Law Council
OF AUSTRALIA

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023—Exposure Draft

Department of Infrastructure, Transport, Regional Development, Communications and the Arts

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- Northern Territory Bar Association
- Law Society Northern Territory
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- Queensland Law Society
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- Law Society of South Australia
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Acknowledgements

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Introductory comments

1. The Law Council welcomes the opportunity to provide a submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts in relation to the Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (the **Draft Bill**).

2. For the purposes of the Draft Bill 'misinformation' is defined to include content provided on the digital service that 'contains information that is false, misleading or deceptive' and is 'reasonably likely to cause or contribute to serious harm'.[1] 'Disinformation' is defined similarly, but includes the added requirement that 'the person disseminating, or causing the dissemination of, the content intends that the content deceive another person'.[2]

3. The growth of digital platforms over the past two decades has fundamentally changed the way that Australians access information. Much of this change has been positive. Digital platforms have provided individuals with ready access to information and the ability to expediently connect with others.[3] Digital platforms have also allowed for greater opportunity for political engagement and debate, creating an unprecedented ability to engage with social issues and connect with representatives on issues relating to Australia's democracy.[4]

4. However, the online sphere, marked with the traits of freedom and flexibility, also presents new and evolving challenges.[5] The growth of digital platforms has provided new opportunities for unreliable or problematic information to be disseminated and spread. A number of recent reports have highlighted the deleterious effect that misinformation and disinformation disseminated on these platforms can have on democratic processes, civil society and vulnerable minority groups.[6] This is particularly so when information is promulgated through the targeted and narrowing information streams provided online.

5. The Australian Media and Communications Authority (**ACMA**), in its June 2021 *Report to government on the adequacy of digital platforms' disinformation and news quality measures*—the recommendations of which underpin the proposals in the Draft Bill—stated that:

> *Widespread belief in harmful misinformation can have serious impacts on individuals and society, with the potential to cause a broad range of*

[1] Exposure Draft, Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) ('*Draft Bill*') s 7(1).
[2] Ibid s 7(2).
[3] Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 1.
[4] Law Council of Australia, Submission No 18 to Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (25 March 2020) 6.
[5] Ibid.
[6] See, eg, Australian Media and Communications Authority, *Report to government on the adequacy of digital platforms' disinformation and news quality measures* (June 2021); Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019); Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (Final Report, August 2023); Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (First Interim Report, December 2021); Joint Standing Committee on Electoral Matters, Parliament of Australia, *Conduct of the 2022 federal election and other matters* (June 2023); Joint Standing Committee on Electoral Matters, Parliament of Australia, *Status Report: Australian Electoral Commission Annual Report 2017-18* (March 2019).

> *harms. These harms can be acute, such as posing an immediate and serious threat to an individual's health and safety, or chronic, such as the gradual undermining of trust in public institutions or authoritative sources of information.*[7]

6. Importantly, Australia is far from alone in grappling with this challenge. The Secretary-General of the United Nations has commented on disinformation in the following terms:

> *The phenomenon of disinformation poses a multiplicity of challenges in different ways. The coronavirus disease (COVID-19) pandemic has provided a powerful example of the potentially enormous consequences of disinformation relating to health for entire societies, including the possible loss of many lives. The spread of disinformation in electoral contexts may diminish public trust in the credibility of processes, undermining the right to political participation. Disinformation can involve bigotry and hate speech aimed at minorities, women and any so-called 'others', posing threats not only to those directly targeted, but also to inclusion and social cohesion. It can amplify tensions and divisions in times of emergency, crisis, key political moments or armed conflict. In effect, disinformation can affect the full range of human rights by disrupting people's ability to make informed decisions about policies relating to, for example, the environment, crime, migration and education, among other issues of public interest and concern.*[8]

7. The spread of misinformation and disinformation online—in particular, disinformation spread by foreign actors—was a focus of the recent inquiry of the Senate Select Committee on Foreign Interference through Social Media.[9] The 'paradox' between the potential benefits and harms created by digital platforms, in particular social media platforms, was noted by the Australian Human Rights Commission (**AHRC**) in its submission to that inquiry:

> *… social media can be used for purposes that both strengthen or undermine Australia's democracy and values. On the one hand, social media can be used in ways that increase access to information and opportunities for the free exchange of ideas, increase the diversity of voices contributing to public discussions and allow for broader public participation in our democracy. On the other hand, social media can also be used in ways that pose a threat to democratic processes through social medial campaigns that spread misinformation and disinformation, undermine trust in public institutions and exacerbate divisions within society.*[10]

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[7] Australian Media and Communications Authority, *Report to government on the adequacy of digital platforms' disinformation and news quality measures* (June 2021) 29.
[8] *Countering disinformation for the promotion and protection of human rights and fundamental freedoms: Report of the Secretary-General*, 77th sess, 287th mtg, Agenda Item 69(b), UN Doc A/77/287, (12 August 2022) 2-3.
[9] Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (Final Report, August 2023).
[10] Australian Human Rights Commission, Submission No 9 to Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (16 February 2023) 3.

8. In this context, the Law Council recognises the need for new responses to address the dissemination of misinformation and disinformation online and, in principle, welcomes regulation that would allow individuals and organisations to identify and address such material more effectively.

