*Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024*

30 September 2024

Committee Secretary
Senate Environment and Communications Legislation Committee
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Dear Secretary,

**Inquiry into the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024.**

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Inquiry into the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* ('the Bill').

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and social justice principles into teaching, research and study. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving the law to promote justice.

**Recommendation**

We recommend that the Parliament reject the bill in its current form.

# Premises for the Regulation of Truth

*Scoping our submission*

The Bill has a broad range of potential impacts, as demonstrated by the substantial civil society interest in the inquiry.[1] We focus our attention on political discussion, deliberation and debate, with particular attention on youth experiences, reflecting our own positions and experiences.

*Does the Bill create a state power to regulate misinformation and disinformation?*

We are aware that the bill primarily puts the onus on digital communications platform providers (DCPP) to manage misinformation and disinformation.[2] However, there are a range of powers for the Australian Communications and Media Authority ('ACMA') to regulate misinformation and disinformation. Importantly, however, for DCPP *users*, their speech remains regulated, regardless of whether the effective regulator is the DCPP or ACMA. ACMA's powers derive from the following features of the Bill:

1. The Bill requires that DCPP publish policies on misinformation and disinformation, therefore impliedly requiring that platforms *have* such policies.[3]
2. The Bill provides for ACMA to have a power to issue remedial directions to DCPP for failure to publish policies on misinformation and disinformation.[4]
3. The Bill provides for ACMA to have a power to issue digital platform rules that DCPP must comply with.[5]
4. The Bill provides for ACMA to have a power to require that DCPP make and retain records relating to misinformation and disinformation.[6]
5. The Bill provides for industry-drafted codes provided to ACMA under certain procedural requirements to become legislative instruments under which ACMA would be the decision-maker.[7]
6. Where voluntary industry codes fail or are not made, or where 'exceptional and urgent circumstances' require a new provision, the Bill provides for ACMA to have a power to make a misinformation standard that is enforceable.[8]

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[1] In light of this interest, we are disappointed that the Committee has only allowed submissions within a 7 day period. This inevitably stifles the public's ability to engage with this Bill. To mitigate against this, we urge the Committee to hold public hearings to assist with this inquiry.
[2] *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024*, s 17 ('Bill').
[3] Ibid s 17(1)(b).
[4] Ibid s 18.
[5] Ibid s 19. Penalty provisions are in ibid s 20.
[6] Ibid s 30. Penalty provisions are in ibid s 31.
[7] Ibid s 47.
[8] Ibid s 55–59. Penalty provisions are in ibid s 63.

In consideration of all of these provisions and the instruments created under them, the definitions in the Act for 'misinformation', 'disinformation' and 'serious harm' will expressly or impliedly operate. Our submissions largely consider the implications of the definitions. We therefore treat the Bill as creating a functional power for ACMA to regulate, directly and indirectly, questions of misinformation and disinformation. We therefore speak of 'regulation', 'state action' and similar terms through the balance of this submission.

*Normative premises*

In our submission we depart somewhat from the popular consensus on matters of misinformation and disinformation. We wish to clearly set out our normative premises.

We agree that truthful discussion and debate in Australian society is broadly preferable. We do not welcome wanton attempts to mislead people. We recognise the substantial social and political harms of misinformation and disinformation. However, with a particular focus on political communication, we also recognise that hyperbole has always been a feature of political expression and we think it is often entirely legitimate. Moreover, even to the extent that we wish many forms of misinformation and disinformation were not part of society, we equally have deep scepticism about the role of the state in directly regulating truth and falsehood through coercive measures. We object to this from fundamental political premises, doubting the role for state action to 'correct' speech.

We think there is a role for state action in improving digital literacy. We also believe there is a responsibility on digital platforms to promote digital literacy and avoid using content strategies and algorithms that promote political 'siloing' and depress critical engagement. While recognising the importance of such measures, we equally recognise that their exact shape is beyond our expertise and therefore do not comment further on these matters in the submission.

