

SUBMISSION:

***Online Safety (Basic Online Safety
Expectations) Amendment Determination
2023***

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

Australian Christian Lobby's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

acl.org.au



Secretary responsible for BOSE Reform
Department of Infrastructure, Transport, Regional
Development, Communications, and the Arts
GPO Box 594
CANBERRA ACT 2601

By Email: BOSEreform@communications.gov.au

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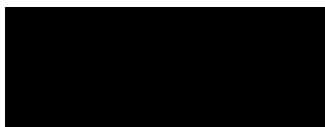
Dear Sir/Madam,

On behalf of the Australian Christian Lobby (ACL), I welcome the opportunity to make this submission in response to the ***Online Safety (Basic Online Safety Expectations) Amendment Determination 2023***.

The ACL strongly urges the Minister not to sign this amended Determination pending the resolution of significant concerns.

The ACL would be very willing to meet with the Department of Infrastructure, Transport, Regional Development, Communications, and the Arts to discuss this submission.

Yours Sincerely,



Michelle Pearse
Chief Executive Officer

Introduction

In mid-November 2023, the Albanese government withdrew its “Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023” (**Misinformation/Disinformation Bill**) following significant public concern about the powers this would grant to ACMA and to digital service providers to censor online communications. As reported [in the media](#), Minister for Communications, Michelle Rowlands, reassured the public that “the government is considering refinements to the bill, including to definitions, exemptions and clarification on religious freedom, among other things.” However, the following week (22 November 2023) the Department for Infrastructure, Transport, Regional Development, Communications and the Arts released a new document - Amending the Online Safety (Basic Online Safety Expectations) Determination 2022 (**BOSE Determination**), which triggers similar concerns.

While moves to protect “the best interests of the child” are welcome (so long as these are anchored to UNCRC definitions), other aspects of the proposed amendments to the BOSE Determination are deeply troubling. In particular:

- **The rationale for proposed interventions is problematic:** A definition of “hate speech”, evidence that “hate speech” is occurring and claims that “hate speech” is causing “harm” are not established.
- **The terms “hate speech” and “harm” are not defined.**
- **Authority to define and police “hate speech” is delegated to service providers.**
- **Nothing guards against selective censorship on ideological grounds.** Previous objections raised with regard to the Misinformation/Disinformation Bill bear repetition here. The BOSE Determination creates a permission structure for service providers to distort the tenor of Australian political discourse by over-censoring expressions of minority, conservative or religious views which merely differ from the prevailing perspective of society or official Government positions. The proposed amendments to the BOSE Determination makes no mention of freedom of speech and contains no protections against such over-reach.

Overall, the proposed amendments to the BOSE Determination do not reflect any real balance in protecting Australians from harm while upholding their rights/freedoms.

Since freedom of speech is a *sine qua non* of a functioning democratic society; since the “Misinformation/Disinformation Bill” was rejected on the grounds that it would impose unacceptable restrictions on freedom of speech, and; since Minister Rowlands ostensibly

accepted these criticisms only the week before the proposed amendments to the BOSE Determination were published, the government's failure to address such obvious problems is surprising. The BOSE Determination proposal may, regrettably, fuel speculation that the government is being less-than-transparent in its dealings with the Australian public, attempting to achieve its objective by administrative means where openly-debated legislative attempts have failed.

Some further reassurance that the Minister understands the right to free speech and the importance of preserving this right by ensuring that "hate speech" is defined narrowly and with reference to the high thresholds established in international law would be most welcome. Like the Misinformation/Disinformation Bill, the BOSE Determination should be withdrawn until these concerns can be addressed.

1) "The best interests of the child"

Moves to protect children from exposure to pornography online are welcomed by the ACL. As explained in the [Consultation Document](#), "the best interests of the child" are anchored to definitions found in the UNCRC, Article 3. This recognises the importance of the child's place within the family and the protective role of parents.

