



Australian
Human Rights
Commission

Finding balance: combatting misinformation and disinformation without threatening free expression

Australian Human Rights Commission

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

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1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Department) on an Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Exposure Draft Bill).
2. The key question that arises when considering any legislation that aims to address the growing challenge posed by misinformation and disinformation is whether it strikes an appropriate balance between combatting misinformation and disinformation on the one hand, while sufficiently protecting freedom of expression on the other.
3. The Commission acknowledges the increasing need to combat misinformation and disinformation, but considers that the Exposure Draft Bill in its current form provides insufficient protection for freedom of expression. While there is a need for legislation aimed at combatting misinformation and disinformation, the current Exposure Draft Bill does not presently strike the right balance.

2 Combatting misinformation and disinformation

4. The Commission recognises the potential harms caused by misinformation and disinformation, and the need for Australia to respond to these risks.
5. In the Commission's recent [submission](#) to the Senate Select Committee on Foreign Interference through Social Media, the Commission emphasised that 'misinformation and disinformation can have devastating effects on human rights, social cohesion and democratic processes. Indeed, this can be the very purpose intended by the release of disinformation.'¹
6. At the same time, there are examples around the world of information being opportunistically labelled as 'misinformation' or 'disinformation' to delegitimise alternative opinions and justify censorship. For example, the Center for International Media Assistance have examined what they describe as the global 'proliferation' of national laws designed to combat misinformation and disinformation in recent years. The Center expressed concern about the potential for these laws to be 'weaponised', resulting in a stifling of independent media and weakening of digital rights.²

7. There is a clear need to combat misinformation and disinformation, however there is also a real risk of different perspectives and opinions being targeted when doing so. Robust safeguards for freedom of expression must form part of any measures taken to combat misinformation and disinformation in order to ensure that Australia's democratic values are not undermined.
8. This reflects the warning by the former U.S. ambassador to the UN Human Rights Council, Eileen Donahoe, that 'an ominous risk also arises when democratic governments responding to digital disinformation undermine their own democratic values'.³
9. Particular care must be taken when attempting to regulate online content, given the central importance of online platforms to our public discourse. For example, the Senate Selection Committee on Foreign Interference through Social Media recently observed:

Whether we like it or not, social media platforms are today not just the dominant communication channels in modern economies, they constitute the public square for democracies. They are the place where news is first reported, contentious issues are debated, consensus is formed and public policy decisions are shaped. The health of these forums directly affects the health of our democracies.⁴

10. Striking the right balance between combatting misinformation and disinformation and protecting free expression is an ongoing challenge. The importance of ensuring that efforts to prevent misinformation and disinformation are placed within a broader human rights framework was highlighted by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur) in their 2021 [report](#) on disinformation and freedom of opinion and expression:

In a report devoted to disinformation, it is easy – but dangerous – to lose sight of the value that digital technology offers to democracy, sustainable development and human rights, or the vital importance of the right to freedom of opinion and expression in that equation. That is why attempts to combat disinformation by undermining human rights are short-sighted and counterproductive. The right to freedom of opinion and expression is not part of the problem, it is the objective and the means for combating disinformation.⁵

3 The Right to Freedom of Expression

11. The right to freedom of expression is recognised as a fundamental human right and has been described as constituting 'the foundation stone for every free and democratic society'.⁶ It is enshrined in a range of international and

regional human rights instruments, including Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).⁷

12. The right to freedom of expression is not absolute, and its exercise ‘carries with it special duties and responsibilities’. The right 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 Article 19(3) of the ICCPR; namely ‘for respect of the rights or reputations of others’ or ‘for the protection of national security or of public order or of public health or morals’.⁸

13. 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.⁹

14. 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.¹⁰

15. With respect to standards on disinformation specifically, it has been stated that ‘general prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression ... and should be abolished’.¹¹

4 The Exposure Draft Bill

16. The Exposure Draft Bill is designed ‘to provide the independent regulator, the Australian Communications and Media Authority (ACMA), with powers to combat online misinformation and disinformation’.¹² These powers are said to be required due to the growing challenge of misinformation and disinformation which ‘pose a threat to the safety and wellbeing of Australians, as well as our democracy, society and economy’.¹³

17. Addressing the growing challenge of online misinformation and disinformation is a legitimate legislative aim. Although this submission expresses the view that the current Exposure Draft Bill does not strike the right balance, it recognises that there is a need to prevent misinformation and disinformation. The Commission would welcome the opportunity to contribute to discussions on any future iterations of the Exposure Draft Bill.

