Submission from Robin Whittle regarding the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

1 - Purported cure worse than the disease

While, by some definitions, communications properly identified as "misinformation" or "disinformation" might, in some circumstances "pose a threat to the safety and wellbeing of Australians, as well as our democracy, society and economy" it is difficult to imagine a threat to these as great as would result from the enactment of legislation along the lines of this exposure draft. This proposed Act aims to, and would in practice, ban, criminalise and in other ways denigrate and suppress lively, free, discussion among adult Australian citizens.

The first casualty of any such legislation would be a diminished trust in government. All such erosion of trust harms every Australian.

This trust must be earned. It cannot be brought into existence by manipulative or in any other way untruthful communication campaigns or any other contrived actions.

It would be a waste of taxpayer money for a government, or any publically funded body, to pay a consulting company for services on the basis that the company's advice must agree with the official policy of the government body, or the current views of the people who manage it.

Governments and related public bodies already have a free source of consulting advice – the public itself – and it would serious mistake to curtail the richness and vitality of this advice and guidance the public provides to governments.

Furthermore, the government works for the people, so any attempt by the government to curtail the ability of its citizens to find, discuss and disseminate a wide variety of observations, hypotheses, viewpoints, news, essays and general discussion is profoundly undemocratic.

We, the public, did not elect or fund the government to curtail our ability to live full lives, including by discussing whatever we like, with whoever we like, within Australia and with people in all other countries.

Groupthink is the pathological tendency of the majority of members of groups to be subject to curtailed sources of information, including ideas and discussion, to the point where the majority of the group comes to believe and act in ways which are at odds with reality. This is a naturally occurring process which typically leads to harmful actions and disastrous consequences.

Irving L. Janis' 1971 essay in Psychology Today https://web.archive.org/web/20100401033524/http://apps.olin.wustl.edu/faculty/macdonald/GroupThink.pdf begins:

> "How could we have been so stupid?" President John F Kennedy asked after he and a close group of advisers had blundered into the Bay of Pigs invasion."

I could write page after page here giving examples of government failures in the COVID-19 pandemic response as especially important and harmful examples of groupthink, but I suspect that this would lead to puzzlement among many of the legislators and public servants who most need to recognise these failings, precisely because they are yet to free themselves from the very patterns of groupthink in which these policies were developed and enacted.

This proposed Act represents the heights of egregiously inept, toxic, power-drunk, hubris - because it is conceived in a groupthunk framework that assumes the government and its official bodies – and the courts – are a more reliable source of information than the best of what results from free, genuinely democratic, discussion among all Australian citizens.

The proposed Act is an attempt to turbocharge the groupthink which threatens us all, by creating an explicit mechanism of control and suppression of information, ideas and discussion which fall outside whatever bounds the government believes reflects truth and long-term public benefit.

Millions of men and women from Western and other democracies have risked and in many cases lost their lives in order to protect our democratic traditions from the threat of totalitarianism. This proposed Act is an attempt to exercise totalitarian control over ordinary people's – and professionals' – casual and formal attempts to understand the world, to live their lives as they choose and to educate themselves, not least for the purpose of more wisely choosing who will lead the governments they elect. As such it is an insult to the principles and sacrifices of generations past who fought for, and won for us, the democratic framework in which we live today.

2 - Even if the goals of the proposed Act were worthy and valuable, its implementation by multiple levels of indirect pressure would be counterproductive and at odds with the principles of good governance

It is self evident that any attempt by the government to classify, regulate, curtail, ban or criminalise any form of human activity must be done by the clearest, most concise, most explicit, most easily interpretable by the courts, most easily understood by ordinary people, arrangements.

The proposed Act is a master class in how not to regulate any industry or field of human activity. It is a cowardly attempt by the parliament and its compliant bureaucracy to meddle in the affairs of all Australians, while leaving the difficult work of interpreting and enforcing its numerous restrictions to everyone else.

The Act is proposed to be a relatively simple piece of legislation which is intended, on the first level, to effect change by threatening social media companies (or anyone who runs a website which enables comments, which includes virtually every blog or Substack (https://substack.com - for instance mine: https://nutritionmatters.substack.com) with the consequences of formal, direct, regulation, if the operators of these sites do not comply with the inadequately defined intentions of the bureaucratic managers of the scheme. The first level is to puppetise all the site operators into forming an "industry body" to regulate themselves.

The second level of threat is that if this fails to occur, or if such a self-regulatory arrangement fails to please ACMA and the government of the day, that ACMA will impose a forcible set of regulations to directly curtail the actions of site operators and their users.

Nowhere in the proposed Act can be found directives on how anyone, including the courts, are to determine what constitutes truth or falsity. Likewise likely or actual harm to the degree specified to the Act.

So the individual users of social media and other comment-supporting websites would be expected to second-guess what the operators of these sites might expect of them in order to prevent the users and the operators getting into trouble.