9. Currently, digital platform providers monitor their own approaches to misinformation or disinformation. This is largely directed by the voluntary *Australian Code of Practice on Misinformation and Disinformation* developed by Digital Industry Group Incorporated (**DIGI**) and signed by a number of the larger digital platform services. Signatories to the DIGI Code of Practice commit to implementing safeguards against harm from misinformation and disinformation and adopting a range of scalable measures to reduce the spread and visibility of such content.[11]

10. The Law Council notes that the Draft Bill seeks to provide ACMA with several new powers to address misinformation and disinformation, in circumstances where it deems self-regulation by industry bodies to be inadequate or ineffective. These powers would enable ACMA to:

    - gather information from, or require digital platform providers to keep records regarding misinformation and disinformation;[12]
    - publish information on its website relating to misinformation or disinformation regulation, measures to combat the issue, and the prevalence of such content;[13]
    - request the industry develop industry codes covering measures to combat misinformation and disinformation which would be registered and enforced by ACMA;[14] and
    - create and enforce misinformation standards where ACMA deems an industry code to be ineffective.[15]

11. The Law Council is aware of concerns that the practical effect of the Draft Bill in seeking to combat misinformation and disinformation may be a problematic incursion on the right of freedom of expression.[16]

12. Restrictions on freedom of expression should not be made lightly. The right to freedom of expression is a democratic ideal that encourages informed decision making. General Comment No 34 of the United Nations Human Rights Committee highlights the importance of freedom of expression in underpinning democratic society:

> *Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom*

[11] Digital Industry Group Inc, *The Australian Code of Practice on Disinformation and Misinformation* (11 October 2021).
[12] Draft Bill, s 14.
[13] Ibid ss 25-28.
[14] Ibid ss 37-39.
[15] Ibid ss 46-50.
[16] See, eg, the discussion at paragraphs [4.45]-[4.49] and [5.30]-[5.41] of Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (Final Report, August 2023).

> *of expression providing the vehicle for the exchange and development of opinions.*
>
> *Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.*[17]

13. The rights to freedom of opinion and expression are contained in article 19 of the International Covenant on Civil and Political Rights (**ICCPR**), to which Australia is a signatory.[18]

14. Unlike the right to freedom of opinion, the right to freedom of expression is subject to potential limitation. Under article 19(3) freedom of expression may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by legislation necessary to achieve the desired purpose and proportionate to the need on which the limitation is predicated.[19] Article 20 of the ICCPR also contains further mandatory limitations on freedom of expression.

15. While the *Australian Constitution* does not recognise an explicit right to freedom of expression, the High Court of Australia has held that an implied freedom of political communication exists in recognition of Australia's system of representative government established by the Constitution.[20] This is a limited Constitutional freedom in that its protective scope extends to discussion of 'government and political matters'. The implied freedom is not an individual right, but instead restricts laws that interfere with free communication about government and politics. The freedom only has practical effect if a properly constituted court determines that legislation (or arguably an executive decision) disproportionately burdens the relevant political speech.[21] That is, it may be limited by laws that are reasonably appropriate and adapted to serving a legitimate end in a manner that is compatible with Australia's system of representative and responsible government.[22]

16. The Secretary-General of the United Nations has outlined the difficulty in appropriately balancing efforts to combat disinformation with the right of freedom of expression:

> *While States have taken a number of helpful steps to counter disinformation, many current efforts to counter disinformation raise significant human rights concerns. Given the challenges in defining disinformation, it is not surprising that some measures adopted by States or companies in recent years to counter disinformation have resulted, whether unwillingly or knowingly, in undue restrictions on*

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[17] Human Rights Committee, *General comment No 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011).
[18] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19-20.
[19] See further, Attorney-General's Department, *Right to freedom of opinion and expression* (Public Sector Guidance Sheet, online) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-opinion-and-expression>.
[20] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.
[21] The High Court of Australia has repeatedly recognised in its 'implied freedom' decisions that 'political speech' can include unpopular and even 'fringe' views: see, eg, *Monis v The Queen* [2013] HCA 4; *Coleman v Power* [2004] HCA 39.
[22] *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, [67] (French CJ).

> *freedom of expression … Approaches that seek simple solutions to this complex problem are likely to censor legitimate speech that is protected under international human rights law. Such overbroad restrictions are likely to exacerbate societal ills and increase public distrust and disconnection, rather than contribute to the resolution of underlying problems.*[23]

17. Former United Nations High Commissioner for Human Rights, Michelle Bachelet, has similarly identified the important balance to be drawn by governments when implementing reforms to combat disinformation online:

> *In taking on the challenges that disinformation poses, we cannot fall into the trap of trying to officially ordain what is false, and what is true, and then attach legal consequences to those determinations. Our human right to access and impart information is not limited to only what is deemed by the State as 'accurate'.*[24]

18. The Special Rapporteur on the promotion and protection on the right to freedom of opinion and expression, Ms Irene Khan, has also underlined the need for balance and caution in this regard.[25] While recognising the particular risks of disinformation to the enjoyment of human rights, she also underlines that any restrictions must be appropriate and proportionate to a legitimate aim, using the least restrictive means to protect it. The prohibition of false information is not *in itself* a legitimate aim under international human rights law. Further, the principle of legality requires the scope, meaning and effect of the law to be sufficiently clear, precise and public.[26] She recommends that any state regulation of social media should focus on enforcing transparency, due process rights for users and due diligence on human rights by companies, and on ensuring that the independence and remit of regulators are clearly defined, guaranteed and limited by law.[27]

19. In light of the above, the Law Council is of the view that particular care must be taken when seeking to implement proposals that regulate online activities to ensure that the protection and respect of individuals' freedom of expression and freedom to seek, receive and impart information, is maintained. It is important that any codes or laws aimed at combating misinformation and disinformation are carefully designed to balance the public interest in ensuring content posted online is not contributing to harm, with individuals' ability to speak freely.