The ACL is aware of instances in which Australian authorities have interpreted "the best interests of the child" differently with the result that parents have been excluded from important decisions which impact their child's health and well-being. The clear statement in the Consultation Document that "the best interests of the child" are to be interpreted according to UNCRC definitions is therefore very welcome. It is important that this definition is commonly understood both by the eSafety Commissioner and by the online service providers empowered by the BOSE Determination to uphold these standards.

The ACL notes that efforts to advance age verification mechanisms to protect children from exposure to pornography online are still in development and will monitor progress in this area with interest. The documents mention circumstances in which children may be asked to self-report their age before accessing mature content. Such a mechanism obviously provides protection only against unintentional access to pornography. We look forward to the progress of more effective mechanisms to ensure that pornography sites (and curious children) are not able to side-step protections.

2) "Hate speech" (undefined)

We note that the definition of "hate speech" – to the extent that it is defined at all - is unacceptably broad. The conclusion that "hate speech" is a problem affecting 18% of the

adult population and disproportionately affecting young people, religious minorities and LGBTIQ+ people is drawn from a survey conducted by the eSafety Commissioner (in conjunction with New Zealand's NetSafe and the UK's Safer Internet Centre) which asked the following question about users' experiences of hate speech:

"In the last 12 months...have you received a digital communication that offended, discriminated, denigrated, abused and/or disparaged you because of your personal identity/beliefs (e.g. race, ethnicity, gender, nationality, sexual orientation, religion, age, disability, etc.)?"¹

Among the "Key Australian findings", this report notes the following:

- *"when asked to define hate speech most respondents see it in the broadest of terms – anything negative which is directed at someone".*
- *"People experiencing online hate speech most often cite their political views, religion, gender race, ethnicity and nationality as reasons for being targeted online. People identifying as LGBTQI overwhelming [sic] identify their sexuality as the reason for being targeted online."²*

There are many issues with using this as evidence of a problem that requires government intervention. To begin with:

- a survey of self-report about the subjective perceptions of individuals online does not rise to the standard of evidence that would normally be required as the basis of government policy;
- the definition of "hate speech" operating within both the question posed and the thinking of the survey respondents is unacceptably broad; "hate speech", properly understood, is not "anything negative which is directed at someone".

Obviously, proposals to limit "hate speech" must align with the internationally-established definition of this term found in Article 19(2) and Article 20 of the ICCPR and have regard to the government's concomitant responsibility to protect freedom of speech.³

¹ [Online Hate Speech: Experiences from Australia, New Zealand and Europe](#), eSafety Research, eSafety Commissioner, 4.

² [Online Hate Speech: Experiences from Australia, New Zealand and Europe](#), eSafety Research, eSafety Commissioner, 6.

³ **Article 19:**

1. Everyone shall have the right to hold opinions without interference.

Freedom of speech is not mentioned at all in the BOSE Determination, which suggests the government has not given the proper consideration to the complex task of guaranteeing competing rights.

3) “Harmful” (undefined)

The word “harm” or “harmful” appears 69 times in the Consultation Document, often as part of the phrase “unlawful or harmful”. While the definition of “unlawful” is clearly understood, the definition of “harm” is unclear:

- Page 7 indicates that “unlawful and harmful content” includes:

“child sexual exploitation and abuse material, image-based abuse, hate speech and other online harms”.

This is non-exhaustive list of what might be captured under this term and two of the five items listed – “hate speech” and “other online harms” – could be interpreted in any number of ways.

- Page 8 of the Consultation Document indicates that:

“[a]t a societal level, the amplification of harmful content can increase the likelihood of discrimination, such as racism, sexism and homophobia and normalise such prejudice or hatred. It can also contribute to radicalisation towards terrorism or violent extremism.”