"Getting into trouble" starts with the site operator having to spend time trying to determine what communications would or would not fall foul of the proposed Act. It could end with onerous and expensive court cases to determine how the new law should be applied.

So the users would be forced to second-guess how the site operators are likely to second-guess how the self-regulatory body might expect them to conduct themselves, and how they might launch investigations into potential problems. Anyone who contemplates forming such an organisation and/or devising and enforcing such a self-regulatory code would be trying to imagine how the courts, the bureaucrats, the parliament and the government would interpret the provisions of the proposed Act.

All this depends on the numerous questions which arise as to how a court could determine, reliably, how to apply the provisions of the Act to any one situation, or to classes of situations, so as to form guidance and case-law which would fill out the Act, which the parliament and its supportive bureaucrats were too lazy and/or inept to fill out themselves.

3 - Definitions

"Misinformation" is "online content" (video, audio, text and images produced professionally and/or as comments by citizens in discussion forums, in response to articles, current events etc.) that is "**false**, **misleading**, or **deceptive**" . . . Whole books could be written exploring the pitfalls of trying to apply such simple terms reliably to the whole gamut of human communication which occurs via Internet communications.

I trust others have offered proper critiques of these seemingly simple concepts in the context of government controlled discussion suppression legislation.

However, to tackle just "false", briefly:

- Is it false to write that Jesus is God?
- Is it false to proclaim that Scientology is a genuine religion?
- Is it false to state, emphatically, that Toyota makes better cars than Subaru? Or that one race of people is, on average, better at one thing or another than another other race? Or that some party or group of people constitutes such a threat to the health and happiness of Australians that every effort should be made to scrutinise and limit their activities?
- Is it false to state that Josephine Blow will be the next prime minister of Australia.

"Misleading" - to whom? This devolves into questions of the context in which a person reads or otherwise senses some statement X, including their entire belief system, their intellectual abilities and all their prior experience of life which is relevant to how they interpret the statement in question.

"Deceptive" - as above. To what extent does this differ from being misleading?

There are two further criteria which must be considered in order to reliably judge whether an item or ensemble of "online content" should be judged as falling foul of the proposed Act:

"**without an intent to deceive"** This cannot be determined by any objective means by examining the "online content" since it requires a reliable judgment to be made about the internal state of the mind of the person who created the "online content" or who adapted or copied it in a manner which resulted in it becoming "online content". Therefore, users will be trying to imagine what site operators would be imagining about what a court might decide about the user's intentions, while also worrying about the operator denying them service because of the risk they might lead to a complaint which might lead to an enquiry and/or court case and all the costs this would entail. The site operator would also be worried about how a court

might decide against them, including about their user's intentions, and how a self-regulatory body might treat them, as members of the body and so regulatory code, which devolves into how the people who run that body would be trying to second-guess what a court might decide about a user's intentions.

"**can cause and contribute to**" Can in the present or in the future? If in the future, under what assumptions about the future is the decision to be made? ("and" should probably be "or", since it makes no sense for something to both cause something and contribute to it at the same time.) How long is the future?

A blog post to the effect that people who worship mothballs are mentally ill and should be hospitalised might seem innocuous enough in the present (I am assuming that no such people exist, today) but could lead to arguably oppressive outcomes in the event that, sometime in the future, a sincere religion does develop in which the adherents worship mothballs. (These are, after all, intriguing solid objects, which slowly disappear - a metaphor for all of life, perhaps?)

"**serious harm**". The proposed Act includes in the definition of this term "harm to the integrity of Australian democratic processes." There is no absolute consensus on what these processes are – and opinions might vary widely as to whether a proposed change, such as this proposed Act, would strengthen or damage such processes . I and many others argue that this Bill, if it became an Act, would cause such serious harm. Clause 7.3 includes items which must be considered in making a judgement about this, including "the author of the information" and the "purpose of the dissemination", which again devolves into courts and the police or other investigators making intrusive enquiries and binding judgements with serious consequences, including on such impossible to determine matters as a person's intention.

The question of intention is crucial to the distinction between "misinformation" and "disinformation".

4 - Investigative powers and enforced collection of information pertaining to three types of online content

Division 2 of the proposed Act contains alarming provisions which would empower ACMA to develop and enforce rules which coerce digital platform providers (which includes anyone who runs a blog site with comments) to gather and retain potentially very extensive, sensitive and contentious, possibly privacy threatening, bodies of information, including about people who use their sites or social media apps.

Sub-clause 14-1-e warrants special attention. Site operators may be required to make and retain records relating to:

> **the prevalence of content containing false, misleading or deceptive information provided on the service (other than excluded content for misinformation purposes)**

This goes far beyond the definition of "misinformation" and "disinformation" since it is not contingent on the material posing any threat of "harm" or "serious harm", however defined.