20. The AHRC has highlighted the difficulty in finding this balance:

> *Striking the right balance between regulating online activities and protecting free expression is an ongoing challenge. While there is a clear need to combat misinformation and disinformation online, there is also a risk that in doing so different perspectives and controversial opinions may be targeted. While reasonable minds may differ on exactly*

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[23] *Countering disinformation for the promotion and protection of human rights and fundamental freedoms: Report of the Secretary-General*, 77th sess, 287th mtg, Agenda Item 69(b), UN Doc A/77/287, (12 August 2022) 11.
[24] Michelle Bachelet, UN High Commissioner for Human Rights, 'High-level panel discussion on countering the negative impact of disinformation on the enjoyment and realization of human rights' (Speech, 50th session of the Human Rights Council, 28 June 2022) <https://www.ohchr.org/en/statements-and-speeches/2022/06/high-level-panel-discussion-countering-negative-impact>.
[25] *Disinformation and freedom of opinion and expression*, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, UN Doc A/HRC/47/25, 13 April 2021.
[26] Ibid, 1-9.
[27] Ibid, 18.

> *where the line should be drawn, if we fail to ensure robust safeguards for freedom of expression online, then the very measures taken to combat misinformation and disinformation could themselves risk undermining Australia's democracy and values.*[28]

21. Similar remarks were made by the Parliamentary Joint Standing Committee on Electoral Matters in its Interim Report on the *Conduct of the 2022 federal election and other matters*:

> *Action must be taken to combat the effects of misinformation and disinformation, but any action must be balanced, so that freedom of political communication is not inhibited or placed at risk. Legislative change must be for a legitimate purpose, proportional, valid and appropriate. Any changes to existing structures, institutions or legislative or regulatory frameworks must therefore be carefully considered.*[29]

22. Much of the practical impact of the Draft Bill will depend on the content of the misinformation codes/standards when developed. The Law Council notes the difficulty in providing appropriate and relevant feedback where the relevant misinformation codes and standards have not yet been developed.

23. However, textual flaws in the Draft Bill which will, in turn, underpin the misinformation codes/standards when developed, will affect implementation. In practice, the Draft Bill may be overly incursive on freedom of expression. This may occur where digital platform services become overly careful in censoring content on their platform to limit their risk of receiving (potentially significant) fines or other penalties.[30] It may also occur where platform users become overly cautious in order to avoid penalties from the platform (for example, being labelled a purveyor of misinformation or disinformation, or having their account suspended).

About the Draft Bill

24. The Draft Bill seeks to implement recommendations 3 and 4 of ACMA's June 2021 *Report to government on the adequacy of digital platforms' disinformation and news quality measures* (**ACMA Report**),[31] primarily through the introduction of a new schedule 9 to the *Broadcasting Services Act 1992* (**BSA**).

Record Keeping and Information-Gathering Powers

25. The Draft Bill would allow ACMA to impose digital platform rules which require digital platform providers to keep records and report on the extent of misinformation and disinformation on the digital platform, and measures implemented to prevent or respond to such content.[32] This information may be published online by ACMA.[33] Further, ACMA may obtain information, documents or evidence from individuals or digital platform providers relating to the publication of false or misleading online

[28] Australian Human Rights Commission, Submission No 9 to Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (16 February 2023) 8.
[29] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Conduct of the 2022 federal election and other matters* (June 2023) 105.
[30] Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (Final Report, August 2023) [5.30]-[5.41].
[31] Australian Media and Communications Authority, *Report to government on the adequacy of digital platforms' disinformation and news quality measures* (June 2021).
[32] Draft Bill, s 14.
[33] Ibid s 25.

content. Non-compliance with the digital platform rules may result in a civil penalty, an infringement notice, or a formal warning for the digital platform service.[34]

26. Contravention of digital platform rules made in relation to record keeping, or a failure to comply with remedial directions, may result in the issuance of an infringement notice and a penalty amount of 60 penalty units ($16,500 in 2023)[35] for corporations and 10 penalty units ($2,750) for individuals.[36] Digital platform providers that contravene the digital platform rules, or fail to comply with remedial directions, can also face civil penalty proceedings and may be fined up to 5,000 penalty units ($1,375,000) for corporations or 1,000 penalty units ($275,000) for individuals for each day of the contravention.[37]

27. ACMA can also issue an infringement notice to address non-compliance with its information-gathering powers.[38] Contravention may result in a penalty amount of 8 penalty units ($2,200) for corporations and 6 penalty units ($1,650) for individuals. ACMA may also seek civil penalties of up to 40 penalty units ($11,000) for corporations and 30 penalty units ($8,250) for individuals for each day of the contravention.[39] The Law Council notes that it is difficult to assess the suitability of digital platform rules which have not yet been drafted.

Industry Codes and ACMA Standards

28. The Draft Bill would also empower ACMA to require industry bodies to develop and register codes ('**misinformation codes**') in relation to the prevention of and response to misinformation and disinformation, with which relevant digital platform providers must comply. If an industry-developed code is deemed deficient, ACMA may then impose mandatory standards ('**misinformation standards**') for digital platform providers to protect the community from misinformation or disinformation online.[40] The Draft Bill outlines a number of examples of matters that may be dealt with by misinformation codes and standards, including prevention of, and response to, misinformation or disinformation; preventing monetisation or advertising of misinformation or disinformation; supporting fact checking; and policies and procedures for managing reports and complaints by end users regarding misinformation and disinformation.[41]

29. The Draft Bill does not give ACMA the power to force digital platforms to remove content or posts.[42] The Law Council understands that the proposed legislation imposes a burden on digital platform providers to implement strategies to respond to misinformation and disinformation but is not intended to directly censor the content posted by individual users (although it may have this effect indirectly).

