4 October 2024

Senate Standing Committee on Environment and Communications
PO Box 6100,
Parliament House ACT 2600

By e-mail: ec.sen@aph.gov.au

Submission on
The *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill* 2024

Who are we?

1. This submission is on behalf of, and co-signed by:

    - Anglican Church of Australia, Sydney Diocese
    - Shia Muslim Council of Australia
    - Australian Baptist Ministries
    - Presbyterian Church of Australia
    - Australian Christian Churches
    - Seventh Day Adventist Church of Australia
    - Hillsong Australia
    - International Network of Churches, Australia
    - Foursquare Churches Australia
    - C3 Churches
    - Acts Global Churches
    - Full Gospel Australia
    - NSW Council of Churches
    - Council of the Ministers of Krean Churches
    - Christian Schools Association
    - Australian Association of Christians Schools
    - Freedom for Faith

2. For more information, contact:

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Executive Summary

3. We have significant concerns about the overall effect of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill* 2024 on the free dissemination of ideas in the public sphere – in particular, religious speech and debate. The Bill places significant constraints on digital communications platform providers (***providers***) and incentivises them to over-censor content on the possibility that it might be "harmful":

    1. The Bill places the burden on providers to police government-defined 'misinformation' and 'disinformation' online;
    2. The Bill empowers private companies to remove content from their services without providing the public any means to know what ACMA and the provider considers false information;
    3. The Bill's definitions of 'misinformation' and 'disinformation' are so broad, that they could easily capture legitimate, good-faith expression of religious, moral and political opinions;
    4. The standard of 'serious harm' in the bill is far too low, drawing an equivalence with mere offense under State-based vilification laws;
    5. The protections for legitimate religious speech are contingent on a series of 'reasonableness' tests applied by a provider. Providers will err on the side of caution when assessing contentious content, because of the threat of financial sanction. This reasonableness standard falls far below Australia's obligations under international human rights instruments;
    6. The overall effect of the Bill on religious speech means that there will effectively be a 'two-tier' approach to religious expression rights under Australian law, with much more stringent controls and less freedom on digital platforms constrained by this Bill, than there are on non-digital communications covered by other laws;
    7. There is a conspicuous lack of appeal rights and transparency with regard to removed content. With an issue as serious as free speech, the public have a right to know what information is being removed and why. Those whose material has been removed should also have the means to appeal such a decision, including external independent appeal.

The Bill's operational framework

4. The Bill places the burden on digital service providers to police misinformation and disinformation (as the Bill defines those terms). This burden will only serve to make providers over-zealous in the policing of content on their platforms and is the legislative equivalent of a one-way-ratchet, ever diminishing the ability of individuals who use digital services to engage in free and open public discourse. The Bill achieves this through three main measures:

    1. The imposition of industry rules that prescribe risk management approaches, public education rules (described as 'media literacy rules' in the Bill) and complaints handling rules that govern how providers are to deal with complaints of misinformation and disinformation on their platforms;

    2. The forced encouragement of self-imposed industry 'codes' that will regulate how misinformation and disinformation are policed on digital platforms; and

    3. Standards imposed by the Australian Communications and Media Authority (ACMA) that supplement or overrule the industry codes where ACMA is dissatisfied with the codes that providers have created themselves.

5. These three main 'planks' in the misinformation and disinformation regime are accompanied by associated civil penalties and remedial enforcement powers that ACMA can bring to bear at its discretion. Though providers are given the opportunity to draft their own codes, in reality this leaves them with little room for heterodox approaches. It is clear that ACMA wields ultimate authority in administering this regime because:

    1. The Bill removes definitional discretion from providers by defining 'misinformation', 'disinformation' and 'serious harm';

    2. ACMA has the ability to override (e.g., cls 57, 58) and even produce its own standards where none exist (cl56);

    3. In addition to this ability to override, ACMA can sanction digital service providers for non-compliance with codes and standards (e.g., cls 52, 53).

6. The legislation gives providers a very strong incentive to censor information that either it, or the regulator considers to be, misinformation or disinformation. Failure to do so to the satisfaction of the regulator means being overridden by the regulator, and other sanctions including the risk of onerous fines.

7. On a plethora of matters potentially encompassed by the legislation, the provider has to determine what is misinformation and what is not, and censor content accordingly. However, its own judgment on this is not sufficient. The regulator may have its own views on what is misinformation and so the digital platform either has to guess what view the regulator will take on the truth or otherwise of a matter, or ask its opinion.

