

New ACMA powers to combat mis- and disinformation

Submission to the Department of Infrastructure, Transport, Regional Development, Communications & the Arts

Friday 25 August 2023

[Public
Interest
Journalism
Initiative]

1 Introduction

The Public Interest Journalism Initiative (PIJI) welcomes the opportunity to provide feedback to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts on the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (the Bill).

PIJI's interest lies in the health and long-term sustainability of public interest journalism and the public benefit it generates for all. PIJI is platform-neutral and size-neutral with respect to news media and with no commercial interests, our activities focus on optimal fiscal and regulatory measures to support a diverse news marketplace and enable news media to innovate, grow and serve in its role as a public good for the Australian community.

This submission is structured as follows:

1. Section 1 provides this brief introduction
2. Section 2 provides general comments
3. Section 3 responds to the terms of reference
4. Section 4 summarises PIJI's recommendations
5. Section 5 summarises PIJI's recommendations
6. Section 6 outlines how this submission was prepared
7. Section 7 provides further information about PIJI

We would be pleased to provide further comment and engage in any future consultations on the proposed legislation.

In preparing the following comments, PIJI is guided by the key defining principles that inform all our work: to act in the public interest; to ensure plurality of news production and neutrality of support; and to be independent, practical and evidence-based in consideration of any option.

2 General comments

PIJI commends the Australian Government's commitment to new regulatory approaches in response to the changing market dynamics brought about by digital platforms and in recognition of the importance of quality information and news to our democracy and broader civil society.

The spread of online misinformation and disinformation is having a profound effect on society and its potential harm is of great concern. Access to accurate, reliable information alongside freedom of speech, inclusive of a diversity and plurality of views, are integral to a working democracy.

PIJI welcomes efforts to measure and mitigate the problem through the proposed legislative framework and to this extent, broadly supports the focus of extended Australian Communications and Media Authority (ACMA) powers on the processes and systems of digital platform services, rather than on assessment of individual content on digital platform services.

PIJI has previously engaged on the development and release of the Voluntary Code of Practice on Misinformation and Disinformation (the Code), launched by the Digital Industry Group Incorporated (DIGI) in 2021. PIJI's [submission](#) to the Draft Voluntary Code of Practice on Disinformation in November 2020 made several recommendations, including that the draft be expanded to cover misinformation on platforms as well as disinformation, as subsequently adopted. Further, PIJI recommended the promotion of public interest journalism content within the Code as an explicit strategy to assist in combatting misinformation.¹

While this Bill seeks to exclude professional news content from its operation, we take this opportunity to reinforce the need for robust, news media industry standards that meet community expectations and accommodate changing technologies, for example a disclosure requirement on the use of generative AI in professional news content.

PIJI supports the underlying principle of the Bill for greater transparency and accountability on how all parties regulate mis- and disinformation on digital platforms. Improved record-keeping and reporting obligations will assist, as will information gathering powers that generate longitudinal and publicly available data to better understand the impacts of, and responses to, mis- and disinformation in Australia. It is important that these powers also permit aggregate data sharing and analysis by academia, civil society and other researchers².

Furthermore, the fast-changing nature of digital platforms and technologies requires regulation be built to stay fit for purpose and therefore, mandated reviews should be embedded in the framework.

¹ Public Interest Journalism Initiative. 2020. Submission on the Draft Australian Code of Practice on Disinformation. <<https://piji.com.au/wp-content/uploads/2023/07/201125-disinformation-code-submission.pdf>>

² With the explicit safeguards against sharing of private data.

3 Response to the terms of reference

3.1 Definitions of key concepts

Some conceptual confusion persists around mis- and disinformation. The Bill presents different definitions of key concepts from those used in the existing, voluntary Australian Code of Practice on Disinformation and Misinformation (the Code). Given the Code predates the draft Bill, we have examined the main definitions below to provide insight on issues for consideration or clarification.

We also note some definitions that appear in other existing legislation, such as ‘digital platform services’, may benefit from harmonisation.

3.1.1 Mis- and disinformation

The Bill defines misinformation on digital platform services as ‘content that contains information that is false, misleading or deceptive and ... which is reasonably likely to cause or contribute to serious harm.’³ The Code defines misinformation as ‘digital content (often legal) that is verifiably false or misleading or deceptive...propagated by users of digital platforms... which is reasonably likely (but may not be intended to) cause harm.’⁴ The Bill’s coverage therefore expands from content that ‘is’ false information to content that ‘contains’ false information. However, it does not clarify how much of a content piece needs to be false before the ‘contains’ standard is met i.e. does the presence of any false information that could cause serious harm mean that content is deemed ‘misinformation’ or is there a minimum threshold? Further clarity is sought on this point.

