17 August 2023

Department of Infrastructure, Transport,
Regional Development, Communications and
the Arts
GPO Box 594
CANBERRA ACT 2601

BY E-MAIL:
information.integrity@infrastructure.gov.au.

Dear Sir/Madam,

Exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

We refer to the invitation to comment on the exposure draft of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023*. HRLA welcomes the opportunity to provide this submission.

HRLA is Australia's only human rights law firm specialising exclusively in the areas of religious liberty and freedom of thought, speech and conscience. We regularly represent clients and litigate religious freedom matters in all States and Territories that relate to contraventions of fundamental human rights.

We enclose our submission with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerely,

[redacted]

John Steenhof
Principal Lawyer

Human Rights Law Alliance Submission on the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

Summary

1. HRLA is opposed to the Bill in its entirety, for the following reasons:

    1.1. The Bill establishes a framework for excessive interference with free expression. This Bill is contrary to Australia's commitments under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

    1.2. The Bill includes overly broad and amorphous definitions of "harm" and "misinformation"/"disinformation" and sets a low bar for interference with free speech and which presents a real risk that the law will be misused to engage in ideological and political censorship.

    1.3. The Bill provides the Australian Communication and Media Authority (ACMA), with extreme powers to censor speech that are not amenable to proper oversight and review.

    1.4. The Bill fails to provide any balancing provisions that would penalise overzealous policing of speech or which would be capable of protecting the free speech of Australians (such as an information Ombudsman).

    1.5. The Bill imposes the threat of draconian penalties on social media providers which is likely to result in the "voluntary" adoption of an overly restrictive code that will threaten free speech.

    1.6. The Bill is asymmetrical in its application and exempts government communications making one rule for the public and another rule for government; and

    1.7. The Bill is excessive compared to similar overseas measures.

2. The Bill would be effective in securing the Government's wish to authorise the imposition of severe restrictions on the free speech of digital platform users. It would deliver to the Government the power which it seeks, but in doing so makes no provision for freedom of expression. This Bill should be rejected.

Detailed Submissions

The Bill unjustifiably interferes with freedom of speech

3. The Bill mentions freedom of expression once, in amendments that it would make to the Broadcasting Services Act 1992 (by adding a new section. 4(3AC)) to state that Parliament "intends that digital platform services be regulated, in order to prevent and respond to

misinformation and disinformation on the services, in a manner that: (a) has regard to freedom of expression" etc. The official Guidance Note also suggest that freedom of expression will be supported. I will not be.

4. Since freedom of expression does not exist in Australia, though lesser forms of protection do, it is misleading of the Government to maintain that it does, both in the Bill and the official Guidance Note. Whatever protection for free speech exists in Australia is a poor subset of "freedom of expression", and does not even go by the name "freedom of expression".

5. HRLA considers that the Government is not being frank with the Australian public in presenting this Bill. It includes narrow exceptions for matters such as news content, parody, satire and education, most of which should not in principle even qualify as disinformation, and it preserves the freedom of political communication under the Constitution (to save the Bill from invalidity). It makes no allowance for protection equivalent to "freedom of expression", which is understood in terms of the European Convention on Human Rights article 10, and the International Covenant on Civil and Political Rights (ICCPR) article 19.

6. HRLA is especially concerned at the limited public consultation on this proposal, already at the stage of an exposure draft, when an issue of such profound social importance deserves greater opportunity for stakeholder engagement and consideration.

The Bill bears no relation to comparable measures overseas

7. There are some obvious parallels between certain provisions of the Bill and European Union measures addressing misinformation, such as the European Commission's *Communication on the European Democracy Action Plan*, and the *EU Strengthened Code of Practice on Disinformation 2022*. However, there is a crucial difference. All EU measures uphold and maintain protection for freedom of expression, as understood under article 10 of the European Convention.

8. The equivalent to article 10 of the European Convention is article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Australia is bound to implement but has failed to do so. If it had done, the freedom would support access to, and expression of, information by Australians (including on digital platforms).

9. The Bill fails to offer any comparable protection for freedom of expression, and for so long as Australian law does not protect that freedom it is wrong to suggest that it does.

10. The Bill is therefore misleading, in proposing the insertion of a new s.4(3AC) of the *Broadcasting Services Act 1992*, that "The Parliament also intends that digital platform services be regulated, in order to prevent and respond to misinformation and disinformation on the services, in a manner that: (a) has regard to freedom of expression", since there is no human rights protection of the individual equivalent in coverage to freedom of expression.

The Bill has no balancing clauses

11. The Guidance Note explaining the provisions of the Bill is even more misleading, in repeating the pretence that the Bill is capable of supporting freedom of expression, when stating:

11.1. on p.6, "We seek your views on the exposure draft (ED) Bill and whether the proposed legislation strikes an appropriate balance of a range of issues such as freedom of expression"

11.2. on p.7, "In balancing freedom of expression with the need to address online harm, the code and standard-making powers will not apply to professional news and authorised electoral content, nor will the ACMA have a role in determining what is considered truthful", and

11.3. on p.12, "The Bill excludes certain content from the definition of misinformation to strike a balance between the public interest in combatting misinformation, with the right to freedom of expression.

12. To comply with article 19:

12.1. Restrictions on freedom of expression have to be justified as "necessary" for a legitimate purpose.

12.2. Restrictions must not be overbroad. They must be the least intrusive means to achieve their protective function; they must be proportionate to the interest to be protected, both in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.

12.3. The government must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

13. This Bill does nothing to secure freedom of expression, and is therefore defective in fundamental ways that comparable measures in the EU are not.

