To: The Department of Infrastructure, Transport, Regional Development, Communications and the Arts
GPO Box 594
Canberra ACT 2601

Re: New ACMA powers to combat misinformation and disinformation (the Communications Legislation Amendment [Combatting Misinformation and Disinformation] Bill 2023)

Dear Officer,

I write to express my extreme concern at the above-named bill, which is entirely redundant, antithetical to the liberal democratic principles on which this country was founded, badly drafted with poorly-defined key terms, and in direct contravention of the International Covenant on Civil and Political Rights, to which Australia is a signatory.

The Bill is unnecessary and illiberal

The Fact Sheet on the draft bill states that "Misinformation and disinformation pose a threat to the safety and wellbeing of Australians, as well as our democracy, society and economy". No evidence is presented in support of this claim.

The government already has the means to take action on genuine threats to national security, on fraud, and on speech which incites violence.

Even vile speech which expresses views that are repugnant to most people is not a "threat" to Australians or our institutions. In fact, liberal democracies such as Australia rest on the principle that people have the right to hold and to freely express any beliefs that they choose. It is not government's place to attempt to regulate the expression of such views, because government has no mandate, let alone capacity, to be the arbiter of what is "false, misleading or deceptive", except in narrowly-defined circumstances such as financial fraud and scams.

As US Supreme Court Justice Louis Brandeis wrote in 1927, "the remedy to be applied [to falsehood and fallacies] is more speech, not enforced silence." Only a government which doubts its own ability to persuade the people by presenting verifiable facts and engaging

in reasoned argument, seeks the ability to instead silence its detractors and dissenters. Such a government has already taken the first dangerous steps on the road to totalitarianism.

The Bill is badly drafted, and its key terms are poorly defined

The draft Bill gives ACMA the power to "make digital platform rules requiring digital platform providers to keep records and report to the ACMA on matters relating to misinformation and disinformation on digital platform services" and to "develop codes in relation to measures to prevent or respond to misinformation and disinformation on digital platform services" to which those platforms must comply, on pain of both civil and criminal penalties.

However, at no point in the lengthy discussion of these rules and codes does the Bill make clear *who* will be responsible for determining what constitutes mis- and disinformation, and *how* this determination will be made. It is already unacceptable that the government is seeking to regulate the speech of Australians; the fact that this regulation will be enforced using a completely non-transparent process is utterly beyond the pale.

The key terms in the draft legislation are "misinformation", "disinformation" and "serious harm", and all three of these terms are so poorly defined as to be not only functionally meaningless, but open to serious abuse.

"Misinformation" is defined as "information that is false, misleading or deceptive". However, no definition of "information" is provided. Are opinions and hypotheses going to be classified as "information"? The draft bill does not rule this out.

Even with respect to types of "information" that are generally classified as factual (such as statistics, and scientific papers), with very rare exceptions - such as the laws of physics - very little that qualifies as "information" is incontestable. Only the most supremely arrogant individual or body would consider themselves qualified to discern all "true" information from "misinformation". The most that can be said by honest brokers, in the vast majority of cases, is that there is more evidence supporting one interpretation of the known facts, than any other interpretation of those facts.

"Disinformation" has the same definition as misinformation, but with the added condition that "the person disseminating, or causing the dissemination of, the content intends that the content deceive another person". However, the draft bill gives no indication of how *intent* will be determined. Once again, only the most arrogant would consider themselves capable of discerning the intent behind any individual's decision to share a piece of content online.

"Harm" is the most problematic of the key terms. Instead of defining "harm" itself, the draft bill gives six instances of "harms", four of which constitute circular definitions - that is, they use the word "harm" to define the word "harm".

The first instance of "harm" is "hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability". The first objection to this is that government has no business attempting to regulate people's emotions and preferences. Whilst harbouring a feeling of hatred for any particular group is regrettable, it is not by any stretch of the imagination unlawful. There is already legislation in place to deal with incitement of violence against any persons, whether on the basis of their membership of any group or for any other reason. Any attempt to police people's emotions is a) pointless, because it will likely engender a backfire response and b) entirely outside the scope of government.

