Wendy Langer
[redacted]

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

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Introduction

Overall opinion - The bill in its current form is bad

I believe that the bill in its current form should not be enacted, for reasons listed in the sections below.

However, I also see the potential for a useful and valuable bill if the bill were to be stripped-down to its “Information gathering” parts. This is also discussed below.

The Bathwater - criticisms of the draft bill

Criticisms from the Victorian Bar Association

The submission form the Victorian Bar association (ref below) very ably and clearly delineates the many problems that I also see in the bill as it stands, so I won’t discuss them in detail here; I will simply state that I am in agreement with them on every point.

Most, if not all, of the difficulties outlined by the Victorian Bar Association relate to the bill's ineffectual approach towards protecting the free speech of Australian citizens.

For my own part, I will not reiterate these, but will add below some comments relating to world ‘best practice’ in these matters as outlined by the United Nation Human rights Council.

Lack of alignment of the draft bill with suggestions from the United Nations Human Rights Council

There are many counts on which the draft bill could find itself in misalignment with best practice as suggested by the UN human rights council (mostly related to free speech concerns). I will point out here some relevant commentary from the UN in recent years.

(Owing to time constrictions, I will only mention one that I think is especially interesting and important in this case)

"**The Special Rapporteur's 2018 report to the United Nations Human Rights Council", (* See References below)** advises that *"States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression. They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users."*

However the model put forward in the draft bill would certainly create all of the worst parts of such a situation, since:

i) the ACMA is not a judicial authority, yet would become an arbiter of lawful expression (in the form of its hand in the development of the definitions contained within codes/standards).

ii) responsibility would then be delegated to companies to adjudicate the meanings of the (already vague) definitions contained in the codes or standards developed by the (non judicial authority that is the) ACMA.

For all these reasons (those from the Victorian Bar Association and also the ones mentioned by myself), I do not think that the bill should be enacted in its current form.

The Baby - a pearl contained within the draft bill

Information-gathering potential of the Bill could be good

Although, as expressed above, I see many problems with the draft bill as it stands, I also see within it the potential for something that would be of great use to both further work into how to regulate hate-speech/misinformation, and at the same time to further work into how to balance this regulation with the protection of free speech for Australians.

This potential is contained in the information gathering powers sections of the bill.

As described briefly in the fact sheet accompanying the draft bill; "The proposed powers would: ... enable the ACMA to gather information from, or require digital platform providers to keep certain records about matters regarding misinformation and disinformation"

So the possibly valuable parts of the draft bill are those that provide for the procurement of information from platforms concerning their activities in moderating speech.

Rather than opposing the requirements of UN human rights law, as some other parts of the bill do, these powers, if used correctly, would actually go a long way towards the UN human rights law requirement for:

"28 .[...] Meaningful and consistent transparency about enforcement of hate speech policies, through substantial reporting of specific cases, may also provide a level of insight that even the most detailed explanations cannot offer."

These 'Information Gathering Powers', if used in a way that is compatible with user privacy, can be used to develop metrics which can then be further used for two purposes:

1) To determine whether the platforms are indeed effectively moderating hate speech and misinformation.
2) To establish whether the platforms are at the same time balancing a robust support for freedom of expression.

The first metric, which explores how well platforms are keeping up with requirements for removing objectionable material, is already well discussed within the bill and the guidance documents, so I will not say more here.

However, of just as much interest is the second set of metrics.

This has not been discussed much in any of the material I could find released by ACMA in relation to the draft bill, except for the very general mention that ACMA will "balance freedom of expression").

These metrics are the kinds of data that ACMA would need in order to be able to tell whether the codes they have developed are in fact functioning as designed.

They would be useful to determine, for instance, whether the platform was overreaching and taking down an overly large portion of material in order to 'stay on the safe side' of any threatened new government regulation.

Since one of the goals stated in the bill is to always 'balance free speech', (whether whilst first creating, or when varying, any new code or standard), it will be very useful to have some kind of measure as to whether the desired balance is in fact achieved.

