304, 307; Williams et al "The Newly Enacted Cybercrimes Act and What It Means for South Africans" available at <https://www.golegal.co.za/newly-enacted-cybercrimes-act/> (Date of use: 26 July 2023).

<sup>95</sup> *Kumalo v Cycle Lab (Pty) Ltd* 2011 JOL 27372 (GSJ) para 30.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

## 5.2.5 The Films and Publications Amendment Act

### 5.2.5.1 The scope and objectives of the Act

The Films and Publications Amendment Act, which was passed in 2019, aims to regulate online content more strictly. The Act gives the government more power to monitor and restrict content deemed harmful. This Amendment Act expands the definition of "film and publication" to include online content.<sup>98</sup> This means that websites, social media platforms, streaming services, and any digital content will now fall under the Act's scope. By implementing stricter classification guidelines and enhancing enforcement mechanisms, this Act ensures that the society maintains its moral values while safeguarding the well-being of its citizens.

Furthermore, the South African Films and Publications Amendment Act acknowledges the importance of promoting responsible self-regulation within the industry.<sup>99</sup> It encourages filmmakers, producers, distributors, and publishers to adopt ethical practices by emphasizing compliance with classification guidelines. This not only protects consumers but also supports creative freedom by allowing artists to express themselves within reasonable boundaries.<sup>100</sup>

Some may argue that these regulations restrict the freedom of speech or artistic expression.<sup>101</sup> It is vital to clarify, however, that these regulations are not meant to stifle creativity, but rather to find a balance between creative freedom and civic duty. The amendment legislation allows filmmakers and publishers to develop responsibly while

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<sup>98</sup> Section 1 of the Films and Publications Amendment Act 11 of 2019.

<sup>99</sup> Majavu N and Dlamini P "Films and Publications Amendment Act Leaves Online Content Producers Hot Under the Collar" (*City Press*, 3 May 2022) available at <https://www.news24.com/citypress/news/films-and-publications-amendment-act-leaves-producers-hot-under-the-collar-20220305> (Date of use: 5 May 2022).

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*



protecting consumers by setting clear standards on what constitutes suitable content for different age groups.<sup>102</sup>

This Films and Publications Amendment Act<sup>103</sup> also defines certain terms not included in the legislation above such as social media, publishing and distribution, and tries to achieve a balance between artistic freedom and societal responsibility by fostering responsible self-regulation within the sector. It is a critical step towards developing a more secure and ethical film and publishing scene in South Africa.

### **5.3 COMMUNITY GUIDELINES FOR SOCIAL MEDIA PLATFORM**

Social media guidelines have been produced to help users of social media platforms use social media as a communication tool and to give assistance and direction.<sup>104</sup> The guidelines' goals are to ensure quality content as well as standardised and organised social media operations in accordance with social media policies, and furthermore to shield users from any unexpected or undesirable outcomes resulting from the usage of social media.<sup>105</sup> These guidelines will enable the users to engage in social media conversations with current and potential users. The official use of social media is governed by the Department of Communications and Information System that outline acceptable as well as unacceptable behaviour when using the Internet.<sup>106</sup> For the dedication of this study, we will not discuss the Department of Communications and Information System, however, we will discuss the Social Media Charter, as it intended to promote mindfulness when using social media platforms.

Below is a discussion on the Social Media Charter.

#### **5.3.1 Social Media Charter**

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<sup>102</sup> *Ibid.*

<sup>103</sup> Section 1 of the Films and Publications Amendment Act 11 of 2019.

<sup>104</sup> Government Communication and Information System *Social Media Policy Guidelines* (South Africa 2011) 8.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Idem* 3.

Prejudice and destructive behaviour are rapidly being communicated through social media platforms, and such negative behaviour is a danger to South African democracy.<sup>107</sup> Through the publishing of the social media Charter, the South African Human Rights Commission wants to raise awareness and identify ways in which social media platforms may be used responsibly while respecting the rights of the user and others. While freedoms such as expression are vital, they should be enjoyed with respect for the rights of others.<sup>108</sup>

Freedom of expression is at the heart of democracy and is an essential component of a democratic society.<sup>109</sup> The Constitution gives everyone the right to express themselves without fear of repercussions. The Social Media Charter emphasises on the consequences of sharing content on social media and making sure it does not include any expression that could be reasonably interpreted as demonstrating a clear intention to be hurtful and harmful.<sup>110</sup> The Social Media Charter also encourages taking precaution when using social media and to avoid insulting or denigrating others on grounds that produce or perpetuate systemic disadvantage, degrade human dignity, or injure them in a way that is equivalent to defamation on a protected attribute. Direct statements, jokes, images, films, poetry, music, artwork, GIFs, *memes*, emojis, dramatizations, skits, and so on can all be harmful speech.<sup>111</sup>

It should be noted that freedom of expression may do harm whether one means it or not, resulting in harassment. Online harassment may take various forms, such as trolling and *memes*, which is purposeful provocation, upsetting, and accosting of people online, and persistent unwanted correspondence.<sup>112</sup> The creation of fake accounts to impersonate the targeted person creating *memes*, manipulated images or fake videos to taunt or humiliate the targeted person sharing videos which has the potential to further humiliate the targeted person.<sup>113</sup>

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<sup>107</sup> South African Human Rights Commission *Summary of the SHINE 1*.

<sup>108</sup> *Ibid.*

<sup>109</sup> Section 14 of the Constitution.

<sup>110</sup> South African Human Rights Commission *Summary of the SHINE 6*.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Idem 19*.

<sup>113</sup> *Ibid.*

In conclusion, the social media Charter is an essential document, especially given the predicted increase in social media usage. Its aim is to encourage awareness when utilising social media platforms. The social media Charter is a personal contract that allows an individual to be empowered to help achieve human rights. The social media Charter instructs social media users on what is and is not acceptable behaviour by providing guidelines for subjects such as defamation, harmful expression, privacy, *crimen iniuria*, and harassment.

#### **5.4 CONCLUSION**

The South African ECT Act, POPI Act, Cybercrimes Act, Films and Publications Amendment Act, and the social media Charter all play a role in regulating *memes* and defamation online.

The ECT Act prohibits the sending of data messages that are unlawful,<sup>114</sup> or offensive. This includes *memes* that contain defamatory or offensive content. Under this Act, people who post and share defamatory *memes* can be held liable.

The POPI Act aims to protect personal information and regulate its processing. Memes that disclose personal information about an individual without their consent may violate this Act, and the individuals depicted in such memes could file a complaint. The Cybercrimes Act criminalises various cybercrimes, including distributing data or computer programs that could injure or cause damage to another person. Defamatory *memes* that damage someone's reputation could fall under this Act, and those who post them could face criminal charges.

The Films and Publications Amendment Act regulates online content, it prohibits the distribution of content that contains propaganda for war, incites violence or hatred, or advocates hate speech. *Memes* falling into these categories would be illegal.

The social media Charter, while not legally binding, provides guidelines for responsible social media use. It discourages the posting of defamatory or harmful content, including

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<sup>114</sup> Section 4(5) ECT Act.

*memes*. While not enforceable by law, it indicates what is considered inappropriate online behaviour.

In summary, various South African provisions and guidelines regulate *memes* and defamation to different degrees, from prohibiting extremely harmful content to providing best practice recommendations for social media users.

Furthermore, the chapter analysed the issues experienced on social media and employed case law to discuss the legal impacts of social media platforms, as well as who can be held liable for the infringement of personality rights on social media platforms.

In the next chapter, the study will provide a summary, recommendations and a conclusion.

## CHAPTER 6

### SUMMARY, CONCLUSION AND RECOMMENDATIONS

#### 6.1 SUMMARY

The defamatory nature of Internet *memes* through social media has formed the focus of this study. In this chapter, a brief summary is included, as well as conclusions and recommendations.

In the study, an examination was made to determine if South African legislation effectively safeguards the interests that are the subject of the right to privacy and the right to dignity, particularly in the context of social media platforms. Other relevant concerns explored included: who should be held accountable for user-generated information published on social media platforms; the role of the ISP; and how anonymous defendants should be dealt with. The examination was conducted using a comparative legal methodology.