## False, Misleading and Deceptive Information

*What is reasonably verifiable as false, misleading or deceptive?*

Our first concern is that the Bill requires the ACMA and online platform providers to make difficult epistemological determinations they are ill equipped to make. The relevant phrase in the Bill is 'reasonably verifiable as false, misleading or deceptive'.[9] According to the Explanatory Memorandum, matters that will be relevant to such a determination include whether 'the information has been fact-checked by a third-party organisation', whether information has been confirmed 'against multiple reliable and independent sources', and 'expert opinion or advice'.[10]

There are a number of epistemological difficulties in these considerations. One must grapple with the core observation that whilst experts are often correct within their particular domain of expertise, they are sometimes wrong — especially when making determinations on issues whereby time has not allowed substantial research to be conducted.

For example, on 19 February 2020, 27 scientists published the *Statement in Support of the Scientists, Public Health Professional, and Medical Professionals of China Combating COVID-19* in prominent medical journal *Lancet*, which declared that the coronavirus had a natural origin; any opinion to the contrary was 'misinformation'. However, in May 2021, 18 scientists published a letter in *Science*, arguing that the lab leak account of the coronavirus' origin was also plausible. However, for the fifteen months that preceded the *Science* letter, the 'natural causes' theory possessed a veneer of official certainty that did not reflect the difficulty of the question. Take another example: In 2006, the few that warned of a housing bubble and potential financial crisis were dismissed. Indeed, if the Bill was enacted then, they may have found their speech regulated because it 'contributed to serious harm' by 'undermining public confidence in the banking system'. Only a year later, they would be proven right.

These examples demonstrate the fickleness of regarding a view as 'false, misleading or deceptive' — frequently the truth is far more complex than initially anticipated. Rather, it is revealed over time as new facts and information come to light. Importantly, when the 'experts' are wrong, or where they express undue confidence irreflective of the difficulty of the question, the relevant issue is often one of great difficulty and public importance. As such, it is in these areas where public discourse is most valuable.

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[9] Ibid ss 13(1)(a), 13(2)(a), 13(3)(b).
[10] Explanatory Memorandum, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024*, 44.

The core point is put well by John Stuart Mill:

> *The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.*[11]

We believe that what is 'true' in the realm of public debate, at least in the general form prescribed by the Bill, should not be determined by government departments and agencies; that is a question best left for the people. History shows that when difficult debates are forcibly agitated in the public arena, the truth ultimately emerges. One explanation for this was offered by Friedrich Hayek, who argued that knowledge was dispersed *throughout* society.[12] If Hayek is correct, and in democracies we believe he is, then one regulator would never possess more knowledge than the wider community. Thus, it would be inappropriate for the regulator — ACMA — to impose its view of the truth on the DCPPs and their users. As a practical example of this, it would be challenging for ACMA to prescribe or apply standards of misinformation or disinformation regarding minority communities whose lived experiences ACMA regulators may struggle to understand. We think that ACMA could find itself embroiled in sensitive community debates with consequences that the regulator is not equipped to manage.

Of course, we acknowledge that the state has the legitimate power to determine truth in some specific contexts. This is typically the role of the judiciary. However, the judiciary draws upon rules of evidence, inference, and interpretation that have been slowly and carefully developed through the history of law. Further, such determinations are made after detailed examination of the evidence in a particular case. This Bill would require the ACMA — a body without this institutional knowledge and tradition — to make such determinations *en masse*. Ultimately, we submit that it is broadly preferable to deal with unfactual discourse and errors in speech through greater discussion and deliberation. We doubt that there is a significant role for the state, except perhaps at the extremities.

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[11] John Stuart Mills, *On Liberty* (1859) ch 2.
[12] Friedrich Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *American Economic Review* 519.

## Constitutional Concerns

Further, we are concerned that the bill, and its explanatory memorandum, take for granted that prohibition of false, misleading and deceptive information is a purpose compatible with the limits imposed by the implied freedom of political communication ('IFPC'). We believe this is at least plausibly not true.

