



**Australian
Human Rights
Commission**

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024

Australian Human Rights Commission

Submission to Environment and Communications Legislation Committee

07 October 2024

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Misinformation and Disinformation Bill, 07 October 2024

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1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission on the [Communications Legislation Amendment \(Combatting Misinformation and Disinformation\) Bill 2024](#) (Bill) to the Environment and Communications Legislation Committee (Committee).
2. Any law aimed at combatting misinformation and disinformation must be framed around human rights, and include robust transparency and scrutiny safeguards. It should also be recognised that a multi-faceted policy response is required, with measures such as improving digital literacy and resilience amongst the broader Australian community also having an important role to play in designing an effective policy response to combat misinformation and disinformation.

2 Limited consultation

3. While the Commission appreciates the granting of an extension, it is disappointing that submissions were originally only open for a period of seven business days.¹ Given the immense impact the Bill could have on freedom of expression and democracy itself, more time should have been provided for stakeholders to provide considered responses to the Federal Government. This is particularly important given the clear public interest in this legislation, with the previous Exposure Draft of the Bill (Exposure Draft)² receiving approximately 20,000 comments and 2,418 public submissions during the public consultation period in 2023.³
4. As noted in several submissions on the Exposure Draft,⁴ it is crucial that the proposed legislation strike the appropriate balance between combatting misinformation and disinformation while sufficiently protecting freedom of expression. This is a complex task, that requires nuance and feedback from experts and stakeholders across all communities. Seven business days does not provide sufficient time for stakeholders to share their views and risks damaging the broader public confidence that is necessary to ensure the effective implementation of any laws designed to combat misinformation and disinformation.

3 Freedom of expression

5. The Commission recognises that misinformation and disinformation can have real and significant impacts on human rights, social cohesion and democratic processes. Yet it also needs to be recognised that information may be opportunistically labelled as ‘misinformation’ or ‘disinformation’ to delegitimise alternative opinions, and limit open discussion about issues of public importance. These competing tensions are set out in the Commission’s original [submission](#) to the Exposure Draft, which we would encourage the Committee to have reference to.
6. Freedom of expression is enshrined in a range of international and regional human rights instruments, including art 19 of both the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights (ICCPR).⁵
7. This right is not absolute, and its exercise carries with it special duties and responsibilities.⁶ Freedom of expression may be subject to certain restrictions, however any restrictions must be provided for by law and may only be imposed for one of the grounds set out in art 19(3) of the ICCPR.⁷
8. Any such restrictions must also meet strict tests of necessity and proportionality. This requires that any proposed restriction pursues a legitimate aim, is proportionate to that aim, and is no more restrictive than is required for the achievement of that aim.⁸
9. In particular, the UN Human Rights Committee has highlighted that:

... when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.⁹
10. It is a welcome change that the Objects of the Bill now expressly considers freedom of expression in respect of the Australian Communications and Media Authority’s (ACMA) powers. However, the language of s 11(e) presumes these powers respect freedom of expression – rather than requiring ACMA’s powers to be carried out with respect for it. This is a concerning precedent to set in the Objects of the Bill.
11. However, there have been several improvements to the Bill which have increased necessary protections for freedom of expression, and which are welcomed. A key example is the provision of a broader exclusion under section 16(1)(c) allowing for the ‘reasonable dissemination of content for any academic, artistic, scientific or religious purpose’.

4 Defining key terms

12. It is critical for any laws designed to combat misinformation and disinformation to define necessary terms with precision in order to ensure that the law does not end up improperly restricting access to diverse perspectives or censoring different views.

4.1 Meaning of 'serious harm'

13. There have been changes to the definition of key terms that have provided additional clarity. Removing the definition of 'harm' and instead defining 'serious harm' is a beneficial change which improves protection for free expression. However, the Commission continues to hold concerns about both the categories of misinformation and disinformation and the low harm threshold that remains.

14. For example, sections 14(f) and 14(h) remain too broad, defining 'serious harm' as 'imminent harm to the Australian economy, including harm to public confidence in the banking system or financial markets' that has either 'significant and far-reaching consequences for the Australian community or a segment of the Australian community' or 'severe consequences for an individual in Australia'. To give one example, legitimate discussion of interest rates may harm any number of Australians' confidence in financial markets, especially during times of economic hardship. However, this isn't information that should be captured as causing or contributing to serious harm.