The Bill defines disinformation as a subset of misinformation but with the addition of ‘intent’ i.e. where ‘the person disseminating, or causing the dissemination of the content, intends that the content deceive another person.’⁵ Under the Code, disinformation is differentiated by the actions of the user sharing the content i.e. disinformation is ‘propagated amongst users of digital platforms via inauthentic behaviours’,⁶ meaning ‘spam and other forms of deceptive, manipulative or bulk, aggressive behaviours’.⁷ The Code’s ‘inauthentic behaviours’ seems to exclude intentional disinformation sharing by ordinary users with mal intent within the ordinary use of a platform. Research has shown little evidence of inauthentic behaviours spreading coronavirus conspiracy theories, and instead, found social networks of people largely responsible.⁸

There are conceptual and practical challenges to using ‘intent’ to differentiate disinformation from misinformation. Bruns et al (2021) and Carson et al (2021) have observed that the same false, misleading or deceptive content can move between mis- and disinformation, both of which result in the further spread of harmful content, regardless of whether it was intentional

³ Exposure draft. Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023. Schedule 1.7.1 p. 12

⁴ Code of Practice 3.2B; 3.6 p. 5-6.

⁵ Ibid. Schedule 1.7.2 p. 12

⁶ Code of Practice 3.2B; 3.6 p. 5-6.

⁷ Code of Practice 3.5 p. 6.

⁸ Bruns, A., Harrington, S. & Hurcombe, E. 2021. Coronavirus Conspiracy Theories: Tracing Misinformation Trajectories from the Fringes to the Mainstream. *Communicating COVID-19: interdisciplinary perspectives*, p. 229 – 249.

or not.⁹ ¹⁰ The establishment of a user's intrinsic motivations for sharing content also cannot be determined from an assessment of content alone. Significant investigative resources are required and even then, findings may prove inconclusive as to the intent to deceive. The Bill's guidance note does not provide instruction on how intent will be verified. Further, the Bill's explicit reference to intent 'to deceive' does not take into consideration other intentions, such as causing confusion or undermining trust.

The Bill characterises both mis- and disinformation against a likelihood of causing or contributing to serious harm. Indeed, it sets out information powers and code and standard powers as applicable to mis- and disinformation as interchangeable terms with the exception of Subclause 35(1)(a) in relation to unauthorised electoral or referendum content. The guidance note acknowledges this general interchangeability of terms.

Various ideas were explored through PIJI's consultations with academia (see Section 6) on the difficulties associated with verifying intent – the primary factor for determining disinformation from misinformation. Given a key regulatory objective is to strengthen measures against the circulation of harmful content, the focus on harm with the intent behind harmful content less relevant for the purposes of the Bill, was discussed. PIJI is supportive of the approach suggested by the Digital Media Research Centre at the Queensland University of Technology that looks to remove the distinction between misinformation and disinformation from the Bill and instead, 'make the central criterion whether the continued circulation of content could cause or contribute to serious harm.'¹¹ PIJI believes this may be a more practicable and refined approach that emphasises action against the harmful content, over action against the actors spreading such content. While both elements are important to address, PIJI agrees with QUT that faster responses to harmful content should be a priority, which this approach may help facilitate.

As QUT also notes, the adoption of this streamlined definition in the Bill does not preclude related industry codes or standards from considerations of intent in measures taken against harmful content and the actors who disseminate such content. It is reasonable to apply proportional measures that distinguish between malicious, bad faith actors and social media users who unintentionally spread misinformation.

In the event separate definitions of misinformation and disinformation are retained in the Bill, PIJI recommends that guidance be developed on how intent is established and operationalised under the Bill and that this guidance be released for public consultation prior to the passage of these powers. PIJI also notes that unauthorised electoral or referendum content may be subject to different powers, depending on whether it is assessed as misinformation or as disinformation.¹²

⁹ Ibid. p. 249.

¹⁰ Carson, A, Gibbons, A. & Phillips, J. B. 2021. Recursion theory and the 'death tax' Investigating a fake news discourse in the 2019 Australian election. *Journal of Language and Politics*, 20(5), p. 696 – 718.

¹¹ Queensland University of Technology Digital Media Research Centre. Submission in response to the exposure draft of the Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023. p. 3 (Draft).

