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Submission on Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023

Zali Steggall OAM MP

I welcome the opportunity to make a submission to the Government on its proposed Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023.

I acknowledge that this Bill is an attempt by Government to address what is a very real and concerning problem in modern Australian society, namely the prevalence of online content which, either unwittingly or deliberately, contains inaccuracies, conflates opinion with “fact”, and in the more sinister instances, seeks to deliberately misinform and mislead.

Background

The public are clearly concerned about this state of affairs. Sometimes incorrect or misleading content is obvious, or quickly capable of being checked against other sources to establish its credibility, but to continuously fact check all information is clearly beyond the capability of the average citizen, and the variability of online content contributes to a rising sense of scepticism and disaffection in society.

There is substantial evidence to assess that mis and disinformation is a significant issue that is facing the Australian public. According to a Roy Morgan survey, over two-thirds of Australian adults have been exposed to deceptive news items.¹ Another study found that a quarter of a sample of Australian adults had read stories that were ‘completely made up’.² More recently, The Australia Institute’s exit poll of the 2022 federal election found that 73 per cent of Australians came across misleading political

¹ Hayden, S., & Bagga, N. (2018) Consumer use of news. *Roy Morgan*, viewed 12 November 2022, <https://www.accc.gov.au/system/files/ACCC%20consumer%20survey%20-%20Consumer%20use%20of%20news%2C%20Roy%20Morgan%20Research.pdf>

² Hughes, C. (2020, September 20) Share of consumers who are exposed to fake news in Australia 2018 by gender. *Statista*, viewed 12 November 2021, <https://www.statista.com/statistics/891818/australia-consumer-exposure-to-fake-news-by-gender/>

advertisements during the election campaign.³ In all these cases, the true figure may be higher, given that research shows that the ability of consumers to distinguish fact from fiction is much lower than they realise.⁴

To make matters worse, there are perverse incentives in the information market to produce false political information.⁵ The political economy of social media erodes ‘both the media’s willingness to supply “truth” in political discourse, and the consumer’s demand for it’.⁶ There is a lucrative market to produce fake news for consumers who naturally seek information that confirms their existing prejudices.⁷ The result is that misleading or deceptive information is highly transmissible.⁸

The Australian Competition and Consumer Commission’s *Digital Platforms Inquiry* recommended better regulation of social media content to prevent misinformation and disinformation.⁹ The current *Australian Code of Practice on Disinformation and Misinformation* (2021) (DIGI Code) provides for voluntary self-regulation by social media companies of the accuracy of content distributed through their platforms.¹⁰ However, the *Code* does not address the matter of misleading or deceptive political advertising because there is no current legal mechanism to underpin it in that regard. This exposure draft equally fails to deal with the issue of political advertising.

Concerns with the Bill

The Government has already passed various pieces of legislation to address digital content which is considered to pose an identifiable and serious threat or harm to society or certain members of society, but I have real concerns about this proposed legislation on several counts.

My main concerns centre on three key areas, namely:

1. The necessity and appropriateness of the new powers and the capacity and appropriateness of Australian Communications and Media Authority (ACMA) to enforce them
2. Proposed changes to the definition of key terms

³ The Australia Institute. (2022) Exit poll – Misinformation in the federal election campaign. *The Australia Institute*, viewed 12 November, <https://australiainstitute.org.au/report/political-advertising-on-social-media-platforms-during-the-2022-federal-election/>

⁴ Lyons, B., Guess, A., Montgomery, J. M., Nyhan, B., & Reifler, J. (2021) Overconfidence in news judgments is associated with false news susceptibility’. *PNAS*, 188(23), e2019527118.

⁵ Braun, J. A., & Eklund, J. L. (2019) Fake news, real money: Ad tech platforms, profit-driven hoaxes, and the business of journalism. *Digital Journalism*, 7 (1), 1–21.