*What is the IFPC?*

The IFPC is an implied limit on the legislative power of the Parliament. The Parliament may not legislate to burden political communication unless the legislation is 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.[13] The rationale for the IFPC is that:

> *The freedom is recognised as necessarily implied because the great underlying principle of the Constitution is that citizens are to share equally in political power and because it is only by a freedom to communicate on these matters that citizens may exercise a free and informed choice as electors. It follows that a free flow of communication is necessary to the maintenance of the system of representative government for which the Constitution provides.*[14]

This is typically broken down into a set of questions as follows:[15]

1. *Does the legislation burden political communication?*
2. *If yes, does it do so for a legitimate purpose, being one that is 'compatible with the constitutionally prescribed system of representative government';*[16]
3. *If yes, is the law 'proportionate to the achievement of that purpose'.*[17]

If a piece of legislation burdens political communication ('yes' on Question 1), it must also be able to answer 'yes' on Questions 2 and 3 to be valid. We think that the legislation has been crafted with a wrong assumption that 'falsehoods' have no legitimate place in political debate. In constitutional terms, we think that preventing false statements in political debate is plausibly not a legitimate purpose (Question 2), or at least that this legislative scheme is not proportionate in seeking to achieve this purpose (Question 3).

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[13] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.
[14] *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18, [44] (citations removed).
[15] Ibid [54]–[85].
[16] Ibid [45].
[17] Ibid [46].

*Legitimate Purpose*

To reiterate the point made earlier, hyperbole is a mainstay of political communication. It is a regular feature of mainstream electoral politics. We are well acquainted with political claims that opponents will 'destroy the economy', 'open the borders' or 'destroy the environment'. Similarly activists and civil society have long used similar speech forms. For example, climate activists have long labelled politicians 'climate criminals' or 'climate vandals'. Amid the war in Gaza, we have seen terms like 'terrorist sympathiser' or 'supporter of genocide' become common epithets. All these forms of speech could be described as misinformation under the bill.

While these forms of speech may be hurtful and inflammatory, we think that to at least a significant extent, they are legitimate speech forms. We would suggest that it has never been the case that political engagement in Australia has lacked this type of speech. We think it would be a bizarre interpretation of the IFPC to hold that it only protects an idealised form of dispassionate democracy that has never existed. We think the IFPC prevents illegitimate and disproportional burdens on political communication *in the real world*. If we admit that hyperbole and invective have always been part of political communication, it is irresistible that we cannot legitimately burden this sort of speech, without contravening the IFPC.

*Proportionate*

We do accept that misinformation at the extremities may be a legitimate target of legislation. This is already the case, for example, with vilification. While some speech may represent moderate hyperbole, other speech may have no discernible anchoring in fact. For example, a description of a political policy as being likely to 'destroy the economy' would fall into the class of moderate hyperbole. Contrastingly, most conspiracy theories are expressions with no discernable foundation in reality. While many speech acts may sit at either end of this spectrum, we think a great deal of speech sits between the two. For example, the so-called 'mediscare' campaign in the 2016 Federal Election and the 'death tax' campaign in the 2019 Federal Election are examples of extensive communications that each had limited foundation in fact but pointed to perceptions or concerns over political adversaries. These perceptions and concerns were appropriate to ventilate. The legislation distinguishes between these very different classes of 'misinformation' and 'disinformation' only by reference to a standard of 'serious harm' which, as we set out in the next section, is a flimsy concept. We think it is most obviously disproportionate when we consider that there are other laws, such as vilification and injurious falsehood tort claims that address potential harms in more targeted ways.[18]

[18] Ibid [78].

*IFPC provisions in the bill*

We note that the bill requires that ACMA not impose standards that breach the IFPC test.[19] We are unconvinced that this in any substantial measure limits the constitutional risks set out above. The provisions essentially require that ACMA guess what a court would rule in a hypothetical case. We doubt ACMA's ability to effectively predict judicial views on the sensitive balancing involved in IFPC analysis, especially when there exists only a modest case law on the implied freedom, and the broad swath of potential speech the ACMA is likely to consider. We are concerned that ACMA would tend to issue standards that plausibly breach the IFPC and these standards would operate until the facts for a case — and a sufficiently resourced plaintiff — appeared. We fear that standards issued by ACMA could limit political expression in the intervening period until the case was decided. Even then, the varied nature of delegated legislation could preclude a clear statement of law that would determine whether standards other than the one considered by the court are valid.

