



Department of Infrastructure and Transport

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Dear Madam/Sir

Kindly accept this submission in relation to the above Bill.

The purpose of this bill is to establish a system for the regulation of disinformation and misinformation on social media. The regulation will be achieved by the Australian Media and Communications Authority ("the Authority") approving codes or creating legally enforceable standards for various parts of the social media industry.

Disinformation is defined as follows:

the content contains information that is false, misleading or deceptive; and (b) the content is not excluded content for misinformation purposes; and (c) the content is provided on the digital service to one or more end-users in Australia; and (d) the provision of the content on the digital service is reasonably likely to cause or contribute to serious harm; and (e) the person disseminating, or causing the dissemination of, the content intends that the content deceive another person.

Misinformation is defined as follows:

the content contains information that is false, misleading or deceptive; and (b) the content is not excluded content for misinformation purposes; and (c) the content is provided on the digital service to one or more end-users in Australia; and (d) the provision of the content on the digital service is reasonably likely to cause or contribute to serious harm.

Harm is defined as

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.

Excluded content includes content produced in good faith for the purposes of entertainment, parody or satire; professional news content and content produced by an educational institution.

As we read it, professional news content will be restricted to the product of the mainstream media. Independent journalism is unlikely to be covered.



In summary, there will be three types of code or standard: those produced by social media industry bodies which are approved of by the Authority; where there is no industry body the Authority will produce its own and thirdly where the industry body does not produce the code when requested to the satisfaction of the Authority or where the Authority finds a code to be deficient, the authority will produce its own standard.

A code or standard is not permitted to deal with “electoral or referendum matters” which is defined to include material that is authorised under the relevant legislation or “matter communicated for the dominant purpose of influencing the way electors vote in an election.”

In determining its own standards, the Authority is to have regard to the implied freedom of political communication.

An approved code or standard is a legislative instrument the breach of which exposes the social media entity to a civil penalty.

The authority is given a broad power to make directions to ensure that any code or standard is complied with.

We note the comment on the website seeking submissions that the Authority will not be authorized to take down content. With respect, it is not clear to us why proposed clause 53 will not allow the Authority to direct a social media entity to do that. In any event, all of the major social media entities contain provisions in their codes which permit them to take down content. The effect of this Bill will be to give those provisions statutory force and to subject providers that do not take down material to a penalty.

This legislation delegates to the Authority enormous power to deal with one of the fundamental rights of all Australians, the right to freedom of speech. It is our position that the Parliament should not delegate its power to make laws on this topic. It should make those laws itself.

That the codes and standards are subject to disallowance does not alter this submission. The facts are that parliamentarians have little time and energy to review delegated legislation, with the result that it is not an effective check on executive power.<sup>1</sup>

It is not the position of this Council that speech cannot be regulated. That is no one’s position. It is also the position of this Council that there are things that are true and other things that are false and there are such things as facts.

It is our submission, that it is not appropriate to regulate freedom of speech by reference to the mechanism by which the speech is made. Freedom of speech is appropriately regulated

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<sup>1</sup> Andrew Edgar *Administrative Regulation-Making: Contrasting Parliamentary and Deliberative Legitimacy* (2017) 40(3) Melbourne University Law Review 738 at pages 740-1 see also House of Representatives Practice (7th Ed) “Of the hundreds of pieces of delegated legislation presented each year very few are ever formally considered, let alone disallowed, by the House”

by analysis of the interests of the speaker, the audience and the bystander in the particular type of speech act<sup>2</sup>.

There is much concern in our community about the effect of social media on our social and political discourse, amongst other things. But similar things have been said about the spread of literacy, the introduction of television, the introduction of radio and even the popularity of comics.

As Milton Mueller has argued

Hypertransparency generates what I call the fallacy of displaced control. Society responds to aberrant behavior that is revealed through social media by demanding regulation of the intermediaries instead of identifying and punishing the individuals responsible for the bad acts. There is a tendency to go after the public manifestation of the problem on the internet, rather than punishing the undesired behaviour itself. At its worst, this focus on the platform rather than the actor promotes the dangerous idea that government should regulate generic technological capabilities rather than bad behaviour.<sup>3</sup>

Any system of regulation should be done by reference to the type of speech that is involved for example political, commercial and professional (such as statements made by doctors to patients)<sup>4</sup>. If one thinks that social media does represent a categorical change then it should be considered in developing a policy for each type of speech act.

