

SUBMISSION ON THE EXPOSURE DRAFT OF THE COMMUNICATIONS LEGISLATION AMENDMENT (COMBATTING MISINFORMATION AND DISINFORMATION) BILL 2023

Background

From the Fact Sheet, the Bill would give the Australian Communications and Media Authority (ACMA) stronger regularity powers. The Bill:

- addresses the need for records in regard to misinformation and disinformation on digital platforms.
- empowers ACMA to request industry to develop a code of practice to combat misinformation and disinformation on digital platforms, and enforce that code of practice.
- empowers ACMA to create and enforce an industry standard should a code of practice be deemed ineffective.

Also from the Fact Sheet: “The powers apply to digital platform services that are accessible in Australia. Some examples include social media, search engines, instant messaging services (although the content of private messages will be out of scope), news aggregators and podcasting services.”

Rather than ACMA directly regulating content on digital platforms, industry is to do this. The Bill will not apply to authorised content of Australian, State, Territory or Local Government, authorised electoral and referendum content, content produced by or for an accredited education provider, or professional news and satire.

The Bill is said to ensure digital platform services are held to account if voluntary industry efforts prove to be inadequate. Effectively under the Bill there would be no longer a voluntary industry code as envisaged by the former Federal Government. While initially in 2019 there was an enquiry by the Australian Competition and Consumer Commission (ACCC), this Bill arose out of recommendations in a report of ACMA in 2021. As such it serves the interests of ACMA.

A very broad subjective Bill

While the purpose of the Bill is to combat misinformation and disinformation it still needs to be fair to industry who apply codes and to people judged to misinform.

The Bill defines misinformation as online content that is false, misleading or deceptive and is reasonably likely to cause or contribute to serious harm. Disinformation is misinformation in which there is the intention to deceive. Disinformation includes disinformation by or on behalf of a foreign power.

According to the definition, if online content merely contributes to rather than causes serious harm, it is still called misinformation or disinformation. There is no requirement to prove a causal relationship between false, misleading or deceptive content and serious harm. Also there doesn't have to be an intention to deceive. Misinformation as well as disinformation may contribute to serious harm. These are novel concepts for Australian Law.

From the Bill:

harm means any of the following:

- (a) hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability;
- (b) disruption of public order or society in Australia;
- (c) harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions;
- (d) harm to the health of Australians;
- (e) harm to the Australian environment;
- (f) economic or financial harm to Australians, the Australian economy or a sector of the Australian economy.

Harm is a broad term in the Bill. It can mean in the Australian context:

- Hatred against a group on the basis of an attribute of that group: It seems that a hateful attitude is itself harmful. Threats or vilification are not necessary. It appears that hatred is about how a group feel about others strongly disliking them.
- More related to the outcomes of an attitude, harm is also disruption of public order or society.
- Broad Harm to health, environment, the economy, democratic processes or Government institutions.

The Bill lists a number of general matters to be considered for harm to be **serious** (definition 7(3)). These include the potential reach and speed of the dissemination; and the severity of the potential impacts of the dissemination. According to the Fact Sheet **serious harm** is harm that “affects a significant portion of the Australian population, economy or environment or undermines the integrity of an Australian democratic process.” From the Guidance Note: “For harm to be **serious**, it is intended that it must have severe and wide-reaching impacts on Australians.” ‘Significant portion’, ‘severe’ and ‘impacts’ are not further defined in the Bill. The Fact Sheet and the Guidance Note also include examples of serious harm corresponding to (a) to (f) above. These are not in the Bill and none of the terms used in the examples of serious harm are in the Bill. The Bill on its own, without the examples of serious harm is very broad and not very clear.

All the areas out of the scope of the Bill, authorised content of Government, electoral and referendum content, accredited education provider content, and professional news and satire, may mislead and cause or contribute to harm. I say more about this later in my submission. While authorised content of Government is out of the scope content produced by opposition MPs is in scope.

In regard to misinformation codes of practice and industry standards, while there are general principles for these in the Bill, the codes (outsourced to industry) and standards (developed by ACMA) themselves are not legislated. While ACMA will not directly regulate content, they nonetheless must have ideas about what should be in the codes when they create a standard, under the authority of the Bill, should a code not be enough. ACMA and industry should be transparent about codes and standards. Under the Bill ACMA will establish a register (4.6) but I suspect that published codes and standards will only be general in nature.

What the Bill means by digital platform services is very broad, going well beyond social media:

- Group chats that are open to the public on instant messaging services are subject to the Bill.

