Academic feedback on an exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.

La Trobe University Submission - Professor Andrea Carson and Professor Lawrie Zion, Melbourne.
August 16, 2023

This submission was prepared by:

Professor Andrea Carson, Department of Politics, Media and Philosophy, School of Humanities and Social Sciences, La Trobe University, Plenty Rd Bundoora, Vic Australia, 3083. E. ███████████████████████

Professor Lawrie Zion, Department of Politics, Media and Philosophy, School of Humanities and Social Sciences, La Trobe University, Plenty Rd Bundoora, Vic Australia, 3083. E. ███████████████████████

This submission may be made public.

About the Authors

As way of background, Professors Carson and Zion are La Trobe University media and communication academics in the department of Politics, Media and Communication and both have extensive past experience working as professional journalists.

Andrea Carson is a professor of political communication and political scientist. She examines the media's role in democracies, journalism and political communication with special interests in investigative journalism (high quality news) and mis and disinformation (low quality information and fake news). She is also a member of Public Interest Journalism Initiative's (PIJI) research advisory group. She is on Meta's Misinformation and Disinformation Global Working Group that meets 4-5 times a year with experts from across the globe and Meta's internal policy experts on the subject.

Professor Carson was consulted by DIGI at various times during the development of the Australian Code of Practice on Disinformation and Misinformation. She has undertaken specific research on mis and disinformation and its effects in Australia and in the Asia Pacific region. Her research work on this subject is listed at the end of this submission. Of particular note is her studies with colleagues examining the role elected political actors and the mainstream media play in dissemination of disinformation, which informs this submission.

Lawrie Zion is Associate Dean, Research and Industry Engagement of the School of Humanities and Social Sciences, and Professor of Journalism. He led the recently completed ARC-funded research project, New Beats (2014-2022), which investigated the aftermath of job loss for journalists whose roles were made redundant.

Introduction

Thank you for the opportunity to contribute to this consultation.

We thank the Department for providing various occasions to respond to the exposure draft bill through recent expert roundtables, of which Professor Carson has participated, and through public consultation.

We commend the Department of Infrastructure, Transport, Regional Development, Communications and the Arts on its work to combat misinformation and disinformation by considering new Australian Communications and Media Authority (ACMA) powers to tackle this global problem.

Firstly we want to acknowledge that we think the Minister and her department are heading in the right direction by making the DIGI Code or its equivalents mandatory. We agree with the Minister's representatives that there is still further refinement to be undertaken on the draft bill.

To that end, this submission deals with issues relating to:

- *freedom of expression*

-*definitions*

- *the complexity of content exemptions*

- *the scope of the private message exemption*

- *Other matters.*

1. Freedom of expression

Australia is a highly successful liberal democracy that is based on an open society that enables freedom of responsible speech. Public access to diverse perspectives and accurate information in the public sphere is a prerequisite of our functioning democracy. To avoid unnecessary censorship concerns about the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023, we recommend a statement of high level principles at the outset of the bill to reinforce Australia's commitments to the value of open, pluralistic communication in a liberal democracy.

2. Definitions of misinformation and disinformation

We know through experience that misinformation and disinformation can cause real-world harms and this was clearly evident during the COVID-19 pandemic, when false information about causes and treatments of the novel coronavirus led to hospitalisations and deaths in some instances.[i] Yet, despite the gravity of the problems, there remains a lack of conceptual clarity. Terms such as false and fake news, misinformation, disinformation, alternatives facts, post-truth and hoaxes (common in Indonesia) are often used interchangeably sowing further confusion about their meaning. Our past studies show that existing definitions have been developed in "information silos".[ii]

This is a problem as the absence of uniform definitions poses a range of challenges for multitudinal actors tackling the problems of mis- and disinformation. It creates difficulties for

scholars analysing political discourse, technology platforms implementing mitigation measures, journalists in their role as gate-keepers of quality information, governments implementing anti-fake news laws, and policy makers and civil society actors seeking to tackle complex global problems such as racism, migration and gender discrimination that are vulnerable to misinformation and disinformation. It is therefore critical that key actors work together to develop policy solutions to this vexed problem of false information online. If decision-makers cannot agree on basic definitions about what it is, then attempts to mitigate and counter its effects may lead to poor policy implementation or, on the other side of the spectrum, government heavy-handiness.

