Submission to the Senate Environment and Communications Legislation Committee

regarding the

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

30 September 2024

DIGITAL RIGHTS WATCH

Who we are

Digital Rights Watch is a charity organisation founded in 2016 to promote and defend human rights as realised in the digital age. We stand for privacy, democracy, fairness and freedom. Digital Rights Watch educates, campaigns and advocates for a digital environment in which rights are respected, and connection and creativity can flourish. More information about our work is available on our website: www.digitalrightswatch.org.au

Acknowledgement of Country

Digital Rights Watch acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land and community. We acknowledge the Aboriginal and Torres Strait Islander peoples as the true custodians of this land that was never ceded and pay our respects to their cultures, and to elders past and present.

Contact

Elizabeth O'Shea | Chair |

General remarks

Digital Rights Watch (DRW) welcomes the opportunity to submit comments to the Senate Environment and Communications Legislation Committee regarding the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.

As Australia's leading digital rights organisation, DRW is primarily concerned with the human rights, safety and wellbeing of individuals and communities in the digital age.

Digital Rights Watch actively participates in public consultations regarding the development of legislation and policy in relation to technology and human rights. We have consistently contributed to the public debate regarding many of the bill's topics, in particular in relation to the public exposure draft, the influence of digital platforms, and the news media bargaining code.

Our recent submissions relevant to this inquiry include:

- Submission on the proposed *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (August 2023)
- Submission to the Inquiry into the influence and impacts of social media on Australian society (June 2024)
- Submission to the statutory review of the Online Safety Act (June 2024)
- Submission to the Inquiry into the influence of international digital platforms (March 2023)
- Submission to the Inquiry into Online Safety and Social Media (January 2022)
- Submission on the proposed News Media Bargaining Code (January 2021)

Digital Rights Watch welcomes the opportunity to participate in public hearings or further consultations and to provide comment and feedback on future specific proposals.

Human rights must be at the centre of Australia's approach to tech policy

We have significant concerns about the breadth of powers that the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* proposes to grant the Australian Communications and Media Authority (ACMA) with limited mechanisms for oversight and accountability.

Mis- and disinformation are undoubtedly serious problems. They ought to be understood in the context of advertising-based business models that focus on the extraction of personal information. The widespread amplification of mis- and disinformation is exacerbated by commercial business models that prioritise engagement and ratings above all else, treating users exclusively as consumers rather than citizens.

As we have noted in our previous submission regarding the exposure draft, digital platforms collect extensive personal information that underpins the strategic optimisation of features designed to attract new users, retain attention, and increase interaction with the platform. This allows platforms to maximise value to advertisers. Platforms use micro-targeted advertising, automated search, active curation, and algorithmic recommendation systems to amplify the most engaging content regardless of its truthfulness or users' motivations for engaging with it. The very fact that users might be engaging with content to point out its inaccuracy or falsity can contribute to the further algorithmic amplification of that content. Revenue sharing systems, in turn, create direct financial incentives for content creators to create and share engaging content. The result is a media ecosystem that prioritises engaging content – often content that is polarising, controversial or addictive, including misinformation and disinformation. Consideration of collective concerns, such as the public interest, human rights, and community obligations cannot compete with these intrinsic, financial motivations and in practice are not prioritised by platforms.

These issues are exacerbated by the fact that commercial platforms are becoming the de facto distribution system for all forms of media content, including public service media and other outlets that have a mandate to take into account public interest obligations, accuracy, and truthfulness. The result is that, for all practical purposes, the media ecosystem is increasingly shaped by a commercial model that profits from the amplification of polarising, sensationalist content regardless of its accuracy. This is not a model compatible with democracy's need for well-informed citizens and meaningful political deliberation.

We welcome efforts to reduce the spread of mis- and disinformation, but these efforts only target the symptoms of the problem rather than the cause. This is not to say such efforts are in vain, but rather to acknowledge the complexity of the task as presented. It is also to ensure that the very real risks of overreach are addressed and not downplayed in pursuit of an over-simplified solution to the very real problems of mis- and disinformation.