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[34] Ibid s 15.
[35] In this submission, all of the dollar amounts given for various penalty units are for 2023.
[36] Draft Bill, s 15(4). Matters to be included in an infringement notice are set out in s 205Z of the *Broadcasting Services Act 1992* (Cth) and the amount of a penalty is set out in s 205ZA. See also, Guidance Note, Exposure Draft, Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (June 2023) 24 ('Guidance Note').
[37] Ibid ss 15(2)-(3), 16(4)-(5). See also, Guidance Note, 24.
[38] Ibid ss 18(8) and 19(8). See also, Guidance Note, 24.
[39] Ibid ss 18(6)-(7) and 19(6)-(7). See also, Guidance Note, 24.
[40] Ibid ss 48-49.
[41] Ibid s 33.
[42] Guidance Note, 7.

30. The Law Council notes the 'parliamentary intention'—as set out in the proposed amendment to insert a new subsection 4(3AC) into the BSA—that:

> *… digital platform services be regulated, in order to prevent and respond to misinformation and disinformation on the services, in a manner that:*
>
> *(a) has regard to freedom of expression; and*
>
> *(b) respects user privacy; and*
>
> *(c) protects the community and safeguards end-users against harm caused, or contributed to, by misinformation and disinformation on digital platform services; and*
>
> *(d) enables public interest considerations in relation to misinformation and disinformation on digital platform services to be addressed in a way that does not impose unnecessary financial and administrative burdens on digital platform providers; and*
>
> *(e) will readily accommodate technological change; and*
>
> *(f) encourages the provision of digital platform services to the Australian community; and*
>
> *(g) encourages the development of technologies relating to digital platform services.*[43]

31. However, the potential penalties for failing to comply with the misinformation codes or standards are significant. ACMA will be empowered to issue infringement notices for contraventions of the codes or standards with penalty amounts of a maximum of 60 penalty units ($16,500) for corporations or 10 penalty units ($2,750) for individuals.[44] ACMA may also seek civil penalties for breaches of the misinformation codes or standards.[45] The Guidance Note identifies that it 'is expected that ACMA will actively seek penalty orders against those providers who routinely contravene provisions in a registered code or a standard, or fail to comply with remedial directions in particular'.[46] The maximum civil penalties in this context include:

- non-compliance with a registered misinformation code: 10,000 penalty units ($2.75 million) or 2 per cent of global turnover (whichever is greater) for corporations or 2,000 penalty units ($0.55 million) for individuals; and
- non-compliance with a misinformation standard: 25,000 penalty units ($6.88 million) or 5 per cent of global turnover (whichever is greater) for corporations or 5,000 penalty units ($1.38 million) for individuals.[47]

[43] See Draft Bill sch 2 s 7 which proposes to insert a new s 3AC into the *Broadcasting Services Act 1992* (Cth).
[44] Draft Bill ss 43(3) and 53(3). See further, Guidance Note, 25.
[45] Ibid ss 43(2) and 53(2). See further, Guidance Note, 25.
[46] Guidance Note, 25
[47] Ibid.

32. The Guidance Notes state that the intention of the significant maximum penalties is to 'deter systemic non-compliance by digital platform services and reflects the serious large scale social, economic and/or environmental harms and consequences that could result from the spread of misinformation or disinformation'.[48]

33. However, the Law Council is aware of concerns that these penalties may lead to digital platform services becoming overly careful in censoring content on their platform to limit their risk of receiving (potentially significant) fines or other penalties.[49] This may occur in particular where compliance with the misinformation codes or standards is made difficult by broad and imprecise definitions of key concepts

34. While there is a need to address false or misleading digital content which may cause harm, the Law Council is concerned that the practical effect of the regulation proposed by the Exposure Draft is a disproportionate response to the risk, in recognition that the Draft Bill is broad and imprecise in its terminology, may result in confusion in its application, and is likely to impact on the freedom of expression and privacy of Australians.

Specific textual comments

Information-gathering powers

35. In principle, the Law Council acknowledges that the power to gather information from digital platform providers or require digital platform providers to keep records regarding misinformation and disinformation could provide greater transparency around the extent of misinformation and disinformation on digital platforms. Empowering ACMA to publish information on its website relating to misinformation or disinformation regulation, is one way to combat the issue. Data evidencing the prevalence of such content could also prove valuable for research and policy-development.

36. However, the Draft Bill provides ACMA with significant coercive information-gathering powers that can be exercised against *any* person who might have information or documents 'relevant' to the existence of, among other things, 'misinformation or disinformation on a digital platform service'.[50] While the Guidance Note suggests that the target of these powers might be 'fact-checkers or other third-party contractors to digital platform providers', they are not limited in this way.[51] For example, suspected authors or disseminators of alleged 'misinformation' could be subject to the use of the proposed information-gathering powers.

37. This part of the Draft Bill is unique within its overall scheme as it is concerned with the responsibilities of individuals, rather than services providers.

[48] Ibid.
[49] See, eg, Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (Final Report, August 2023) [5.30]-[5.41].
[50] Draft Bill, s 19.
[51] Guidance Note, 15.

Privilege against self-incrimination and self-exposure to penalties

38. Unlike Part 13 of the BSA, which contains equivalent information-gathering powers related to broadcasters, an individual called to provide information or evidence, or produce a document under the new proposed powers, is not entitled to refuse to do so on the basis that to comply might incriminate them or expose them to a penalty.

39. The Bill's abrogation of the privilege against self-incrimination is purportedly counterbalanced by the protections offered against direct and derivative use of any compelled disclosures.[52]

40. The Law Council is concerned there is no such protection offered in consideration of an individual's privilege against exposing themselves to a civil penalty.[53] There is no attempt to justify this complete and unqualified abrogation of penalty privilege, which itself is rooted in the important idea of ensuring that those who allege criminality or other illegal conduct should prove it.