¹² Guidance note. Attachment 2. P. 29.

Recommendations

1. Provide more guidance on the applicable ‘contains’ false information standard within the definition of misinformation.
2. Consider the removal of the distinction between misinformation and disinformation in the Bill but retain the concept of ‘intent’ in measures for harmful content and actors circulating harmful content.
3. If separate definitions of mis – and disinformation are maintained, develop guidance on how user intent will be established and operationalised and release this guidance for further public consultation. Provide additional guidance around the instances where mis- and disinformation are covered differently under the new ACMA powers.

3.1.2 Harm

The Bill adopts the term ‘serious harm’ (Clause 2), where the dissemination of misinformation is reasonably likely to either ‘cause or contribute to’ serious harm as distinct to the Code’s narrower harm standard¹³ that addresses misinformation reasonably likely to ‘cause’ harm.¹⁴

The Bill also broadens the categories of people and things that can be harmed from the Code. The guidance note outlines different types of harm including hatred according to protected attributes such as race, gender or sexual identity, religious beliefs or health.¹⁵ As an example, it is unlikely that most Christian religious beliefs in Australia are ‘marginalised or vulnerable’ as per the Code’s protection¹⁶, but these appear protected from serious harm under the draft Bill. We suggest some consideration be given to whether hatred or vilification is the appropriate term according to existing legal frameworks, such as the Racial Discrimination Act 1975¹⁷, Racial and Religious Tolerance Act 2001 [Vic]¹⁸ and that consistent language be adopted accordingly.

Another type of harm, the ‘disruption of public order or society’¹⁹ in Australia appears to greatly expand the ‘public safety and security’ category²⁰ from the Code of Practice. The example of serious harm that is provided against this type of harm is ‘misinformation that encouraged or caused people to vandalise critical communications infrastructure’, which would appear to refer

¹³ Code of Practice 3.4 p. 6.

¹⁴ Code of Practice 3.2C; 3.6C p. 5-6.

¹⁵ Guidance note 2.1.2 p. 11

¹⁶ Code of Practice 3.4B p. 6

¹⁷ Racial Discrimination Act 1975 <<https://www.legislation.gov.au/Details/C2016C00089>>

¹⁸ Racial and Religious Tolerance Act 2001 <<https://www.legislation.vic.gov.au/in-force/acts/racial-and-religious-tolerance-act-2001/011>>

¹⁹ Guidance note 2.1.2 p. 11

²⁰ Code of Practice 3.4B p. 6

to a spate of arsons of 5G mobile towers²¹ due to conspiracy theories.²² PIJL supports this example of a misinformation-caused, serious harm as actionable, however, it does not clearly align with the presented type of harm. Are telecommunications towers ‘public order or society’? That term could be interpreted far beyond critical infrastructure, potentially into social and political issues. Some further consideration may be necessary for the terminology of this harm type to avoid overreach into social and political issues not related to protected attributes or democratic processes and institutions.

PIJL notes and supports the inclusion of democratic processes, public health, and the environment as types of harm covered under the Bill, as well as coverage of ‘economic or financial harm to Australians, the economy or a sector of the economy’.

Recommendations

4. While supportive of the expanded definitions of harm, determine language around hatred and vilification that is consistent with existing legal frameworks.
5. Exclude social and political issues not related to protected attributes or democratic processes and institutions from the Bill.

3.1.3 Instant messaging messages

The challenge of responding to mis- and disinformation in instant messaging services while preserving a user’s reasonable expectation of privacy remains.

Our understanding of the Bill is that instant messaging services fall under the category of ‘connective media services’, which are within scope of the proposed new powers. However, the content of encrypted private messages, meaning ‘an instant message sent using a digital platform service from one end-user...to one or more other end-users...where the message is only observable to end-users...selected by the sender or any of the recipients,’²³ is out of scope. PIJL notes the increased use of instant messaging services as larger-scale distribution platforms beyond their original function.²⁴ We echo concerns of a La Trobe University submission that the guidance note needs to provide definitions for key terms such as ‘group’, ‘social media’ and ‘publicly open conversation’.²⁵