A founding myth of the Internet is that it was a haven for free speech and facilitated the liberation of citizens from the authoritarian reach of the nation state. We accept that this was fantastical thinking; algorithmic amplification of content for profit has been a feature of the Internet since its earliest days, as it was in the broadcast era. The curation of online content is nothing new. That said, a key priority of policymaking in this field should be to avoid contributing to digital authoritarianism. It is important to resist the temptation to over-police content at the expense of human rights like privacy, freedom of association as well as freedom of speech.

In this context, we wish to raise a number of comments and concerns about the exposure draft for your consideration.

Recommendations

1. Enact a comprehensive federal Human Rights Act.

2. Develop an Australian equivalent to the European Union's Declaration of Digital Rights and Principles.

The importance of privacy reform

We note that the Privacy Act is currently under review, and a bill has been tabled to reform the act, described by the government as a first tranche.

In our view, strong privacy reform that favours the rights of users over data extractive business models is central to tackling mis- and disinformation. Industrialised exploitation of individual privacy is a key driver of the business models of digital platforms that encourages the production and spread of divisive and controversial content.

We are disappointed that the reforms tabled by the government represent only a small collection of the changes that the government accepts need to be made to the *Privacy Act 1988*, yet there is no timetable for the remainder of the reforms. Key proposals, including the introduction of a fair-and-reasonable test, and updates to the definition of personal information have been delayed indefinitely. In a circumstance where data-driven business models have significantly contributed to the scale of mis- and disinformation, a failure to progress necessary reforms to Australia's privacy laws is more urgent than ever.

For too long, Australia's privacy laws have not adequately reflected public expectations. Reform to limit the kinds of information that platforms are able to collect and how such information can be used is key to addressing the root causes of mis- and disinformation by ensuring that user engagement for its own sake is a less lucrative design goal.

Recommendations

3. Prioritise robust reform to Australia's *Privacy Act*.

The mechanism for the development of Codes risks the abrogation of democratic policy making

We remain concerned about the approach set out under Division 4 of the bill that allows for the creation of Codes, either by industry, or by industry upon invitation of ACMA. Such an approach to regulation is highly resource-intensive and risks the abrogation of democratic oversight over rule-making.

In an environment where the resources of civil society are constrained, specifically with respect to human rights in the digital economy, and industry faces no such limitations, there is a real risk that this process can become a *de facto* form of self-regulation. Given

previously documented bad behaviour by digital platforms, and the public mandate to regulate them, we do not consider such a situation justifiable.

We appreciate that this model of regulatory rule-making brings with it flexibility and responsiveness, which are both important in a field which is subject to rapid change and technological development. However, this ought not be prioritised above accountability. To that end, we recommend introducing formal mechanisms for review of the powers exercised by ACMA by the Parliament on a regular basis.

Recommendations

4. Introduce formal mechanisms for review of the powers exercised by ACMA by the Parliament on a regular basis.

The definition of harm is still too broad

Key definitions in the exposure draft involve the concept of harm, which is itself defined. We remain concerned that this definition is too broad. In particular, we refer to:

> For the purposes of this Schedule, ***serious harm*** is:
>
> (a) harm to the operation or integrity of a Commonwealth, State, Territory or local government electoral or referendum process; or
>
> (b) harm to public health in Australia, including to the efficacy of preventative health measures in Australia; or
>
> …
>
> (f) imminent harm to the Australian economy, including harm to public confidence in the banking system or financial markets;
>
> that has:
>
> (g) significant and far-reaching consequences for the Australian community or a segment of the Australian community; or
>
> (h) severe consequences for an individual in Australia.

We are pleased to see improvements to this definition since the exposure draft, but remain concerned about particular aspects. Specifically, content that challenges Australia's reliance on the fossil fuel industry could potentially be interpreted as giving rise to imminent harm to that sector of the Australian economy. We also note that certain kinds of public health initiatives can be contested, but would prefer a policy approach that prioritises creating trust in such initiatives rather than using content moderation powers to avoid such controversies.

Defining harm is undoubtedly challenging, and without any clear and enforceable commitment to human rights principles there is a real risk that such a definition could be interpreted in ways that undermine democratic principles. An overly broad definition of serious harm creates a situation where incursions on speech cannot be limited to what is

necessary for a legal purpose, which is what is required under international human rights law.