Again, this captures an unacceptably broad range of communication – anything from a message which could, according to a subjective judgement, “increase the likelihood of discrimination” to communications which could “contribute to ...terrorism”.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20:

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Where the proposed amendments to the BOSE Determination would require service providers to take proactive steps to suppress all communications captured by such wide, non-exhaustive, subjective terms as “harm”, it is impossible that this will not impact the freedom of speech and the implied right of political communication of Australian citizens in unacceptable ways.

4) Authority to define, pre-empt and police “harm” and “hate speech” delegated to service providers

The point is particularly pressing because the vague, broad and subjective definition of “hate speech” is not the only problem afflicting the proposed amendments to BOSE Determination as it currently stands. The government seems to propose granting authority (indeed responsibility) for defining and policing “hate speech” to service providers who may then write “terms of use”, “policies and procedures” and “standards of conduct” which determine what Australians may, and may not, say online:

Proposal 1: Proposed paragraph 6(3)(i) will provide that a reasonable step in ensuring end-users are able to use a service in a safe manner is by:

having processes for detecting and addressing hate speech which breaches a service’s terms of use and, where applicable, breaches a service’s policies and procedures and standards of conduct mentioned in section 14.

New subsection 6(4) will provide a non-exhaustive definition of ‘hate speech’:

For the purposes of paragraph 6(3)(i), hate speech is a communication by an end-user that breaches a service’s terms of use and, where applicable, breaches a service’s policies and procedures or standards of conduct mentioned in section 14, and can include communication which expresses hate against a person or group of people on the basis of race, ethnicity, disability, religious affiliation, caste, sexual orientation, sex, gender identity, disease, immigrant status, asylum seeker or refugee status, or age.

In other words, the amended BOSE Determination would empower providers to limit the freedom of political communication guaranteed to Australians under the Constitution and freedom of speech guaranteed by the ICCPR in ways that may not be obvious to the end user, or even to the eSafety Commissioner. It simply cannot be the intention of the government to give away the fundamental human rights of Australian citizens in this way yet, on its face, this is what seems to be proposed.

The addition of the words “identified and appropriately mitigated to section 6(3)(e), ensuring service providers’ will take responsibility for: “ensuring that assessments of safety risks and impacts are undertaken, **identified risks are appropriately mitigated**, and safety review processes are implemented throughout the design, development, deployment and post-deployment states for the service” would seem to make service providers responsible for screening out undesirable content.

This might be acceptable, were the parameters for such censorship clearly defined (and confined to proper, international standards) but they are not. Instead, a low and variable threshold is established, to be determined by the service provider, with the potential to impact public discussion on a broad range of contentious social issues without the influence of service providers necessarily being visible to the public, to the eSafety Commissioner or the Minister. How is it possible that freedom of expression will be secured under these circumstances? How does the Minister/eSafety Commissioner propose to regulate what communications the platforms do and do not allow?

A proposed new Subsection 14(2) introduces similar concerns regarding the transparency of decision-making processes by service providers. It requires:

“The provider of the service will take reasonable steps (including proactive steps) to ensure that any penalties specified for breaches of its terms of use, policies and procedures in relation to the safety of end-users, and standards of conduct for end-users, are enforced against all accounts held or created by the end-user who breached the terms of use and, where applicable, breached the policies and procedures, and standards of conduct, of the service”.

Without clear guidelines on determinations, there is a risk of arbitrary actions that could impact users' freedom of expression and access to online platforms.

5) Conclusion

In short, the amendments now proposed trigger many of the concerns about freedom of speech and the implied right of political communication enlivened by the Misinformation/Disinformation Bill. It is disappointing that the strong public rejection of government-led curation of the public discourse in that context does not appear to have registered in this new document; that, within a week, the same Ministry (re)produced proposals that threaten fundamental democratic freedoms, this time in the form of an administrative Determination, which is far more likely to pass unnoticed by the public. Given

the grave repercussions of the measures that are now proposed, it is striking that the lessons of the Misinformation/Disinformation Bill do not appear to have been taken on board.

The ACL strongly urges the Minister not to sign this amended Determination without public consultation and before these problems can be resolved.