18. The key question is whether the Exposure Draft Bill meets the requirements of necessity and proportionality in order to be compatible with international human rights standards for restrictions on freedom of expression.
19. The issues raised below all raise questions about whether the Exposure Draft Bill in its current form meets these requirements and provides sufficient protection for freedom of expression.

4.1 Defining misinformation and disinformation

20. Defining misinformation and disinformation is a well-recognised conceptual challenge. For example, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression concluded in 2021 that ‘there is no universally accepted definition of disinformation’ and stated:

... part of the problem lies in the impossibility of drawing clear lines between fact and falsehood and between the absence and presence of intent to cause harm. False information can be instrumentalized by actors with diametrically opposite objectives. Truthful information can be labelled as ‘fake news’ and delegitimized. Opinions, beliefs, uncertain knowledge and other forms of expression like parody and satire do not easily fall into a binary analysis of truth and falsity.¹⁴

21. The risk with any legislation of this type is that it requires clear and precise definitions to ensure that it does not end up becoming either over-inclusive or under-inclusive when applied. If the definitions are too broad or vague the risk is that content that is not objectively ‘misinformation’ or ‘disinformation’ may be restricted. On the other hand, if the definitions are not broad enough, then they will not be effective in addressing the mischief that the legislation is attempting to address.
22. The definitions of ‘misinformation’ and ‘disinformation’ (under s 7(1) and 7(2)) and ‘harm’ and ‘excluded content for misinformation purposes’ (under s 2), combine to create a definitional framework that is overly broad and vague. This enhances the risk of subjective judgments being made about what content constitutes misinformation or disinformation.
23. The Special Rapporteur has warned that in this context, ‘vague laws that confer excessive discretion can lead to arbitrary decision making and are incompatible with article 19(3) [of the ICCPR]’.¹⁵
24. The definitions under s 7(1) and 7(2) of the Exposure Draft Bill provide that content will be considered misinformation or disinformation if it, *inter alia*, ‘... contains information that is false, misleading or deceptive’.

25. The term ‘information’ is not itself defined in the Exposure Draft Bill. It is not necessarily clear whether ‘information’ is intended to be limited to factual content, and thus distinguished from other forms of content such as opinion, commentary, or creative content. Nor is it clear how this distinction will be applied in practice, given the volume of online content that involves a combination of both factual and other forms of content. It is also difficult to understand how content will be characterised when information is incomplete, more than one reasonable interpretation is open, or information is accurate at one point in time but subsequently becomes inaccurate.
26. The definitions provided in the Exposure Draft Bill differ in various respects from definitions of misinformation and disinformation provided in other contexts, but without any explanation in the guidance materials as to why this particular wording has been adopted. For example, the Australian Code of Practice on Disinformation and Misinformation includes the additional requirements that digital content be *verifiably* false or misleading or deceptive and be ‘propagated amongst users of digital platforms via Inauthentic Behaviours’ in order to be characterised as disinformation.¹⁶ The definitions adopted by the Electoral Integrity Assurance Taskforce provide further examples that are significantly more limited in scope, with only ‘false information’ being characterised as misinformation or disinformation.¹⁷ Further clarification as to why particular definitions have been selected would assist in evaluating the Exposure Draft Bill.

4.2 The harm threshold

27. Content will only be characterised as misinformation or disinformation if it is, *inter alia*, ‘reasonably likely to cause or contribute to serious harm’.¹⁸
28. The categories of ‘harm’ provided within the Exposure Draft Bill are themselves extremely broad and not clearly defined. For example, it is not clear how the definition of harm as including the ‘disruption of public order or society in Australia’ accommodates the lawful exercise of the right to protest and where that balance will be struck. Similarly, categories such as ‘harm to the health of Australians’, ‘harm to the Australian environment’ and ‘economic or financial harm to Australians, the Australian economy or a sector of the Australian economy’ are each categories about which reasonable people may legitimately have different perspectives and views. The definitions provided in the Exposure Draft Bill do not make clear whether in assessing harm it is intended that the perspective to be applied will be, for example, short-term or long-term, majoritarian or proportional, objective or subjective.