The scope of misinformation and disinformation

8. Sections 13(1-2) provide the baseline definition of misinformation and disinformation as 'content that contains information that is reasonably verifiable as false, misleading or deceptive' and is 'reasonably likely to cause or contribute to serious harm'.

A) Misleading and deceptive

9. Firstly, the terms 'misleading' and 'deceptive' are not defined in the legislation. 'False' statements are already covered, so the logical conclusion is that 'misleading or deceptive' includes statements that are factually true, or cannot be reasonably verified as false. On what basis should such statements then be defined as 'misleading or deceptive'? The legislation does not provide specifics.

10. One likely interpretation is that 'misleading or deceptive' content, while possibly being true, contributes to an argument or conclusion that is deemed to be false. However, that will require a determination of what *conclusion* a piece of content is promoting, and whether that is verifiably false.

11. The construction opens up the possibility that 'misleading or deceptive' could encompass statements that are entirely true, but have implications that point to a conclusion that the provider does not believe to be true. This poses a real risk to the ability to provide evidence in support of a counter argument against a prevailing orthodoxy.

12. Secondly, the addition of the term 'reasonably verifiable' adds an additional layer of ambiguity. While the courts have a history of interpreting the threshold of what is 'reasonable', providers do not. Instead they will have to second-guess what a court, or ACMA, would determine to be 'reasonable'. Verification in the digital world is a complicated concept. With major news sources being accused as being disinformation themselves (e.g. accusations against Fox news), and much of our fact validation coming from the crowd-sourced Wikipedia, what verification source is 'reasonable'?

13. Many of the most debated issues sit on heavily contested scientific or historical claims, with contrary, and often ideologically driven, research and evidence being provided by all sides. One professional news service could champion a piece of research while another denounces it as 'fake news' or 'out of context'.

14. This leaves providers with the impossible task of determining which sources of verification are 'reasonable'.

B) Disinformation

15. Disinformation is further defined in clause 13(2)(e) as where 'there are grounds to suspect that the person disseminating […] the content intends that the content deceive another person' or 'the dissemination involves inauthentic behaviour'. Clause 15 provides a definition of 'inauthentic behaviour', which also includes the language of 'grounds to suspect' and 'reasonably likely'.

16. This adds further confusion as to what is misinformation and what is disinformation. However, given that the vast majority of the Bill treats misinformation and disinformation almost synonymously, there is great ambiguity as to the functional difference between the two categories.

C) Standard of 'harm'

17. The term 'serious harm' used in the legislation gives the appearance of a high standard. However, when examining the definition in the Bill, it is actually a lower and broader standard than in other legislation.

18. We are particularly concerned that serious harm is defined to include 'vilification' of a group or individual based on a set of protected attributes, without providing a definition of 'vilification'. If providers are to implement this prohibition, they need to look for a definition elsewhere – including the Explanatory Memorandum and Impact Analysis.

19. Alarmingly, the Explanatory Memorandum cites the *Anti-Discrimination Act 1992* (NT) as an example of a vilification prohibition (p 51). The NT prohibition includes the extremely low bar of 'reasonably likely to offend' and also includes 'insult, humiliate, intimidate'. The Memorandum states that the inclusion of vilification as a harm in the Bill 'aligns broadly with the approach' taken in the NT, ACT and other State based anti-discrimination acts. As discussed above, a provider searching for a definition of 'vilification' could be reasonably be expected to settle on the most expansive definition to avoid the implications being deemed non-compliant to the Bill. This opens the real possibility that a provider chooses to define 'serious harm' as including the 'vilification' that is 'reasonably likely to offend'.

20. This wide scope of 'harm' is further broadened by the statement that misinformation does not need to cause actual harm, but merely needs to be 'reasonably likely to cause or contribute to serious harm'. Whatever working definition of 'vilification' a provider develops from the legislation, they must treat any content that is 'reasonably likely' to 'contribute' to 'vilification' to be misinformation.

21. The protected attributes listed include 'religion, sex, sexual orientation [and] gender identity'. These categories include some of the most controversial topics in modern society, including the ethical debates on the nature of gender or the correct expression of sexuality, and the truth claims of different religious and the eternal consequences of disbelief or disobedience. These are areas with strongly held opposing beliefs, where differing views question the fundamental truth of other sides' positions. Emotions run high in these discussions, and claims of lies, hatred or harm are frequently made.