The aim of this study was to evaluate whether the use of *memes* via social media platforms may infringe on the personality rights of other users, mainly the right to a good name, the right to privacy and the right to freedom of expression.

In achieving this aim, three pertinent questions needed to be addressed: Does the South African law on defamation adequately regulate the use of Internet *memes*? What relief does a person have when defamed by a *meme*? Can South African law draw lessons from Australia to address the defamatory nature of Internet *memes* through social media?

The following assumptions were used to contextualise the study: that the Internet is an essential means of communication; that people maintain their personality rights when using the Internet, especially on social media platforms and that the law must safeguard user's rights when they use social media platforms. The study also showed how the usage of social media platforms may infringe on one's personality rights and furthermore disclosed how these rights (good name, privacy and the right to freedom of expression) may overlap with each other.

Chapter 2 of the study provided an outline on the conceptual and historical overview of defamation. The chapter looked at defamation under common law, as well as the requirements for liability. The chapter further explored the infringement of these personality rights in the context of *memes* and the possible grounds of justification in this regard. The chapter addressed the procedural challenges where either privacy or reputation has been infringed in the context of defamatory nature of *memes*. The chapter concluded by identifying possible remedies available to a plaintiff whose personality has been infringed on social media.

Chapter 3 of the study focused on the challenges highlighted in Chapter 2. The chapter defined and provided examples of defamation, social media and *memes*. The chapter pointed out the complexities of social media that arises with the increase in Internet usage across the globe. Social media usage has a rapid prosperity on both national and international levels, and with its increased usage, legal problems such as defamation came to the fore. The chapter concluded by discussing the community guidelines for social media platforms, more in particular Twitter/X.

For a comparative law approach, Chapter 4 covered the Australian law, wherein the study examined how the Australian government regulates the Internet and whether the legislation in place and recently enacted laws adequately protect Internet users, especially in the social media context. As a background, the chapter presented an outline of the Australian legal system, including the existing Constitution and common law views on reputation and freedom of speech. Furthermore, the chapter examined online defamation and social media legislation. In conclusion, the chapter analysed the Defamation Amendment Bill that the Australian government enacted in 2022.

Chapter 5 focused on the relevant South African law and social media guidelines. The chapter analysed whether South African Internet users have been afforded legal protection within the social media context and whether the current legislation provides adequate protection against the infringement of these personality rights. The chapter also examined the transformation of publishing information, especially within the digital era.

The chapter also highlighted the consequences of publishing and how publishing information without fact-checking is a prerequisite of defamation which is clearly demonstrated by the case of *Isparta v Richter and Another*,<sup>1</sup> *Manuel v EFF*<sup>2</sup> and *Heroldt v Wills*.<sup>3</sup> The chapter also discussed the remedies afforded to individuals who have been defamed through social media.

## 6.2 CONCLUSION

The study has shown the importance of the Internet and how social media platforms are a tool for communication, exchanging information and self-expression. However, the study has also shown the disadvantages of abusing this powerful tool and the legal consequences thereof.

It is crucial to realise that as technology evolves and advances, so should our legal system. To protect individual rights, our laws must adapt to the ever-changing digital landscape. The study has further shown that social media is a catalyst for global change, and it is currently unfolding and progressing at a rapid pace. One gets to connect and build through the usage of social media.

Chapters 2 and 5 showed the importance of balancing the rights to freedom of speech, privacy and a good name, making reference to the case of *RM v RB*,<sup>4</sup> wherein Chetty J reiterated that: “This reasoning appears to be an appropriate balancing of the Constitutionally enshrined right to freedom of expression and the right to dignity.”

The study explored the challenges in relation to social media as well as the legal effects these challenges may have. Chapter 5 also covered the legislation that regulates the Internet such as the ECT Act, the Protection of Personal Information Act, the Cybercrimes Act, the Films and Publications Amendment Act.

In Chapter 2, the study provided three remedies (interdict, retract and damages) to social media users who have had their rights infringed. Interdicts, however severe, remain a

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<sup>1</sup> *Isparta v Richter and Another* 2013 (6) SA 529 (GNP).

<sup>2</sup> *Manuel v EFF and Others* (13349/2019) [2019] ZAGPJHC.

<sup>3</sup> *Heroldt v Wills* 2013 (2) SA 530 (GSJ).

<sup>4</sup> *RM v RB* 2015 (1) SA 270 (KZP).

viable means to defend one's personality rights, especially within the social media context.

From a comparative discussion, the study drew conclusions, for instance, that social media platforms have evolved into strong communication and information sharing tools, however, in as much as it can be a tool of communication, it can be a tool of disruption and they should be held liable. Chapter 4 establishes fundamental expectations for social media platforms to impose stronger restrictions on content moderation.

As to the question of liability of an ISP for third party content, the study concluded that both the Australia and the South Africa provide some form of immunity for the ISP, however, taking note that Australia has introduced the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth), which aims to hold social media service providers liable for defamatory content posted on their platforms.

### **6.3 RECOMMENDATIONS**

The impacts and effects of *memes* have not been captured in legislation regulating the Internet. Notwithstanding the ECT Act and the POPI Act, Internet users have limited influence in the processing of their personal information once it has been uploaded on a social media platform. As a result, social media users generally have limited knowledge about who can access their personal information.

The right to freedom of expression as captured in section 16 of the Constitution does not only include the right of freedom of expression but also the right to receive information.<sup>5</sup> Although freedom of expression is widely acknowledged as a basic human right in terms of section 16 the Constitution, it is also generally recognised that this freedom comes with restrictions and responsibilities.<sup>6</sup>

As far as the development of South African law is concerned, the study offers the following recommendations:

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<sup>5</sup> Section 16 of the Constitution; and Nel (1997) *CILSA* 189.

<sup>6</sup> Nel (1997) *CILSA* 184.



- In terms of section 6 and 7 of POPI Act, the applicability of the household exemption to the users of social media platforms. This study recommends that the Information Regulator should provide some clarity or formulate guidelines to clarify the applicability of the household exemption to social media users.
- In terms of immunity for ISPs, the study recommends that a Bill should be made, which gives victims of online defamation legal redress by holding both those who publish defamatory information and the platforms that host it accountable, as Australia did with the Social Media (Basic Expectations and Defamation) Bill 2021 (Cth) and the Social Media (Anti-Trolling) Bill 2022 (Cth).

Therefore, individuals should always ensure that any information they post or create about a person or entity is truthful, especially if it could be considered as damaging to the person's reputation. What one publishes has the potential to influence one's thinking, expression, and even who one wishes to be. With hundreds of thousands of Facebook status updates, tweets, and highly filtered Instagram photographs being posted every second of the day, it is critical to consider the rights of other people or organisations who may be harmed by such sharing.

## BIBLIOGRAPHY

### Books, Chapters in Books, And Theses

Adams and Heirbaut *The Method and Culture of Comparative Law*.

Adams A and Heirbaut D *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Bloomsbury Academic 2015).

Babbie *The Basics of Social Research*.

Babbie E *The Basics of Social Research* 4<sup>th</sup> ed (Thomson Wadsworth 2005) United States of America.

Baker *Defamation Law and Social Attitudes: Ordinary Unreasonable People*.

Baker R *Defamation Law and Social Attitudes: Ordinary Unreasonable People* (Edward Elgar Publishing 2011) United Kingdom.

Balkin and Davis *Law of Torts*.

Balkin PR and Davis JLR *Law of Torts* 5<sup>th</sup> ed (LexisNexis 2013) Australia.

Bishop *The Thin-Blue Web*

Bishop J "The Thin-Blue Web: Police Crime Records of Internet Trolling Show Chivalrous Attitudes That Can Be Resolved through Transfer of Powers" in Thomas PE, Srihari M, Kaur S (eds) *Handbook of Research on Cultural and Economic Impacts of the Information Society* Australia 67-91.

Burchell *Principles of Criminal Law*.