*Political Freedom and Young People*

We think that the Bill is likely to disproportionately affect the political expression of young people. Political organisation of young people disproportionately happens on digital platforms. Efforts such as the School Strikes for Climate have primarily been built through social media.[20] If the Bill has the effect of potentially chilling free expression on digital platforms, we think this is likely to particularly affect the ability of young people to organise politically.

[19] Bill (n 2) s 54.
[20] Shelley Boulianne et al, '"School Strike 4 Climate": Social Media and the International Youth Protest on Climate Change' (2020) 8(2) *Media and Communication* 208.

## 'Reasonably Likely to Contribute to Serious Harm'

Under s 13(1)(c) of the Bill, one attribute of misinformation is that it is 'reasonably likely to contribute to serious harm'. In this section, we explain why this is an inappropriate legal standard.

*'Reasonably likely'*

The first thing to notice about this standard is that it does not require that any actual harm has occurred. All that is necessary is that the misinformation was 'reasonably likely' to contribute to serious harm. In this sense it is a *prospective*, not *retrospective* assessment. In determining whether speech was 'reasonably likely' to contribute to serious harm, the courts will consider, *inter alia*, the subject matter of the speech and its circumstances.[21] Importantly, the actual consequences of the speech are irrelevant. Accordingly, misinformation may be regulated by the Bill even where it turns out that no serious harm has occurred.

We believe that, in general, unmooring the regulation of damaging speech from the occurrence of damage is a problematic infringement on free expression. Historically, the state has only restricted speech which caused damage, such as through the law of defamation. Although there may be some narrow circumstances where the prohibition of speech is required *before* harm has occurred — such as an injunction in defamation, or prohibiting terrorist propaganda before it garners supporters — the category of speech captured by prospective legislation must be carefully considered. For the reasons which follow, we believe the category of speech captured by the Bill is unacceptably broad.

*'Contribute to Serious Harm'*

The definition of 'serious harm' provided under the Bill encapsulates a number of elements. We acknowledge that a number of these provisions are not controversial. Speech that is likely to contribute to 'intentionally inflicted physical injury', or contribute to 'imminent damage to critical infrastructure' may legitimately be regulated. Of course, such speech is likely to be regulated under other doctrines like the tort of assault, conspiracy, or laws against public threats of violence.

Where we raise concerns is in the elements of the definition that point to broader, indeterminate types of 'harm' to public discourse. We suggest that whilst such speech may no doubt cause harm, its regulation may risk encapsulating legitimate political discussion. For example, the undermining of 'public confidence in the banking system or financial markets', the 'vilification' of a particular group, or the undermining of 'efficacy of preventative health measures in Australia' all may constitute serious harm under the Act. However, defining the scope of such harm is difficult.

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[21] Bill (n 2) s 13(3).

For example, the Explanatory Memorandum to the Bill implies that sexist critique of women in politics may constitute misinformation.[22] Whilst such objectionable comments are typically made by misogynists not interested in legitimate debate, they may be made in the context of political criticism, and the line between these extremes may often not be so clear. For example, a politician might be critiqued as unfit for office (a clearly legitimate political commentary), but this critique may be made — either intentionally or unintentionally — using offensive tropes. The use of offensive tropes should have political consequences for those who use them and, when it meets the relevant thresholds, bodies of law such as vilification may be relevant. We recognise that digital platforms expose women and minorities to intolerable conduct. However we think that regulation of misinformation and disinformation is the wrong instrument to address structural discrimination. Indeed, we think that examples of discrimination are some of the areas where there is the most existing regulation and state intervention, making the case for this Bill the weakest over these examples.