22. In summary a provider needs to consider a post taking part in a debate about religious truth or sexual ethics and assess if it is 'reasonably likely' to 'contribute' to an undefined concept of 'vilification' which could well include 'reasonably likely to offend' on the grounds of religion or sexuality.

23. This is in contrast with the standard set in the recently introduced *Criminal Code Amendment (Hate Crimes) Bill 2024*, which sets a much higher standard of "the person

threatens to use force or violence against a group [or person and …] a reasonable member of the targeted group would fear that the threat will be carried out."

D) Exemptions

24. Within this broad scope for misinformation, a limited exemption for religious speech is provided: 'reasonable dissemination of content for any academic, artistic, scientific or religious purpose.'

25. This exemption again uses the problematic term 'reasonable', with all the concerns enumerated above. Furthermore, it is not clear from the drafting what the reasonableness standard attaches to; the dissemination or the substance of the religious content. The explanatory memorandum (**EM**) says that the test attaches to the dissemination and not the substance of the content. *However*, the EM goes on to effectively nullify the difference by stating that if the content of a statement is 'highly' unreasonable its dissemination will be unreasonable:

> In some circumstances this distinction will be immaterial, because if content is in the first place so unreasonable, it will also be unreasonable to share it any further. However, in some circumstances the dissemination of content may be reasonable for the purposes of paragraph 16(1)(c), even if the content itself is unreasonable.

26. This means that digital providers will be assessing whether the content of a religious belief is reasonable in determining whether or not it is misinformation. This is the same as saying that providers are empowered to determine whether the teaching is reasonable in itself.

27. Furthermore, the Bill removes the exemption in the Exposure Draft for content created by an educational institution. As a result, content created by bible colleges and religious schools will also be regulated by the Bill and subject to the 'reasonableness' test.

E) The 'reasonable' test and religious speech

28. This 'reasonableness' test is highly inappropriate to be applied to religious speech. It is recognised to be ambiguous, is in violation of international standards, and contradicts established Federal laws.

29. Firstly, under vilification law, there is recognition of the uncertainty and ambiguity in the term 'reasonable'. For example, in *Bropho v Human Rights & Equal Opportunity Commission* ('*Bropho*') French J recognised the vagaries of the 'reasonable' test when his Honour said (with reference to clause 18D of the *Racial Discrimination Act 1975*):

> … the judgment which the Court is called upon to make in deciding whether an act falls within clause 18D has the character of judicial opinion and assessment in the application of legal standards of ill-defined content. In difficult or borderline cases judicial opinions may differ.[1]

30. Similarly, in declining the appeal from the Federal Court, Gleeson CJ stated

[1] *Bropho v Human Rights & Equal Opportunity Commission* ('*Bropho*') [2004] FCAFC 16 (6 February 2004) [76] (French J).

> The issue of whether the conduct in question in this case was reasonable and in good faith involved a matter of judgement on which minds might differ.[2]

31. Given the courts have difficulty navigating the concept of 'reasonable' content, we cannot expect a private company to be able to do so with confidence and accuracy.

32. Secondly, the International Covenant on Civil and Political Rights permits the limitation of religious speech only as *necessary* for limited circumstances. By extending a test of 'reasonableness' on religious speech, the bill transgresses Australia's obligations under the Covenant (see Appendix I).

33. Finally, the Bill sets a standard much lower than other vilification and anti-discrimination legislation. For example, the *NSW Anti-Discrimination Act* 1977 s 49ZE(2)(c) protects "a public act, done reasonably and in good faith, for […] religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of an act or matter."

34. In effect the Bill would see differing standards applied to religious statements according to whether the statements are made online or not. If a statement were to be made online it would be subject to a non-identifiable determination by a private commercial operator. However, if the statement is made during a sermon, it would be subject to the exemption regime in various State legislation, which is determined by the Courts.

35. Requiring providers to assess religious doctrine and teaching is highly inappropriate. Private companies are not theologians and are not equipped to pass judgment on the reasonableness of religious beliefs, nor should their theological opinions on such beliefs be the determinative factor on whether or not religious material should be considered misinformation.

F) Summary of the interpretation of the Bill

36. In summary, when faced with a post that makes a religious claim disagreeing with another religion, a provider would have to determine if that post was 'reasonably verifiable as false, misleading or deceptive', and 'reasonably likely to cause or contribute to' the 'serious harm' that is 'vilification of a group … distinguished by … religion' (the definition of which may include 'reasonably likely to offend'). The provider also needs to identify whether the post was 'reasonable dissemination' for a 'religious purpose'.