Burchell J *Principles of Criminal Law* 5<sup>th</sup> ed (Juta 2016) South Africa.

Burchell *Law of Defamation in SA*.

Burchell J *The Law of Defamation in South Africa* (Juta 1985) South Africa.

Burns *et al Communications Law*.

Burns Y, Beer T and Sadleir E *Communications Law* 3<sup>rd</sup> ed (LexisNexis 2015) South Africa.

Chesterman *Freedom of Speech in Australian Law*.

Chesterman M *Freedom of Speech in Australian Law: A Delicate Plant* 1<sup>st</sup> ed (Ashgate 2000) Australia.

Collins *Collins on Defamation*.

Collins M *Collins on Defamation* 1<sup>st</sup> ed (Oxford University 2014) United Kingdom.

Collins *Law of Defamation and the Internet*.

Collins M *The Law of Defamation and the Internet* 1<sup>st</sup> ed (Oxford University 2001) United Kingdom.

Currie and De Waal *Bill of Rights Handbook*.

Currie I and De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed (Juta 2013) South Africa.

Davey and Dahms-Jansen *Social Media in the Workplace*.

Davey R and Dahms-Jansen L *Social Media in the Workplace* (LexisNexis 2017) South Africa.

Davidson *Social Media and Electronic Commerce Law*.

Davidson A *Social Media and Electronic Commerce Law* 2<sup>nd</sup> ed (Cambridge University Press 2016) Australia.

De Stadler et al *Over-thinking The POPI Act*.

De Stadler E, Hattingh IL, Esselaar P and Boast J *Over-thinking The Protection of Personal Information Act: The Last POPIA Book You Will Ever Need* (Juta 2021) South Africa.

Denisova *Internet Memes and Society*.

Denisova A *Internet Memes and Society: Social, Cultural and Political Contexts* (Taylor and Francis 2019) New York.

De Wet *South Africa*

De Wet E "South Africa" in Shelton D *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University 2011) United States of America 567-593.

Fagan *Gist of Defamation in SA Law*.

Fagan A "The Gist of Defamation in South African Law" in Descheemaeker E and Scott H (eds) *Iniuria and the Common Law* (Hart Publishing 2013) North America 169-195.

Fagan *Undoing Delict*.

Fagan *Undoing Delict: The South African Law of Delict Under the Constitution* 1<sup>st</sup> ed (Juta 2018) South Africa.

Fairgrieve *Comparative Law In Practice*.

Fairgrieve D *Comparative Law In Practice: Contract Law in a Mid-Channel Jurisdiction* (Hart Publishing 2019) United Kingdom.

Gahtan et al *Internet Law*.

Gahtan A, Kratz M and Mann J *Internet Law: A Practical Guide for Legal Business Professionals* (Carswell Legal Publications 1998) United States of America.

Gillooly *The Law of Defamation in Australia and New Zealand*

Gillooly M *The Law of Defamation in Australia and New Zealand* (The Federation Press 1998) Sydney.

George *Defamation in Australia*.

George P *Defamation Law in Australia* 3<sup>rd</sup> ed (LexisNexis 2017) Australia.

Gosling *Plato Philebus*.

Gosling J *Plato Philebus* (Oxford University Press 1975) United Kingdom.

Hardy *Law in Australian Society*

Hardy K *Law in Australian Society: An Introduction to Principle and Process* (Allen & Unwin 2019) Australia.

Homann *Legal Implications*.

Homann LH *The Legal Implications of Defamatory Statements on Social Media Platforms in South Africa* (LLM thesis North-West University 2015) South Africa.

Hutchison et al *Law of Contract in SA*.

Hutchison D, Pretorius C, Naude T, Du Plessis J, Eiselen S, Floyd T, Hawthorn L, Kuschke B, Maxwell C and De Stadler E *The Law of Contract in South Africa* 3<sup>rd</sup> ed (Oxford University Press 2017) South Africa.

Jordaan J and Snail ka Mtuze *Information Security and the Law*.

Jordaan J and Snail ka Mtuze S "Information Security and the Law" in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 495-517.

Kemp et al *Criminal Law in SA*.

Kemp G, Walker S, Palmer R, Baqwa D, Gevers C, Leslie B and Steynberg A *Criminal Law in South Africa* 3<sup>rd</sup> ed (Oxford University Press 2018) South Africa.

Kenyon *Comparative Defamation and Privacy Law*.

Kenyon A *Comparative Defamation and Privacy Law* (Cambridge University 2016) United Kingdom.

Lomic *Social Media and Internet Law*.

Lomic PV *Social Media and Internet Law: Forms and Precedents* (LexisNexis 2014) Canada.

Luttrell *Social Media*.

Luttrell R *Social Media: How to Engage, Share, and Connect* 3<sup>rd</sup> ed (Rowman and Littlefield 2019) United Kingdom.

Mabeka *A Positive Path Towards a Digital System*.

Mabeka Q "A Positive Path Towards a Digital System" in Van der Merwe D, Roos A, Eiselen GTS, Nel SS, Erlank W and Mabeka NQ *Information and Communications Technology Law* 3<sup>rd</sup> ed (LexisNexis 2021) South Africa 667-703.

Mandiberg *The Social Media Reader*.

Mandiberg M *The Social Media Reader* (New York University 2012) United States of America.

McKerron *The Law of Delict*.

McKerron RG *The Law of Delict: A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 4<sup>th</sup> ed (Juta 1952) South Africa.

Mendelson *New Law of Torts*.

Mendelson D *The New Law of Torts* 2<sup>nd</sup> ed (Oxford University 2010) Australia.

Milo and Stein *Practical Guide to Media Law*.

Milo D and Stein P *A Practical Guide to Media Law* (LexisNexis 2013) South Africa.

Neethling et al *Personality Rights*.

Neethling J, Potgieter JM and Roos A *Neethling on Personality Rights* 2<sup>nd</sup> ed (LexisNexis 2019) South Africa.

Neethling et al *Law of Delict*.

Neethling J, Potgieter JM and Visser PJ *Law of Delict* 7<sup>th</sup> ed (LexisNexis 2015) South Africa.

Nelson *Social Media and Morality*.

Nelson LS *Social Media and Morality: Losing our Self Control* (Cambridge University 2018) United Kingdom.

Nel *Freedom of Expression*.

Nel S "Freedom of Expression" in Van der Merwe D, Roos A, Eiselen GTS, Nel SS, Erlank W and Mabeka NQ *Information and Communications Technology Law* 3<sup>rd</sup> ed (LexisNexis 2021) South Africa 531-629.

O'Reilly and Milstein *The Twitter Book*.

O'Reilly T and Milstein S *The Twitter Book* 2<sup>nd</sup> ed (O'Reilly Media Inc 2011) United States of America.

Papadopoulos *An Introduction to Cyberlaw*.

Papadopoulos S "An Introduction to Cyberlaw" in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 1-9.

Papadopoulos and Snail ka Mtuze *Cyberlaw @ SAIV*.

Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa.

Potgieter et al *Visser and Potgieter: Law of Damages*.

Potgieter JM, Steynberg L and Floyd TB *Visser and Potgieter: Law of Damages* 3<sup>rd</sup> ed (Juta and Company (Pty) Ltd 2012) South Africa.

Rolph *Reputation, Celebrity and Defamation Law*.

Rolph D *Reputation, Celebrity and Defamation Law* 1<sup>st</sup> ed (Routledge 2008) Australia.

Rolph et al *Balkin & Davis Law of Torts*.

Rolph D, Varuhas J, Crossley P and Douglas M *Balkin & Davis Law of Torts* 6<sup>th</sup> ed (LexisNexis 2021) Australia.

Safko and Brake *The Social Media Bible*.

Safko L and Brake DK *The Social Media Bible: Tactics, Tools and Strategies for Business Success* (John Wiley & Sons 2009) Canada.

Scott et al *Law of Commerce in SA*.

Scott J, Cornelius S, Baqwa D, De Stadler E, Eiselen S, Evans R, Humby T, Kelly-Louw M, Konyon I, Kopel S, Naude T, Schoeman H, Scott S, Smit N, Sutherland P, Van der Bijl C and Woker T *The Law of Commerce in South Africa* 2<sup>nd</sup> ed (Oxford University Press 2014) South Africa.