- Internet posts between registered members of a forum are subject to the Bill.
- Private messages are not subject of the Bill but ACMA will gather information and keep records in relation to these messages.

It is not entirely clear what kinds of messages might attract a fine and who is fined but the net cast by the Bill is wide. It seems the convenor of even a closed forum will be fined if they allow misinformation. This is a serious matter given the fines in the Bill for publishing misinformation on the internet. For example, individuals not complying with the industry standard may be fined \$1.38 million. And messages allowed on a digital platform don't have to intentionally mislead, only be judged to contribute to serious 'harm'. In my view community forums and group chats on the internet should be encouraged not discouraged.

The upshot of the subjectivity and lack of clarity in the Bill is that it is open to wide interpretation and there is great potential for inconsistency and abuse. As a matter of fairness the law should be clear so that digital platform custodians know whether they may be contributing to serious harm by allowing content on the internet.

Because the Bill is extraordinarily broad there may be a huge amount of material on digital platforms that qualifies as misinformation or disinformation under this Bill. Given the possibility of incurring a fine digital platform custodians will err on the side of caution.

Fact checkers make mistakes

The Bill assumes it is straight forward to determine in a great range of situations what is true and what is false, misleading or deceptive. In reality this is not always the case. Fact checkers can make mistakes. Which of them can claim to be completely free of bias? History shows that many fringe ideas prove to be correct.

In regard to the covid-19 pandemic this was new territory. Not all Australian epidemiologists agreed on every point. The official advice continually changed over time. The early aim to eliminate covid-19 had to be abandoned. Advice changed on quarantine rules, density limits, vaccine mandates, mask mandates and rapid antigen testing mandates. The chopping and changing itself fuelled speculation. Consider the following questions of great interest during the pandemic:

Are deaths caused by the covid-19 vaccines?

In February 2021 the suggestion that covid-19 vaccines were causing deaths was regarded as misinformation. It was said that causation could not be established in the cases where people were dying following vaccination. Then the evidence started mounting that the AstraZeneca vaccine was causing fatal blood clots. By April 2021 the ATAGI announced the Pfizer vaccine was the preferable vaccine for people under 50. The risk of serious side effects from AstraZeneca for younger people was outweighing the risk of contracting serious covid-19. There was a further change in advice on 17 June 2021 when the ATAGI revised upward the age for which the Pfizer vaccine was the preferable vaccine. It was now preferable for people under 60. At that time 2 deaths had been linked to AstraZeneca vaccination. However further deaths occurred. The last time the TGA reported on deaths linked to AstraZeneca vaccination was on 16 December 2021. Eleven deaths had occurred by that time.

At this time questions remain about deaths during the pandemic. Consider the following:

- After below average total deaths (all causes) in Australia in 2020, the first year of covid-19 (with restrictions also reducing flu transmission), and around average total deaths in 2021, 2022 was a year of statistically significant excess deaths and this has continued into 2023 (ABS articles on excess mortality).
- In regard to people who died from covid-19:
 - At June 2023, only 3.3% of all deaths in Australia, since the start of the pandemic, were where people have died from or with covid-19 (ABS covid-19 mortality statistics).
 - A minority of the excess deaths since January 2022 are explained by deaths from or with covid-19.

Out of respect for thinking Australian citizens, a full explanation of these statistics should be provided by authorities. The lack of official comment gives opportunity for speculation by people sceptical of the official response to the pandemic.

Did covid-19 come from a lab leak?

After three years the source of the covid-19 pandemic is still officially unknown. The proposition that covid-19 was a lab leak was initially regarded by mainstream media as misinformation, but is now respected as an alternative theory.

Other considerations

Experts in any field may not be disinterested parties. For instance should some pandemic experts have undisclosed financial interests in pharmaceutical companies this should be public information. The public interest is better served when possible conflicts of interest are out in the open so that the public is aware of possible sources of bias in expert advice.

The covid-19 pandemic illustrates some difficulties in determining the truth in relation to a novel virus. Even now so much in the pandemic remains unknown. When experts disagree which expert will industry call on?

Fact checkers only examine a relatively small number of questions. For the Bill to operative effectively a yardstick like Wikipedia would have to be used and that tool would have to be completely accurate all the time. This is an enormous ongoing undertaking given the ever expanding nature of knowledge. Many people are aware of instances where errors in Wikipedia are not corrected.

The question has to be asked whether Government really has a role in determining and enforcing truth?

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In the rest of my submission I consider some of the examples of serious harm in the Fact Sheet and Guidance Note.