41. The failure to offer any protections consequent upon the abrogation of penalty privilege could lead to a position where a person is compelled to produce documents that later expose them to significant civil penalties. This ought not to be where there is no apparent reason, and no reason is apparent for not offering direct and derivative protections against the use of information that might expose an individual to civil penalty. It is not clear why reforms primarily intended to allow ACMA to monitor and improve the responses of digital platform providers to misinformation and disinformation, would need to curtail this privilege, including for users of the platforms unrelated to the operation of the platforms.

42. The Law Council notes that, under Part 13 of the BSA, journalists cannot be compelled to reveal their sources.[54] The same protection is not provided under Part 2 of the proposed Schedule 9. Given the potential scope of ACMA's information-gathering powers, that protection should be included.

Privacy and data security

43. The Law Council notes that the proposed information-gathering powers could raise privacy concerns, particularly where sensitive user data is collected or stored. Although proposed section 27 of the Draft Bill outlines an obligation on ACMA to not publish information if the information would meet the definition of 'personal information' under the *Privacy Act 1988* (Cth), the Law Council recommends the further inclusion of a legislative requirement for sensitive user data to be de-identified, where possible, and stored or accessed in strict compliance with Australia's privacy framework.

44. The Law Council highlights that the imposition of record-keeping requirements on digital platform providers may impose significant administrative and financial burdens, and may also increase data security risks if not properly secured.

[52] Draft Bill s 21.
[53] Ibid s 21(3).
[54] See *Broadcasting Services Act 1992* (Cth) s 202(4)).

Definitions of 'misinformation' and 'disinformation'

45. At the heart of the difficulties presented by the Draft Bill are the definitions of 'misinformation' and 'disinformation'.

46. 'Misinformation' is defined to include content provided on the digital service that 'contains information that is false, misleading or deceptive', where 'the content is not excluded content for misinformation purposes' and is 'reasonably likely to cause or contribute to serious harm'.[55]

47. Disinformation' is similarly defined, but includes the added requirement that 'the person disseminating, or causing the dissemination of, the content intends that the content deceive another person'.[56]

48. 'Excluded content for misinformation purposes' is defined under the Draft Bill[57] and is discussed below.

49. 'Serious harm' is not defined under the Draft Bill, although the Draft Bill outlines a number of factors which should be considered in determining whether content is reasonably likely to cause or contribute to serious harm.[58] 'Harm' is defined.[59] These provisions are also discussed below.

50. The relevant definitions raise at least three conceptual issues. The first is the substantive breadth of the definitions, including the concept of 'harm'. The second is the limited nature of the exemptions that take content outside the definition of 'misinformation'. The third is the statutory supposition that misinformation (however defined) is identifiable as such; and is capable of being so identified by ACMA (or indeed the service providers whom the Bill effectively requires to monitor the content published via their services).

51. The definitions of 'misinformation' and 'disinformation' are fundamental to the operation of the Draft Bill, particularly in the face of the suggestion in the Fact Sheet accompanying the Bill that industry 'does not need to adopt definitions in the Bill'. In a specific sense, the scope of almost all obligations under the Draft Bill and the concomitant scope of ACMA's powers are hinged upon the concepts of 'misinformation' and 'disinformation'.[60] In a more general sense, those concepts define the scope of the 'mischief' that the statute purports/aims to remedy, and thus will inform the interpretation of every provision of the Draft Bill. It is for these reasons that the problems with concepts of 'misinformation' and 'disinformation' are fundamental to the Draft Bill's justifiability.

Breadth of the definition of 'misinformation'

52. There are at least five principal respects in which the statutory definition of 'misinformation' can be regarded as overly broad and difficult to apply in practice.

53. First, the statutory definition requires a distinction to be drawn between 'information' and other forms of online content. What 'information' means in this context is unclear, but it is unlikely to be limited to 'positive claims about the truth of identified

[55] Exposure Draft, Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) ('*Draft Bill*') s 7(1).
[56] Ibid s 7(2).
[57] Ibid s 2.
[58] Ibid, s 7(3).
[59] Ibid s 2.
[60] See, eg, ss 4(1)(c), 18(2)(a) and 25(1).

facts'. Much online content involves combinations of fact, opinion, commentary or invective. Speech about political, philosophical, artistic or religious topics often involves statements that are not straightforwardly 'factual', but which are not mere statements of subjective belief. Much scientific discourse involves the testing and rejection of hypotheses, in which even 'true' information is provisional or falsifiable.

54. The prospect that digital platform providers and ACMA will be required to sift 'information' from 'opinion' or 'claims' is itself likely to have a chilling effect on freedom of expression; especially in sensitive or controversial areas. The effect may be particularly pernicious if a regulator or platform is tempted to be over-inclusive about what counts as 'information' rather than 'opinion'. The risk is that disfavoured opinions might come to be labelled and regulated as 'misinformation' (i.e., as misleading facts, and not as opinions).

55. Second, the statutory concept of 'misinformation' in the Draft Bill involves information that is false, misleading or deceptive; not merely information that is alleged or suspected to be so, or that is so in the opinion of a decisionmaker. The internet contains a vast amount of information, and the Draft Bill is not confined to information authored by Australians. The burden of identifying which of that worldwide information is 'misinformation' is likely to be significant.