The second objection to defining "hatred" as a type of harm generated by online mis- and disinformation is that there is no conceivable way to demonstrate that viewing particular types of content online will cause an individual to engage in actions that cause *actual* harm (as opposed to the putative and/or imaginary harms formulated in the draft legislation). An individual may view content that glorifies Nazism and denies that the Holocaust took place, for example, without ever engaging in actions that cause actual harms to Jewish people. The mere holding of deplorable beliefs does not cause actual harm to anyone; individuals can choose whether to take offence to views expressed by other people, to attempt to educate them, or to simply ignore them.

The third instance of harm is "harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions". However, questioning the integrity of processes or institutions cannot possibly be construed as causing them harm. It is a foundational principle of democratic societies that citizens have the right to raise concerns about the integrity of the processes and institutions

employed in governance. It is the responsibility of government to respond to such concerns by ensuring that the processes are transparent and the institutions are accountable. If a certain proportion of the population remains sceptical even after being provided with information on democratic processes, that is, quite frankly, none of the government's business - especially in a country in which voting citizens are compelled to participate in elections via mandatory voting.

The fourth instance of harm is "harm to the health of Australians". The example of this type of harm that is given in the Guidance Document (p. 11) - namely, "Misinformation that caused people to ingest or inject bleach products to treat a viral infection" - is itself an example of misinformation (or possibly disinformation) which would not be addressed by the Bill. As PolitiFact.com has confirmed, former President Trump never suggested that bleach products be injected or ingested in order to treat SARS-CoV-2 infection. His words were misrepresented by multiple mainstream media outlets and political actors - both of which are categories exempt from sanctions against spreading mis- or disinformation under the draft Bill. In any case, there is already legislation that can be used to take action against people who make fraudulent claims that result in actual harms to the health of specific people; it is not government's responsibility to police the information that people use to make health-related decisions.

The fifth instance of harm is "harm to the Australian environment". Once again, no definition of this type of harm is offered, the example of such harm given in the Guidance Note ("Misinformation about water saving measures during a prolonged drought period in a major town or city") is incoherent, and there is no conceivable way of determining that content viewed online directly caused a person to take an action which harmed the environment, absent an incitement to commit such harm in the form of, for example, arson, which is already covered by existing legislation.

Likewise, there is no mechanism by which the sixth instance of harm, "economic or financial harm to Australians, the Australian economy or a sector of the Australian economy" could be definitively attributed to information shared online. Industries that are subjected to online attack can hire public relations agencies to manage reputational harm, as they have always done in the past; they do not need government to manage business risks on their behalf.

The lack of proper definitions of key terms, and lack of transparency with respect to the process of classifying mis- and disinformation, leaves open the possibility - indeed the probability - that the legislation will be weaponised against individuals or groups who hold positions contrary to government policy. The draft Bill provides no mechanism by which such weaponisation could be prevented.

The Bill contravenes multiple articles of a key human rights treaty

The second instance of harm is "disruption of public order or society in Australia". However, the right to peaceful protest - an activity that is inherently disruptive of public order and society - is enshrined in the International Covenant on Civil and Political Rights (ICCPR, Articles 21 and 22), to which Australia is a signatory. Again, there are already laws in place to prevent or halt *violent* protest, so there is no justification for adding yet another restriction on Australians' right to express themselves, to the legal code.

More generally, Article 19 of the ICCPR enshrines the following rights: "the right to hold opinions without interference" and "the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

The draft Bill directly contravenes the second of these rights, by seeking to impose restrictions on the types of information that individuals can seek, receive and share, based on poorly-defined categories of potential or putative "harm". The attack on the first right is indirect; by policing the information available to Australians, government appears to be covertly seeking to influence, and even control, the opinions we hold.

In summary, this Bill represents an assault on the pillars of our democracy: the right of citizens to hold and express opinions, and to seek information from a wide diversity of sources. We have many examples from history of governments that sought to control the flow of information within their borders, and thereby to regulate the actions, speech and even the very thoughts of their citizens. Such examples are presented to students as a warning of what can happen when governments place more value on compliance and ideological conformity than on the rights of the individuals whom they are tasked with serving. This draft Bill signals a dangerous turn toward totalitarianism. Australians do not

need government to protect us from information; we need government to protect our human rights.

Sincerely

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without prejudice