²¹ See Alexander H. 2021. Police investigate fire at Vaucluse phone tower. It turns out it wasn’t 5G. Sydney Morning Herald. 20 October. <<https://www.smh.com.au/national/nsw/police-investigate-fire-at-vaucluse-phone-tower-it-turns-out-it-wasn-t-5g-20211019-p591cf.html>>; Yim N. 2022. Telstra tower vandalism deprives flood-stricken town of service. news.com.au. 18 March. <<https://www.news.com.au/national/nsw-act/crime/telstra-tower-vandalism-deprives-floodstricken-town-of-service/news-story/f47d7e756d758618ecc089d181009a44>>

²² Satariano A. and Alba D. 2020. Burning cell towers, out of baseless fear they spread the virus. New York Times. 10 April. <<https://www.nytimes.com/2020/04/10/technology/coronavirus-5g-uk.html>>

²³ Exposure draft. Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023. Schedule 1.7.1 p. 7

²⁴ A case study in Indonesia published by Carson and Fallon (2021) shows instant messaging services being used to spread misinformation on a larger distribution sale, prompting Facebook (owner of WhatsApp) to limit the number of people to which a message can be forwarded to.

²⁵ La Trobe University. 2023. Academic feedback on an exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023. p. 4.

Recommendations

6. Consider the definition of ‘connective media services’ with regards to the use of instant messaging services as larger-scale distribution platforms.
7. Provide further definition on key terms such as ‘group’, ‘social media’ and ‘publicly open conversation’.

3.2 False information that isn’t misinformation

The Bill grants the ACMA powers to gather information and make records about the prevalence of false, misleading or deceptive information that may not be ‘seriously harmful’ and therefore does not meet the definition of misinformation. The guidance note explains this as an additional metric necessary to make complete assessments of false information.²⁶ PIJI noted during the development of the voluntary Code that ‘the accumulation of small amounts of misinformation disseminated over time can culminate in serious threats to the democratic process and community safety.’²⁷ PIJI also promoted transparency around Code record-keeping and reporting as a key accountability measure, which would also produce a longitudinal, evidence-base to better inform policy. However, this proposed expansion of the ACMA’s information-gathering powers from misinformation to any information that is false, misleading or deceptive, warrants further examination as to its exact purpose and to avoid any regulatory overreach. The inclusion of some examples in the guidance note may assist understanding.

Recommendations

8. Examine the necessity for the proposed expansion of the ACMA’s information-gathering powers from misinformation to any information that is false, misleading or deceptive. If necessary, include examples in the guidance note to assist understanding.

3.3 Professional news content

As expressed in PIJI’s submission to the Draft Voluntary Code of Practice on Disinformation in November 2020, the production and distribution of high-quality, public interest journalism is essential to the functioning of a democratic society, and as an antidote to the spread of mis- and disinformation harmful to that goal.

PIJI emphasises the role of improving visibility of public interest journalism in combatting online mis- and disinformation and points to news quality as a separate but related issue to this Bill.

We welcome the proposed Bill’s definition of ‘professional news content’ as ‘news content produced by a news source who is subject to certain rules and has editorial independence from the subjects of the news

²⁶ Guidance note. Footnote 2. p. 15.

²⁷ Public Interest Journalism Initiative.. 2021. PIJI concerned by disinformation code. Media release. <<https://piji.com.au/piji-media-releases/piji-concerned-by-dis-misinformation-code/>>

source's news coverage'.²⁸ We note and support the intention to exempt news content for the purposes of misinformation, provided certain criteria are met by the Australian professional news organisations that produce the content, consistent with the professional standards test in the News Media and Digital Platforms Mandatory Bargaining Code Act 2021. Analogous rules and editorial standards apply for international professional news producers on exemption of content. PIJI recommends the definition of professional news businesses be strengthened with the addition of an external complaints process to the professional standards test, a criterion repeatedly recommended by PIJI although yet to adopted under the Bargaining Code.²⁹

Robust, professional news industry standards are needed to address the challenges of mis- and disinformation. News production is held accountable to professional standards, regulation and public scrutiny. It plays an essential part of any effort to improve the quality of digital information ecosystems. Such standards should also meet community expectations and accommodate changing technologies, such as a disclosure requirement on the use of generative AI in professional news content. Improvements to news industry standards can be undertaken separately, given the Bill's specific focus on the processes and systems of digital platform services.

Recommendations

9. Adopt the proposed definition of professional news content but add the oversight of an external complaints process to the professional standards test.

4 Regulatory framework review

The digital platforms and the spread of mis- and disinformation are changing rapidly as are market conditions. Technologies including generative AI continue to emerge and evolve. It is essential the regulatory framework remains fit-for-purpose. To do so will require a mandated review after a specified time period, such as after an initial 12 months.

