

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 proposed draft Communications Legislation Amendment
[Combatting Misinformation and Disinformation] Bill 2023)**

I am writing to express my concern regarding the above mentioned proposed draft Bill which is an anathema in a society founded on democratic principles. It appears to be in direct conflict with human rights laws, with common law and the implied freedom of political communication within our Constitution; it is poorly drafted with key terms poorly defined; and since it proposes to exempt some parties and not others creates a sanctioned imbalance in viewpoints and voices in the public debate.

An Anathema to the Democratic principles of our Society.

Australia, like many liberal democracies, has its foundations resting on the principle that people have the right to hold and express any belief they choose within the bounds of the law. There are already tools and legislation available to take action on genuine threats to national security, defamation, obscenity, sedition, fraud and scams, and on speech that incites violence, so it is difficult to understand why further legislation is required.

The proposed focus of the Bill raises questions about potential unintended consequences of censorship. Freedom of expression and the right of political and intellectual communication are preeminent in a liberal democracy. Any legislation intended to address misinformation needs to carefully consider the potential impact on these rights and harm to the underlying foundations of our society. A well functioning liberal democracy should be committed to a “marketplace of ideas” with the remedy for falsehoods and fallacies, in the words of Justice Louis Brandeis, being “more speech, not enforced silence.”

While 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" it provides no evidence to support this claim. It also fails to provide any argument that current laws and legislation covering this area are inadequate.

The Government neither has the mandate nor the capacity to be the arbiter of what is "false, misleading or deceptive" beyond that already specifically defined by existing laws and legislation. As the Archbishop of Canterbury in a speech to the U.K parliament stated "Politics takes it for granted that human beings are not merely declarative but communicative; that is to say that there is an absolute link between freedom of speech and a healthy community. That is why it matters so much. It is not just a free-standing right, a good in and of itself, but the means—the only means—to the end of a just and generous society."

Conflicts with human rights, common law and our constitution

Australia has signed up to seven core international human rights treaties. The right to freedom of opinion and expression is contained in articles 19 and 20 of the [International Covenant on Civil and Political Rights \(ICCPR\)](#). According to the Attorney-General's Department website "The right to freedom of opinion is the right to hold opinions without interference, and cannot be subject to any exception or restriction." The proposed Bill has failed to show that there is any justification for further restriction or that the best way to achieve these restrictions is via administrative arbitration of a Government body rather than a court of law.

The Attorney-General's website goes on to say "The right to freedom of expression extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right is not absolute. It carries with it special responsibilities, and may be restricted on several grounds. For example, restrictions could relate to filtering access to certain internet sites, the urging of violence or the classification of artistic material." Each of these current restrictions have corresponding legislation that covers off and limits as

previously described above. The draft Bill contravenes the right to freedom of expression by endeavoring to restrict the types of information that individuals have an ability to access based on a poorly-defined and highly subjective category of potential "harm". Furthermore, the Australian Government appears to be surreptitiously seeking to sway, and even control, the beliefs people hold by limiting or blocking the breadth of information available to Australians.

According to the Australian Human Rights Commission website "A well-established principle of statutory interpretation in Australian courts is that Parliament is presumed not to have intended to limit fundamental rights, unless it indicates this intention in clear terms. This includes freedom of expression." Furthermore, the High Court has held that as an indispensable part of the system of representative and responsible government created by the Constitution there is an implied freedom of political communication. "This operates as a freedom from government restraint, rather than a right conferred directly on individuals."

The proposed Bill seeks to limit the information available to its citizens and thus interfere with the basic rights of citizens to hold and express opinions. History provides many examples of regimes that have restricted or limited the information their citizens have access to - none of which have led to a better functioning society over the longer term.

Poorly drafted with key terms poorly defined

While the proposed Bill gives ACMA the power to create rules and codes on the way digital platforms handle matters relating to misinformation and disinformation, including civil and criminal penalties, it fails to make clear *WHO* will be responsible for determining what constitutes misinformation and disinformation, and *HOW* this determination will be made. These are crucial aspects of the proposed draft Bill and requires greater elucidation.

Key terms within the draft legislation including "misinformation", "disinformation", and "serious harm" are so poorly defined as to be operationally meaningless, but

also highly subjective and open to interpretation and therefore abuse. Other terms with equally oblique definitions include “information”, “intent” and “harm”.

The problem with any plan to legislate on what is true or false is who gets to define these terms and apply them to information, news (by independent sources) or even personal opinion? Adding to this is the ambiguous criteria of causing “harm”. What criteria will be used to judge such situations? Rather than defining "harm", the draft Bill provides six scenarios of harms, most of which consist of circular definitions where the word "harm" is used to define the word "harm". Unfortunately there are likely to be a myriad of consequences as a result of a Government entity attempting to limit the availability of information under the murky pretense of harm mitigation.

The inclusion of "harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions" is extremely nebulous and at its core anti-democratic. Australians have the right to query the validity or soundness of a policy, process or institution and this should not be interpreted as causing harm. Government has a duty to provide transparency to its citizenry, and, they in turn, have every right to question the ideas and proposals put forward by the Government and its institutions.

In the scenario of "harm to the health of Australians" and the example given, fraudulent claim legislation already exists so why is it necessary for there to be further restrictions? Furthermore, throughout the course of the COVID-19 pandemic, much of the skepticism toward government-sanctioned public health messaging was quickly labeled as the dissemination of misinformation with over 4000 posts surreptitiously being removed from social media. The Australian newspaper reported on July 21 2023 that many of those posts “contained factual information and reasonable arguments rather than misinformation”. This being the case, how will the proposed draft Bill ensure this sort of obvious overreach does not happen again?

In the scenarios of "harm to the Australian environment" and "economic or financial harm to Australians, the Australian economy or a sector of the Australian economy", it is difficult to see how such "harm" could be determined and attributable to information shared online. In the case of inciting violence then as already discussed, legislation already exists so why is there a need for further interference to freedom of opinion?

The subjective and obscure definitions with the proposed draft Bill provide the Government with arbitrary powers to decide what constitutes "intent", "harm", "information" and "mis- or disinformation" and is therefore open to misuse against individuals or groups who hold opinions contrary to the Government or its sanctioned narrative.

Sanctioned imbalance of voices contributing to public debate

Since the proposed draft Bill proposes to exempt some, including the Government itself and not others, a sanctioned imbalance in viewpoints and voices contributing to public debate will be created. The proposed legislation provides exemptions for government, mainstream media, and approved organizations such as academic institutions, thus bringing about an imbalance in the different voices, opinions and perspectives within the public domain. This undermines the principle of equality of speech and open public debate. If the proposed draft 'Misinformation and Disinformation' Bill is truly about misinformation and disinformation then why not make it universal? If we do not have free speech then we do not really have a democracy.

The Bill also appears to allow ACMA to fine both social media companies and individuals. The massive fines proposed for social media companies will inevitably create incentives for them to censor and block content or debates that they know the Government would not like. It also appears that the legislation allows no right of appeal if your posts are censored or your account is banned as a result of the draft Bills requirements on Social Media companies. Further, there are expansive powers of ACMA to demand any Australian appear at a time and place of its choosing to

answer questions about misinformation or disinformation with heavy fines being imposed for non-attendance. All of this would have the bleak impact of inhibiting open dialogue and freedom of speech.

In light of these concerns, I call on the Government to rethink its draft Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023, recognizing that it poses a threat to freedom of speech in Australia.