

Standing Committees on Environment and Communications
The Senate
Parliament House
CANBERRA 2600

Via email: ec.sen@aph.gov.au

12 November 2024

Dear Senators

Re: question on notice taken during the Committee's inquiry into the *Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2024*

Thank you for the opportunity to provide evidence to the Committee on 11 November 2024 as part of your inquiry into the Combating Misinformation and Disinformation Bill 2024 (**the Bill**).

I appreciate your consideration of my contributions and the important discussions we had on the balance between combating harmful content and upholding the right to freedom of expression.

As requested, I am writing to provide a response to the question I took on notice regarding what improvements are needed to better align the Bill with international human rights law.

Specifically, I outline below how the Bill can more effectively protect freedom of expression, as required under international human rights standards, while ensuring that restrictions are lawful, necessary, and proportionate.

The Bill has sparked widespread public interest and considerable debate, especially concerning its potential impact on the freedom of expression.

Much of the opposition to the Bill arises from a misunderstanding or mischaracterisation of the freedom of expression. While this right is fundamental, it is not absolute- which means it can be limited provided the limitation is done in accordance with human rights law.

The freedom of expression is protected under Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)*.¹

As a party to the *ICCPR*, Australia is required to uphold the rights set out in the Covenant, ensuring our laws, policies, and practices protect human rights and that any restrictions on these rights comply with the limits permitted by the *ICCPR*.

¹ See also Article 20 of the *ICCPR*, Articles 4 and 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*, Articles 12 and 13 of the *Convention on the Rights of the Child*, and Article 21 of the *Convention on the Rights of Persons with Disabilities*.

The freedom of expression guarantees the right to seek, receive, and impart information and ideas of all kinds, irrespective of borders and through any medium.² This right extends even to expression that may be deeply offensive or factually incorrect, although such forms of expression may be subject to certain limitations under the ICCPR.³

The ICCPR recognises⁴ that exercising the freedom of expression comes with special duties and responsibilities and therefore it may be subject to certain restrictions, but only those that are:⁵

1. **Prescribed by law** – Clear and precise legal definitions must guide any restrictions.
2. **In pursuit of a legitimate aim** – And for one of the grounds for limitations outlined in the ICCPR, which include, protecting public health, public order, national security, or the rights and reputations of others.
3. **Necessary and proportionate** – Restrictions must be the least intrusive means to achieve the desired objective.

Furthermore, the Human Rights Committee has held that any restrictions of the freedom of expression on internet-based platforms- including supporting systems like internet service providers or search engines- are only permissible if they are specific and comply with the criteria set out above.⁶

Unfortunately, much of the discourse about the Bill and the freedom of expression ignores the inalienable and indivisible nature of human rights.

The freedom of expression is just one right among many; it must be balanced against others, including the right to life, the right to health, and the right to live free from discrimination, among many others similarly enshrined in international human rights instruments that Australia is a party to.

The freedom of expression is not in competition with other human rights. Human rights are mutually reinforcing, and effective regulation for misinformation and disinformation must reflect this critical balance.

Opaque Decision-Making by Platforms

A significant concern that has been under explored in the debate about the Bill is the opaque nature of content and account decisions that are currently being made by the digital platforms.

Platforms wield significant influence over what content is seen or suppressed, often without any transparency, accountability, or even the ability to challenge these decisions. Platforms already moderate content extensively, but their decision-making processes are shrouded in mystery.

The Bill aims to introduce much needed transparency over these decisions, while also assessing what if - anything- the platforms are doing to combat the harms caused by misinformation and disinformation.

The Bill would shed light on the systems and processes platforms use to enable or manage harmful content.

Contrary to claims of censorship, the Bill seeks to enable a more nuanced understanding of the risk of misinformation and disinformation online by requiring platforms to take responsibility for the risks their products create or enable while ensuring the public understands the parameters guiding these decisions.

Human Rights-Based Regulation

The Human Rights Law Centre has produced a report, *Rights First: Principles for Digital Platform Regulation*, which is grounded in international human rights law and draws on international best practice. It outlines how regulation can protect the freedom of expression while safeguarding other rights, provided it adheres to key human rights principles.

To assist your consideration of the Bill, we are also enclosing our advice on the Bill's compliance with these principles.

² Human Rights Committee, 'General Comment No. 34. Article 19: Freedoms of Opinion and Expression' Human Rights Committee 102nd session, CCPR/C/GC/34, 11-29 July 2011, 11.

³ Ibid. 11, 49.

⁴ ICCPR Article 19(3)

⁵ ICCPR Article 19(3) and see also: Human Rights Committee, 'General Comment No. 34. Article 19: Freedoms of Opinion and Expression' Human Rights Committee 102nd session, CCPR/C/GC/34, 11-29 July 2011, 21-36.

⁶ Human Rights Committee, 'General Comment No. 34. Article 19: Freedoms of Opinion and Expression' Human Rights Committee 102nd session, CCPR/C/GC/34, 11-29 July 2011, 43.

Concerns and Recommendations

While we believe the Bill is workable from a human rights perspective, we have identified specific areas requiring improvement to better align the Bill with international human rights law and standards.

Below are our key recommendations:

1. Clarify the Definitions of Misinformation and Disinformation

The Bill introduces distinct definitions for “misinformation” and “disinformation,” but their current formulation carries a risk of chilling legitimate speech and unduly burdening the right to the freedom of expression.

