Submission to Dept of Infrastructure, Transport, Regional Development, Communications and the Arts on the proposed Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

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1. Introduction

I welcome the opportunity to respond to the request for public input on the Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation (mis/dis)) Bill 2023 (the **Amendment**) released by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the **Department**).

For reasons discussed below, I do not support the Amendment. I do however acknowledge and appreciate the fact our system of government provides openly accessible mechanisms for people and other entities to have their say, and for their submissions to be publicly available for others to review.

In addition to this, the release of the Guidance Note is an excellent tool for ensuring that those of us without formal legal training, can be appraised of the proposed changes and have input into the process.

It is my hope that we can be a society where open communication, respectful yet robust discourse, and ideas being subjected to vigorous testing is the norm; as these principles are the most effective tools against false, misleading, or deceptive content.

2. Responses to request for input in Guidance Note

2.1 The definition of misinformation and disinformation

The proposed amendment defines "misinformation" as "dissemination of content that is false, misleading or deceptive, and where the provision of that content is reasonably likely to cause or contribute to serious harm". It then defines "disinformation" as "dissemination of misinformation with the intent to deceive another person".

My first thought was "how will ‘cause or contribute to serious harm’ be determined?". Fortunately, the Bill goes on to list a number of matters that will be taken into account when the ACMA is determining 'serious harm', with the final 'any other relevant factor' leaving the door wide open for subjective interpretation and application of the law by those who wield it.

I crosschecked my reading of the Bill with the Guidance Note, and was stunned to read in section 2.1.2 of the Notes "...'misinformation' and 'disinformation' are used interchangeably for the remainder of this Guidance Note...". If these terms are so nebulous that they one can be used for the other, then what purpose do they both serve?

George Orwell in his essay "Politics and the English Language" said "In our time, political speech and writing are largely the defence of the indefensible… Thus, political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness… Where there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms…". I feel "misinformation" and "disinformation" fall rather neatly into the "long words" category. Australia is, or at least used to be, a plainspoken nation; why do we now need to follow the global herd and use vague, rubbery words, rather than plainly say what we mean?

As I read on, I kept being drawn back to the requirement for "serious harm". Naturally, I thought of the recent COVID pandemic and the various claims and counter-claims that were flying around the internet during this turbulent time. There certainly were outlandish claims, such as the "bleach

ingestion" referred to in the Guidance Note; however, there were also many other claims which at the time were derided as the ranting of "anti-vaxxers" or "conspiracy theorists" but with the benefit of hindsight's keen gaze, appear to clear the "misinformation" bar with room to spare.

I Searched "misinformation serious harm" and the first result was from the WHO[1], and I thought "who (heh) better from outside my normal circles to provide information about misinformation?". I read the article and then read the underpinning study[2], and it turns out that the primary "serious harm" caused by "misinformation" was "vaccine hesitancy". Based on this, the “serious harm” was to cause people to hesitate before committing to a medical treatment which had not undergone the usual clinical testing before being publicly available.

To define “harm”, there is an “any of the following” list, and the first item is “hatred”. While possibly appearing to be virtuous, I believe this term as used to be nebulous and highly divisive – this is evident from the debate that still goes on about its definition in both general and specific instances. Its loose definition in this Amendment opens the door for subjective application of the proposed laws, as a report of “hatred” will potentially require providers to flag or supress content, and include the content in either an aggregated or detailed report to the ACMA. We only need to look to the current debate about The Voice referendum to see how discussion about an issue which affects all Australians can be reduced to cheap, low-effort accusations of “racist” and “hate speech” instead of real discussions about the core issues.

There are comprehensive and detailed definitions and frameworks dealing with “hatred” and “hate speech”, including the UN’s “Rabat Plan of Action”[3]. The definitions of other categories and terms in the Amendment are defined tightly and clearly (as they should be), so the lack of attention to the definition of “hatred” is a concern.

The more research I did into “misinformation” and “disinformation”, and their linguistic sibling “malinformation”, the more it became apparent that these are themselves terms of misinformation and if desired, disinformation. Self-referencing ironies which may play a part in the daily discourse of those who wish to avoid analysis of the foundation of their claims, but ones that have no part in the law, where clarity is paramount.

If we take a step back, remove “misinformation” and “disinformation” and focus on their foundational terms “false, misleading or deceptive information” then we are getting closer to the heart of this Amendment.