Example - Useful Transparency Data from Meta

Currently Meta records, in the 'Hate Speech' section of its Transparency Center, amongst other data, the following three items:

- "Content Actioned" ,
- "Appealed Content", and
- "Restored Content"

These three metrics would clearly be useful in keeping track of the sensitivity of the platform to its users' freedom of speech.

It is also probable that further data is kept by the company, not currently displayed in the Transparency Center, which would be of great use to the Australian Government in determining if, in what way, and to what extent, Meta is insensitive to the desired moderation/speech freedom balance.

I have not found equivalent data in the DIGI transparency reports for Google or Twitter. If the information gathering parts of the bill were to be passed, this information could presumably be requested, and used to make judgements across platforms and over time to see how each platform is upholding the desired balances.

What about a bill aimed only at "information-gathering"?

So if the information gathering powers of the bill, and these alone, were to be passed into law, I believe they would be valuable on their own and also would form a valuable step towards the creation of a comprehensive and balanced speech regulation ecosystem for digital speech in Australia,

However the rest of the bill, as it stands, would in fact impede such a thing. For this reason I do not believe it should be enacted as is, but only if trimmed down to an 'information-gathering' bill, and then given a further period of public consultation.

Conclusion - the bill is mainly bad, but not all bad!

It seems to me that the attempt made by this draft bill in its current form to legislate digital speech in Australia is rushed, inadequate, and dangerously skewed against freedom of speech.

As it stands, the language in the bill is both inadequate to its stated purpose and also likely to create an unnecessary burden upon the freedom of speech for Australian citizens which impedes their ability to govern as a democratic people.

The bill could, however, be re-oriented towards the purposes of being a digital 'transparency bill'.

Rather than directly influencing or compelling platforms to develop certain moderation policies, at this stage, it would only compel platforms to provide desired data.

This data would enable an evaluation of their policies, takedowns, and also appeals and items returned online

In this way the Australian public would become apprised of both the effectiveness of attempts by the platforms to reduce hate/misinfo, and ALSO to important metrics pertaining to any concomitant incursions upon their free speech.

The Industry could continue with the voluntary opt-in policies it has been using up until now, but the ACMA would be empowered to collect more relevant data about what is happening 'under the hood'.

Then, in light of this data, the discussions listed above in the first section (regarding freedom of speech, intermediary liability, and so on) could take place, and then a new bill could be drafted which would be in line with Australia's commitment to freedom of speech in a liberal democratic setting.in this way

Appendix - more general comments

General comments on steps needed before a better bill can be discussed

Prior to attempting to regulate digital speech in this way, I think Australia needs to undergo a much more thorough discussion of all of the very complex and intermeshed issues surrounding this issue. These include, but are not limited to:

a. Overall alignment with principles of international human rights
b. The meaning of and form of freedom of speech we want in Australia (ie is the implied constitutional freedom still the form we want? Is It adequate to situations we face in the 21st century?)
c. The way in which we answer the two previous points will then need to be combined with other relevant law to decide how we ought to govern areas such intermediary liability .
d. Only then can we really come up with legislation to cover the areas that this draft bill attempts to cover.

Here are just a few resources which relate to the issues listed above:

1. Santa Clara Principles (2.0) for transparency in content moderation (2021)
2. The Manila Principles on Intermediary Liability (2015)
3. Pappalardo, Kylie; Suzor, Nicolas --- "The Liability of Australian Online Intermediaries" [2018] SydLawRw 19; (2018) 40(4) Sydney Law Review 469

REFERENCES

(Refs here for items where reference is not included in main text)

1. https://www.infrastructure.gov.au/sites/default/files/documents/communications-legislation-amendment-combatting-misinformation-and-disinformation-bill2023-june2023.pdf

2. Zhu, K., 2023. THE VICTORIAN BAR INCORPORATED - SUBMISSION TO THE LAW COUNCIL OF, Victorian Bar Association. Australia. Retrieved from