37. The lack of definition of 'misleading', 'deceptive' or 'vilification' create a high level of ambiguity, further exacerbated by the multiple uses of 'reasonable'.

38. These layers of ambiguity would be highly problematic even if they were to be interpreted by a court. In the hands of a private provider, they create an impossibly wide range of interpretations. From their interpretation, a provider will have to decide what content is 'misinformation', and accordingly remove it from their service.

39. How are they going to achieve this?

[2] *Bropho v Human Rights & Equal Opportunity Commission* HCA Transcript 9 (4 February 2005) (Gleeson CJ).

Implementation by providers

40. A major platform sees hundreds of millions of posts daily. Assessing them will be undertaken by AI-based and rules-based automatic processes. These processes work in a band of sensitivity, and will always create 'false positives' (wrongly identifying content as 'misinformation') or 'false negatives' (failing to identify misinformation). Attempts to minimise one will inevitably increase the other.

41. Given this, providers are likely to adopt a more expansive interpretation of definitions of 'misinformation' and 'disinformation' and create far more 'false positives', for the following reasons:

42. Firstly, the industry codes are at risk of the ACMA altering or overruling them. The administrative cost of re-developing systems to comply with changes to codes will push providers to write a code expansive enough to not risk alteration by the ACMA. Even when codes are finalised, the ACMA is authorised to enforce compliance with intervention or heavy civil penalties. In short, 'false negatives' are far riskier and more expensive than 'false positives', so the algorithms will be biased against that risk.

43. Secondly, providers' main source of revenue is advertising – a form of income that is particularly susceptible to shifts in trends, political pressure and boycotts.[3] Many major corporations have taken sides on contentious issues and have used their advertising dollar to try and influence platforms. Equally, activists have attempted to pressure corporations and platforms to take a stand on their preferred issue.[4] A prominent example is the current Middle East crisis, where activists and business are extremely sensitive to language that is considered 'antisemitic' or 'Islamophobic'. This pressure creates financial incentive for a platform to consider strong differences of opinion to be 'misinformation'.

44. Finally, some platforms take their own ideologically led positions on some issues (e.g. Google's 'Legalize Love' campaign in support for same-sex marriage, or Twitter/X moving its offices in objection to Californian policies on trans students[5]). Some platforms tend to be aligned with the political 'left', while others are aligned to the 'right'. Either way, these platforms are primed to consider the opposing views to be 'misinformation'.

45. By its very nature, the Bill addresses some of the most controversial topics in modern society, including current political events, such as the war in the Middle East; ethical debates such as the nature of gender, or the personhood of unborn children; and the truth claims of different religious and the eternal consequences of disbelief or disobedience. These are the topics where it is hardest to definitively identify what is false, misleading or deceptive and claims of harm are rampant.

[3] https://www.bbc.com/news/world-us-canada-67460386

[4] https://www.economist.com/the-world-ahead/2022/11/18/companies-are-expected-to-take-a-stand-on-more-social-issues

[5] https://www.advocate.com/politics/marriage-equality/2012/07/08/google-pushes-marriage-equality-new-campaign
https://www.cnbc.com/2024/07/16/elon-musk-says-spacex-hq-officially-moving-to-texas-blames-new-ca-trans-student-privacy-law.html

46. With the Bill's expansive and ambiguous definition of 'misinformation', these platforms will be highly motivated to over-censor content. There are already well documented accounts of 'shadow-banning' and other non-transparent forms of censorship even before the application of this Bill.[6] With the introduction of the bill, providers can claim Government approval – and even mandate – for removing posts, shadow banning, and other forms of censorship. Indeed, clause 67(2) makes explicit that the Bill does not prevent providers from removing content or blocking users.

47. Digital content platform providers are privately owned or publicly traded companies with a primary responsibility to maximise profit and share value. It would be foolish to rely on these organisations to prioritise freedom of speech, the good of society, or anything other than profit. By and large, these organisations do not have a history of behaving in the public interest. Their algorithms are addictive, and apparently designed to be so.[7] The fact that the Government has flagged its own legislation to limit children from accessing these platforms indicates the trust that it has in them.[8] If we do not trust these companies with our children, it is unreasonable to trust them to balance freedom of speech without rigorous oversight.