PIJI also recommends that any related codes and industry standards are required to undergo mandatory review for their effectiveness and any unintended consequences within a short time frame after enactment.

Recommendations

10. Any regulated frameworks, codes and industry standards require a mandated review after a specified time period.

²⁸ Guidance note. p12.

²⁹ Public Interest Journalism Initiative. 2022. Review of the News Media and Digital Platforms Mandatory Bargaining Code. <https://piji.com.au/wp-content/uploads/2023/05/nmbc-review_piji-submission_may-2022.pdf>

5 Summary of recommendations

1. Provide more guidance on the applicable 'contains' false information standard within the definition of misinformation.
2. Consider the removal of the distinction between misinformation and disinformation in the Bill but retain the concept of 'intent' in measures for harmful content and actors circulating harmful content.
3. If separate definitions of mis – and disinformation are maintained, develop guidance on how user intent will be established and operationalised and release this guidance for further public consultation. Provide additional guidance around the instances where mis- and disinformation are covered differently under the new ACMA powers.
4. While supportive of the expanded definitions of harm, determine language around hatred and vilification that is consistent with existing legal frameworks.
5. Exclude social and political issues not related to protected attributes or democratic processes and institutions from the Bill.
6. Consider the definition of 'connective media services' with regards to the use of instant messaging services as larger-scale distribution platforms.
7. Provide further definition on key terms such as 'group', 'social media' and 'publicly open conversation'.
8. Examine the necessity for the proposed expansion of the ACMA's information-gathering powers from misinformation to any information that is false, misleading or deceptive. If necessary, include examples in the guidance note to assist understanding.
9. Adopt the proposed definition of professional news content but add the oversight of an external complaints process to the professional standards test.
10. Any regulated frameworks, codes and industry standards require a mandated review after a specified time period.

6 Preparation of this submission

In preparation of this submission, PIJl has engaged with industry, government agencies and academia including participation in the Department's briefing session on July 7, 2023, and the Digital Industry Group Inc. and University of Technology Sydney hosted Mis- and disinformation: content moderations and policy approaches on July 27, 2023. We also thank the following organisations for their comment:

Australian Associated Press

Copyright Agency Limited

Croakey Health Media

Google Australia

Department of Politics, Media and Philosophy, La Trobe University

Digital Media Research Centre, Queensland University of Technology

Centre for Media Transition, University of Technology Sydney

7 About the Public Interest Journalism Initiative

The Public Interest Journalism Initiative (PIJI) is a specialist think tank advancing a sustainable future for public interest journalism in Australia. Through our research and advocacy, we seek to stimulate public discussion and establish optimal market pre-conditions in investment and regulation that will sustain media diversity and plurality in the long term.

PIJI is a registered charity with the ACNC under the charitable category of ‘advancing education’ (ABN 69 630 740 153). It is a philanthropically funded, non-profit company limited by guarantee governed by a Board of independent directors, advised by an Expert Research Panel and Policy Working Group and regulated by the ACNC, ATO and ASIC.

Board of Directors

Professor Allan Fels AO (Chair)

Virginia Haussegger AM (Deputy Chair)

Eric Beecher

Richard Eccles

Leslie Falkiner-Rose

Mette Schepers

Professor Simon Wilkie

Policy Working Group

Richard Eccles (Chair)

Professor Allan Fels AO

Virginia Haussegger AM

Professor Simon Wilkie

Expert Research Panel

Professor Derek Wilding (Chair), University of Technology Sydney

Associate Professor Jason Bosland, University of Melbourne

Professor Axel Bruns, Queensland University of Technology

Professor Andrea Carson, La Trobe University

Associate Professor Andrew Dodd, University of Melbourne

Professor Kristy Hess, Deakin University

Professor Sora Park, University of Canberra

Dr Margaret Simons, University of Melbourne

Professor Glenn Withers AO, Australian National University

Project team

Anna Draffin, Chief Executive Officer

Gary Dickson, Head of Research

Maia Germano, Research Coordinator

[Public Interest Journalism Initiative]

CONTACT US

Public Interest Journalism Initiative


ABN 69 630 740 153

info@piji.com.au

www.piji.com.au

 [@piji_journalism](https://twitter.com/piji_journalism)

 [linkedin.com/company/public-interest-journalism-initiative](https://www.linkedin.com/company/public-interest-journalism-initiative)

 [/publicinterestjournalisminitiative](https://www.facebook.com/publicinterestjournalisminitiative)