Harm from hatred

The following example of harm and serious harm is in the Fact Sheet and Guidance Note:

Type of harm	Example of serious harm
Hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability	Misinformation about a group of Australians inciting other persons to commit hate crimes against that group

Few would dispute that the example of serious harm given is a matter of concern. As I alluded to earlier while the above type of harm is from the definition of harm in the Bill, the example of serious harm in the Fact Sheet and Guidance Note is not in the Bill, nor the words 'hate crimes' or 'incite'. The Bill is broader than the example of serious harm. As I have already noted, it seems hatred exists if a target group feels subjectively that it exists. It seems then that serious harm to a group occurs when there are widespread feelings that others strongly dislike them. Not to be unkind, but the reality is that people suffering from a mental disability may have a paranoia about others hating them. Children may object to internet posts saying parents should correct bad behaviour interpreting this to mean they are hated. Feelings in themselves may not accurately reflect the reality. The fear of hatred may be greater than the reality of hatred. There are times when therapy is more appropriate than legal redress.

Should the above example of serious harm be incorporated in an industry code it should be noted that, in regard to any crime, intent is normally taken into account in determining guilt. However, this Bill blurs the distinction between misinformation and disinformation and regards both as contributing to serious harm.

In my view online abuse or threats of physical harm are best handled case by case under existing law. There are existing provisions under the Australian Online Safety Act 2021 to handle cases where online abuse makes individuals feel unsafe. The eSafety Commissioner already has powers to respond to situations where individuals are subject to race-based harassment, individual abuse or trolling, and require digital platform services to remove adult cyber abuse content. These powers are already very broad in my view and do not need to be added to by this Bill.

Online hate is a sad reflection on human nature but is it possible or desirable to eradicate it as the Bill wants to? It has to be kept in perspective. Online abuse does not deter people playing professional sport or entering into politics.

There is a case for allowing greater freedom of expression in Australian society. Consider the following issues:

- The suitability of women versus men for particular jobs.
- The problems of a particular ethnic group.
- Aspects of the culture of a group which do not help the members of the group.
- Situations where a group is not taking responsibility for their adverse impacts on other groups and on the broader community.

These topics are often off limits for much mainstream media because of group sensitivities. In my view our society is poorer for such censorship. Groups are helped more in the long run when issues are

directly faced and there is open discussion. But this Bill will severely dampen such discussion. Groups should be held to account where there is bad behaviour, just as the churches are correctly held to account for child sex abuse.

Example of possible serious harm to Australians on the basis of religion

I now consider an example of misinformation possibly contributing to hatred against Australians on the basis of religion:

The Wikipedia article on Jesus states: “there is widespread scholarly agreement on the existence of Jesus.” <https://en.wikipedia.org/wiki/Jesus>

However a Tweet by well known atheist Richard Dawkins says:

"Did Jesus exist?" Who cares? "Did Jesus lack a father? Raise Lazarus? Walk on water? Resurrect?" I care, and the answer is no in all cases. 9:43 PM · Jun 11, 2013
<https://twitter.com/richarddawkins/status/344419641101275137>

Compared to Wikipedia, Dawkins statement about the existence of Jesus is clearly false. Indeed his statement is offensive to a large number of Australians who are Christians. Perhaps Dawkins is able to claim (from the definition of excluded content in the Bill) that his Tweet is “content produced in good faith for the purposes of entertainment, parody or satire”? Certainly Dawkins would claim he does not mean any harm by his Tweet but under this Bill it is still a candidate for misinformation. While Dawkins’ Tweet shows utter contempt for Christian belief, it might not be misinformation under the Bill because the feelings of Australian Christians that others strongly dislike them because of Dawkins Tweet may not be widespread. It doesn’t as yet severely impact Australian Christians. Some Australian Christians may feel however, that Dawkins contributes to the hatred some Australians have toward Christians, and warn about the bad treatment of Christian minorities in many overseas countries, often aided by repressive governments. As a Christian, I believe that inciting others on the internet to physically harm or vilify Christians should be handled by the authorities in Australia, under existing law, on a case by case basis. Also I believe the rights of Australian Christians should be strengthened and publicly promoted by enshrining in Australian law Article 18 of the International Covenant on Civil and Political Rights (ICCPR) in regard to the fundamental right to freedom of thought, conscience and religion.

One further matter about this Tweet. Dawkins not only questions the existence of the founder of a world faith he also disputes central teachings of Christianity. These are matters which Christians believe, but ACMA censors might have difficulty deciding whether Christians or Dawkins is correct. Indeed they should not try to adjudicate on theological matters. However, this is currently happening when Christians upholding traditional marriage are cancelled on social media. In the main they are simply reflecting biblical truth as they understand it. They do not mean any harm by it. Instead they intend only good for society. However, currently Christians are lumped together with racists, bigots, fascists and other undesirables.

