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Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

Comments on Exposure Draft

Background

I am a former senior policy officer and senior contract officer in the WA Department of Health where I managed funding programs for aged people and people with disabilities and for homeless and at risk young people, and provided high level policy advice in many other areas of health.

I have tertiary qualifications in literature and philosophy, and have published in peer reviewed journals of philosophy and theology.

Two volumes of my poetry have been published, along with over 150 poems in print and on-line journals. I have won national awards for my poetry and two special journal issues devoted to my work have been published.

I have a strong interest in the accuracy and integrity of information and language.

I have a personal interest in matters related to Covid-19 and to vaccines. In December 2022 I became gravely ill with Covid pneumonia and was in the Intensive Care Unit at Rockingham General Hospital for ten days. The senior consultant at the ICU (where I received excellent care that saved my life) indicated that I would have had a much lower chance of survival if I had not been, as I was and am, fully vaccinated.

I am happy for this submission to be made public.

Proposed legislation

The proposed Communications Legislation Amendment Bill identifies issues relating to misinformation and intentional disinformation. These can, as the Fact Sheet notes, have serious and dangerous consequences.

The proposed legislation would, among other things:

- enable the Australian Communications and Media Authority (ACMA) to gather information from, or require digital platform providers to keep certain records about matters regarding misinformation and disinformation;
- enable the ACMA to request industry develop a code of practice covering measures to combat misinformation and disinformation on digital platforms, which the ACMA could register and enforce; and
- allow the ACMA to create and enforce an industry standard (a stronger form of regulation), should a code of practice be deemed ineffective in combatting misinformation and disinformation on digital platforms (Fact Sheet, page 1).

Clearly these powers would require the ACMA, either on its own or in consultation with others, to become an arbiter of what constitutes misinformation or disinformation. This would be necessary in order for it to monitor and assess the required code of practice and its effectiveness and to create and enforce an industry standard.

It cannot be said too strongly that the proposed legislation is not the way to address these issues.

When incorrect statements and misinformation gain currency, the way to combat them is to provide better and more accurate information. Governments have a legitimate and vital role in doing this, in a context of free and open debate.

During the Covid-19 pandemic, the Australian Government provided sound and up-to-date facts and figures on the pandemic, vaccination rates and other matters, including rebuttals of people's misapprehensions about the vaccines. This contributed to the outstanding uptake of vaccinations in Australia that helped save many lives. As I have said (see Background above), it is likely that I am myself alive today because I have been fully vaccinated.

In order for this function of providing information to be successful, it is essential for government departments to maintain credibility. If governments are perceived as attempting to suppress dissenting views, this can only damage their credibility. Ironically, initiatives aimed at combating misinformation and conspiracy theories will therefore bolster them and make them seem more plausible.

Recent experience

There is an obvious example in recent history of the dangers in attempts at government control. In a number of jurisdictions, including the United States, pressure was applied by government to social media companies, including Facebook and Twitter, to suppress or downplay suggestions that Covid-19 may have originated in a laboratory, and such suggestions were widely stigmatised as conspiracy theories.

It is now clear that this was and is a genuine possibility. It may be that the truth about the origin of Covid-19 will not be known for a long time, if ever.

But even if it eventually proves to have had a purely natural origin, the possibility of a leak from a laboratory will always have been a hypothesis worthy of being taken seriously, investigated and debated.

Attempts to suppress the laboratory leak hypothesis may have been motivated by the desire of certain scientists to protect their field of research and their reputations, or by the wish of governments to avoid a deterioration in relations with the Chinese government. Whatever their motivation – even if they were made in good faith – the attempts that were made to suppress and discredit discussion were wrong and dangerous.

This example – in a matter of the highest importance, a global pandemic that has resulted in millions of deaths – illustrates that neither governments nor social media providers, nor other media providers, can be relied upon to get these things right.

