

Department of Infrastructure, Transport, Regional Development, Communications and the Arts

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023: Exposure Draft Feedback

Dear Sir/Madam,

I am writing to submit my feedback on the above proposed legislation. I am a social worker with over 8 years' experience working in the mental health sector in central Victoria, as well as a performing artist and writer. I am making a submission because I am concerned that, while the problem that this legislation seeks to address is significant, its approach to addressing it will set a dangerous precedent regarding freedom of speech, while exacerbating the mistrust of public institutions, polarisation and extremist tendencies that it seeks to curtail.

I recognise that the Australian government is concerned about the potential impact of disinformation and misinformation on public health, safety and community welfare, and I agree with those who developed this legislation that false ideas, whether spread maliciously or through sincere belief, can cause significant harm under certain circumstances. I also agree that social media platforms can significantly amplify the reach and spread of all kinds of discourse, and tends to amplify extreme, polarised and poorly thought-out discourse due to the algorithms that govern their functioning. However I strongly disagree with the government's proposed solution to these problems, as contained in this legislation, and moreover consider that its approach is taking us further down a path that is a threat to principles of human rights and free speech that are foundational to the great tradition of liberal democracy. Below I will explain further the reasons for my concern, and also how I think the problems this legislation seeks to address could be tackled better.

Disinformation and misinformation

I note that the report that led to the development of this legislation was originally focused exclusively on tackling disinformation, i.e. the intentional spreading of untruths for political purposes. Knowingly attempting to deceive others is prohibited in many areas of society, particularly in regard to commercial dealings and contract law, and is a well-known problem in the political sphere. *Disinformation* is clearly undesirable, and combating this is certainly a legitimate goal, although the best way of doing so needs to be thought through carefully, particularly given the difficulty in proving intent in many cases.

However so-called *misinformation* is a very different proposition. I say 'so-called' because I believe that this term has become a *weasel word* that acts, whether intentionally or not, as a rhetorical device disguising what it actually refers to, which is false ideas that are spread by someone who sincerely believes them to be true. By doing this, it creates a category of ideas that can be constructed in social discourse as being special: dangerous, supposedly prone to 'infecting' people and spreading like a virus and because of this danger, exempt from previously accepted principles of free speech. At best, this construction reflects an extremely paternalistic view of Australian citizens, seeing them as passive consumers of information who can be manipulated by every con artist who comes along, and needing to be 'protected' from being 'infected' and 'harmed' by false information. However it is also worth noting that this formulation of 'dangerous ideas that threaten the common good' has been a favourite tool of

countless totalitarian governments over the years for suppressing ideas and opinions that they perceive as a threat to either their rule or their agenda. Thus legislation such as this, if enacted, could be used for base political ends as well as noble ones, which is one of the reasons that liberal thinkers, over the decades, have often forsworn such an approach to public speech.

Will the legislation lead to censorship of free speech?

The government argues that this legislation will not threaten citizens' rights to free speech, however I think this argument is a disingenuous one. This argument rests on two notions, which I will address one at a time:

1. A social media platform is a privately owned space, and therefore social media companies are free to apply whatever codes of conduct they (or the government) likes around permissible and impermissible speech, provided these do not contravene other relevant laws.
2. Misinformation is a special category of speech that can rightly be exempt from free speech principles and laws

Are social media platforms public spaces?

While it is true that Facebook, Youtube, Twitter and other social media platforms are privately owned, they function as significant sites of public discourse: community pages, special interest groups, political and activist groups, corporate and independent media sites and many other groups use these platforms for either a significant part or the majority of their shared communications. In effect, a significant proportion of the 'public square' has been privatised, and is now owned by social media companies. Notwithstanding that this is, in itself, problematic for healthy community life, it is clearly specious to deny that social media platforms are functionally public spaces, and therefore censorship of speech on these platforms is functionally equivalent to censorship in other public spaces in terms of its social impact. Such censorship should as unacceptable as, for example, a telecommunications company barring individuals from using its mobile phone network because it disapproves of their political beliefs.

Is it justifiable to censor misinformation?

Governments and other bodies calling for misinformation to be 'controlled' or 'tackled' typically do not use the word 'censor', however some of the actions that they recommend or require of social media platforms clearly fall under any normal definition of censorship: for example deleting posts, restricting the spread or sharing of posts in various ways and banning certain users from their platforms. It is these types of restrictions that I will be addressing here.