The Government should have taken notice of the following clear guidance from the UN Secretary-General

14. In August 2022 the UN Secretary General provided clear guidance on countering disinformation in a way that meets the ICCPR's requirements for upholding freedom of expression under article 19. This is the relevant standard since the ICCPR is binding on Australia.

14.1. "State responses to disinformation must themselves avoid infringing on rights, including the right to freedom of opinion and expression."

14.2. "responses to the spread of disinformation should comply with international human rights law and promote, protect and respect the right of individuals to freedom of expression, including the freedom to seek, receive and impart information."

14.3. "State efforts to address the impacts of disinformation should avoid approaches that impose an undue burden on the freedom of expression or are susceptible to politicized

implementation. Not all inaccurate information is harmful, and only some harms – such as those that in fact implicate public health, electoral processes or national security – may warrant State intervention. Even when there is a legitimate public interest purpose, the risks inherent in the regulation of expression require a carefully tailored approach that complies with the requirements of legality, necessity and proportionality under human rights law."

14.4. "States bear the primary responsibility to counter disinformation by respecting, protecting and fulfilling the rights to freedom of opinion and expression, to privacy and to public participation."

14.5. "To be effective in countering disinformation, responses need to be multifaceted and context-specific, and should be grounded in respect for the right to freedom of expression."

14.6. The Secretary-General recommended that States:

14.7. "Recognize that a multifaceted approach anchored in the protection of and respect for human rights, in particular the right to freedom of expression, is indispensable for combating disinformation."

14.8. "Invest in meaningful, inclusive and safe participation at all levels, from local to global, and respect the rights to freedom of opinion and expression, to association and to peaceful assembly, in recognition of the role of community engagement and civil society involvement in enhancing societies' resilience to polarization."

14.9. "States should adhere to international human rights principles when countering disinformation and ensure that any restrictions on the right to freedom of expression are provided for by law, serve a recognized legitimate interest, and are necessary and proportionate to protect that interest."[1]

15. The Bill fails to observe any of these serious appeals to freedom of expression. Instead, the Bill gives ACMA the power to interfere unjustifiably with the freedom of expression of Australians on a larger scale than has ever occurred before.

The Bill contains overly broad definitions that invite abuse

16. The code that ultimately applies is not settled. It will regulate two types of online information, misinformation and disinformation. A differentiating feature between them is whether there is an intention to cause harm:

16.1. 'Misinformation' is content that is considered false, misleading or deceptive, which regardless of intention is reasonably likely to cause or contribute to serious harm.

[1] Report of the Secretary-General, Countering disinformation for the promotion and protection of human rights and fundamental freedoms, A/77/287, 12 August 2022, paras 10, 11, 42, 56, 57, 60.

16.2. 'Disinformation' is a subset of misinformation, that is disseminated deliberately or with an intent to deceive or cause serious harm.

17. The Bill is predicated on a broad conception of "harm".

18. Legislative responses to supposed "harm" in Australia are already highly politicised. The Bill would polarise and fracture Australian society at a time when it needs healing.

18.1. "Harm" includes "hatred…on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability". "Hatred" lacks any objective meaning. The simple expression of difference of opinion is becoming synonymous with hatred.

18.2. "Harm to the health of Australians" could foreseeably prevent open discussion, for example, on gender transitioning, and the "affirmation-only" model which is increasingly open to question in light of available science in the findings of the Cass inquiry in the UK.

18.3. Since authorised government material is immune from constituting "misinformation", any online public debate criticising or challenging a position taken by any Australian government (whether Commonwealth, state or territory), or government official such as the chief medical officer, is liable to censorship. It is undemocratic to impose a government view in place of public debate on sensitive subjects concerning the wellbeing of Australians. They are entitled to the best available health treatment most fitting to their circumstances. It amounts to the substitution of ideology for caring medical practice.

18.4. Public discussion questioning conversion therapy legislation is often described as hateful, even though it unjustifiably prohibits prayer, talk-based counselling and other help. Discussion could similarly be shut down, on the basis that positions put in public debate contradict a government-endorsed ideological position. This would be an extremely serious curtailment of freedom of expression, which has no justification.

The Bill imposes overly draconian penalties

19. The Bill stipulates hefty penalties for breaches:

19.1. of the industry code of practice, of up to $2.75 million or 2% of their global turnover

19.2. of any ACMA-imposed standard, of up to $6.88 million or 5% of global turnover.

20. This will cause digital platforms to monitor and exclude content excessively, as a self-protective measure to avoid significant fines. This will necessarily have a stifling effect on free speech and access to information in Australia.

The Bill places too much power in ACMA

21. This Bill essentially gives the government, through ACMA, a mechanism to determine what constitutes acceptable content, on an unprecedented scale. It gives the state power beyond anything that a government should have in a free and democratic society. There is insufficient oversight of ACMA to ensure that ACMA itself does not inappropriately implement the legislation to encourage the mislabelling of content as misinformation, or to accentuate or amplify misinformation.

Conclusion

22. The Bill is far more extensive than any form of regulation of digital content that exists in Australia already. It covers all content. Freedom of expression is not preserved at all by the Bill.

23. The Bill will result in liability on the part of digital platforms related to their turnover, running in billions of dollars, and will cause them to censor out of self-interest.

24. The everyday usage of digital platforms by Australians will be restricted, when Australians are entitled to express themselves and access what others have to say. It is fundamental to maintaining democratic accountability. The Bill is excessive in controlling online content. It has the potential for misuse by substituting government ideology for public debate.

25. We are grateful for the opportunity to make this submission and welcome any opportunity to appear in support of it.

Yours sincerely,

John Steenhof
Principal Lawyer