Sharp *Critical Analysis of the Role of the Boni Mores in the South African Law of Contract*.

Sharp M *Critical Analysis of the Role of the Boni Mores in the South African Law of Contract and its Implications in the Constitutional Dispensation* (LLM thesis University of KwaZulu-Natal 2014) South Africa.

Skosana *Right to Privacy and Identity*.

Skosana MT *The Right to Privacy and Identity on Social Networking Sites: A Comparative Legal Perspective* (LLM thesis University of South Africa 2016) South Africa.

Snail ka Mtuze and Papadopoulos *Privacy and Data Protection*.

Snail ka Mtuze S and Papadopoulos S "Privacy and Data Protection" in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 307-377.

Snyman *Criminal Law*.

Snyman CR *Criminal Law* 6<sup>th</sup> ed (LexisNexis 2014) South Africa.

Snyman *Snyman's Criminal Law*.

Snyman CR *Snyman's Criminal Law* 7<sup>th</sup> ed (LexisNexis 2020) South Africa.

Steele *Tort Law*.

Steele J *Tort Law: Text, Cases, and Materials* 4<sup>th</sup> ed (Oxford University Press 2017) United Kingdom.

Swales and Snail ka Mtuze *Freedom of Expression and the Internet*.

Swales L and Snail ka Mtuze S "Freedom of Expression and the Internet" in Papadopoulos S and Snail ka Mtuze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 383-428.

Tladi *The Regulation of Unsolicited Electronic Communications*.

Tladi SEM *The Regulation of Unsolicited Electronic Communications (Spam) in South Africa: A Comparative Study* (LLD thesis University of South Africa 2017) South Africa.

Van Blerk *Interdicts*.

Van Blerk P *Precedents for Applications in Civil Proceedings: Interdicts* (Juta and Company (Pty) Ltd 2019) South Africa.

Van der Merwe *Criminal Law*.

Van der Merwe D "Criminal Law" in Van der Merwe D, Roos A, Eiselen GTS, Nel SS, Erlank W and Mabeka NQ *Information and Communications Technology Law* 3<sup>rd</sup> ed (LexisNexis 2021) South Africa 67-118.

Van der Merwe *Telecommunications Law*.

Van der Merwe D "Telecommunications Law" in Van der Merwe D, Roos A, Eiselen GTS, Nel SS, Erlank W and Mabeka NQ *Information and Communications Technology Law* 3<sup>rd</sup> ed (LexisNexis 2021) South Africa 11-37.

Van der Merwe et al *Information and Communications Technology Law*.

Van der Merwe D, Roos A, Eiselen GTS, Nel SS, Erlank W and Mabeka NQ *Information and Communications Technology Law* 3<sup>rd</sup> ed (LexisNexis 2021) South Africa.

Watney *Cybercrime*.

Watney M "Cybercrime" in Papadopoulos S and Snail ka Mtuzze S *Cyberlaw @ SAIV: The Law of Internet in South Africa* 4<sup>th</sup> ed (Van Schaik Publishers Pretoria 2022) South Africa 463-492.

## **Journal Articles**

Al-Natour (2020) *Journal of Sociology*

Al-Natour R "The Digital Racist Fellowship Behind the Anti-Aboriginal Internet Memes" (2020) 57(4) *Journal of Sociology* 780-805.

Alston (2000) *UNSW Law Journal*

Alston R "The Government's Regulatory Framework for Internet Content" (2000) 23(1) *UNSW Law Journal* 192-197.

Bachman (2003) *German LJ*.

Bachman G "'*Volenti Non Fit Iniuria*' – How to Make a Principle Work" (2003) 10(4) *German Law Journal* 1033-1042.

Baker (2008) *Deakin LR*.

Baker R "Defamation and the Moral Community" (2008) 13 *Deakin Law Review* 1-35.

Batchelor and Tapiwa (2021) *Obiter*.

Batchelor B and Tapiwa S "Combating Harassment under the Protection from Harassment Act 17 of 2011 in South Africa: Does it Punish Victims and Protect Perpetrators?" (2021) *Obiter* 268-288.

Bossio et al (2022)

Bossio D, Flew T, Meese J, Leaver T and Barnett B "Australia's News Media Bargaining Code and the Global Turn Towards Platform Regulation" (2022) 14 *Policy Internet* 136-150.

Cascio and Montealegre (2016) *Annual Review of Organizational Psychology and Organizational Behavior*.

Cascio WF and Montealegre R "How Technology Is Changing Work and Organizations" (2016) 3 *Annual Review of Organizational Psychology and Organizational Behavior* 349-375.

Cassim (2017) *SALJ*.

Cassim F "Regulating Hate Speech and Freedom of Expression on the Internet: Promoting Tolerance and Diversity" (2017) 28(3) *South African Law Journal* 303-336.

Cheshmedzhieva (2023) *The European Journal of Humour Research*.

Cheshmedzhieva D "The General Said": Challenges in Understanding Covid-19 Memes" (2023) 11(2) *The European Journal of Humour Research* 49-67.

Chitimira and Ncube (2021) *PELJ*.

Chitimira H and Ncube P "The Regulation and Use of Artificial Intelligence and 5G Technology to Combat Cybercrime and Financial Crime in South African Banks" (2021) 24 *Potchefstroom Electronic Law Journal* 1-32.

Douglas and Bennet (2020) *Brief*.

Douglas M and Bennett M "'Publication' of Defamation in the Digital Era" (2020) 47 *Brief* 6-10.

Editorial (2018) *The Lancet*

Editorial "Growing Up in a Digital World: Benefits and Risks" (2018) 4 *The Lancet* 79.

Eiselen (2014) *PER*.

Eiselen S "Fiddling With The ECT Act – Electronic Signatures" (2014) *Potchefstroom Electronic Law Journal* 2805-2820.

Ewin (2001) *The Philosophical Quarterly*.

Ewin R "Hobbes on Laughter" (2001) 51(202) *The Philosophical Quarterly* 29-40.

Floridi (2016) *Philosophy & Technology*.

Floridi L "On Human Dignity as a Foundation for the Right to Privacy" (2016) *Philosophy & Technology* 307-312.



Garry (2020) *WLR*.

Garry PM "The Erosion of Common Law Privacy and Defamation: Reconsidering the Law's Balancing of Speech, Privacy, and Reputation" (2020) *Wayne Law Review* 279-324.

Grant (2002) *Journalism Studies*.

Grant D "Defamation and the Internet: Principles for a Unified Australian (and World) Online Defamation Law" (2002) *Journalism Studies* 115-132.

Hanks (2022) *LSA Legal Briefs*.

Hanks J "What Happens on The Internet Stays on The Internet? Defamation Law Reform and Social Media" (2022) *LSA Legal Briefs* 1-14.

How (2022) *The Southeast Asian Journal of English Language Studies*.

How C "What Do They Really 'Meme'? A Multimodal Study on 'Siakap Langkawi' Memes as Tools for Humour and Marketing" (2022) 28(2) *The Southeast Asian Journal of English Language Studies* 160-180.

Kenyon (2007) *Sydney Law Review*.

Kenyon A "Perfecting Polly Peck. Defences of Truth and Opinion in Australian Defamation Law and Practice" (2007) 29(4) *Sydney Law Review* 651-682.

Kheir *et al* (2020) *Birchgrove Legal*.

Kheir M, Alameddine H and Parton W "Defamatory content online: The responsibility of online intermediaries? A comparative analysis of Australia, the United States, the European Union, and Canada's regulatory responses" (2020) *Birchgrove Legal* 1-19.

Kriel *et al* (2012) *De Rebus*.

Kriel K, Manyathi N and Sedutla M "Social Networking for Attorneys" (2012) 66 *De Rebus* 30-32.

Lantagne (2017) *URLL*.

Lantagne SM "Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication" (2017) 52 *University of Richmond Law Review* 387-389.