56. Third, the definition of 'misinformation' is overbroad, in that it is not confined to straightforward positively false statements of fact. The existing law of misleading or deceptive conduct in trade or commerce makes clear that conduct will infringe the statutory norm in a very wide range of circumstances, particularly because the concept of 'misleading' information is much broader than 'false' information. Here, it is immaterial that the Draft Bill uses the language of 'information' rather than 'conduct'. The heartland of misleading or deceptive conduct under existing law is conduct that conveys inaccurate information to a recipient. Accordingly, the drafting of the Bill is likely to encompass not merely positive false statements, but also:

    (a) information that is partial or incomplete;[61]

    (b) information that is silent about some relevant contextual matter;[62]

    (c) information that is capable of two or more reasonable readings, only one of which is misleading;[63]

    (d) information that is literally true but that may be said to be rendered misleading by its context;[64]

    (e) information that is later rendered inaccurate by subsequent events, where the author fails to correct the initial impression;[65] and

    (f) information that causes harm to a person other than the person who is misled.[66]

[61] *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, [23] (French CJ and Kiefel J).
[62] Ibid. See also *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.
[63] *Tobacco Institute of Australia Ltd v Australasian Federation of Consumer Organisations Inc* (1992) 38 FCR 1, 5, 27.
[64] *Porter v Audio Visual Promotions Pty Ltd* (1985) ATPR 40-547.
[65] *Winterton Construction Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97, 114; *Thong Guan Plastic and Paper Industries SDN BHD v Vicpac Industries Australia Pty Ltd* [2010] VSC 11, [123]–[125].
[66] *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526.

57. Fourth, there is no content-based limit on the definition of 'misinformation'. It is not, for example, confined to information about health, finances, the environment, or the democratic process. Whether any given information is 'reasonably likely' to 'contribute' to 'serious harm' of the kinds specified in the Draft Bill is a complex interpretative question which might not readily be determined by the apparent character of the information standing alone.

58. Fifth, the statutory definition labels content as 'misinformation' if it *contains* information that is false, misleading or deceptive—the 'misinformation' is not merely the false, misleading or deceptive information itself. There is no statutory requirement that the content substantially consist of false, misleading or deceptive information. This raises the prospect that the statutory category of 'misinformation' may be overly-inclusive.

59. Given the breadth of the definition of 'misinformation' as outlined above, the Law Council cautions that a digital platform is unlikely to have sufficient expertise or adequate resources to make accurate and completely informed determinations as to whether content is false and, therefore, may choose to censor significant amounts of information in order to ensure compliance and avoid incurring substantial fines. This would, in turn, have a significant impact on freedom of expression.

The concept of 'excluded content' is insufficiently protective of freedom of expression

60. The Draft Bill excludes certain categories of content disseminated online from regulation. 'Excluded content for misinformation purposes' is defined to include:

- content produced in good faith for entertainment, parody or satire;
- professional news content;
- content produced by or for accredited Australian or international education providers; and
- content authorised by Commonwealth, state, territory and local governments.[67]

61. The definition of 'excluded content for misinformation purposes' does not sufficiently protect freedom of expression. The Law Council notes with particular concern that there is no general exclusion of content that involves reasonable scientific, academic, political, artistic or religious discussion, including factual disagreements in respect of those topics. There is no general recognition in the Draft Bill that many topics of public interest involve genuine and legitimate factual disagreement, uncertainty or debate.

62. The exclusion in proposed subclause (a) ('entertainment, parody or satire') is unsatisfactory and under-inclusive. Significantly, this is the only exclusion that identifies content by its substance or character, rather than its provenance. Many socially valuable forms of expression are not readily identified as 'entertainment, parody or satire', including serious artistic expression, criticism and review, or religious speech. Equally, the line between 'entertainment' and 'information' falling within the concept of 'misinformation' is not clear given the prevalence of so-called 'infotainment'.

[67] Draft Bill, s 2 (definition of 'excluded content for misinformation purposes').

63. The exclusion in proposed subclause (c) ('content produced by or for an [accredited] educational institution') appears to be inadequate, and may lead to significant inroads into academic freedom. First, even where an individual academic speaks or writes for a professional purpose, and within their field of expertise, it is not self-evident that such 'content' is produced 'by or for an educational institution'. The requirement for institutional endorsement is inconsistent with academic freedom. Universities generally insist on the distinction between the views—perhaps diverse, conflicting or controversial—expressed by individual academics on the one hand, which are not taken to be the view of the university as an institution, and the (more limited) views or policies expressed by the institution itself on the other. Further consideration of this proposed exclusion (alongside the 'authorised content' exclusion) may be needed, including by reference to recent measures adopted under the *Higher Education Support Amendment (Freedom of Speech) Act 2020* (Cth) to promote and protect freedom of speech and academic freedom.[68]

64. Additionally, the concept of 'educational institution' is itself unsatisfactory and requires clarification. For example, it is not clear whether research institutes or think-tanks that are not 'accredited' as 'educational institutions' would fall within this definition.

65. The exclusion in proposed subclause (d) (foreign institutions accredited 'to substantially equivalent standards as a comparable Australian educational institution') is troublesome in two interrelated respects. Educational institutions exist in many societies that do not share Australia's understandings of the rule of law and academic freedom. For example, there are a number of long-established public research universities that are notoriously subject to ideological pressure from authoritarian governments. Depending on the interpretation of 'substantially equivalent standards', it could be argued that the views of foreign governments that are false or misleading could be excluded from the definition of 'misinformation' where they are 'filtered' through a regime-friendly educational institution. It may also be difficult to determine what 'substantially equivalent standards' means given that educational institutions exist in a variety of different forms, which may be unfamiliar in Australia.

66. The Law Council is aware of particular concern regarding the exclusion in proposed subclause (e) (content that is authorised by a government). In accordance with this exception, views authorised by government are automatically protected from designation as 'misinformation'. Yet the views of critics of government (whether the political opposition, NGOs or private individuals) are at risk of precisely such a designation. The Guidance Note provides a relatively benign example of social media by a state transport department about an upcoming road project or health campaign. However, it is where the views of a government are particularly controversial or contestable that this exception, as drafted, risks making significant inroad into freedom of expression.

[68] As a result of which there are requirements upon higher education providers to have a policy that upholds freedom of speech and academic freedom under the *Higher Education Support Act 2003* (Cth), s 19-115. See also this Act's objects, which include supporting a higher education system that promotes and protects freedom of speech and academic freedom: s 2-1(a)(iv).