It does not, of course, mean that governments or social media providers will always get them wrong. What it means is that there is demonstrably a high risk that they will sometimes get them wrong, and sometimes in matters of high importance. When that happens, it will be doubly damaging:

- In the short term, it will impair debate on vital topics.
- In the medium and longer terms, it will damage public confidence in government as a provider of reliable information.

Ill-advised attempts to limit debate during the Covid-19 pandemic have already seriously damaged public confidence in scientists and in governments. The proposed legislation risks further reducing trust. This would be far more damaging than individual instances of misinformation or disinformation, however widespread. Indeed, it would be likely to have the unintended effect of giving them further currency.

Particular comments

Since the proposed legislation is in my view a mistake and should be withdrawn entirely, there is little to be gained by extensive comments on points of detail. However, the following deserve to be highlighted.

1. It is said that:

   > Criminal penalties would only apply to digital platforms or individuals **knowingly** making or retaining **false or misleading records** under the record keeping provisions, or giving **false or misleading information** or evidence under the information-gathering provisions of the new powers.
   > (Fact Sheet, page 8; my emphasis).

   This requires the ACMA both:

   - To determine what is false and misleading, and
   - To determine individuals' or platforms' knowledge and intentions.

The second of these is outside the legitimate province and competence of government. Both risk embroiling the ACMA in costly and unproductive disputes and litigation.

2. The same consideration applies to the wording of the proposed conditional exclusion of satire, etc. from the scope of the legislation (Guidance Note, Attachment 2 [page 29] and elsewhere):

> Satire / parody / entertainment – content produced in good faith for these purposes.

Determination of "good faith" risks becoming subjective and, again, leading to disputes and litigation.

3. Section 4.5.1 of the Guidance Note (page 22) states:

> The ACMA will be required to be satisfied of the following general factors before determining a standard:
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> • whether the standard would burden freedom of political communication; and
> • if so, whether the burden would be reasonable and not excessive, having regard to any circumstances the ACMA considers relevant.

Consideration of these factors itself involves political decisions, and outcomes are likely to vary according to the side of politics in power. It also risks leading to disputes and litigation.

4. In the Fact Sheet, at page 2, it is stated:

> private messages sent on instant messaging services will not be within scope of the powers.

Similar statements are made at various points throughout the documentation and the Exposure Draft Bill.

However, in the Guidance Note, at page 7, we find:

> We are seeking your views on the Exposure Draft Bill, particularly:
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> […]
>
> how instant messaging services will be brought within the scope of the framework while safeguarding privacy.

This appears to vary from the statements in the Fact Sheet and elsewhere. More importantly, it illustrates the potential, if these powers are once established, for them to be extended.

5. Section 3.3.2 of the Guidance Note (page 16) discusses the proposed legislation's abrogation of individuals' right to avoid self-incrimination, as follows:

> The common law privilege against self-incrimination entitles an individual to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person – broadly referred to as the privilege against self-incrimination. The Bill provides that a person is not

> excused from answering a question or providing information or a document on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty. **This abrogation of the privilege is necessary to avoid undermining the regulatory regime and the intention and purpose of the Bill.** Enabling the ACMA to have the information necessary for it to undertake work to encourage digital platform services to protect the community against the harms from misinformation and disinformation is an important objective necessitating abrogation of this privilege. (My emphasis.)

This sets an extremely dangerous precedent. In many areas of legislation and law enforcement, it could equally be argued that "abrogation of the privilege [against self-incrimination] is necessary to avoid undermining the regulatory regime," and it would be equally wrong and dangerous.

Conclusion

The proposed Communications Legislation Amendment Bill is a potentially disastrous attempt to extend government's powers to adjudicate and control the bounds of legitimate public debate. It should not be revisited and reworded to meet criticisms. It should be withdrawn and abandoned.

This will enable government agencies to focus on their legitimate and essential role of providing accurate, timely information, and rebutting falsehoods when they arise, without being perceived as attempting to suppress dissent and thus losing credibility.

Michael Robinson

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