Leonard (2010) *JIMEL*.

Leonard P "Safe Harbours in Choppy Water – Building a Sensible Approach to Liability of Internet Intermediaries in Australia" (2010) 3(2) *Journal of International Media and Entertainment Law* 221-261.

Lyer (2018) *Speculum Juris*.

Lyer D "An Analytical Look into the Concept of Online Defamation in South Africa" (2018) 32 *Speculum Juris* 124-134.

Matamoros-Fernández et al (2022) *Media and Communication*.  
 Matamoros-Fernández A, Rodriguez A and Wikström P “Humor That Harms? Examining Racist Audio-Visual Memetic Media on TikTok During Covid-19” (2022) 10(2) *Media and Communication* 180-191.

Meagher (2019) *MULR*.  
 Meagher D “Is There a Common Law ‘Right’ to Freedom of Speech?” (2019) 43(1) *Melbourne University Law Review* 269-302.

Mhlanga (2022) *International Journal of Environmental Research and Public Health*.  
 Mhlanga D “The Role of Artificial Intelligence and Machine Learning Amid the COVID-19 Pandemic: What Lessons are We Learning on 4IR and the Sustainable Development Goals” (2022) 19(3) *International Journal of Environmental Research and Public Health* 1-22.

Musoni (2019) *Obiter*.  
 Musoni M “The Criminalisation of “Revenge Porn” in South Africa” (2019) *Obiter* 61-74.

Nancy, Boyd and Boyd (2012) *Journal of Broadcasting & Electronic Media*.  
 Nancy K, Boyd B and Boyd D “Socially Mediated Publicness: An Introduction” (2012) *Journal of Broadcasting & Electronic Media* 320-329.

Nel (1997) *CILSA*.  
 Nel S “Defamation on the Internet and Other Computer Networks” (1997) 30 *Comparative and International Law Journal of Southern Africa* 154-174.

Nissenbaum and Shifman (2017) *New Media and Society*.  
 Nissenbaum A and Shifman L “Internet Memes as Contested Cultural Capital: The Case of 4chan’s /b/ Board” (2017) 19(4) *New Media and Society* 483-501.

Nwabueze (2019) *SAIPLJ* 116.  
 Nwabueze CJ “Social Media, Online Communications and Defamation in the Workplace: A Puzzle for Liabilities?” (2019) *South African Intellectual Property Law Journal* 116-142.

Priyadarshini et al (2022) *Applied Artificial Intelligence*.  
 Priyadarshini I, Chatterjee JM, Sujatha R, Jhanjhi N, Karime A and Masudet M “Exploring Internet Meme Activity During Covid-19 Lockdown Using Artificial Intelligence Techniques” (2022) 36(1) *Applied Artificial Intelligence* 1382-1405.

Rolph (2008) *Torts LJ*  
 Rolph D “A Critique of The National, Uniform Defamation Laws” (2008) 16 *Torts Law Journal* 207-248.

Rolph (2019) *Australian Feminist Law*.  
 Rolph D “Defamation, Race and Racism” (2019) *Australian Feminist Law* 351-371.

Rolph (2021) *Torts LJ*.

Rolph D "The Concept of Publication in Defamation Law" (2021) 27 *Torts Law Journal* 1-27.

Rolph (2010) *UNSW Law Journal*.

Rolph D "Publication, Innocent Dissemination And The Internet After Dow Jones & Co Inc V Gutnick" (2010) 33 *UNSW Law Journal* 562-580.

Roos (2012) *SALJ*.

Roos A "Privacy in the Facebook Era: A South African Legal Perspective" (2012) 129 *South African Law Journal* 375-402.

Roos and Slabbert (2014) *PELJ*.

Roos A and Slabbert M "Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)" (2014) 17 *Potchefstroom Electronic Law Journal* 2845-2868.

Sanchez *Pathways*.

Sanchez B "Internet Memes and Desensitization" (2020) *Pathways: A Journal of Humanistic and Social Inquiry* 1-11.

Shifman (2013) *Journal of Computer-Mediated Communication*.

Shifman L "Memes in a Digital World: Reconciling with a Conceptual Troublemaker" (2013) 18 *Journal of Computer-Mediated Communication* 362-374.

Smith and Urbas (2022) 3 *Australian National University Journal of Law and Technology*.

Smith M and Urbas G "Evolving Legal Responses To Social Media: Litigation, Legislation And System Architecture" (2022) 3 *Australian National University Journal of Law and Technology* 8-31.

Snail ka Mtuze and Musoni (2023) *International Cybersecurity LR*

Snail ka Mtuze S and Musoni M "An Overview of Cybercrime Law in South Africa" (2023) 4 *International Cybersecurity Law Review* 299-323.

Stone (1998) *UNSW LJ*.

Stone A "Lange, Levy and the Direction of the Freedom of Political Communication Under the Australian Constitution" (1998) *UNSW Law Journal* 117-123.

Wolf, Sims and Yang (2018) *UK Academy for Information Systems Conference Proceedings*

Wolf M, Sims J and Yang H "Social Media? What Social Media?" (2018) *UK Academy for Information Systems Conference Proceedings* 2.

Zakaria et al (2019) *International Journal of Law, Government and Communication*.

Zakaria Z, Ghani FA, Razali NHA, Sulaiman NS, Nawi NHM "Liability Of Internet Service Provider In Cyber Defamation: An Analysis On Communication And Multimedia Act 1998" (2019) *International Journal of Law, Government and Communication* 66-71.

## **Legislation**

### **South Africa**

Constitution of the Republic of South Africa, 1996.

Criminal Procedure Act 51 of 1977.

Cybercrime Act 19 of 2020

Electronic Communications and Transactions Act 25 of 2002.

Films and Publications Amendment Act 11 of 2019.

Promotion of Access to Information Act 2 of 2000.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

### **Australian**

Broadcasting Services Act 1992

Commonwealth of Australia Constitution Act, 1900.

Defamation Act 77 of 2005 (New South Wales).

Defamation Amendment Act 2020 No 16.

Defamation Amendment Bill 2022.

Industrial Relations Act 86 of 1988.

Online Safety Act 2021.

Online Safety Act 2021 Compilation No 1 (as amended on 23 January 2022).

Privacy Act of 1988.

Telecommunications Act 1997.

Uniform Defamation Laws of 2006.

## **Case Law**

### **South Africa**

*ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016).

*Bernstein v Bester* 1996 (2) SA 751 (CC).

*Cawood and Another v Mthimunye and Others* (2020) ZAMPMBHC 13.

*Chilowore v Menyaka; Phiri v Sandala; Terblanche v Nadine; Bester v Kemp; Makgareetsa v Molapisi; Kolobi v Seitebaleng* (2019) ZAGPJHC 198.

*Clover SA (Pty) Limited and Another v Sintwa* (2016) 12 BLLR 1265 (ECG).

*Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

*Economic Freedom Fighters (EFF) and Others v Manuel* (2021) 1 All SA 623 (SCA).

*Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd. and Another* (1993) (2) SA 451.

*Flocutt (Pty) Ltd v Eisenberg* (2016) ZASCA 33.

*Gwe v De Lange and Another* (2020) 1 BLLR 92 (ECP).

*Halewood International South Africa (Pty) Ltd v Van Zyl and Another* (2023) ZAGPJHC 262.

*Hanekom v Zuma* (2019) ZAKZDHC.

*Herbal Zone (Pty) Limited and Others v Infitech Technologies (Pty) Limited and Others* (2017) 2 All SA 347 (SCA).

*Heroldt v Wills* 2013 (2) SA 530 (GSJ).

*Hoffmann v South African Airways* (2000) 12 BLLR 1365 (CC).

*Gqubule-Mbeki and Another v Economic Freedom Fighters (EFF) and Another* (2020) ZAGPJHC 2.

*Isparta v Richter and Another* 2013 (6) SA 529 (GNP).

*Ketler Investments CC t/a Ketler Presentations v Internet Service Providers Association* 2014 (2) SA 569 (GSJ).

*Khumalo and Others v Holomisa* (2002) ZACC 12.