The definition of 'harm' is overbroad and does not sufficiently limit the concept of 'misinformation'

67. The concept of harm is critical to the intention of the Draft Bill. The Department noted in a hearing before the Senate Select Committee on Foreign Interference through Social Media that the intent of the Bill is to:

> *… tackle content that is reasonably likely to cause or contribute to serious harm. That, in a sense, is the intent of the bill … for digital platforms to take steps and responsibility for the content on those platforms and, in doing so, take steps to address content that they judge could be likely to cause serious harm. So the focus is on the harm and the content rather than the intent or the source of the content.*[69]

68. The Draft Bill outlines that provision of the misinformation or disinformation on the digital platform must be 'reasonably likely to cause or contribute to serious harm' under proposed section 7. The Law Council acknowledges that the serious harm threshold enables digital platforms and ACMA to prioritise content that is perceived as more dangerous to individuals, a group of people, or the public at large. However, as noted, while 'harm' is defined in the Draft Bill, 'serious harm' is not. Rather, the Draft Bill outlines a number of factors which should be considered in determining whether content is reasonably likely to cause or contribute to serious harm.[70]

69. Under proposed section 2, 'harm' is defined as including any of the following:

    (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; or

    (f) economic or financial harm to Australians, the Australian economy, or a sector of the Australian economy.[71]

70. The Law Council is concerned that the definition of 'harm' in the Draft Bill is overbroad, especially when read in light of the definition of 'misinformation', under which material is caught not merely when it in fact causes serious harm (however defined) but also when it is only 'reasonably likely' to do so; or when it might only 'contribute to' such harm.[72] The width of that definition is significant, given that the concept of 'harm' and 'serious harm' each involve value judgments that are likely to be contestable and politically sensitive. Given that the existence of 'harm' is the only substantive differentiation between 'misinformation' (as defined) and any other

[69] Richard Windeyer, Deputy Secretary, Communications and Media Group, Department of Communications, *Committee Hansard* (12 July 2023) 25, cited in Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (Final Report, August 2023) 75.
[70] Ibid, s 7(3).
[71] Ibid s 2 (definition of 'harm').
[72] Ibid s 7(1)(d).

false, misleading or deceptive information that exists in the world, it is important that the definition be clear, sufficient, and easy to apply.

71. Proposed subclause (a) ('hatred against a group in Australian society') identifies a matter that is already captured (at least to some extent) by anti-discrimination and anti-vilification laws, but without the calibrated exemptions to protect (for example) artistic, academic and religious freedom that those laws typically contain.

72. Proposed subclause (b) ('disruption of public order or society in Australia') is overbroad, and may capture valuable behaviour such as encouraging the lawful exercise of the right of public assembly and peaceful protest.

73. Proposed subclause (c) ('harm to the integrity of Australian democratic processes') is vague and overbroad, and is best met by specific legislation if existing electoral law is shown to be inadequate (for example about campaign financing, or electoral publications).

74. Proposed subclause (d) ('harm to the health of Australians') is overbroad, and insufficiently calibrated. Even where scientific opinion is clear, there is a wide continuum of conduct that involves harm to health. At the same time, it is unclear why the health of 'Australians' would be the determining factor, noting that there are also large numbers of persons resident or present in Australia (non-citizens) whose health also deserves consideration.

75. Proposed subclause (e) ('harm to the Australian environment') is overbroad, and insufficiently calibrated. The complexity of current environmental protection legislation, and the frequent length and complexity of the proceedings in which that legislation is applied, suggests that it may not be easy to identify what is, in fact, a harm to the environment. There may also be competing environmental goods.

76. Proposed subclause (f) ('economic or financial harm to Australians, the Australian economy or a sector of the Australian economy') is overbroad, and insufficiently calibrated. 'Economic or financial harm to Australians' may arise from any number of causes. The subclause is not, for example, confined to fraudulent conduct, or conduct causing material financial loss to a significant number of people.
An individual Australian might experience 'economic or financial harm' by being encouraged to spend money needlessly on expensive brand-name clothes, or by being encouraged to make legitimate but unnecessarily conservative investment choices, just as much as by being encouraged to invest in a Ponzi scheme.
A significant amount of substantively unobjectionable commercial (and non-commercial) communication is likely to be caught by this aspect of the definition of harm.

77. Under proposed section 7(3) of the Draft Bill, the factors that should be considered to determine whether the content is reasonably likely to cause or contribute to 'serious harm' include:

    (a) the circumstances of dissemination;

    (b) the subject matter of the content;

    (c) the potential reach and speed of dissemination;

    (d) the severity of the potential impacts;

    (e) the author of and purpose for the dissemination;

(f) the correct attribution of a source for the information; and

(g) any other relevant matter.

78. In the Law Council's view, the definition of 'harm' is not improved by the inclusion of these contextual factors for determining 'serious harm'. They repose significant discretion in an executive decision-maker, including by making judgements in respect of favoured and disfavoured 'authors' or 'purposes', without any express obligation to have regard to freedom of expression, privacy, broader human rights or any other countervailing public interest criteria.

79. Further, the Law Council submits that the Draft Bill should more clearly define the concept of 'serious harm' to reduce ambiguity for regulatory purposes and ensure effective enforcement of the misinformation codes or standards.

The definition of 'disinformation' replicates and extends the difficulties Inherent in the concept of 'misinformation'

80. The concept of 'disinformation' embeds the same difficulties that are inherent in the definition of 'misinformation', with the additional problems caused by the requirement that 'the person disseminating, or causing the dissemination of, the content intends that the content deceive another person'. Two difficulties are of particular importance.

