Australian Institute for Progress

Submission to Environment and Communications Legislation Committee on Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024

Contents

September 30, 2024

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

The Australian Institute for Progress is an Australian think tank based in Queensland, with a particular interest in free speech and publishing. We thank the committee for this opportunity to make a submission on the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024*.

Should you have any queries you may contact me

Regards,

GRAHAM YOUNG
EXECUTIVE DIRECTOR

Introduction

This bill is a reworking of an earlier bill of last year with the same name which we have already made a submission on. This submission draws on that earlier submission, as while there are some changes the bill still suffers from the same fundamental flaws:

- there is no proof that this legislation is needed and that current laws are insufficient;
- it would stifle free speech, which is an absolutely necessary feature of any democratic system and mistakes the roles of digital media platforms;
- it would devastate small online publishers, wrapping them in impossible levels of bureaucratic complexity;
- ACMA and social media platforms are the wrong organisations to be determining what is, or isn't misinformation and disinformation; and
- It lays the way open for manipulation of political debate, depending on what parties are in power.

This is a deeply undemocratic bill which arrogates to a government instrumentality the right to determine what is right or wrong. In a democracy, apart from certain issues, like fraud and defamation, this is determined by the people. To do this they must be able to have an open public conversation, and the right to argue their point of view, without interference by the elected government, let alone an unelected wing of it.

Our firm recommendation is that existing legal avenues are sufficient to deal with any real harms that might arise from information on the net that is either accidentally or deliberately wrong and this legislation should be withdrawn.

Onus on proponents of legislation

In the cases of all new legislation, it must be incumbent on the proponents of change to demonstrate a need for the change which balances both the costs and the benefits. If it is possible to do this in the case of the proposed legislation, it is not contained in the research which the ACMA has relied on. This was in two parts – first from the ACCC and second from the News and Media Research Unit at Canberra University.

Relationship to the original ACCC research

In its Digital Platforms Inquiry[1] the ACCC directed ACMA to look at disinformation, not misinformation.

On the subject of misinformation it said:

> *To balance these competing interests, the recommended code does not include 'misinformation' which is defined as false or inaccurate information not created with the intention of causing harm. Under this approach, the ACCC expects the code would cover issues such as:*
>
> *doctored and dubbed video footage misrepresenting a political figure's position on issues*
>
> *incorrect information about time and location for voting in elections*
>
> *information incorrectly alleging that a public individual is involved with illegal activity.*
>
> *The ACCC expects the code would not apply to:*
>
> *false or misleading advertising (which is regulated under the Australian Consumer Law and overseen by industry body Ad Standards, with advertising broadcast on television and radio also bound by additional legislative restrictions and is co-regulated by the ACMA)*
>
> *reporting errors (news publishers are generally regulated by the Australian Press Council with complaints about news broadcast on television and radio subject to coregulation through an industry code overseen by the ACMA)*
>
> *explicit hate speech or incitements to violence not presented as journalism or reporting of fact (addressed through the Racial Discrimination Act 1975)*
>
> *commentary and analysis that is clearly identified as having a partisan ideological or political slant*
>
> *incorrect or harmful statements made against private individuals (addressed by existing defamation laws)*
>
> *satire and parody*[2]

We would agree with the ACCC.

[1] https://www.accc.gov.au/about-us/publications/digital-platforms-inquiry-final-report
[2] Ibid pp 370-371

Further it suggests that policing of disinformation should be confined to very large platforms.

Recommendation 15: Digital Platforms Code to counter disinformation

Digital platforms with more than one million monthly active users in Australia should implement an industry code of conduct to govern the handling of complaints about disinformation (inaccurate information created and spread with the intent to cause harm) in relation to news and journalism, or content presented as news and journalism, on their services. Application of the code should be restricted to complaints about disinformation that meet a 'serious public detriment' threshold as defined in the code. The code should also outline actions that constitute suitable responses to complaints, up to and including the take-down of particularly harmful material.

The code should be registered with and enforced by an independent regulator, such as the ACMA, that:

- is given information-gathering powers enabling it to investigate and respond to systemic contraventions of code requirements
- is able to impose sufficiently large sanctions to act as an effective deterrent against code breaches
- provides frequent public reports on the nature, volume and handling of complaints received by digital platforms about disinformation
- reports annually to Government on the efficacy of the code and compliance by digital platforms.

While the code should focus on addressing complaints about disinformation it should also consider appropriate responses to malinformation (information inappropriately spread by bad-faith actors with the intent to cause harm, particularly to democratic processes).

In the event that an acceptable code is not submitted to the regulator within nine months of an announced Government decision on this issue, the regulator should introduce a mandatory industry standard.

The code should be reviewed by the regulator after two years of operation, and the regulator should make recommendations as to whether it should be amended, replaced with an industry standard, or replaced or supplemented with more significant regulation to counter disinformation on digital platforms.