Example

48. Take, for example, the following orthodox statement made by a Christian on social media:

> Jesus said 'I am the way and the truth and the life. No one comes to the Father except through me'.[9] This is a claim to absolute truth with eternal consequence. However, God is a God of love and 'desires that none should perish.'[10]

49. Setting aside the limited religious exception for now (see below), for the statement to not be considered 'misinformation', it would need to satisfy the threshold test that it is not 'false, misleading or deceptive'. Proving the truthfulness of such a claim to anyone who does not believe is beyond the wit and capability of any mortal. A fact checking process from an atheist or other religious viewpoint would consider the statement to be false. Apart from that, the use of the passages 'out of context', or a fact check from a person who interprets the Bible differently, could justify the claim that the statement is 'misleading or deceptive'.

50. The second test is whether the content 'is reasonably likely to cause or contribute to serious harm.' There are two elements to the definition of 'serious harm' that may be relevant to the statement. The first is 'vilification of a group in Australian society distinguished by … religion, sexual orientation, [or] gender identity'. In contemporary Australia, many people now assert that traditional religious beliefs on matters such as sexual conduct or gender, or on the eternal consequences of earthly conduct are

[6] https://www.washingtonpost.com/technology/2022/12/27/shadowban/
[7] https://www.popsci.com/technology/tiktok-algorithm/
https://www.scientificamerican.com/article/facebook-whistleblower-testified-that-companys-algorithms-are-dangerous-heres-why/
[8] https://www.pm.gov.au/media/albanese-government-set-introduce-minimum-age-social-media-access
[9] *The Holy Bible: New International Version*, (Biblica, 2011) John 14:6.
[10] Ibid 2 Peter 3:9.

offensive, insulting, humiliating or even intimidating to them. The second element is 'severe consequences for an individual'. It is frequently claimed that exclusive claims to eternal truth can harm psychological health. According to these claims, the above religious statement could easily be interpreted by a cautious provider as 'reasonably likely to cause or contribute to serious harm'.

51. Finally, the post might fall under the limited religious exemption. However, as discussed above, the 'reasonable' qualifier can easily be understood as applying not only to the dissemination but also to the content of the religious speech. Hence, the post's religious protection is dependent entirely on the provider's interpretation of whether that religious belief is 'reasonable'.

52. While the terms of the Bill might be fairly interpreted by a court, in the hands of a private company, we are provided with no certainty as to whether the poster's assertion of traditional religious truth would successively run the gauntlet of their interpretation of the Bill.

Mechanisms for appeal and transparency

53. Given the likely tendency of these businesses to over-censor, it is imperative that there is utmost transparency of what information is being censored, and the right to rapid appeals and redress when material is incorrectly labelled 'misinformation' or 'disinformation'.

54. Two mechanisms are essential to detect and prevent over-censorship;

1. Rapid, transparent and independent appeals for an individual about a specific instance of censorship

55. Any individual whose content is censored in whole or in part must be told immediately by the platform provider the reasons why their content was decided to be misinformation or disinformation. There must also be independent bodies available to review that decision upon appeal. These rapid review bodies could be set up like industry ombudsmen in that they are paid for by a levy on platform providers and their governing bodies have equal representatives of platform providers and user advocates with an independent chair. These independent review bodies would provide an independent assessment of whether content was false, misleading or deceptive or likely to cause serious harm. The conclusions of these bodies must be binding, requiring providers to reinstate any content that they incorrectly treated as 'misinformation' or 'disinformation'.

56. These review bodies would publish weekly the number of reviews they had conducted, the platform involved, the decision reviewed and the outcome of the review. This would provide much more transparency about the operation of the regime as well as a rapid accountability mechanism for platform providers. (Having more than one such review bodies may be useful to handle the volume of reviews and to provide some reputational accountability for each other.)

2. Periodic review data made available to the public, Governments, platform providers and researchers

57. At regular intervals, anonymised data on the amount and nature of content that is being censored should be made available to Government, academic and human rights researchers. This will allow researchers to find and report on systematic problems in the application of the rules.

58. The independent review bodies should also publish a summary of their decisions and a commentary on trends or systemic issues they had observed in the type of content being censored, the reasons being given by platform providers as to why content was 'misinformation' or 'disinformation' and whether those reasons were upheld on review.