*Khumalo v Holomisa* 2002 (8) BCLR 771 (CC).

*Kumalo v Cycle Lab (Pty) Ltd* 2011 JOL 27372 (GSJ).

*Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* (2006) (1) SA 144 (CC).

*Lawrence and Others v Mitha and Another* (2019) ZAGPJHC 343.

*Le Roux and Others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as amicus curiae) 2011 (3) SA 274 (CC).

*Manuel v Economic Freedom Fighters (EFF) and Others* (2019) ZAGPJHC.

*Manyi v Dhlamini* (2018) ZAGPPHC 563.  
*Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC).  
*Meyer/Onelogix (Pty) Ltd* (2018) 11 BALR 1232 (CCMA).  
*Moepi v Ratlhangane* (2019) ZAGPPHC 493.  
*Motsepe v S* (2) SACR 125 (GP).  
*Mthembu-Mahanyela v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA).  
*National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA).  
*National Media Ltd v Jooste* 1996 (3) SA 262 (A) 271; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T).  
*O’Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954 (3) SA 244 (C).  
*Pieterse v Clicks Group Ltd t/a Clicks Stores and Another* (2015) (5) SA 317.  
*Qwelane v South African Human Rights Commission and Another* (2021) (6) SA 579 (CC).  
*Rapp van Zyl Incorporated and Others v FirstRand Bank and Others* (2022) 3 All SA 437 (WCC).  
*Reynolds v Times Newspaper* (2001) 2 AC 127.  
*RM v RB* 2015 (1) SA 270 (KZP).  
*S v Hoho* 2009 (1) SACR 276 (SCA).  
*S v Makwanyane* 1995 (3) SA 391 (CC).  
*S v Mamabolo* (2001) (3) SA 409 (CC).  
*Setlogelo v Setlogelo* 1914 AD 221 227.  
*SKJ v PJ and Another* (2016) ZAKZDHC 33.  
*The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC).  
*Tsedu and Others v Lekota and Another* (2009) (4) SA 372 (SCA).  
*Universal Church of The Kingdom of God v Bongani* (2022) ZAGPJHC 518.  
*Vermaak v Van der Merwe* 1981 (3) SA 78 (N).  
*Waring and Gillow Ltd v Sherborne* 1904 TS 340 344.  
*Whittington v Bowles* 1934 EDL 142.

## **Australia**

*Adam v Ward* [1917] AC 309.

*Australia Capital Television Pty Ltd v Commonwealth* HCA 45, (1992) 177 CLR 106.

*Bruce v Odhams Press Ltd* (1936) 1 KB 697.

*BeautyFULL CMC Pty Ltd v Hayes* (2021) QDC 111.

*Burrows v Houda* (2020) NSWDC 485.

*Chakravarti v Advertiser Newspapers Ltd* (1998) HCA 37.

*Dow Jones & Co Inc v Gutnick* (2002) HCA 56, 210 CLR 575, 194 ALR 433, 77 ALJR 255.

*Dwek v Macmillan Publishers Ltd* (1999) EWCA Civ 2002.

*E Hulton & Co v Jones* (1910) AC 20.

*Fairfax Media Publications Ltd v Dylan Voller; Nationwide News Pty Limited v Dylan Voller; Australian News Channel Pty Ltd v Dylan Voller* (2021) HCA 27.

*Google Inc v Trkulja* (2016) VSCA 333.

*Hardie v Herald & Weekly Times Pty Ltd* (2016) VSCA 103.

*Howden v Truth and Sportsman Ltd* (1937) 58 CLR 416.

*Howden v Truth and Sportsman Ltd* (1937) 37 SR (NSW) 521.

*John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR.

*Knupffer v London Express Newspapers Ltd* (1944) AC 116.

*Lange v Australian Broadcasting Corporation* HCA 25, (1997) 189 CLR 520.

*Lord McAlpine of West Green v Sally Bercow* (2013) EWHC 1342 (QB).

*Mickle v Farley* (2013) NSWDC 295.

*Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632.

*Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1 (30 September 1992)

*Reid v Dukic* (2016) ACTSC 344.

*Trkulja v Google Inc & Anor* (2012) VSC 533.

*Uren v John Fairfax & Sons Pty Ltd* (1966) HCA 40; 117 CLR 118; (1967) ALR 25.

## **Other**

*Kindler v Canada* (1992) 6 CRR (2d).

## Reports

Ahmed and Bulmer *Limitation Clauses*.

Ahmed D and Bulmer E *Limitation Clauses* (International Institute for Democracy and Electoral Assistance 2017).

Arts Law Centre of Australia *Defamation Law*.

Arts Law Centre of Australia *Defamation Law* (Australia Council 2022).

Australian Human Rights Commission *Freedom of Information, Opinion and Expression*.

Australian Human Rights Commission *Freedom of Information, Opinion and Expression* (AHRC 1986).

Australian Human Rights Commission *Internet Regulation in Australia*.

Australian Human Rights Commission *Internet Regulation in Australia* (AHRC 1986).

Australian Government *Privacy Act Review Issues Paper*.

Australian Government *Privacy Act Review Issues Paper* (Australian Information Commissioner and Privacy Commissioner 2011)

Brannon *Free Speech*.

Brannon VC *Free Speech and the Regulation of Social Media Content* (Congressional Research Service Report 2019).

Department of Justice and Constitutional Development *The Basic Provisions of the Constitution*.

Department of Justice and Constitutional Development *The Basic Provisions of the Constitution of the Republic of South Africa, 1996, Made Easy for Learners* (RSA Government 2021).

Ehrlich A *Brief History of Internet Regulation*.

Ehrlich EV *A Brief History of Internet Regulation* (Progressive Policy Institute 2014).

EU Australia *European Union–Australia Partnership Framework*.

EU Australia *European Union–Australia Partnership Framework* (EU & Australian Department of Foreign Affairs and Trade 2008).

EU Australia *Framework Agreement*.

EU Australia *Framework Agreement Between The European Union And Its Member States, of The One Part, And Australia, of The Other Part* (EU & Australian Department of Foreign Affairs and Trade 2017).

Government Communication and Information System *Social Media Policy Guidelines*.

Government Communication and Information System, *Social Media Policy Guidelines* (South Africa 2011).

Jones *Debunking Dreyfus on Free Speech and Freedom*.

Jones B *Debunking Dreyfus on Free Speech and Freedom* (Open Letter to Australia Parliament House 2014).



Law Council of Australia *Social Media (Anti-Trolling) Bill 2022*  
Law Council of Australia *Social Media (Anti-Trolling) Bill 2022* (Senate Legal and Constitutional Affairs Legislation Committee 2022).

Robinson, Smith *Social Media and Mental Health*.  
Robinson L, Smith M *Social Media and Mental Health* (HelpGuide 2023).

South African Human Rights Commission *Summary of the Social Harmony*.  
South African Human Rights Commission *Summary of the Social Harmony Through National Effort (SHINE)* (SAHRC 2023).

Speakman *Review Recommends Defamation Cyber-Age Reboot*.  
Speakman M *Review Recommends Defamation Cyber-Age Reboot* (NSW Government 2018).

## **International Instruments**

European Convention on Human Rights, 1950.

## **News Articles**

Bateman B "Tuks investigates SRC deputy leader's racism comments" 2016-08-30 Eyewitness News.

BBC Trending "The Australian Teen Suing Over Mullet Memes" 2016-11-03 BBC News.

BusinessTech "Mxit is Officially Dead" 2016-10-06 BusinessTech.

Douglas M "Australia's 'Outdated' Defamation Laws Are Changing – But There's No 'Revolution' Yet" 2020-07-28 The Conversation.

George P "Reviewing Defamation Law for the Digital Age" 2019-04-01 LSJ.

Gill M "Holding Social Media Platforms Accountable For Trolls: What A Draft Bill In Australia Proposes" (*The Indian Express*, 30 November 2021) <https://indianexpress.com/article/explained/explained-australias-bill-social-media-companies-7647341/> (Date of use: 30 November 2021).