Thus we see the government, directly via the proposed Act and the ACMA, and indirectly through the regulations made by the ACMA, enforcing data collection and retention by a very large number of site operators ("digital platform operators"), concerning actions of their users regarding a third class of online content. We need some tables:

Name	Label	Attributes				
(14-1-e)	FMD	False	Misleading	Deceptive		
Misinformation	FMDH	False	Misleading	Deceptive	Harmful	(Unintentional)
Disinformation	FMDHI	False	Misleading	Deceptive	Harmful	Intentional

Table 1: Three types of online content defined in the proposed Act.

Name	Label	Prohibit	Force digital content provider (site operator) to collect information	Force anyone else to provide information (Section 19)
(14-1-e)	FMD		X Prevalence	X Prevalence
Misinformation	FMDH	X	X	X
Disinformation	FMDHI	X	X	X

Table 2: Prohibition and data collection requirements concerning three types of online content.

In both categories of forced data collection and retention there are:

- Criminal provisions for knowingly keeping false records.
- No exclusion for self-incrimination on civil matters.

5 - Disastrous impact on freedom of expression, ability to learn and evaluate information about anything at all, and on the trust in governments

I trust that other people have provided critiques of the most obvious anti-democratic, oppressive, trust-in-government-destroying impacts an Act such as this would have, if passed by parliament.

This exposure draft is a testimony to the unworldly, likely well-intentioned, proclivity of large numbers of parliamentarians and public servants to consider their own, and the government's knowledge and judgment about any matter at all to be so superior to those of ordinary people that they are prepared to erect an oppressive, national, framework of regulation, with criminal penalties for non-compliance, to tackle what they naively consider to be "misinformation" and "disinformation".

I have not attempted to explore the minefield of compliance problems the proposed act would raise for site / app operators, from individuals and small businesses with blogs to the biggest multinational social media companies. This is obviously a minefield, and a possible outcome for some of the larger overseas companies is not to accept Australians as users. This would be in part to avoid the prohibitive costs of compliance for this one country, but also to discourage other countries from adopting their own oppressive regimes which would tie the company up in a completely impractical web of costly, error-prone, compliance rules and algorithms, complete with staff based in each country necessarily fussing over individual users, individual comments, videos or whatever, and interacting with the regulator of that country while handling any resulting court cases.

6 - The proper way for governments, organisations and individuals to tackle what they consider to be "misinformation" or "disinformation"

These two categories of material are not something which can be objectively defined in a way which reliably and clearly identifies such material in the real world.

To person A, "misinformation" or "disinformation" is material which they think is untrue and/or misleading (to someone else - even to one person in the whole country, and/or deceptive (likewise) and/or "harmful" in some way. Person B would have somewhat or very different assessments of the same set of materials.

These are totally subjective judgements. Each individual is entitled to judge material as being "misinformation" or "disinformation".

No individual, company, organisation, government agency or government should be empowered to suppress discussion and

dissemination of material they judge to be "misinformation" or "disinformation". There are obvious freedom of speech and democratic process arguments which show this to be the case.

However, there are further arguments against such empowerment concerning:

- The corruption of public discourse.
- The suppression of governments ability to get (including being given, when not asked for) information, feedback, critiques and guidance from the general public all of which are critical to its ability to make proper judgments on every conceivable matter, not least public health and the democratic process itself.
- The direct destruction in public trust for governments. This profoundly limits the ability of governments and their agencies to do any good at all.
- Regulatory capture of the mis/dis-information management agency by individual companies, industries, political, religious or other groups

The correct way for individuals, companies, organisations, government departments and governments to tackle whatever they consider to be "misinformation" or "disinformation" is to:

- Provide evidence and arguments for their position, critiquing the supposedly mis- or dies-information and providing what they believe to be a correct account of all relevant matters.

That's it. There is only one dot point.

This requires no new legislation or expenditure.

This approach treats the public in general, and each individual citizen, with respect. The proposed Act is a deeply condescending action on the part of government to corral and manipulate the minds and lives of all Australians – the people who they are elected and paid to serve. The government should respect and take a real interest in the opinions of the public, rather than view the entire population as an unruly and potentially dangerous flock which needs to be constrained for its own good.

Governments already have such strong powers to argue for and against whatever they like, via advertisements and other government programs that there is a case for independent scrutiny of all such public information initiatives, regarding their expense, and to provide some professional scrutiny, probably from multiple contrary perspectives, on the veracity of the evidence and arguments governments provide in this manner.

About the author

I became involved in consumer advocacy for privacy in 1993, particularly concerning the intrusive nature of telemarketing. In the mid to late 1990s I joined the board of Consumers Telecommunications Network and represented consumers on several AUSTEL technical standards committees.

In the late 1990s I wrote some telecommunications technology articles for *Australian Communications* magazine and did some consulting work. https://www.firstpr.com.au/robin/cv.html

I now work with electronic musical instruments and with C++ programming for mining optimisation. My Substack, concerning nutrition and the immune system, allows comments and so would be subject to the regulations in this proposed Act: https://nutritionmatters.substack.com

I appreciate the offer of the government publishing this submission. Since this would entail this document carrying my home address and phone number, I decline. I will make it available at the just mentioned cv.html page.