Recommendations

5. Refine the definition of 'serious harm' with respect to mis- and disinformation.

ACMA's powers in relation to misinformation codes and misinformation standards should be limited by Article 19 of the *International Covenant on Civil and Political Rights*

The bill requires ACMA to consider matters including any burden on the implied freedom of political communication. The regulation of mis- and disinformation raises important human rights concerns, particularly about the right to freedom of expression. The bill should require that ACMA be satisfied that any codes or standards are compliant with the international standard for the right to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights, and that the explanation and rationale for compliance is made public.

ACMA's information-gathering powers under Division 3 Subdivision B should be limited to situations in which there is an identifiable cause of action against the digital platform provider or other person

The bill provides ACMA with extremely broad information-gathering powers. We are concerned about this expansion of executive power without appropriate mechanisms for oversight and accountability. The extent and limits of these powers should be clearly articulated in legislation, and their exercise should be transparent and reviewable. Given the serious privacy concerns involved, we suggest that their introduction should be postponed until after the completion of the entire set of reforms of the *Privacy Act 1988*.

The information gathering powers should ensure that ACMA is only permitted to collect information in a de-identified form. Further, explicit safeguards should be introduced to prevent the use or disclosure of any personal information collected for the purpose of this legislation, including to law enforcement agencies and other public entities. This will ensure that the integrity of protections within other data retention and access regimes is not undermined by additional powers to collect information under this bill.

ACMA's powers to require digital platforms to keep records should come with the responsibility to report on these records publicly

Division 3 Subdivision C of the bill allows ACMA to publish certain information obtained from digital platform providers about digital platform services. However, it creates no obligation to do so, and it will be up to the ACMA to decide what is published. We think this lacks adequate transparency. A key method for incentivising good behaviour among platforms is to allow the public to make up their mind about the efforts they have made to address mis- and disinformation. Unless there are reporting obligations imposed on ACMA, there is a risk that information that is in the public interest will not be available to the public.

For example, virality of content is very important for engagement on digital platforms, but the viral spread of harmful misleading content is difficult to understand without additional information that is only visible to these platforms. Reporting on the kind of content that goes viral, in ways that allow comparison across platforms and other content types, could be an important insight for the public, the media and academia to assess and assist with designing systemic responses that might justify limits on virality.

Recommendations

6. Require that ACMA's powers in relation to codes and standards be limited by Article 19 of the *International Covenant on Civil and Political Rights*.
7. Limit ACMA's information-gathering powers to situations in which there is an identifiable cause of action against the digital platform provider or other person.
8. Implement reporting obligations for ACMA to publish information obtained from digital platform providers about their services.

The exclusion of professional news content from the definition of mis- and disinformation is problematic

Mis- and disinformation exist and spread within a complex media environment that includes mainstream media organisations as well as social media platforms. The strong financial incentives to create engaging content also apply to content created by mainstream media (defined as 'professional news content' in the bill), and mainstream news organisations encourage, adopt, and amplify harmful and misleading content created by others. Advertising business models provide incentives for mainstream media sources to create an information environment that sows doubt and legitimises disinformation, and professional news organisations are often responsible for concentrating attention on otherwise discredited fringe content.

We think that the government should consider removing the exemption of professional news content from the definition of disinformation.

Recommendations

9. Remove the exemption of professional news content from the definition of disinformation.

The Bill should include minimum requirements for the misinformation codes and misinformation standards, grounded in the current research on misinformation and content moderation.

The bill currently provides examples of matters that may be dealt with by misinformation codes and standards, but does not provide sufficient protection for due process. We recommend that the bill should explicitly require that any misinformation codes or standards mandate appropriate transparency from platforms about their enforcement of misinformation codes and misinformation standards. We also suggest that the bill explicitly clarify that the powers to approve codes and standards are to be exercised in relation to systemic responses to mis- and disinformation, rather than focusing on or requiring the removal of individual pieces of content.

Recommendations

10. Include minimum requirements for the misinformation codes and misinformation standards.