Halim T "Gigaba Took Matters Into His Own Hands" 2018-11-02 Daily Voice.

Karp P "Freedom of Speech May Not Be Protected by Australia's Constitution, High Court Judge Says" 2021-06-16 The Guardian.

McGovern A and Milivojevic S "Social Media and Crime: The Good, The Bad and The Ugly" 2016-10-16 The Conversation.

Majavu N and Dlamini P "Films and Publications Amendment Act Leaves Online Content Producers Hot Under the Collar" (*City Press*, 3 May 2022) <https://www.news24.com/>

[citypress/news/films-and-publications-amendment-act-leaves-producers-hot-under-the-collar-20220305](#) (Date of use: 5 May 2022).

Lewis P and Paul Hilder P “Leaked: Cambridge Analytica's Blueprint for Trump Victory” 2018-03-23 The Guardian.

Miya N “Malusi Gigaba Sex Tape Divides Twitter” 2018-10-29 Sunday Times Live.

Mueni P “Nikita Murray: Everything We Have Found Out About Katlego Maboe's Mistress” 2020-10-26 Briefly.

Naik S “Facebook Loses Court Case for Refusing to Remove Defamatory Post by SA Woman” 2020-10-03 IOL.

Nkanjeni U “Mask Off! 10 of the Best Reactions to Cyril Ramaphosa's Mask Mishap” 2020-04-24 Sunday Times Live 2023).

Nonyane M “Belinda Magor's Racist Rant 'Constituted Hate Speech', Impaired Dignity of Black South Africans – SAHRC” 2023-10-01 News24.

Pelly M “Changes to ‘Outdated’ Defamation Law Fast-Tracked for Social Media Age (*Financial Review*, 31 January 2019) <https://www.afr.com/companies/professional-services/changes-to-outdated-defamation-law-fasttracked-for-social-media-age-20190130-h1an29> (Date of use: 23 November 2023).

## Internet Sources

Allen K “South Africa Lays Down The Law on Cybercrime” <https://issafrica.org/iss-today/south-africa-lays-down-the-law-on-cybercrime> (Date of use: 9 June 2023).

Anderson J and Rainie L “Concerns About Democracy in The Digital Age” <https://www.pewresearch.org/internet/2020/02/21/concerns-about-democracy-in-the-digital-age/> (Date of use: 21 February 2023).

Australian Government “Federal Register of Legislation” <https://www.legislation.gov.au/C2004A03712/2017-08-23/text> (Date of use: 23 August 2017).

Australian Government “Privacy” [https://www.ag.gov.au/rights-and-protections/privacy#:~:text=The%20Privacy%20Act%201988%20\(Privacy,and%20in%20the%20private%20sector](https://www.ag.gov.au/rights-and-protections/privacy#:~:text=The%20Privacy%20Act%201988%20(Privacy,and%20in%20the%20private%20sector) (Date of use: 23 August 2017).

Australian Law Reform Commission “Laws that Interfere with Freedom of Speech” <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/3-freedom-of-speech/laws-that-interfere-with-freedom-of-speech/> (Date of use: 31 July 2023).

Australian Law Reform Commission “What is a Tort?” <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/17-immunity-from-civil-liability/what-is-a-tort/> (Date of use: 31 July 2023).

Australian National University “The Australian Legal System”  
<https://libguides.anu.edu.au/c.php?g=634887&p=4547083> (Date of use: 15 March 2023).

Beal V “E-Mail Signature” <https://www.webopedia.com/definitions/e-mail-signature/> (Date of use: 9 November 2022).

Bregman Moodley Attorneys “Social Media and the Law”  
<https://www.bregmans.co.za/social-media-and-the-law/> (Date of use: 26 October 2022).

Brown L “50 Cent Mocks Floyd Mayweather With Great Manny Pacquiao Meme”  
<https://larrybrownsports.com/boxing/50-cent-floyd-mayweather-manny-pacquiao-meme/239640> (Date of use: 28 August 2023).

Cartwright M “Twelve Tables” [https://www.worldhistory.org/Twelve\\_Tables/](https://www.worldhistory.org/Twelve_Tables/) (Date of use: 11 April 2023).

Cornell Law “*Prima Facie*” [https://www.law.cornell.edu/wex/prima\\_facie](https://www.law.cornell.edu/wex/prima_facie) (Date of use: 4 January 2023)

Dictionary.com “Broadband” <https://www.lexico.com/en/definition/broadband> (Date of use: 29 May 2023).

Dictionary.com “Caricature” <https://www.dictionary.com/browse/caricature> (Date of use: 3 February 2023).

Dictionary.com “Clout chasing” <https://www.dictionary.com/e/slang/clout/> (Date of use: 28 January 2023).

Dictionary.com “Meme” <https://www.dictionary.com/browse/meme> (Date of use: 20 March 2023).

Dictionary.com “Trending” <https://www.lexico.com/en/definition/trending> (Date of use: 20 November 2022).

Dictionary.com “Wi-Fi” <https://www.lexico.com/en/definition/wi-fi> (Date of use: 29 May 2023).

Equality and Human Rights Commission “Article 10: Freedom of Expression”  
<https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression> (Date of use: 3 June 2023).

eSafety Commissioner “Learn about the Online Safety Act”  
<https://www.esafety.gov.au/newsroom/whats-on/online-safety-act> (Date of use: 21 February 2023).

Etheringtons Solicitors “Be Careful What You Say on Social Media”  
<https://etheringtons.com.au/defamation-on-social-media/> (Date of use: 27 July 2023).

Gentile L “These Junk Food Memes Will Make Your Mouth Water – Practice Self-Control”  
<https://memes.com/blog/these-junk-food-memes-will-make-your-mouth-water> (Date of use: 20 August 2023).

Gil P “What is a Meme?” <https://www.lifewire.com/what-is-a-meme-2483702> (Date of use: 6 May 2023).

Gillis AS “ISP (Internet Service Provider)” <https://www.techtarget.com/whatis/definition/ISP-Internet-service-provider> (Date of use: 14 December 2023).

Griffiths O “Reform of Defamation Law” [https://www.apf.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook46p/DefamationReform](https://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/DefamationReform) (Date of use: 30 June 2023).

Heather “Give a Man a Mask and He Will Show His True Face” <https://mindsetmadebetter.com/2021/09/give-a-man-a-mask-and-he-will-show-you-his-true-face/> (Date of use: 2 September 2022).

History.Com “Apartheid” <https://www.history.com/topics/africa/apartheid>. (Date of use: 3 March 2023).

Human Rights Guide “Freedom of Expression & Media” <https://www.cilvektiesibugids.lv/en/themes/freedom-of-expression-media> (Date of use: 18 August 2023).

Index on Censorship “Why is Free Speech Important?” <https://www.indexoncensorship.org/2016/04/free-speech-important/> (Date of use: 13 April 2023).

Kemp S “Digital 2021: Australia” <https://datareportal.com/reports/digital-2021-australia> (Date of use: 9 February 2023).

Kerner SM “Facebook” <https://whatis.techtarget.com/definition/Facebook> (Date of use: August 2023).

Kitchen K “What Do You Meme it is Illegal to Share Meme?” <https://www.kisch-ip.com/article/what-do-you-meme-it-illegal-share-memes> (Date of use: 26 March 2023).

Le Roux MB “Social Media and the South African Law” <https://www.cch.co.za/news/social-media-the-south-african-law/> (Date of use: 10 July 2023).

Lepard C “What are GIFs and How to Effectively Use Them on Social Media” <https://www.wix.com/blog/2017/11/gifs-in-social-media> (Date of use: 16 November 2022).

Madu Z “It’s Cruel to Laugh at Floyd Mayweather’s Reading Problems” <https://www.sbnation.com/2015/9/4/9213521/floyd-mayweather-reading-berto-fight-rousey> (Date of use: 26 August 2023).

Man's NOT Barry Roux (@AdvoBarryRoux) “Nando are Already on Malusi Gigaba’s Case” <https://twitter.com/AdvoBarryRoux/status/1056525134130044928> (Date of use: 28 October 2022).