Based on this, “misinformation” and “disinformation”, especially when combined with the “any other relevant factor” subclause, are essentially meaningless and the two core terms of the Amendment, are worse than worthless if the goal is clarity; serving only those who seek the proliferation of obscurity, for therein lie the tools for those that would chip away at the foundation of our free society.

[1] https://www.who.int/europe/news/item/01-09-2022-infodemics-and-misinformation-negatively-affect-people-s-health-behaviours--new-who-review-finds
[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9421549/
[3] https://www.ohchr.org/en/freedom-of-expression

2.2 The definition of digital platform services and the types of services we propose be subject to the new framework

The definition of “digital platform services” is extremely broad and appears to cover everything where any sort of public commenting is permitted. It includes everything from Facebook and Twitter to an individual person running a WordPress blog with comments turned on.

In addition to this, subclause 4(6) allows the Minister to specify “a digital service” as a “digital platform service” and thereby covered by the new framework, which would allow current and future Governments to use this law to target inconvenient emerging technologies and/or services. Partnered with this is subclause 6(2) which allows the Minister to exclude a service, thereby giving the Minister control over which services are included and excluded, which effectively provides Government with the carrot and stick when liaising with services.

Of greater concern is the blanket exemption of any Government content on these digital services. Clause 2’s definition of "excluded content" includes "content that is authorised by Commonwealth, State or Local Governments". Any Government subjecting its citizens to scrutiny, should at the very least subject itself to the same level of scrutiny, or preferably a higher level as an example to be emulated. The greater the transparency and brighter the light, the fewer places corruption and incompetence have to hide.

Let's take a leaf out of the Guidance Note and lay out a Scenario

> Scenario 1: An Energy Minister says in public[4] in response to a question about the cost of living crisis - "Renewable energy is the cheapest form of energy available without question. The sun doesn't send a bill, and the wind doesn't send an invoice. It is by far the cheapest form of energy. All the scientific evidence shows that. You get more renewable energy into the grid you get cheaper energy."
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> Users on social media platforms report posts by the Government containing this statement and provide links to data supporting their claims. They flagged the fact that the Minister says "cheapest form of energy", which is technically correct when viewed through the narrowest of lenses, void of anything aside from the literal interpretation of these words; however when put in the "cost of living" context of the question, where it is about how much consumers are going to be paying for electricity, then the "without question" part is clearly untrue, as there are many reputable sources who do question this; and the statement "all the scientific evidence shows this" is at best, hyperbolic.
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> Based on the language in the Bill, the ACMA has no recourse when contacted by an irate Minister demanding action over his press releases are being flagged then either taken down or shadow banned on social media platforms.

I fear scenarios like this are why the Government is exempted from this Amendment.

I note the references to ensuring political speech is exempted, however I am concerned as to why it needs to be. Will the censorship on non-political speech be so onerous as to render it all but moot? Why are the post from our Governments so much more important than the posts from the citizens these elected bodies serve?

[4] https://minister.dcceew.gov.au/bowen/transcripts/press-conference-victorian-minister-climate-action-energy-and-resources-and-state-electricity-commission-lily-dambrosio

2.3 How instant messaging services will be brought within the scope of the framework while safeguarding privacy

Instant messaging services do not need to be brought within the scope of the framework. As the then President of the Human Rights Commission, Gillian Triggs stated, to a room who reportedly gave her a standing ovation *"Sadly, you can say what you like around the kitchen table at home".* Instant messages, including but not limited to SMS, MMS, and direct or invite-only messages on digital platform services, should be as private and sacrosanct as our conversations within our homes.

2.4 The scope of the information-gathering and recording keeping powers, which includes the prevalence of false, misleading or deceptive information on digital platform services

The scope of the powers is essentially unlimited.

Both misinformation and disinformation require serious harm, and disinformation additionally requires intent, thereby somewhat limiting their powers. The Amendment's Clause 14, however, allows the ACMA to collect reporting on and "reports containing the information contained in the records" of "content containing false, misleading or deceptive information". This effectively allows targeting of anything the ACMA and the Minister deem to be undesirable.

2.5 The preconditions that must be met before the ACMA can require a new code, register a code and make an industry standard

The preconditions seem reasonable enough, however as they ratchet up, essentially mean that if a digital service resists compliance with a "voluntary" measure, the ACMA will have the tools to eventually enforce compliance. This makes the "voluntary" component essentially meaningless, for if a digital service is not a signatory, then it will be brought to heel via enforcement.