⁶ Hill, L. (2022, August 23) Australians are tired of lies in political advertising. Here’s how it can be fixed. *The Conversation*, viewed 12 November, <https://theconversation.com/australians-are-tired-of-lies-in-political-advertising-heres-how-it-can-be-fixed-189043>

⁷ Hughes, H. C., & Waismel-Manor, I. (2021) The Macedonian fake news industry and the 2016 US election. *Political Science & Politics*, 54(1), 19–23.

⁸ Buchanan, T. (2020) Why do people spread false information online? The effects of message and viewer characteristics on self-reported likelihood of sharing social media disinformation. *Plos One*, 15(10), 1–33.

⁹ Australian Competition and Consumer Commission (2019) *Digital Platforms Inquiry Final Report*, Commonwealth of Australia, 280, <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>

¹⁰ DIGI. (2021) *Australian Code of Practice on Disinformation and Misinformation*. <https://digi.org.au/disinformation-code/>

3. The exclusion of professional news content

1. The necessity and appropriateness of the new powers

Are the new powers necessary or appropriate, or might they do more harm than good?

The draft Bill purports to give effect to certain recommendations of the ACMA in its “Report to government on the adequacy of digital platforms’ disinformation and news quality measures” dated June 2021 (“**ACMA Report**”).

The main recommendations it deals with are:

(a) Recommendation 3, which would give the ACMA formal information-gathering powers (including powers to make record-keeping rules) to oversee digital platforms, including the ability to request Australia-specific data on the effectiveness of measures to address disinformation and misinformation, and

(b) Recommendation 4, which would give the ACMA reserve powers to register industry codes, enforce industry code compliance, and make standards for the activities of digital platforms. These powers would come with enforcement powers.

In this submission I will deal mainly with concerns about how the legislation deals with Recommendation 4. I refer to how it deals with Recommendation 3 (which I have fewer concerns about) in section 4 below.

How well is the ACMA performing its current role? Leaving aside whether the proposed new powers are on balance needed or appropriate, is the ACMA capable of exercising such new powers properly and effectively?

I note that the recommendations made in the ACMA Report could be seen as self-serving, in that they operate to bestow further powers on ACMA, without providing for any oversight of the ACMA or evaluation of whether the ACMA is currently performing its functions in respect of broadcasters adequately and appropriately.

As far as I am aware, there has been no recent evaluation of the effectiveness of the ACMA in performing its role vis-a-vis broadcasters. For reasons set out in my introductory paragraph, I do not think it has performed well. In my view, before embarking on a course which would give this entity broader powers, it should be subject to an external evaluation to assess whether it is capable of doing the job. I also note the comments in the VB Submission at p.5 on the difficulty of interpreting the concepts of misinformation and disinformation, with which I concur.

I note the submission of the Victorian Bar to the Law Council of Australia, on its view of the Exposure Draft of the Bill (“**VB Submission**”). I am persuaded that many of the points made in the VB Submission have validity. In particular:

(a) I am not at all convinced that the ACMA has the experience or capability to determine whether content is “misinformation” or “disinformation” and therefore, whether the industry is properly enforcing its own voluntary code.

I am concerned to find out whether the voluntary codes are working. I note that at the time of the ACMA Report, the administrative functions had not been set up, meaning that a “compliance subcommittee, a detailed reporting guideline and a facility to address signatory non-compliance” were still under development.

I consider that those parts of the Bill which enable the ACMA to gather information and require record-keeping would assist in establishing whether the voluntary codes are working.

To give effect to the reserve powers in this Bill without the information required to assess the performance of the voluntary codes is in my view, inappropriate.

However, I support in principle the information gathering and record-keeping powers, which I consider would assist in achieving this aim.

(b) Given that the ACMA ultimately reports to the Minister, and therefore to Government, the powers given under the Bill are, I believe, capable of being misused should the political and social environment enable this to happen and could be used in a way which threatens freedom of speech and democracy.