81. First, the Law Council queries by what means it will be determined that the disseminator 'intend[ed] that the content deceive another person'.[73] The mere intentional act of dissemination will not suffice—proof of intention to deceive will be needed. That will not often be apparent or inferable from the face of the allegedly misleading content. In the absence of coercive powers and the safeguards of the judicial process, people are not ordinarily compelled to disclose their unexpressed intentions,[74] especially when what is alleged against them is actual deceit.

82. Second, the disseminator of content need not be its author. An author's innocent error may be misleading, and their content may amount to 'misinformation' (as defined) by reason of that innocent mistake. The content might then be disseminated by other innocent people who are ignorant of the error. If the content is thereafter disseminated by a malicious person who intends to deceive others, there is a risk that the pejorative label of 'author and disseminators of disinformation' will be applied to innocent people. Given that the observable conduct involved in innocent authorship, innocent dissemination and deceitful dissemination is the same (namely, transmission of particular information), there is a real risk of over-inclusion in any regulatory investigation into those people's intentions and, hence, the existence of 'disinformation'.

[73] Draft Bill, s 7(2).
[74] As it appears may occur under section 19 of the Draft Bill.

Identification of 'misinformation' and 'disinformation'

83. The statutory scheme of the Draft Bill presupposes that misinformation is an identifiable category of online material. This is inherent in the definitions of 'misinformation' and 'disinformation', which do not depend on the mere existence of allegation, suspicion, or executive opinion that information meets the statutory definition. Equally, it is inherent:

    (a) in proposed sections 14(1)(c), 18(2)(a), 19(2)(a) and 25(1)(a), about regulating or reporting the existence of 'misinformation or disinformation on digital platform services';

    (b) in proposed sections 14(1)(d), 18(2)(b), 19(2)(b) and 25(1)(b), about the 'effectiveness' of measures 'to prevent or respond to misinformation or disinformation on digital platform services'; and

    (c) in proposed sections 14(1)(e), 18(2)(c), 19(2)(c) and 25(1)(c), which suppose that it is possible to form a meaningful judgement about the 'the prevalence of content containing false, misleading or deceptive information'.

84. Each of these, by definition, involves an objective assessment that such content exists.

85. The discussion at paragraphs 60-79 highlights the inherent difficulties with appropriately identifying whether information is false, misleading or deceptive, reasonably likely to cause or contribute to 'serious harm' and not subject to an exception. As a result of this burden, and the potential for significant penalties, there is a real risk of over-cautiousness by digital platform services, in turn limiting the freedom of expression of users.

86. The statutory scheme means that ACMA is the ultimate decision-maker about what is, or is not, misinformation (or disinformation), subject only to the (unexpressed) possibility of limited judicial review in the federal courts. There are three fundamental problems with these statutory presuppositions.

87. First, the broad definition of 'misinformation' requires the decision-maker to distinguish 'information' (whether misinformation or not) from all other online content, such as opinion, criticism, political commentary, creative writing, religious expression or invective. It requires identification of the 'true' position against which the alleged misinformation is shown to be false, misleading or deceptive. That is because the statutory definitions do not concern material that is merely alleged, suspected or believed in the opinion of the decision-maker to be misinformation. Given the vast amount of material available online on digital platform services, each of these aspects of the task of identifying 'misinformation' would be significantly burdensome on ACMA and the digital platform services. This is especially so in light of the High Court's recognition of the 'considerable difficulty' of discerning what is, and what is not, misleading and deceptive.[75] This issue goes to the proportionality of the Draft Bill.

88. Second, it is not clear what justifies the statutory presupposition that ACMA and the digital platform services will have the expertise and resources to identify and distinguish 'misinformation' from other forms of online content. Taking only recent examples of contestable online claims, these organisations may not be well-placed to identify the economic cost-benefit analysis of major sporting events; the biological

[75] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197 (Gibbs CJ).

origin of novel viruses; the efficacy of newly developed medical techniques; the extent of corruption on the part of foreign politicians; or the strategic motivations of the protagonists in major geopolitical events— to provide simply a few examples. They may also, in the absence of a federal human rights charter—which establishes domestic norms of Australia's human rights obligations, including an understanding of how relevant rights intersect and may (in certain instances) be limited—be unable to make informed judgments about the proportionality of limitations on the freedom of expression or rights to privacy, alongside the rights to life or to the enjoyment of the highest attainable standard of physical and mental health.

89. Third, the everyday experience of the courts or commissions of inquiry shows that discerning truth from falsehood in a procedurally fair manner may be an elaborate, costly and time-consuming process. The statutory supposition that this can be done readily, uncontroversially, and with little effort by ACMA or by digital platform services seems unrealistic in light of real-life experiences, for example:

    (a) the truth (or otherwise) of allegations of war crimes committed in Afghanistan;[76]

    (b) the truth (or otherwise) of allegations of financial exploitation of Aboriginal people in remote communities;[77]

    (c) the truth (or otherwise) of allegations of inadequate medical care in psychiatric hospitals;[78]

    (d) the truth (or otherwise) of allegations that widely used medical devices were unsafe.[79]

Conclusion

90. The Law Council recognises that there is global recognition that misinformation and disinformation can result in significant harms to the enjoyment of human rights in particular contexts. However, this is a highly complex topic requiring a cautious regulatory response.

91. The Law Council considers that the Draft Bill as proposed (recognising that it is an Exposure Draft and an important means of testing stakeholder views) is overly broad, uncertain, and may have serious unintended consequences.

92. The Law Council recommends and would be pleased to engage further with the Australian Government on the issues canvassed above.

[76] *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555. Cf *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* (2020).
[77] *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1.
[78] *Herron v HarperCollins Publishers Australia Pty Ltd (*2022) 292 FCR 336.
[79] *Ethicon Sàrl v Gill* (2021) 288 FCR 338.