That freedom of speech will be implicated by these laws is clear when you consider the extremely broad definition of harm including such amorphous concepts as “disruption of the public order” and “economic harm to Australians”. This definition of harm would permit codes requiring platforms to take down significant amounts of political content. The exclusion of election related material is very narrow in its focus on elections. Most political speech is not made for the **dominant purpose** of influencing elections. The implied freedom of political communication is an entirely inadequate protection of free speech.

Erroneous statements and exaggerations are inevitable in the heat of political debate. There are very few if any political claims that do not involve or rely upon either stated or unstated factual assumptions. Particularly in political and social discourse the tenets of one person may be viewed by another person as the rankest error.

The government's role as an intellectual arbiter of the truth in social and political debate must be constricted, if not completely denied. This is based on a deep skepticism about the good faith of those controlling the government. That skepticism flows from the fact that decisions about what is true or false, when made by those in power, are bound up with political

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<sup>2</sup> TM Scanlon *A Framework for Thinking about Freedom of Speech, and Some of its Implications*. A lecture delivered in 2018 and found at <https://www.law.berkeley.edu/wp-content/uploads/2018/10/Freedom-of-Speech-Berkeley.pdf>

<sup>3</sup> “Challenging the Social Media Moral Panic” Policy Analysis Number 876 23 July 2019

<sup>4</sup> The use of categories must be treated with care because a commercial may serve the same interests as political activity - T M Scanlon “*Freedom of expression and categories of expression*” in TM Scanlon *The Difficulty of Tolerance* Cambridge University Press 2003

perspectives of those in power. In that regard the government is not impartial when it comes to contested disputes about the facts underlying political life. This is not meant to be some conspiracy theory. It derives from the fact that in the words of Lord Acton “All power tends to corrupt.”

Given the lack of consensus about values in our society the underlying idea must be that everyone of us would want equal freedom with everyone else to be able to express our values and ideas as they relate to government and the management of our society. When we suppress a person’s ideas, we are violating that basic conception that everybody has an equal right to participate in the decision-making process on matters which may affect them. What must be added to this is the notorious fact that Governments consistently overestimate threats to the country and to their policies.

These propositions mean that freedom of speech includes the right to make false claims about social and political matters. In order to sustain uninhibited political discourse, the state cannot prevent resort to exaggeration or offence or even to false statements.

Of course, outside the debate about social and political matters there can be prohibitions on lies about matters to do with politics. There is no objection to laws preventing false or misleading statements about the electoral process (eg when and where you can vote, how to cast a valid vote etc) or materially false statements of fact about a candidate. These are questions on which the State can be neutral and where the claims can be subject to empirical evaluation by ordinary process of law. But outside those narrow focuses the government is not the appropriate arbiter and can never be allowed to be it because it is not neutral.

To those who say that our politics needs a shared substratum of facts to function, we say that substratum cannot be created by the State. It must be generated by debate. The best answer to false speech remains counter-speech.

By way of contrast would be advertisements about medicines. It is clear that the harm to people receiving poor medical advice or information is far greater than the harm to those who wish to deliver false information about drugs. Furthermore, most of the time the facts of the matter can readily be determined by reference to empirical evidence and involve no political controversy, so the scope for government bias is very limited.

Relevant when considering the question of medical advice, is the fact that adults of capacity are entitled to make their own decisions about their medical treatment. So that in the context of medical treatment in many circumstances, at least in the first instance, the appropriate remedy may not be to ban advice but to compel practitioners to make full disclosure of the competing positions by introducing laws reinforcing the duty on practitioners to obtain the fully informed consent of the patient.

We do not have copies of any proposed code or standard and it maybe that at least parts of them would be satisfactory from the point of the free speech principles underlying this submission. However, as we said at the beginning, this is our first objection to this process. But the only conclusion we can reach from documents such as the Department’s “Report to government on the adequacy of digital platforms’ disinformation and news quality measures” is that the intention is to introduce laws that will violate those principles. As it is clear therefore that this legislation authorizes unacceptable intrusions into the right of Australians to free speech, we oppose it.

We trust this is of assistance to you in your deliberations.

Yours Faithfully

A handwritten signature in blue ink, appearing to read 'Michael Cope', written in a cursive style.

Michael Cope

President

For and on behalf of the

Queensland Council for Civil Liberties

19 August 2023