Memes Monkey “Floyd Mayweather Memes” <https://www.mememonkey.com/topic/floyd+mayweather> (Date of use: 28 August 2023).

Merriam Webster “GIF” <https://www.merriam-webster.com/dictionary/GIF> (Date of use: 6 September 2022).

Merriam Webster “Internet” <https://www.merriam-webster.com/dictionary/Internet> (Date of use: 14 August 2022).

Merriam Webster “Tortfeasor” <https://www.merriam-webster.com/legal/tortfeasor> (Date of use: 31 July 2022).

Michalsons “Cybercrimes Act in South Africa” <https://www.michalsons.com/focus-areas/cybercrime-law/cybercrimes-act-south-africa> (Date of use: 5 April 2022).

Miller M “Floyd Mayweather 2.0: Growing Pains” <https://www.badlefhook.com/2009/9/17/1034407/floyd-mayweather-2-0-growing-pains> (Date of use: 17 September 2023).

Mybroadband “The History of Internet access in South Africa” <https://mybroadband.co.za/news/internet/114645-the-history-of-internet-access-in-south-africa.html> (30 November 2022).

Nando’s “South Africa: Where The Fire Began” <https://www.nandos.co.za/work/about-us> (Date of use: 2 November 2022).

Neshapriyan M “Social Media And Freedom of Speech And Expression” <https://www.legalserviceindia.com/legal/article-426-social-media-and-freedom-of-speech-and-expression.html> (Date of use: 28 February 2022).

New South Wales Caselaw “Memes” <https://www.caselaw.nsw.gov.au/search?query=memes&pagenumber=> (Date of use: 16 January 2023).

NewsCentral Media “The Internet in South Africa Turns 25” <https://www.ru.ac.za/informationandtechnologyservices/latestnews/theinternetinsouthafriceturns25.html#:~:text=The%20now%2Dretired%20Mike%20Lawrie,Africa%20for%20exactly%2025%20years.%E2%80%9D> (Date of use: 17 February 2023).

Next Nature “Enter the Memesphere” <https://nextnature.net/magazine/visual/2021/entering-the-memesphere> (Date of use: 29 July 2022).

NSW Government “Review of Model Defamation Provisions” <https://dcj.nsw.gov.au/about-us/engage-with-us/past-consultations/statutory-reviews/review-model-defamation-provisions.html> (Date of use: 31 March 2023).

Parliament of Australia “The Constitution” <https://www.aph.gov.au/infosheets/13> (Date of use: 15 March 2023).

Privacy International “What is Privacy?” <https://privacyinternational.org/explainer/56/what-privacy> (Date of use: 23 October 2022).

Rainie L, Anderson J and Albright J “The Future of Free Speech, Trolls, Anonymity and Fake News Online” <https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/> (Date of use: 29 March 2023).

r/Kanye “an r/memes story in two pictures (top comment btw)” [https://www.reddit.com/r/Kanye/comments/sfwzeb/an\\_rmemes\\_story\\_in\\_two\\_pictures\\_top\\_comment\\_btww/](https://www.reddit.com/r/Kanye/comments/sfwzeb/an_rmemes_story_in_two_pictures_top_comment_btww/) (Date of use: 27 July 2022).

Seacom “How Much Internet Traffic in South Africa Has Increased Due to the Coronavirus” <https://seacom.co.za/media-centre/how-much-internet-traffic-south-africa-has-increased-due-coronavirus/> (Date of use: 5 April 2023).

Shumsky M “Australia: Social Media Defamation: Be Cautious When Posting or Re-posting Online Comments, Reviews and Links” <https://www.mondaq.com/australia/social-media/978550/social-media-defamation-be-cautious-when-posting-or-re-posting-online-comments-reviews-and-links> (Date of use: 26 August 2023).

Singh A “Social Media and Defamation Online: Guidance from Manuel v EFF” <https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff/> (Date of use: 31 May 2023).

Singh R “Emoji Meanings: Types of Emojis and What Do They Mean” <https://www.91mobiles.com/hub/emoji-meanings/> (Date of use: 28 November 2023).

Social Media Perth “Everything You Need to Know About Social Media” <https://www.smp Perth.com/resources/social-media-statistics/> (Date of use: 8 November 2022).

South African Broadcasting Corporation “About Us” <https://www.sabc.co.za/sabc/about-us/> (Date of use: 12 September 2022).

Sguazzin A “Ramaphosa Train Farce, Corruption Woes Mocked in Memes” <https://www.fin24.com/Economy/ramaphosa-train-farce-corruption-woes-mocked-in-memes-20190321-2>. (Date of use: 21 March 2023).

Statista “Number of Users of Twitter in South Africa 2019-2028” <https://www.statista.com/statistics/558415/number-of-twitter-users-in-south-africa/> (Date of use: 24 November 2023).

Stats SA “How COVID-19 Changed The Way We Learn” <https://www.statssa.gov.za/?p=15197> (Date of use 24 February 2022).

TechSmith “How To Make a Meme” <https://www.techsmith.com/blog/how-to-make-a-meme/> (Date of use: 11 November 2022).

Taxing Law “Know About Social Media Basic Expectations And Defamation Bill 2021” <https://www.defamationlawyersperth.com.au/blog/know-about-social-media-basic-expectations-and-defamation-bill-2021/> (Date of use: 28 December 2021).

TK “Moshe Ndiki Claps Back at Musa Khawula, He Was Not Fired” <https://www.sarichandfamous.com/2022/09/17/moshe-ndiki-claps-back-at-musa-khawula-he-was-not-fired/> (Date of use: 17 September 2022).

TMO Contributor “Facebook Face-off – SA Law Firm Takes on Facebook And Wins” <https://themediainline.co.za/2020/10/facebook-face-off-sa-law-firm-takes-on-facebook-and-wins/> (Date of use: 2 October 2022).

Urbandictionary.com “Trolling” <https://www.urbandictionary.com/define.php?term=Trolling> (Date of use: 3 January 2023).

Webwise “Explainer: What is Periscope?” <https://www.webwise.ie/parents/explainer-what-is-periscope/> (Date of use: 14 October 2022);

Westbrook C “What is FaceApp And Why Are People Concerned About It?” <https://metro.co.uk/2019/07/18/faceapp-people-concerned-10413997/> (Date of use: 18 July 2023).

White T “Humor Promotes Spread and Retention of News, Study Finds” <https://www.verywellmind.com/humor-key-in-helping-young-adults-pay-attention-to-news-5097144> (Date of use: 3 February 2023).

Wikipedia "Mxit" <https://mybroadband.co.za/news/software/331336-the-rise-and-fall-of-mxit-in-south-africa.html> (Date of use: 4 December 2019).

Williams G, Fourie T and Siyaya S “The Newly Enacted Cybercrimes Act and What It Means for South Africans” <https://www.golegal.co.za/newly-enacted-cybercrimes-act/> (Date of use: 26 July 2023).

Worldometer “South African Population” <https://www.worldometers.info/world-population/south-africa-population/> (Date of use: 3 January 2024).

World Population Review “Australia” <https://worldpopulationreview.com/countries/australia-population> (Date of use: 12 October 2022).

X Help Centre “About Direct Messages” available at <https://help.twitter.com/en/using-x/direct-messages> (Date of use: 23 April 2023).

X Help Centre “About Public and Protected Posts” available at <https://help.twitter.com/en/safety-and-security/public-and-protected-posts> (Date of use: 23 April 2023).

X Help Centre “About Your For Your Timeline on X” available at <https://help.twitter.com/en/using-x/x-timeline> (Date of use: 23 April 2023).

X Help Centre “Misleading and Deceptive Identities Policy” <https://help.twitter.com/en/rules-and-policies> (Date of use: 23 April 2023).

X Help Centre “X Privacy Policy” available at <https://twitter.com/en/privacy#update> (Date of use: 23 April 2023).

Yeo A “Reminder: Australia Does Not Have Freedom of Speech” <https://www.lifehacker.com.au/2021/01/australia-does-not-have-freedom-of-speech/> (Date of use: 7 January 2022).