2.6 How the digital platforms industry may be able to operationalise the Bill and various content exemptions (e.g., professional news, satire, authorised electoral content)

I believe, based on my experience with current social media platforms, that digital platforms who embrace censorship of particular viewpoints (which is their right as private companies, assuming they are making these choices free from coercion from any outside agency) will be already compliant with the Amendment. The newer platforms which have sprung up as a result of censorship on the main platforms will either comply and then lose their reason for existing, or resist and run the gauntlet of whatever legislation ends up getting passed around the world.

2.7 Appropriate civil penalties and enforcement mechanisms for non-compliance

There are no appropriate penalties for non-compliance with this Orwellian abhorrence.

3. Other Items

3.1 The Twitter Files

These information releases showed clear Government interference, and deliberate censorship, including suppression of a story which could clearly have influenced the outcome of the previous Presidential election. Yes, this was America and we are Australia, however to believe that any

bureaucracy will not exercise whatever power is within its purview to accomplish its goals, is naive in the extreme.

3.2 Editorial Independence

“Professional news content” is explicitly excluded from the Amendment’s purview. "Manufacturing Consent: The Political Economy of the Mass Media" (1988, Edward S. Herman & Noam Chomsky) lays out 5 filters of editorial bias including "News media must therefore cater to the political prejudices and economic desires of their advertisers" and "If a given newspaper, television station, magazine, etc., incurs disfavor from the sources, it is subtly excluded from access to information. Consequently, it loses readers or viewers, and ultimately, advertisers. To minimize such financial danger, news media businesses editorially distort their reporting to favor government and corporate policies in order to stay in business". Clause 2’s definitions states the need for editorial independence from subject of the source’s coverage (i.e. the entity/topic being covered).

The idea that mainstream (aka “professional”) media has independence from the stories it covers of a political or socially relevant nature is plainly false. Media bias, towards both sides of the political spectrum, is clear; and evidence of media collusion with Governmental narratives is readily available.

4. Conclusion

Throughout the Bill, "protection for the community from misinformation and disinformation" is used. This is a patronising and ironically misleading and deceptive phrase. A well-educated, balanced and open community such as we have (for now) in Australia, does not need "protection" from "information" by an organ of the State. We are free, in our thus far Democratic society, to make our own choices, based on all the available information. Having anyone or anything control the flow of input information is to cede control of our lives to another entity, and this is anathema to the foundational principles of a humane society. We are a nation built upon hard work, a wide brown land of drought and flooding rains, and I believe our ancestors would be shocked at the thought of a society where the individuals allowed themselves to be led around by the metaphorical nose, like cattle to the slaughterhouse, by a nebulous parasitic overlord whose very existence is sustained by the taxes paid by those same hardworking individuals.

As was evident during the recent COVID-19 Pandemic, Governments and Health Authorities do not always get things right, and as time passes, topics that were branded “anti-science” or “dangerous misinformation” are now shown to be true. I bring this up not to target or mock any individual or group, but instead to highlight how the vast majority of Australian society was convinced that a certain narrative was correct, only to have more and more of the key parts of that narrative be shown to be either misinformation (any mention of a lab-leak would have you shadow banned at best) or simply false (videos are still up on YouTube where Rachel Maddow, CDC officials, and many others state that being vaccinated will prevent you from transmitting COVID).

I’ve never been in Government, and I am aware of how easy it is to throw stones from poorly erected glass houses, so instead of my opinion as to why Government would want a free pass for its content, I’ll quote Jacinta Ardern in 2020 at a press conference "*You can trust us as a source of that information. You can also trust the Director General of Health and the Ministry of Health. ... Otherwise, dismiss anything else. We will continue to be your single source of truth."*[5]

Perhaps this was a case of "in lassitudine, veritas"?

I was not a fan of Jacinta Ardern, Daniel Andrews, Mark McGowan, et al; however, they were leaders during a time of unprecedented pressure and I believe they made the decisions which they thought were right at the time. It is for this exact reason we need to jealously guard our freedoms and enshrine, as much as possible, these rights and freedoms in ways which cannot be undone on a whim. As the saying “the road to hell is paved with good intentions” implies, many evil outcomes begin benignly enough; and as the five-eyes nations all move in unison to enact similar legislation, it appears the road is being cleared of obstacles which reared up during the Pandemic and frustrated Governmental attempts to control communications and organisation of citizens who didn’t agree with the policies at the time.

The only balance we have against even a benevolent Government is the citizen’s ability to freely and openly discuss all topics, even (and maybe especially) those that make us uncomfortable.

[5] https://www.youtube.com/watch?v=ENEUktOrQV8