Table 1: ACCC Digital Platforms Inquiry[3]

Canberra Uni research

In 2020 ACMA commissioned the News and Media Research Centre at Canberra University to conduct "COVID-19: Australian news and misinformation longitudinal study"[4]. This is an extremely flawed piece of polling. It purports to measure misinformation on the Internet using a survey instrument, but it makes two fundamental flaws.

The first is to ask respondents how often they encounter misinformation, without an objective measure of what misinformation is.

So when respondents report they see misinformation, we have no idea what propositions they are reacting to, and whether they are in fact seeing misinformation or not. The difficulty of determining what is, and isn't, true, is then demonstrated by a further question in the survey where five propositions are put to respondents to see whether they agree with them as facts or not.

These "facts" were not properly determined to be facts by the researchers, and appear to reflect their own flawed ideas as to what was true or false at the time. In some cases the propositions were just expressions of opinion which could not be said to be true or false. In others they demonstrate that truth is an emergent property of inquiry, and, while most people might have thought them to

[3] Ibid pp 370
[4] https://apo.org.au/node/316582

be true at the time, events have shown they most likely were not. In one case the proposition was definitely incorrect, even at the time of the study.

No competent pollster would have designed a survey like this.

Stifling free speech

The bill fails to understand the role of digital media platforms in the civic world. They are our public open spaces. Analogously to public open spaces, the owners should not be held responsible for what is said or discussed on them. They certainly shouldn't be required to police the speech of participants, beyond what they need to make their site orderly.

If the law is being broken in a town square, it should be the role of officials of the government, such as police officers, to intervene, not the owner of the square. A drug deal may be going down, violence may be being incited, but it is not the role of the provider of the space to get involved.

Of course they should cooperate with the police or civil authorities as required, but that is a reactive, not a proactive, role.

The comparison is more complicated than that, because almost all online spaces do some curating of content, which makes them a cross between publishers and convenors, but we would put much more weight on them as facilitating conversations rather than publishing them as this is the way they run their sites.

In the modern world, a substantial percentage of political discussion has gone online, and the online environment has proven surprisingly successful at uncovering the truth, at the same time as it can also disseminate untruths. The same can be said for public open spaces. We've seen rallies for the CFMEU and Hezbollah in recent days in public spaces, but there were no calls for the controllers of these spaces to censor what was said at those rallies.

I see propaganda from both those sources online which are either misinformation or disinformation, but unless they break the law there is nothing that should be done about them. However, under this legislation any website that carried these claims might be required to remove them, on pain of paying a fine of 5% of their global income.

The test of a democracy is not how much freedom of expression it gives to majorities, but how much to minorities.

Devastate small digital platforms

The legislation requires digital platforms of all sizes to provide extensive and onerous documentation on their sites for transparency and record keeping and would be impossible for a site that did not have significant human resources to meet these requirements. It would certainly be beyond most small platforms, which under this legislation would appear to include blogs, substack sites, and other micro-publishing enterprises who all allow for discussion on their sites.

ACM and digital platforms do not have the skills to determine what is mis- and disinformation

A huge fault in the legislation is that it gives powers, which are not reviewable, to ACMA to determine what is and isn't mis- and disinformation. This is particularly troubling as disinformation is dealt with more severely, but depends on an assessment of intent, which is even harder to do than to determine accuracy.

Much of this is delegated to the social media platforms themselves. Here, two problems arise. The first is that as most people are not qualified to make the fine distinctions that would need to be made by the legislation, the more people who are required to make these decisions, the worse the decision making is likely to be.

The second is that as the penalties for failure are so onerous, the platforms are likely to err in the direction of the government. The Twitter files, and recent admissions by Facebook CEO Mark Zuckerberg, demonstrate this is a real problem.

Governing political parties can potentially enlist the regulator in their cause

Under the system envisaged in the bill where the minister has a final say on a number of issues, and where the regulators are appointed by the government, it should be relatively easy for a minister to appoint decision makers who will favour their point of view.

In which case I look forward to disinformation currently being espoused by some politicians and activists being removed from social media sites as causing serious harm to Australia on a change in government. These include assertions by environmentalists that we are in a climate crisis or that CO2 emissions are causing extreme weather events – these are directly contradicted by the IPCC reports. Or that nuclear energy is more expensive than fully-firmed renewables – contradicted by the USA Energy Information Administration.

In fact, I don't look forward to this at all, because even though I believe these propositions to be true, they have no right to be exclusive. In a society which is interested in the truth, and these are the only societies that can progress, there is no excuse for suppressing opinions, even those that are wrong.

Conclusion

It is disturbing that the government has persisted with this bill and suggests it is not an organisation that is interested in democracy. Just as disturbing is the fact that this legislation originated with the now Opposition who commissioned the ACCC and Canberra University research demonstrating that at least that minister did not have a deep understanding of democratic principles. A bipartisan approach to suppressing uncomfortable opinions is not encouraging to those of us who believe in robust debate, and the diversity that matters the most, that of opinion.