15. Section 14(f) should not be included in the legislation. The practical effect of this could be the censorship of Australians expressing opinions that unfavourably affect market trends or corporate reputations. This could include, for example, criticising a major company's environmental or human rights record or policies. Including economic harms as a category also goes further than the limited restrictions to freedom of expression outlined in art 19(3)(b) of the ICCPR.

16. Section 13(3) of the Bill sets out non-exhaustive factors which are relevant in determining if content is reasonably likely to cause or contribute to serious harm.¹⁰ The 'author' of content is listed as a factor in determining serious harm. This rightly allows decision-makers to consider trolls or repeat offenders in their consideration, as well as the potential reach and authority of an 'author'. However, there is concern that it may lead to

discretionary decisions being made about a person, rather than the content they post.

17. The Commission remains concerned that the Bill continues to set a low threshold for content moderation by allowing content that is reasonably likely to contribute to serious harm. While a lower threshold may assist ACMA in the operation of these new powers, it threatens the right to freedom of expression.

4.2 Misinformation and disinformation

18. Adopting a more broadly accepted definition of ‘misinformation’ and ‘disinformation’ improves workability and better protects freedom of expression. Requiring information to be ‘reasonably verifiable as false, misleading or deceptive’ strengthens the protection against opinions being unduly captured by the Bill, and more closely aligns with existing definitions of misinformation and disinformation.¹¹
19. However, a number of concerns originally raised by the Commission’s past submission about the definition of ‘misinformation’ and ‘disinformation’ have not been addressed. For example, the term ‘information’ is not itself defined – but instead it is stated in the Explanatory Memorandum that the term ‘is intended to include opinions, claims, commentary and invective’.¹² Considerable caution should be exercised before including opinions and commentary within the scope of ‘information’ as this significantly broadens the potential reach of this legislation and increases the risk of it being used to censor legitimate debate about matters of public importance.
20. Any legislation aimed at combatting misinformation and disinformation should err on the side of ensuring robust protections for freedom of expression, noting that laws preventing misinformation and disinformation are only one component of what needs to be a multi-faceted policy response. Importantly, misinformation and disinformation also need to be countered by the provision of accurate and truthful information, as well as improving digital literacy and resilience amongst the broader Australian community so that they are more easily able to distinguish between the two.

4.3 Excluded dissemination

21. The shift to focus on ‘excluded dissemination’ rather than ‘excluded content’ is welcome, and has resulted in stronger protections for freedom

of expression. For example, including and broadening the exemption for the reasonable dissemination of content for an academic purpose is a positive change from the Exposure Draft.¹³

22. However, based on the Bill and Explanatory Memorandum it is still unclear if content disseminated by bodies that are not traditionally seen as 'academic' but which strongly contribute to the public discourse will be protected. For example think-tanks, non-governmental organisations, international bodies or organisations, or even National Human Rights Institutions (such as the Australian Human Rights Commission) would not be included within the scope of this exemption. One possibility would be extending the meaning of 'excluded dissemination' under s 16(1)(c) to also include 'reasonable dissemination of content for any other genuine purpose in the public interest' to provide further clarity on this point.

5 Platform reporting

23. Section 14(1)(e) of the Exposure Draft played an important role in requiring digital platforms to report on the 'prevalence of false, misleading or deceptive content'. Regulator and researcher access to this kind of information is essential to monitor and evaluate the prevalence of misinformation and disinformation in Australia. It also comes at a time when more social media platforms are reducing transparency and limiting access to avoid scrutiny.¹⁴
24. The removal of this obligation in the Bill is short-sighted if access is not strengthened in the broader transparency reporting regime for digital platforms. Transparency is a key factor in determining how misinformation and disinformation is affecting the online environment. It is also an important safeguard for freedom of expression as it may allow insights into the kinds of information which is being flagged.

6 Annual reporting

25. Although the inclusion of an annual reporting requirement for ACMA is welcomed, s 69 of the Bill is too vague in its current form. The reporting requirements should be more prescriptive and include an impact analysis of how the Bill has both countered misinformation and disinformation as well as any implications on freedom of expression.

