

Submission on the Exposure Draft of the Communication Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023. Particular clauses in the bill are referred to in the form (number).

The bill defines mis- and dis- information as false, misleading or deceptive content "reasonably likely" to cause or contribute to "serious harm" (discriminatory hate, disruption to public order, damage to the democratic process, harm to health, the environment, the economy). It can be disseminated by or on behalf of a foreign power (7). It is to be applied to social media services offered to the public but not - at least for now - to peer-to-peer services like email and text messaging (6).

So basically ACMA would have the hugely subjective (and somewhat arbitrary) power to decide what is false, misleading or deceptive and how "reasonably likely" it is to cause "serious harm" to society. (7(1)d). If the progress of science itself testifies how today's fact can turn into tomorrow's error (and vice versa), then government-inspired attempts at censorship in the end amount to a fool's errand at best and a cynical exercise in creeping authoritarianism at worst.

More remarkable is what is deemed to be content "excluded for misinformation purposes" (2, 6): apart from that material produced "in good faith" for entertainment and "professional news content", it's pretty much anything the government - and government-recognised academic institutions - says it is. Indeed not so long ago during the pandemic the NZ government openly and frankly stated they were the sole source of trusted information.

Although the intention is for industry bodies to develop codes (32) for "responses" to and "prevention" of (effectively censorship) mis- and dis- information, ACMA would certainly have discretion to determine if these codes are "reasonable" and "not excessive" (45). It would also have the power to formulate a "standard" (apparently synonymous with "code", this term isn't defined) if the industry does not, the current one is deemed deficient" by ACMA or in exceptional/urgent circumstances (again as deemed by ACMA, as per clauses 45-50).

ACMA can also direct providers to take "actions" for breaches and "incorrect" records (16, 17). It would also be able to obtain documentation from providers (and/or others) if it has "reason to believe" or "considers it necessary" and can keep that documentation indefinitely (24) (the owner gets a certified copy) (18, 19). These apparently coercive powers would extend to any person it believes has information about "misinformation or disinformation on a digital platform service" and can issue summons to answer questions about same (19(2,3)). There would be no protection from self-incrimination (21(3)). It has all the makings of a star chamber.

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Today it's increasingly difficult to sort fact from fiction, sense from nonsense and truth from fallacy, but short of Divine insight, the best (or least-worst) means we have to filter mid- and dis- information is still the freedom of speech, with all its messiness and occasional nastiness. In other words, the citizenry's capacity to call it out (and in so doing, persuade others who may have erroneously believed it). That will be limited - and ultimately completely suppressed - if the sort of silent censorship spawned by this bill is allowed to operate.

Even without this kind of legislation in place, we have already seen what amounted to a kind of dry run with revelations of the secret takedowns of over 4000 posts relating to the COVID pandemic: and now the government is looking to, as it were, "cement" this in law ?

The Communications Minister has been reported saying the legislation is "not about moderating content". Okay maybe not directly, but nonetheless quite effectively by palming off the dirty self-censoring work to the outlets: if only this determined ingenuity could find a more constructive outlet, say in the more mundane duties of government ...

Although this legislation is aimed at control of social media posts and explicitly excludes private emails and texts, it has to be likely - humanity being what it is - that some future government(s) will be tempted to extend control into the media generally and thereafter, those areas of private communications currently exempt from this bill.

This bill must be soundly defeated, preferably withdrawn.

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P.S. Clause 17(1) specifies a penalty of "100 penalty units" for the offence of creating or maintaining a false record. No idea what these "penalty units" are, maybe it's a remnant of "boilerplate" language left behind by a (hurried?) draftsman.