While the Government may be designing the system with the current political makeup in mind, consideration must be given to the potential for such powers to be misused by future governments. The Bill provides for the potential for a new code to be imposed by ACMA in the event of underperformance of the voluntary code.

Recommendation

In addition to (and independently of) Government reconsidering the possibility for misuse or abuse of these new powers by future governments with less benign agendas, I urge the Government in any event to commission an independent external review of the performance of the ACMA in enforcing its current powers, before putting this legislation before Parliament. The potential for failure of this legislation of this kind to achieve its intended outcomes will rest firmly on the ability of the ACMA (or other enforcement body) to enforce it effectively and vigorously.

2. Concerns about the definitions employed

I note that the DIGI Australian Code of Practice on Disinformation and Misinformation, (“**DIGI Code**”) which is the voluntary code and the focus of the ACMA report, acknowledges at page 7 that “online disinformation and misinformation are relatively novel and dynamic phenomena and there is no established consensus on the definition of either term.”

The definitions in the Bill are very broad:

(a) Misinformation is (summarised) information that is false, misleading or deceptive, and reasonably likely to cause or contribute to serious harm.

(b) Disinformation has a similar definition with the added element that the person disseminating it intends that it deceive another person.

There is also a detailed definition of “serious harm”.

I note here a particularly important fact: that these definitions are quite different from the definitions used in the DIGI Code.

The definitions in the Code summarised below are:

(a) Misinformation is digital content that is verifiably false or misleading or deceptive, the dissemination of which is likely (but may not be clearly intended to) cause Harm.

(b) Disinformation is digital content that is verifiably false or misleading or deceptive, is propagated via Inauthentic Behaviours, the dissemination of which is likely to cause Harm.

There follow definitions of both “Harm” and “Inauthentic Behaviours”, which I will not go into here, but I note that the definition of Harm is quite different from the definition of “serious harm” in the Bill, and the Bill does not contain a concept of “Inauthentic Behaviours”.

I question why Government proposes completely different definitions from those used in the DIGI Code. Have the definitions in the Bill been tried in other jurisdictions, and if so, have they been evaluated to determine whether they are effective, or whether they cause unintended negative consequences?

If Government is seeking to implement the recommendations of the ACMA Report, why has it substituted different definitions of such critical terms?

3. The exclusion of “professional news content”?

I have concerns about several limbs of the “Excluded Content” concept (including the exclusion of content authorised by a government of any level) but I am particularly concerned that the powers do not extend to enable monitoring “professional news content”.

I note that the definition of “professional news content” is detailed, but it is also very broad. It assumes that bodies such as the Australian Press Council and the Independent Media Council have monitoring and enforcement powers in place (and a corresponding track record) which would make it unnecessary for the ACMA to monitor their codes. In fact, the Guidance Note at page 12 says that “the Australian Government does not seek to influence the editorialisation and reporting by the free press”. However professional news providers are not currently excluded from the ACMA’s current powers with respect to broadcasters, and so I question whether this represents a change in the position of Government?

A particularly important effect of this exclusion would be that a broadcaster who would be subject the ACMA’s monitoring and control under its current powers could simply transfer its content to a digital platform and thus escape scrutiny. This seems to be an obvious and glaring loophole.

Conclusion

In conclusion, while I agree that the issue of mis- and disinformation is an issue for Australia and the global information landscape that needs to be addressed, especially in the realm of social media, this Bill as drafted requires significant improvement to:

- a. adequately address the issue at hand and
- b. put limits on the potential for abuse of power by future governments.

Without these improvements, I fear that the Bill will both fail to live up to the expectations of controlling misinformation and disinformation and have the potential to be exploited in the event of a future extremist government.

I strongly recommend that an independent external review of the performance of the ACMA be conducted before this Bill is presented to Parliament, to establish whether that body is the appropriate body to entrust with any part of these novel and far-reaching powers.