Further, the Bill utilises the phrase 'contribute to' serious harm as the relevant threshold standard for when false, misleading or deceptive speech acts become misinformation. We consider the phrase 'contribute to', to be at best an unsuitably vague phrase that leaves substantial questions on the operation of the Act to ministerial determination. Thus, at best, individuals will largely be *unaware* the extent to which their online speech may be regulated. At worst, we believe the phrase may be an unsuitably low threshold. To draw out the issues with the phrase, consider the following examples:

- *Example 1:* A small business owner posts on social media saying: *"I think I have found that essential oils can cure my chronic illness".* The post doesn't receive much traction—perhaps a few comments from friends agreeing, and some heart emojis.
- *Example 2:* A well-regarded doctor makes a statement encouraging the taking of a particular supplement to reduce Covid-19 symptoms. A prominent anti-vaccine advocate reposts this statement and gains substantial engagement. It is later confirmed that the supplement does not reduce Covid-19 symptoms.

*Example 1* illustrates the issue of regulating subjective statements under the "contributes to" threshold. The comment is speculative, unfounded and garnered minimal engagement. While it may reflect general scepticism or distrust in conventional medicine, it's unclear how it meaningfully leads to serious harm. However, the broad legislative standard could nonetheless capture this post under the rationale that it plays a small part in encouraging use of unproven treatment over evidence-based medicine. This risks targeting speech that does not have a *substantial* effect on public sentiment merely because it *may* have *some* effect. Whilst s 14(g)-(h) of the Bill may ostensibly limit the scope

[22] Explanatory Memorandum (n 10) 12.

of what may constitute 'serious harm', they together act to encapsulate conduct that may harm the 'Australian community', a 'segment of the Australian community', or an 'individual' — a taxonomy that does little to limit the scope of s 14(a)-(f).

*Example 2* highlights how whether or not a particular statement 'contributes to' serious harm will likely depend on one's audience. The initial statement by the doctor is unlikely to be classified as misinformation. However, the subsequent reposting may — by the context of that individual's social media presence — take on elements of deception. In doing so, it may be deemed to 'contribute to' a broader loss of confidence in the public healthcare system — an undermining that may constitute 'serious harm'. We acknowledge that in some cases, speakers have an obligation to consider their audience when making a statement, and often the restriction of a *particular individual's speech* because of their likely audience is justified. To take the canonical example, shouting fire in a crowded theatre may be a form of speech legitimately regulated.

However, through the 'contributes to' threshold, the legislation puts such *audience* considerations front and centre in the definition of misinformation. This is inappropriate. First, it may undermine the perceived public legitimacy in the scheme. The perception that the same speech is regulated when made by some but not by others may further perceptions by those that spread misinformation that their speech is being deliberately and unfairly stifled. Rather than prevent disinformation, this perception may merely encourage it 'underground' or promote a perception of elitism in political debates. Second, it may have a distorting effect on online debate. Those with online influence — which may be garnered through useful public contributions or discussion — are dicinventivised to engage in potentially incorrect online discussion. Those without influence are not faced with this disincentive.

## Conclusion

In our view, the Bill should be rejected. We come to this conclusion because the coercive measures and extent of state intervention in determination of truth is, in our view, dangerous and incompatible with the core principles of a liberal democracy.

We believe that misinformation and disinformation can be dangerous. We do however note that many of the most serious harms caused by misinformation and disinformation are addressed by other existing laws. These include vilification, defamation, injurious falsehood, and incitement to violence. We concede of course that some types of misinformation, for example medical misinformation, may not be able to be addressed by other laws. However, we believe it is essential to appreciate that this Bill provides the first instance of regulation for a relatively small class of undesirable expression while placing further and additional regulation over a much larger class of desirable and undesirable expression. It must be earnestly considered whether this encroachment upon expressive freedoms can be justified by a relatively narrow potential benefit. We believe it cannot be justified.

Yours faithfully,

Felix Archibald, Ben Yates and Daniel Marns

for the ANU LRSJ Research Hub

**ANU College of Law**