Foreign interference through social media

Further examples of harm and serious harm from the Fact Sheet:

Type of harm	Example of serious harm
Harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions	Misinformation undermining the impartiality of an Australian electoral management body ahead of an election or a referendum
Economic or financial harm to Australians, the Australian economy or a sector of the Australian economy	Disinformation by a foreign actor targeting local producers in favour of imported goods

These examples of serious harm intersect with the work of the Senate Select Committee on Foreign Interference through Social Media, chaired by Senator James Paterson. The Bill preempts the report of that committee which is expected soon. A submission from Senator Paterson has said: “Disinformation, particularly when wielded by foreign authoritarian governments against democracies, is a serious issue that demands a serious response, but so is maintaining freedom of speech for all Australians”. “There are other more direct means of dealing with this problem without censoring Australians.” He is referring to greater transparency by social media platforms. A submission to his committee is that the Australian government should mandate that all social media platforms publicly disclose the content they censor. Both the Australian Human Rights Commission and the International Cyber Policy Centre in the Australian Strategic Policy Institute have recommended such an approach.

<https://www.senatorpaterson.com.au/news/censorship-wont-combat-fake-news>

Harm to the health of Australians

A further example of harm from the Fact Sheet:

Type of harm	Example of serious harm
Harm to the health of Australians	Misinformation that caused people to ingest or inject bleach products to treat a viral infection

If anyone sold bleach on the internet in Australia for the purpose of treating covid-19 they should be prosecuted under existing law. If any individuals used bleach for this purpose there would be existing avenues to support them. If they responded to internet posts promoting this ‘cure’ the eSafety Commissioner should have been involved and remedies explored under the Online Safety Act 2021. Public health campaigns can draw to people’s attention the need to read warnings on household products.

Under the heading in the Fact Sheet, ‘Why these powers are needed’ one of harms cited is that of disruption to public health responses. I now consider the question of whether misinformation or disinformation discouraged people from being vaccinated in Australia during the covid-19 pandemic. I believe this is a far more serious issue than the bleach example given in the Fact Sheet for this Bill. I wish to disclose that my personal decision about having covid-19 vaccines was made after talking to my doctor and after my personal research which included: reading the TGA Assessments of the provisionally approved vaccines, the TGA approved product information, posts on the departments of Health and

several research papers available through Google Scholar. My observations about the pandemic are also informed by my reading of official statistics, and reading official epidemiology reports.

Has misinformation or disinformation disrupted the public health response to the covid-19 pandemic in Australia through discouraging people from being vaccinated?

Considered broadly I dispute that online misinformation or disinformation discouraged people from being vaccinated during the covid-19 pandemic:

- The take up of the first two doses of covid-19 vaccine in each Australian state and territory was extremely high despite questions raised on digital platforms about the seriousness of covid-19, the effectiveness and safety of vaccination, and possible safe and effective treatments for covid-19 instead of vaccination. Where groups of people were reluctant to be vaccinated seeing people fall seriously ill would have been an incentive to be vaccinated.
- The take up of subsequent doses of vaccine diminished.
 - As I previously noted serious side effects for some people were reported by the TGA and this changed the official age recommendation for the AstraZeneca vaccine. While material on digital platforms may have discouraged some to be vaccinated, news of deaths from AstraZeneca also impacted. It was important for authorities to be transparent.
 - It was fact that the effectiveness of the vaccines waned faster than expected, challenging the notion of ‘fully vaccinated’ and producing the demand for continual periodic vaccination. When the booster dose of vaccine was offered in Australia from 8 November 2021 the gap from the 2nd shot was 6 months. This is the current advice for boosters but there was a period in which the gap was revised down.
 - It was fact that the Omicron variant commencing from January 2022 was more contagious than earlier variants but was less likely to cause serious illness. This meant that a large percentage of Australians developed antibodies to covid-19 through being infected. (Research indicates infection gives protection similar to vaccination.) While this did not remove the need for more vaccination, by this time public fatigue had set in. There had been a big impact on the economy and on personal rights and freedoms.

Has the Australian public health response to covid-19 itself contributed to the growth of misinformation and disinformation on digital platforms?