- Under the draft bill, these two categories are defined in a similar way in that the content needs to be 'false, misleading or deceptive' and not 'excluded content', and is 'reasonably likely to cause or contribute to serious harm'. A point of difference is that to be disinformation it must also be the case that the person disseminating it 'intends that the content deceive another person'.

From our studies on this topic (see publications listed below), we find the definitions are problematic in that it is difficult to divine what one's intention is – which is the primary factor differentiating misinformation from disinformation.

One way to address this is to focus more on harm and where necessary to examine motivation, operationalised by what a digital platform user's behaviour reveals about intention.

In this regard, the existing DIGI code does this well in its sections 3.2 relating to 'disinformation'; 3.4 relating to 'harm', 3.5 relation to 'inauthentic behaviour' and 3.6 relating to 'misinformation'.

We recommend better harmonisation with the existing DIGI definition and the one applied by ACMA that will take in to account the difficulty of 'intention' by focusing instead on *decisive actions* that spread information that can mislead, deceive or otherwise cause emotional, physical, political, financial or intangible harm. These decisive actions may follow the label that platforms use such as 'inauthentic behaviours'. In any case, we recommend consideration be given to operationalising the behaviours that show intent in order to differentiate 'disinformation' from 'misinformation'.

3. Content exemptions

Professional news

- Under the draft bill the content exemptions are established partly via a concept of 'excluded content for misinformation purposes'. This category includes professional news; entertainment, parody and satire; content produced by certain educational institutions; and content authorised by the Commonwealth and state, territory and local governments.

We have some concern about the exclusion of '**professional news'** as research shows that mainstream media companies can perpetuate and disseminate misinformation – for example the false claim that the ALP would introduce a 'death tax' in the 2019 election (see publications list). The DIGI code currently notes that "professional news content

disseminated by a news aggregation service is excluded from the definition of Misinformation but may fall within the definition of Disinformation if propagated by Inauthentic Behaviours." We recommend that the draft bill be refined to have a similar provision and to include professional news content if disseminated on a digital platform if propagated by inauthentic behaviours.

Authorised and unauthorised electoral and referendum content

Similarly, we also have concerns about the different treatments in the draft bill regarding authorised and unauthorised electoral and referendum content and how to best deal with the interrelationship between misinformation and disinformation.

- At this stage, "Unauthorised electoral or referendum content that is misinformation" is not in scope for code and standard power, yet "Unauthorised electoral or referendum content that is disinformation" is. This is made most apparent in the slide below provided by the department.

We believe this poses a problem when the key difference in definition relies on intent (see definitions above). Past studies show that harmful falsehood spread without intent (i.e. 'misinformation") can easily switch to being "disinformation" when spread with intent, and vice versa (for an example of this see Carson, A., Gibbons, A., & Martin, A. (2021). Recursion theory and the "death tax": Investigating a fake news discourse in the 2019 Australian election. *Journal of Language and Politics*, 20(5), 696-718.)

Key examples of what is in scope of the ACMA powers

Examples	Information powers	Code and standard powers
Misinformation and Disinformation	In-scope	In-scope
Professional news content	Excluded	Excluded
Authorised electoral and referendum content	In-scope	Excluded
Unauthorised electoral or referendum content that is misinformation	In-scope	Excluded
Unauthorised electoral or referendum content that is disinformation	In-scope	In-scope
Satire / parody / entertainment (in good faith)	Excluded	Excluded
Educational content (accredited)	Excluded	Excluded
Content authorised by a government in Australia	Excluded	Excluded
Private message content	Excluded	Excluded
Digital platform services (excluding services in clause 6)	In-scope	In-scope
Excluded services for misinformation purposes (clause 6 services (e.g. email, BVODs, SVODS))	Excluded	Excluded

4. **The scope of the private message exemption**

Instant Messaging Services

We are pleased to see the coverage of the bill has exemptions relating to certain services, like broadcasting services, email, SMS and MMS. However, we think consideration should be given to greater clarity in defining **Instant messaging services,** particularly on what 'messages in a publicly open conversation sent using an instant messaging service' is. Our reading of 2.1.3 in the explanatory notes on private messages suggests it should be clearer about what constitutes a 'group', 'social media' and publicly open conversation'.