It is worth noting that the particular ideas that would fall under the category of misinformation will vary considerably according to who holds the responsibility for deciding what is true and what is false: for example our Prime Minister and Leader of the Opposition would likely have some major disagreements on topics such as climate change, indigenous history and gender. In the context of legislation permitting the censorship of misinformation, it is evident that the power to determine what is misinformation is a very great one. The government has made much of the fact that this will be determined under the legislation by an 'independent' authority, the ACMA; however as this is a government body whose members are appointed by the government of the day, there is a risk that appointees can be chosen to serve a government's ideological agenda. Thus the government can exercise indirect power in determining the direction that this body pursues. Even if the government refrained from doing this, the power to determine what is

false content, and therefore liable to be censored, is a very great one, and giving an appointed (and therefore unelected) official this power could be seen as being contrary to the norms of a democratic country.

To address potential concerns about this issue, the proposed legislation narrows the definition of misinformation mentioned earlier to include only those false ideas that have a risk of leading to significant *harm* to the community, and then specifies some examples of speech that it considers falling into this category. I think most people would accept that wrong ideas can lead to harm, especially when adopted by large numbers of people, however it does not automatically follow from this that censorship of those ideas is either ethically acceptable or pragmatically an effective way to prevent that harm. Historically, there has been a debate among legal scholars about when the risk of harm can be a justification for censoring speech. For example the US Supreme Court permitted the censorship of communist and anti-war activists in the early part of the 20th Century on the grounds that the ideas that they put forward threatened to cause harm to US society. However since the early 1970s, the standard legal test for protected speech in the US has been whether the speech concerned involved incitement to imminent violence against specific persons or groups. This position recognises both the risks of censorship described above, and the other harmful impacts it can have that I will discuss later.

In Australia, there is far weaker protection for free speech, along with other human rights, however the restrictions that have been broadly accepted into recent times have been those involving either incitement to violent acts or harassment, intimidation and vilification of others, particularly based on race. In these cases, we can broadly see the presence of an *intent to harm*: either through violence or through vilification and abuse. However the legislation makes no such distinction, and leaves considerable room open for interpretation of what constitutes 'harm'. As a result, there is a risk that the 'public harm' justification could be applied far more broadly than has until recently been accepted in liberal societies, with several destructive consequences, which I will list below.

What could be the negative consequences of this legislation?

First, there is a risk of ideologically motivated censorship of ideas being pursued by the censor, whether it be instigated by the government of the day through stacking the ACMA with individuals of a particular ideological agenda, or merely that an appointee to the role has a particular ideological agenda that they are determined to pursue. As mentioned above, the loose definition of 'harm' allows sufficient room for such an agenda to use it as a justification for censoring speech on any number of social, economic, environmental or geopolitical subjects. Again, this has to be considered in terms of future governments and appointees, not simply the incumbents.

A second risk is that debate on important social issues could be stifled, leading to society missing out on hearing and utilising valuable truths. The Covid19 pandemic provides us with some telling examples of arguments that were labelled by public health officials to be clearly incorrect, and censored accordingly, when our scientific understanding of the issue at hand was still evolving. Some of those who were censored and sidelined were experts in their field, yet rather than engaging in debate and dialogue, their voices were silenced. Yet in several cases, the dissident position was later recognised as having greater weight than it was given at the time, most notably in the case of the theory that the SARS CoV2 virus emerged from a laboratory leak:

once dismissed as a conspiracy theory, this theory is now considered the most likely explanation for the origin of the virus by several US government agencies who have researched the subject. Such censorship can make it harder for critiques of bad government policies to be heard, meaning that the policies may go on longer than would otherwise have been the case, to the detriment of society.

A third risk of the proposed legislation, and of censorship in general, is that the censored ideas and actors promulgating them will 'go underground', continuing their influence in less visible environments where there little or no oversight, a digital version of the 'Wild West'. In addition, there is the likelihood that having their ideas censored will lead to increased alienation, anger and paranoia among the censored individuals, priming them for becoming more extreme and antisocial in their thinking and actions. During the pandemic, I witnessed many people whose voices were excluded from social media and mainstream media by censorship congregating in alternative settings, where their often reasonable, well-intentioned (and in some cases justified) concerns about Covid policies could be expressed freely, but where they were also exposed to highly paranoid theories and beliefs, and the influence of politically extreme agendas. Without the censorship, most of these people would not have considered such ideas credible, but their experience of alienation and silencing saw many of them attracted by groups who they saw as 'on their side', and being far more vulnerable to being taken in by extremist positions. This illustrated to me the danger that censorship poses to social cohesion.

A final risk that the legislation poses is that, rather than restoring confidence in public institutions, it will actually worsen the breakdown in trust in these bodies, and in shared sensemaking frameworks in general. This trend has been an increasing problem across Western societies in recent decades, and the causes are likely multiple: revelations of corruption and abuse of power by government and institutional officials; regulators becoming financially dependent on the industries they are meant to be regulating (e.g. fossil fuel and pharmaceutical industries); increases of poverty and inequality, and the failure of economic policies to address these; rapid social change and finally the deleterious influence of social media algorithms, which promote emotionally charged, reactive thinking, siloing of views and polarised, toxic discourse (the documentary 'The Social Dilemma' powerfully exposes this last issue). The resulting loss of trust in public institutions, shared values and even common humanity is a grave problem and needs to be urgently addressed. But trying to address it through censoring 'wrong' opinions demonstrates a failure to understand basic human psychology. I would commend to the government the work of US social philosopher Daniel Schmachtenberger on the above problems, and the solutions he recommends to address them.