I assert that aspects of the Australian response to covid-19 actually contributed to the growth of misinformation and disinformation on digital platforms. Covid-19 vaccination mandates that denied people their livelihood served to alienate and victimise people and further entrench non-mainstream views. When the TGA provisionally approved the vaccines it did not know whether they stopped transmission. Soon after vaccine mandates were applied evidence was emerging that the vaccines were not stopping transmission. This was certainly the case with the Omicron variant but also with Delta. By the start of 2022 it became evident the greatest contribution to ongoing covid-19 transmission was the fully vaccinated population. (See 15 January 2022 NSW Covid-19 Surveillance Report.) Punitive vaccine mandates were not appropriate in these circumstances.

The ACT is one jurisdiction where covid vaccine mandates were better managed. In August 2021, the Chief Minister, Andrew Barr warned that businesses who required staff and patrons to be covid-19

vaccinated had to abide by the discrimination law. Later he spoke to the National Cabinet about his approach which balanced the rights of employers, employees and clients, contrasting to the state premiers. (<https://www.canberratimes.com.au/story/7440850/the-act-records-17-new-covid-19-cases/>) While covid vaccination was mandated for government employees in the ACT, conscientious objectors did not lose their job. Alternative arrangements were made for these people so that they were moved away from public contact until the crisis had passed. Interestingly the ACT is the jurisdiction with the highest percentage vaccinated in Australia (from the last published covid-19 vaccine rollout jurisdiction breakdown tables Jul 2022).

Has the Australian public health response to covid-19 caused harm to the health of Australians?

I mentioned earlier that authorised Government content may mislead and cause or contribute to harm. I believe some harm was caused by the Australian health response to covid-19.

I accept that covid-19 vaccination saved many lives. Also I accept that some people became seriously ill and died because they refused to be vaccinated. However, there were also some casualties from being vaccinated. As the vaccine roll out got under way, increasingly the public campaign pushed people to get vaccinated and the early TGA warnings and cautions and the 'check with your doctor' message got lost in the process. Some people unwisely were vaccinated. Apart from remaining in quarantine they had little choice because treatments were not available.

I believe Governments around the world as well as WHO must also accept some blame for the delay in availability of safe and effective covid-19 treatments. There was poor availability in Australia of Paxlovid and Lagevrio until 11 July 2022. In my view pharmaceutical companies should have been conducting statistically robust trials of treatments parallel with the trials of vaccines. Australia could have been involved in local trials. It could have been forecast that some people with serious immunity issues were not going to benefit greatly from vaccines and would need the treatments. Treatments should also have been available to people who could demonstrate they conscientiously objected to vaccination. This would have respected the fundamental right of individuals to consent to medical treatment. Lives would have been saved.

The Bill may harm democracy

Not all in the Social Media industry support this Bill. Meta representing Facebook and Instagram has said the Bill could be abused and free and legitimate expression harmed. Faced with the fines (for corporations: maximum of 25,000 penalty units (\$6.88 million in 2023) or 5 per cent of global turnover (whatever is greater)) corporations will err on the side of censoring. What is clear is that current internet censorship will be made worse under this Bill. <https://www.senatorpaterson.com.au/news/dangerous-and-orwellian-tech-giants-lawyers-warn-on-labor-bill>

I suspect that areas exempt under the Bill, professional news and education providers are likely also to follow the codes and standards imposed on the other areas of the internet. The impact on information dissemination and freedom of expression would be chilling.

The internet has become an essential part of modern life. To be excluded from participating on the internet because of personal opinions which do not conform to mainstream views enforced by Government is a serious restriction of personal freedoms.

There is a spiritual aspect to the thinking behind this Bill. Secular humanism has succeeded in freeing the individual from repressive external authorities. However, faced with the popular acceptance of non-mainstream ideas during the recent time of national emergency, Government reinforced external

authority over individual thought. Suppressing the individual conscience while elevating the State is however at our peril. Authoritarianism is not a good way to deal with our unprecedented challenges. When individuals become subservient to the State they are at the mercy of real spiritual, mental and physical harm.

The Bill is said to be about mitigating severe and wide-reaching harmful impacts on Australians. It may be that the Bill will itself have severe and wide-reaching harmful impacts on Australians.

Conclusion

The rationale for the Bill is said to be about combatting high level threats to the safety and wellbeing of Australians, as well as to our democracy, society and economy.

However the Bill is so broad and subjective that it will lead to gross censorship by industry in order to avoid fines.

On what basis will unelected censors determine truth and error and judge whether material will seriously harm?

The need for this Bill has not been demonstrated. There are other ways to handle the threats while also respecting the right of Australians to freedom of expression.

The question has to be asked whether the Bill is more about Government control of society than care for society? If passed into law, I believe this Bill is likely to cause more harm than good. There are too many examples throughout history where suppression of public debate was not a good thing.

Mr Arthur Connor