Nick McGowan MP
Member for North Eastern Metropolitan Region

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

25 August 2023

Dear Director,

Submission by Nick McGowan MP on new ACMA powers to combat misinformation and disinformation

In January 2023, the Minister for Communications announced that the Australian Government would introduce new laws to provide the independent regulator, the Australian Communications and Media Authority (ACMA), with new powers to combat online misinformation and disinformation.

Both as a Member of the Parliament of Victoria and as an Australian citizen, I read the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* and am writing to express my dismay and alarm at this ill-thought out, poorly worded and dangerous draft exposure bill.

I believe this draft legislation – both in intent and in its proposed implementation – is incompatible with democracy.

I recommend this draft legislation be scrapped altogether.

I have five key objections to this draft legislation.

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1. **The justification of this Bill is based on the exceptional information environment of COVID**

The current government's sole justification for drafting this bill is a single report produced by ACMA in June 2021: *A report to government on the adequacy of digital platforms' disinformation and news quality measures*.

The report was commissioned in December 2019 and delivered in June 2021, and relied heavily on consumer 'research' during the COVID-19 pandemic. This means that ACMA's 'research' and recommendations for these draconian censorship codes and laws are entirely based on highly exceptional circumstances. This is a fact.

Yet, the current government has entirely failed to take this into account when weaponising the report to draft this Bill. The government even failed to take into account that the ACMA's report itself recommended a second report be done on the issue before drafting any legislation.

2. **The proposed law is fundamentally incompatible with freedom of speech and democracy.**

The concept of freedom of speech is not based on the premise that any nation or community can ever have a perfect information environment. It is based on the premise that people are mature enough to sift through a variety of information – speak, debate, discuss, test and cross check the information they receive – on any issue before acting on it.

A democratic system of governance – that is, a government 'by the people' – trusts the intelligence and maturity of its citizens. It is premised on the idea that people can decide for themselves, and *equally importantly, live with the consequences of those decisions*.

By contrast, dictatorships create a separation between the 'government' and the 'people', where information is often controlled or mediated by the government on the assumption that people cannot be trusted to act in their own or society's best interest.

Yet, history gives us all the evidence we need to show that – despite hiccups – democracies lead to better outcomes for people over time than dictatorships.

However, this legislation assumes a paternalistic relationship between people and the government – where 'government' must control information because 'people' cannot be trusted to distinguish good from bad information, or live with the consequences of their decision-making. This is fundamentally incompatible with governance 'by the people'.

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3. The legislation's definition of 'misinformation' and 'disinformation' are vague, and open to abuse by both social media companies and government agencies.

As per the proposed draft legislation, one of the criteria for any information to be deemed 'misinformation' or 'disinformation' is if 'the content contains information that is false, misleading or deceptive'.

Yet, the ACMA 2021 report which is the basis for this legislation held that this threshold was if 'the content is verifiably false'. The bill has broadened 'verifiably false' to 'false, misleading or deceptive'.

This is a highly significant alteration, and a misapplication of ACMA's report and recommendation.

If the truth of a statement doesn't have to be necessarily 'verifiable', then social media companies or ACMA are free to deem content as 'misinformation' or 'disinformation' on a feeling or hunch or bias in respect to its reliability in order to remove it.

Further, the dictionary definition of the word 'misleading' is 'giving the wrong idea or *impression*'; and that of 'deceptive' is '*tending* or having power to cause someone to accept as true or valid what is false or invalid'. So ACMA (or the technology companies that will be its enforcer) is no longer just judging whether the information is true or false, but also the surrounding context in which the content is being presented – what *impression* it could create, or what it could be *tending* to do.

In effect, this legislation empowers tech employees to judge what even highly trained lawyers in our courts of law would struggle to arrive at a definite conclusion on.

Given the vagueness of the legislation, the gargantuan scale of content on online platforms, and the draconian fines this legislation proposes if tech companies fail to comply, this legislation would only lead to one result – technology companies will err on the side of caution and over-police citizen-created content on their platforms.

In short, threatens even considered and measured speech, and will kill free speech in Australia.

After all, corporations have no incentive to care about freedom of speech or democracy in society; citizens do.

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4. **Its definition of 'harm' is so broad that citizens won't be able to debate critical issues of public policy that intimately impacts them.**

According to this legislation, a piece of content is deemed 'misinformation' or 'disinformation' if it has the potential to cause '**harm'**, which in turn is defined as:

> (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.

However, these are precisely the issues that citizens would most need to discuss and debate: social and community relations, public health, their environment, economy and democratic processes.

These are also some of the most contentious issues of our times, with ordinary citizens contending with information, views and theories that are constantly shifting, changing and moving.

Let's take a current example: the Uluru Statement of the Heart, which is the basis of the proposed Indigenous-only Voice to Parliament, on which Australians will have to vote very soon.

Recently, media reports debated whether the Statement is a one-page document or a full 26-page document.

The government-aligned ABC RMIT Factcheck labelled media reports that it is a 26-page document as 'false' – on the basis of which the reports were removed by Facebook. Yet, the ABC journalist Paul Barry in the popular media program 'Media Watch' disputed this label, saying 'The Uluru Statement is expressed on one page, but there are many more pages of notes and background'.

That highly trained journalists from the same masthead – the ABC – are unable to decide among themselves the truth or falsehood of an issue shows the complexity and constantly shifting nature of public policy issues.

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It is precisely because these issues are so important that we must allow as much information, views and approaches as possible to be discussed everywhere, including on online platforms, rather than limit it.

5. **The legislation is unfair as it leaves out government, media and academics from its ambit.**

The most egregious aspect of this legislation is that it does not apply to content put out by the government, media and academics.

There is absolutely no reason why this should be so, given that governments, media and academics are in the business of influencing society. Not only do they put out most amount of information into society, they also have the highest incentive to 'mislead' and 'deceive', as they stand to gain most from it.

If one takes a charitable view, this exclusion is an admission of how hard it is to comply with the broad categories for 'misinformation' and 'disinformation' that this legislation takes. It is so broad that governments, media and academics cannot possibly meet them – and hence, given their importance in society, they have been excluded from it.

However, if we took an uncharitable view, we could say that the legislation necessarily wants to create a powerful *elite* who control what is said or not said in society, and who can conduct debate and discussion on behalf of the citizens – without an equal participation of the citizenry.

Either way, if this legislation is too hard for government, media and academics (with all their resources) to comply with, it is too hard for ordinary citizens to comply with.

For this reason alone, it should be scrapped.

Conclusion

This proposed legislation must be completely abandoned.

It seeks to capitalise on the anxieties of Australian citizens from a short, exceptional and traumatic period in our nation's history to give powerful institutions – government, media, technology companies, and academics – extraordinary powers over what ordinary citizens can and cannot say (or hear) over the Internet.

It is poorly written and thought out and is akin to taking a sledgehammer to a problem that requires extreme nuance and care in handling.

It is incompatible with debate and discussion thriving in a democracy because it *hugely* incentivises technology companies to over-police what can and cannot be said online.

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It is hypocritical because it has a different standard of conduct for government, media and academics than to the people they are meant to represent and serve, ordinary citizens.

Instead of empowering ordinary citizens against powerful institutions, this proposed legislation aims to further empower already powerful institutions to oppress and limit ordinary citizens.

Please do not hesitate to contact me on 9877 7188 or write to be at Nick.McGowan@parliament.vic.gov.au if you wish to discuss my submission further.

I would like my submission to be made public.

Yours sincerely

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