Under the Bill, digital platforms would be required to manage misinformation and disinformation risks, which could incentivise platforms to over-regulate content out of caution. This overreach may suppress lawful and valuable discourse, leading to a “chilling effect” on the freedom of expression.

The Bill defines misinformation as content that:

- a) contains information that is reasonably verifiable as false, misleading, or deceptive; and
- b) is reasonably likely to cause or contribute to serious harm.

The broad and subjective language, such as “contribute to” and “misleading or deceptive,” may capture a wide array of speech, including opinions and commentary that are integral to political discourse. The term ‘contribute to’ lacks a clear threshold, leaving it ambiguous whether it refers to a substantial contribution to harm or some other quantum.

Similarly, the Bill’s definition of disinformation includes content where:

- a) there are grounds to suspect an intent to deceive; or
- b) dissemination involves inauthentic behaviour, such as the use of bots or coordinated deceptive practices.

The low threshold of “grounds to suspect” and the inclusion of subjective elements in both definitions amplify the risk of disproportionate content moderation.

Suggested Amendments:

- Remove the phrase “contribute to” to ensure a higher causality threshold for harm.
- Limit the scope of misinformation to statements that are demonstrably false, removing “misleading or deceptive” to reduce subjectivity.
- Exclude opinions from the definition of “information” in the Explanatory Memorandum.
- In the definition of disinformation, replace “grounds to suspect” with “reasonable grounds to believe” to align with proportionality principles in Australian case law, where the Courts have demanded a closer fit between a legislative aim and the means of achieving it.⁷
- Introduce a new clause ensuring Digital Platform Rules do not contravene the implied freedom of political communication.

These amendments would strike a better balance between combatting harmful content and safeguarding the freedom of expression, ensuring the Bill aligns with international human rights obligations. Namely, that to ensure compliance with the ICCPR, a restriction on the freedom of expression must be made according to a law of sufficient precision.

2. Bring Forward the Timing of the First Review

Clause 70(1) requires a review of the Bill three years after its commencement. Given the community concern of the Bill’s potential impact on fundamental rights, we recommend conducting the first review after two years.

This would allow a timely assessment of the Bill’s effectiveness and impact on human rights while also being able to identify any unintended impacts of the Bill quickly.

⁷ *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45.

3. Expand the Scope of Human Rights Assessments in Reviews

The scope of reviews under Clause 70(2) should include the Bill's impact on human rights more broadly and not just on the freedom of expression. A comprehensive assessment ensures the Bill upholds all of the rights it may affect.

4. Parliamentary Oversight of Digital Platform Rules, Codes, and Standards

Digital platform rules, misinformation codes, and standards should be subject to stronger Parliamentary oversight. They should be able to be referred to a Parliamentary Committee, ideally to the Parliamentary Joint Committee on Human Rights, to assess their impact on human rights, including by holding public inquiries.

This measure would further enhance the Bill's transparency and accountability.

5. Strengthen Media Literacy Provisions

Media literacy plans under the Bill must be accessible and comprehensible to be effective. This includes making them available in multiple languages and in accessible formats, ensuring inclusivity for all people, including children and people with disabilities.

6. Consult the Australian Human Rights Commission when developing codes

Clause 47 of the Bill should require that the Australian Human Rights Commission is consulted on the development of codes, as their expertise is crucial to embedding human rights considerations.

Currently, under Clause 47(g) the Australian Communications and Media Authority has to be satisfied that at least one body or association that represents consumer interests has been consulted about the development of codes, this must be expanded further.

7. Ensure Transparency and Data Access

We are heartened that the House has amended the Bill to provide independent researchers with access to platform data. This amendment is a significant step forward for transparency and accountability, while also demonstrating the Parliament's openness to negotiating common-sense improvements to the Bill.

Access to operational Application Programming Interfaces (APIs)—which are tools that allow researchers to interact with and extract data from digital platforms—is essential for transparency and accountability.

APIs enable researchers to independently verify how platforms moderate content and detect misinformation or disinformation. This fosters a deeper understanding of the systemic risks posed by harmful content and ensures platforms remain accountable for their actions.

8. Include Legal Protections for Researchers

The Bill should ensure that there are specific immunities for researchers conducting good-faith studies on platform data. This would safeguard their work from legal challenges aimed at suppressing findings critical of platform practices.

9. Establish a Legislated Duty of Care for Digital Platforms

Platforms should have a legal duty to ensure their systems are designed to prevent harm proactively. Drawing from the EU's *Digital Services Act* and the UK's *Online Safety Act*, this duty would require platforms to conduct risk assessments, implement mitigation measures, and submit to independent audits.

In conclusion, we urge you to consider this Bill within the broader context of human rights.

Free speech absolutists may dominate your inbox with alarmist claims, but we must also listen to those suffering real harm due to misinformation and disinformation.

Regulation grounded in human rights law can protect both the freedom of expression and the well-being of our society provided that it is crafted carefully.

Thank you again for your time and for your commitment to this important issue. I trust the following information will assist the Committee in its deliberations.

Please find enclosed our report and detailed advice on the Bill for your consideration.

Regards,

David Mejia-Canales
Senior Lawyer