What would be a better approach?

As the last paragraph demonstrates, I accept that there is a very real problem in this country with the spread of destructive ideas and ideologies, whether by bad actors or simply by those who hold misguided beliefs (there is also an equally significant problem with destructive ideas and ideologies being spread by powerful corporate interests and governments acting at their behest, but that is another story). I think that this problem cannot be overcome through coercive means for both ethical and pragmatic reasons: ethically, because it undermines fundamental human values, and pragmatically, because it won't work and is likely to make things worse. Instead, I think the government needs to address the causes of public mistrust that I outlined in the previous section. This means being more honest and transparent with the

public about what government can and cannot do, and what it knows and does not know. It means a bipartisan effort to restore trust through prioritising civility and shared standards of conduct over short-term political gain.

Addressing this problem also means listening to the grievances of the public, and prioritising addressing those grievances, which are mostly economic, even if this means confronting corporate and financial interests whose demands have been allowed to usurp the needs of the people for too long. It has long been known that citizens who feel economically secure rarely incline towards political extremism, whilst politically extreme parties usually only come to power in times of severe inequality or economic breakdown when the populace is desperate and angry. It also means making a concerted effort to root out any undue corporate influence from all fields of scientific research, but particularly the field of medicine, even though this will likely mean that significantly more public money will need to be spent to ensure researchers and publishers are not economically dependent on corporate interests.

Finally, the government does need to tackle the role of social media in driving destructive public discourse. But what needs to be addressed is not the content but the underlying format, specifically the way social media algorithms are engineered. As 'The Social Dilemma' explains, these algorithms are designed to keep users on the platform for as long as possible, often through manipulating human psychology, especially our attraction to negative emotions, drama and the dopamine-generating rewards of winning and being right. The result of this is that these algorithms promote content that stirs negative emotions such as fear and outrage, and steers people towards others who share the same views as them, while playing down content that promotes civility and goodwill, conciliation, sober judgment, careful thinking and above all sustained attention. It is not difficult to see how this programming is likely to exert a powerful influence on the psychology, thinking and behaviour of users, and drive them towards increasingly polarised views, toxic discourse, shallow, reactive thinking and extremism – the very results that 'The Social Dilemma' documents, and that the government is seeking to address.

There is an urgent need for our government to tackle this problem, even though the difficulty of doing so will likely be formidable due to the power of the social media companies. Perhaps an international campaign is the only way of doing so. However courage is needed: the social media companies must sooner or later be compelled to either reconfigure their algorithms to ameliorate the harms they are causing, or to introduce other mechanisms to offset these harms, such as generating educative content that may counteract the effect of the content that appeals to the basest human instincts. In the short term, the government could put far greater resources into promoting user literacy in interacting with social media (as well as traditional media), so users are at least aware of the risks and can take some steps to counteract their influence.

Conclusion:

I would like to close this submission by again reminding legislators to think historically: this country has experienced periods where ideas emerged that seemingly threatened the social good, and where well-meaning people argued that such those speaking those ideas needed to be silenced (usually, it must be emphasised, such people were from the conservative side of

politics). Those who respected the fundamental importance of human rights and human dignity resisted these arguments because they saw that as soon as governments censor speech, they take away something important of what it means to be human: the right to think and speak for oneself. They saw that diminishing our individual humanity diminishes the fabric of society, as well as creating an increasingly toxic, violent social underbelly that requires increasingly repressive, coercive measures to keep it at bay, until one day it may emerge, like the Lambton Worm, to wreak havoc upon society. Instead, they promoted dialogue, openness and the slow, patient work of building social capital and goodwill as protection against the human tendencies to succumb to fear, mistrust and hatred, reserving legal sanction for those who deliberately sought to incite violence and harm against others.

One of the most articulate defenders of the principle of free speech that I have come across is the former US Supreme Court Justice Louis Brandeis. The first person of Jewish descent to sit on the highest court in that country, Brandeis was a progressive who was known as ‘the People’s Lawyer’ for his work (often done for free) in fighting corporate oligarchies and defending the rights of working people. I will conclude with an excerpt from his influential dissenting judgment in the case of *Whitney v. California*, which I consider as applicable today and in this country as it was in 1927 in the USA (italics are mine):

Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary... They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; *that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.*

Yours sincerely,



Keppel Cassidy