7 Review mechanism

26. Section 70 of the Bill provides a review mechanism which includes an assessment of the impact of the Bill on freedom of expression three years after commencement. While this is a welcomed safeguard, three years is a long time in the digital environment given the rapid pace of technological development. At a minimum, an additional, initial review should take place twelve months after the commencement of the legislation.
27. Section 70(3) also provides that the review ‘must be conducted in a manner that provides for public consultation’. Given the short consultation period provided for this submission, the Commission would emphasise the importance of ensuring that subsequent public consultations provide a full opportunity for meaningful engagement.
28. With the importance of third part access to data (as noted above), it is disappointing that the Federal Government has pushed back any decision on independent researcher access until the review takes place three years from the date of commencement.¹⁵ If the Federal Government truly wishes to understand and combat misinformation and disinformation researcher access needs to be strengthened and supported now, and not in three years’ time.
29. These reviews must also consider multi-faceted policy implications beyond the immediate reach of the Bill. For example, there is considerable misinformation and disinformation surrounding climate change on everything from ‘greenwashing’ to climate changes impact on bushfires in Australia.¹⁶ While this topic is no longer considered by the Bill, it remains relevant when addressing misinformation and disinformation.
30. Given the serious concerns noted throughout this submission, the Bill does not strike the appropriate balance between freedom of expression and content moderation.

Recommendation

1. The Commission makes the following recommendation.

Recommendation 1:

The Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 (Cth) should not be passed in its current form.

Endnotes

- ¹ The *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) was introduced to Parliament on 19 September 2024 and submissions close on 30 September 2024.
- ² Exposure Draft, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Cth).
<<https://www.infrastructure.gov.au/sites/default/files/documents/communications-legislation-amendment-combatting-misinformation-and-disinformation-bill2023-june2023.pdf>>.
- ³ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *New ACMA powers to combat misinformation and disinformation* (Web Page)
<<https://www.infrastructure.gov.au/have-your-say/new-acma-powers-combat-misinformation-and-disinformation>>.
- ⁴ See e.g. Australian Human Rights Commission, Submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' *Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Submission, 18 August 2023); Law Council of Australia, Submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' *Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (Submission, 29 August 2023).
- ⁵ See e.g. *Convention on the Rights of Persons with Disabilities*, art 21; *Convention on the Rights of the Child*, art 12; *European Convention on Human Rights*, art 10; *American Convention on Human Rights*, art 13; *African Charter on Human and Peoples' Rights*, art 9; *ASEAN Human Rights Declaration*, art 23.
- ⁶ *International Covenant on Civil and Political Rights*, art 19(3).
- ⁷ *International Covenant on Civil and Political Rights*, art 19(3).
- ⁸ Frank La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion* (UN Doc A/HRC/14/23, 20 April 2010) 13-15 [79]-[81]; See also United Nations ('UN') Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* (UN Doc CCPR/C/GC/34, 12 September 2011) 6 [22].
- ⁹ UN Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* (UN Doc CCPR/C/GC/34, 12 September 2011) 5-6 [21].
- ¹⁰ Explanatory Memorandum, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) 45.
- ¹¹ See, for example, Digital industry Group Inc. (DIGI), *Australian Code of Practice on Disinformation and Misinformation*, 22 December 2022.
- ¹² Explanatory Memorandum, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) 44.
- ¹³ *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) s 16; cf *Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* s 2.
- ¹⁴ See generally Reset Tech Australia, *Achieving digital platform public transparency in Australia* (Report, June 2024).

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¹⁵ *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024* (Cth) s 70(2)(c).

¹⁶ See generally Climate Council, *Mythbusting* (Webpage) <https://www.climatecouncil.org.au/resources/explaining-bushfires-climate-change/?_gl=1*v1pck*_up*MQ..&gclid=Cj0KCQjwo8S3BhDeARIsAFRmkOOV4-0--uDzMbSBrZuP-NFKXtscL2xSB_p9PP5dQjN_hp9WnwWxDhAaAkQQEALw_wcB>; United Nations, *Greenwashing – the deceptive tactics behind environmental claims* (Webpage) <<https://www.un.org/en/climatechange/science/climate-issues/greenwashing>>.