For example a family group chat is exempt from the powers but 'a social media group for a particular interest or hobby' is included.

This may be a problem if we are thinking about a small Facebook Messaging groups that revolve around a shared hobby through a group chat.

It seems at odds with the exemption that ACMA has in place that it could not require the production of information that would reveal the content of private messages sent over instant messaging services or require platforms to keep records of the content of private messages, and that it can't register a code with provisions about the content or encryption of private messages. In other words, without further clarification, the example in the explanatory notes appears to pave the way for a loophole to include private messaging. If this is the correct reading of this scenario, we think this oversteps the balance needed with any new regulation in relation to personal privacy.

5. **Other matters – standard making and harmonisation of terms with similar bills**

The Bill gives ACMA the power to make a standard to cover 'emerging circumstances', although the actual terms of s50 talk of 'exceptional and urgent circumstances'. We think there needs to be some definitional criteria and harmonisation of these terms. We also recommend that a 'reasonable period' be clarified.

On the issue of harmonisation, where there is similar legislation in place that uses similar terms such as **"digital platform services".** Where possible consistency of definitions is preferable to assist with compliance.

Appendix

Research publications on mis and disinformation in Australia and beyond

- Carson, A. & A. Gibbons. (2023). The Big Chill? How Journalists and Sources Respond to Fake News Laws in Indonesia and Singapore, *Journalism Studies*, Online first: DOI: 10.1080/1461670X.2023.2192299.

- Carson, A. & S. Wright (2022). Fake news and democracy: definitions, impact and response, *Australian Journal of Political Science*, 57(3), 221-230. DOI: 10.1080/10361146.2022.2122778.

- Gibbons, A. & A. Carson. (2022) What is misinformation and disinformation? Understanding multi-stakeholders' perspectives in the Asia Pacific, *Australian Journal of Political Science*, 57(3), 231-247. DOI: 10.1080/10361146.2022.2122776.

- Carson, A., Gibbons, A., Martin, A., & J. Phillips (2022). Does Third-Party Fact-Checking Increase Trust in News Stories? An Australian Case Study Using the "Sports Rorts" Affair, *Digital Journalism*, 10(5), 801-822.

- Carson, A., Gibbons, A., & Martin, A. (2021). Recursion theory and the "death tax": Investigating a fake news discourse in the 2019 Australian election. *Journal of Language and Politics*, 20(5), 696-718.

- Farhall, K., Carson, A., Wright, S., Gibbons, A., & Lukamto, W. (2019). Political Elites' Use of Fake News Discourse Across Communications Platforms. *International Journal of Communication*, 13(23), 4353-4375.

- Carson, A., & Farhall, F. (2018). Understanding Collaborative Investigative Journalism in a "Post-Truth" Age. *Journalism Studies*, 19(13), 1899-1911. DOI:10.1080/1461670X.2018.1494515

- Carson A. and L. Fallon. (2021). *Fighting Fake News: A Study of Online Misinformation Regulation in the Asia Pacific*. Melbourne: La Trobe University, 137 pages.
- The Fake News Crisis: Lessons for Australia from the Asia-Pacific. University of Melbourne, 8 pages.

Opinion piece

Carson, A. (2023, 14 July) More stick, less carrot: Australia's new approach to tackling fake news on digital platforms, *The Conversation*. https://theconversation.com/more-stick-less-carrot-australias-new-approach-to-tackling-fake-news-on-digital-platforms-209599

---

[i] Andrews, Travis M., and Danielle Paquette. 2020. "Trump Retweeted a Video with False Covid-19 Claims. One Doctor in It Has Said Demons Cause Illnesses." *Washington Post*, June 29, 2020. https://www.washingtonpost.com/technology/2020/07/28/stella-immanuel-hydroxychloroquine-video-trump-americas-frontline-doctors/.

ii Gibbons, A. & A. Carson. (2022) What is misinformation and disinformation? Understanding multi-stakeholders' perspectives in the Asia Pacific, Australian Journal of Political Science, 57(3), 231-247. DOI: 10.1080/10361146.2022.2122776.