29. There is an attempt to lift the harm threshold by imposing a requirement of not just harm, but *serious* harm. The effect of this is, however, uncertain given that the Exposure Draft Bill does not define 'serious harm', despite this being an essential element of the definition of both misinformation and disinformation.
30. This attempt to raise the harm threshold is further counteracted by the definitions providing that the provision of the content on the digital service only has to be 'reasonably likely to cause or contribute to serious harm'. The use of '*reasonably likely*' and '*contribute to*' both lower the threshold and significantly expand the potential reach of these provisions.
31. Content does not have to actually cause or contribute to serious harm, but simply be 'reasonably likely to do so'. This creates particular uncertainty here, given that the defined categories of 'harm' are themselves broadly defined and involve categories which are contested areas of public discussion and debate.
32. In addition, the extent to which the content in question must contribute to the 'serious harm' before it is considered to be misinformation or disinformation is not specified. No minimum level of contribution is stated, which leaves open the possibility that even a minor or tangential contribution will be sufficient.
33. The broad and imprecise way that these key terms have been defined in the Exposure Draft Bill appears to establish an extremely low harm threshold, and risks an overly-inclusive characterisation of content as being misinformation or disinformation.

4.3 Excluded content for misinformation purposes

34. The Exposure Draft Bill defines 'excluded content for misinformation purposes' (Excluded Content) in s 2. Excluded Content provides a limited carveout and subsequent protection for certain content within the Exposure Draft Bill. This definition risks being both too broad and too narrow with respect to different elements.
35. An example of the definition being too narrow is the failure to provide for a general exclusion for academic, artistic, or scientific content, or content that is fair reporting or comment. The definition of Excluded Content includes some content that would fall within a general exclusion of this nature (such as, for example, 'content produced in good faith for the purposes of entertainment, parody or satire') but overall the existing definition creates a narrower

exclusion framework than is found in other relevant legislation that restricts expression.¹⁹

36. A second example of the Excluded Content definition being too narrow is the way that the exclusion covering academic content is limited to content produced by, or for, an accredited educational institution. This raises questions about academic freedom, particularly in terms of whether both the institutional and individual dimensions of academic freedom are encompassed by the current definition. For example, it is not clear whether content produced by an individual academic that criticised or challenged content produced by the academic institution that employs them would be considered Excluded Content. At the very least, this highlights uncertainty around the scope of the phrase ‘produced by or for an educational institution’.
37. The exclusion for accredited educational institutions also fails to extend to content that is produced by research institutions, think-tanks or international bodies or organisations that are not accredited educational institutions. For example, it does not appear to include any of the United Nations bodies within the scope of the existing exemptions. This highlights the inconsistencies that inevitably arise when attempting to define misinformation or disinformation with reference to the source of the content, rather than its nature.
38. In contrast there are also examples of Excluded Content being too broad. Excluded Content provides a degree of protection for any content that is authorised by a Commonwealth, State, Territory or local government. Therefore any government-authorised content cannot, by definition, be misinformation or disinformation.
39. This fails to acknowledge the reality that misinformation and disinformation can emanate from government. Indeed, government misinformation and disinformation raises particular concerns given the enhanced legitimacy and authority that many people attach to information received from official government sources.
40. A further risk with this specific exclusion is that it privileges government content, while failing to accord the same status to content authorised by political opponents. The result is that government content cannot be misinformation, but content made by political opponents might be. This is especially concerning where such content is critical of the government. There are obvious risks if the regulatory framework is perceived to be anything other than impartial and apolitical.

4.4 Powers granted for content regulation

41. The Exposure Draft Bill encourages digital platform providers to develop misinformation codes. These codes require providers to implement measures to prevent, or respond, to misinformation or disinformation on their platform. In addition, it provides the ACMA with oversight of these codes, powers to ensure compliance, and the power to introduce misinformation standards in certain circumstances.
42. While the Exposure Draft Bill is focused directly on the regulation of systems and processes rather than content, in reality an assessment about the former cannot be made without a view being formed about the latter. For this reason, there is no avoiding the conclusion that the Exposure Draft Bill does involve the ACMA, albeit indirectly, in content moderation.
43. In practice, the Exposure Draft Bill requires that both digital platform providers and the ACMA prevent or respond to misinformation or disinformation, which necessarily engages both in content moderation (to varying degrees). For example, while the ACMA is not provided with the power to directly regulate individual pieces of content, it is difficult to see how it could exercise its power to issue a formal warning for non-compliance with a registered misinformation code (under s 43), issue a remedial direction to ensure compliance with a registered misinformation code (under s 44) or determine misinformation standards (under Division 5) without itself making content assessments and deciding whether individual pieces of content fall within the legislative definitions of misinformation and disinformation. In practice, the Exposure Draft ultimately gives ACMA powers to regulate digital content, and to impose significant fines on digital platforms if it determines that they are not doing enough to stop misinformation or disinformation.
44. A key assumption here is that misinformation or disinformation can be easily identified, and that there is no room for legitimate differences in opinion as to how content should be characterised. However, distinguishing truth from falsehood is not always a simple or straightforward task.
45. As the Commission noted in the recent [submission](#) to the Senate Select Committee on Foreign Interference through Social Media:

There are also dangers inherent in allowing any one body – be it government, a government taskforce, or a social media platform – to become the sole arbiter of ‘truth’. There is a real risk that efforts to combat online misinformation and disinformation by foreign actors could be used to legitimise attempts to restrict public debate, censor unpopular opinions and enforce ideological conformity in Australia. All efforts to combat misinformation and disinformation need to be accompanied by transparency

and scrutiny safeguards to ensure that any limitations imposed upon freedom of expression are no greater than absolutely necessary and are strictly justified.²⁰

5 A human-rights based approach to combatting misinformation and disinformation

46. In its current form, the Exposure Draft Bill runs the risk of disproportionately burdening freedom of expression. It is critical for laws in this area to strike the right balance between combatting misinformation and disinformation and protecting freedom of expression. As the Commission observed in the recent [submission](#) to the Senate Select Committee on Foreign Interference through Social Media:²¹

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 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.

47. 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.

Endnotes

¹ Australian Human Rights Commission, *Inquiry into the risk posed to Australia's democracy by foreign interference through social media* (Submission to Senate Select Committee on Foreign Interference through Social Media, 16 February 2023), [16]. <<https://humanrights.gov.au/our-work/legal/submission/foreign-interference-through-social-media>>.

² Sasha Schroeder, *Fighting Fake News: How Mis- and Disinformation Legislation is Weaponized Against Journalists* (Center for International Media Assistance, 10 August 2023)

<<https://www.cima.ned.org/blog/fighting-fake-news-how-mis-and-disinformation-legislation-is-weaponized-against-journalists/>>.

- ³ Eileen Donahoe, *Protecting Democracy from Online Disinformation Requires Better Algorithms, Not Censorship* (Council on Foreign Relations, 21 August 2017) <<https://www.cfr.org/blog/protecting-democracy-online-disinformation-requires-better-algorithms-not-censorship>>.
- ⁴ Senate Select Committee on Foreign Interference through Social Media, *Final Report*, August 2023, (xi) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Interference_rough_Social_Media/ForeignInterference47/Report>.
- ⁵ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Disinformation and freedom of opinion and expression*, UN Doc A/HRC/47/25 (13 April 2021) [83].
- ⁶ UN Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), [2].
- ⁷ For example, see also United Nations Convention on the Rights of Persons with Disabilities, article 21; United Nations Convention on the Rights of the Child, article 12; European Convention on Human Rights, article 10; American Convention on Human Rights, article 13; African Charter on Human and Peoples' Rights, article 9; ASEAN Human Rights Declaration, article 23.
- ⁸ International Covenant on Civil and Political Rights, article 19(3).
- ⁹ 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, [79-81]. See also UN Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), [22].
- ¹⁰ UN Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), [21].
- ¹¹ UN Special Rapporteur on Freedom of Opinion and Expression et al., *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda* (3 March 2017). <<https://www.osce.org/files/f/documents/6/8/302796.pdf>>.
- ¹² Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* – *Guidance Note*, June 2023, [1.2].
- ¹³ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* – *Fact sheet*, June 2023.
- ¹⁴ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Disinformation and freedom of opinion and expression*, UN Doc A/HRC/47/25 (13 April 2021), [10].
- ¹⁵ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Disinformation and freedom of opinion and expression*, UN Doc A/HRC/47/25 (13 April 2021), [40].
- ¹⁶ Digital Industry Group Inc. (DIGI), *Australian Code of Practice on Disinformation and Misinformation*, 22 December 2022.
- ¹⁷ Electoral Integrity Assurance Taskforce, *Disinformation and Misinformation*, <https://www.aec.gov.au/About_AEC/files/eiat/eiat-disinformation-factsheet.pdf>.
- ¹⁸ Exposure Draft Bill, s 7(1) and (2).

¹⁹ See, for example, *Racial Discrimination Act 1975* (Cth), s 18D.

²⁰ Australian Human Rights Commission, *Inquiry into the risk posed to Australia's democracy by foreign interference through social media* (Submission to Senate Select Committee on Foreign Interference through Social Media, 16 February 2023), [33]. <<https://humanrights.gov.au/our-work/legal/submission/foreign-interference-through-social-media>>.

²¹ Australian Human Rights Commission, *Inquiry into the risk posed to Australia's democracy by foreign interference through social media* (Submission to Senate Select Committee on Foreign Interference through Social Media, 16 February 2023), [31]. <<https://humanrights.gov.au/our-work/legal/submission/foreign-interference-through-social-media>>.