59. This level of transparency is not currently provided for in the Bill.

60. Regarding the complaints or review process, clause 25 of the Bill states that 'The digital platform rules **may** provide for […] complaints and dispute handling processes for misinformation complaints.' (emphasis added). Section 26 makes it a civil penalty to contravene any such rules, and clause 27 allows the ACMA to direct action to require compliance. However, these two enforcement clauses are predicated on the existence and rigor of such dispute processes, which are not required. Nor is any detail provided as to what such dispute processes should involve.

61. This is far too weak a provision. The Bill does not require there to be any complaints or review mechanism under a code or a standard, let alone a rapid and effective one. The detailed rapid accountability system needs to be built into the legislation or regulations.

62. Regarding wider transparency, the Bill is similarly vague and non-prescriptive. Section 17 requires a provider to publish their current misinformation and disinformation policy, as well as a risk assessment, while clause 22 states that a media literacy plan may be required. Section 30 states that a provider **may** be required to 'make and retain records' relating to misinformation and disinformation, and the measures taken to prevent them. They also **may** be required to prepare reports on these records and provide them to ACMA. There is no indication that data will be stored or made available in a systematic enough way to identify patterns of over-censorship.

63. Most alarmingly, there is no certainty that the kinds of claims that are removed will be able to be identified. If a particular provider took the approach that any religious claim about the exclusive nature of eternal truth was offensive, insulting, humiliating or intimidating, how would the public know that it had adopted this approach? The only potential avenue would be through ACMA. However, there is no guarantee that ACMA will be requiring reports in such a way that this issue will be identified. There is no guarantee that, should ACMA look for and detect such a systematic removal, they would consider it inappropriate and seek to correct it or make it public. The reliance on ACMA's policing of private companies' censorship makes ACMA the ultimate preserve of

orthodoxy. Content that does not accord with that orthodoxy, or evidence of systematic removal of it, will not be available to the public.

64. The closest to public accountability is the addition of 10(1)(mg) to the functions of ACMA defined in the *Australian Communications and Media Authority Act 2005: '*to make available to the public information about matters relating to misinformation and disinformation on digital communications platforms'. That provides no certainty that the example of the removal of religious truth claims would be exposed.

65. Given the level of detail provided in the definition of misinformation and disinformation, and the requirements to remove it, the lack of equivalent detail in protections for speech is disturbing. There is a marked imbalance in the legislation between the impetus to censor information and the protections against over-censorship.

66. As a result, this Bill provides no certainty to the public that they will be promptly notified if their content is deemed 'misinformation', or whether they will have a trustworthy and speedy mechanism for appeal. Neither does the public have any guarantee that it will ever be told what types of material have been determined to be 'misinformation', or any confidence that any systematic failings of providers' systems or over-censorship will be detected. Entire categories of legitimate speech could be impacted without any person outside the platform providers having a clue as to what is happening.

67. Finally, we also note that the Bill does not *guarantee* a right of appeal against any decision made by ACMA. New proposed subsection 204(4A) of the *Broadcasting Services Act 1992* (Cth) delegates the decision as to whether a matter may be subject to appeal to the executive by promulgation of Regulations. The ability to limit the grounds of appeal should require direct Parliamentary endorsement.

68. Furthermore, as it is not clarified, presumably the only persons who are to be given appeal rights against a decision of the ACMA to require a code are the providers regulated by that code, being the entities to whom the ACMA's decision directly relates. It is not clear that such providers will share the concerns of religious institutions or religious believers who may object to the code. It is not clear that they will offer any objection to requirements that impose restrictions on religious speech.

Oversight by ACMA

69. Apart from the relatively un-monitored censorship by private companies, the Bill also raises concerns of the ability of ACMA to enforce their understanding of what is and is not 'reasonable' religious speech. Although ACMA is not given the authority to remove specific content (apart from that which is 'disinformation … that involves inauthentic behaviour' - clause 67), it still has the capacity to impose its interpretation of misinformation.

70. Firstly, ACMA's powers to adopt an enforceable industry code or standard under Part 2 of the Bill enable it to define 'misinformation' in much more granular detail. ACMA may adopt this power where it is satisfied that the development of the code 'is necessary' (cl 55-60). The boundary of what is 'necessary' is undefined, and does not appear to be subject to any right of appeal.

71. Secondly, the Bill creates open-ended emergency powers to determine service provider standards (that have attached civil penalties) when ACMA considers there to be 'exceptional and urgent' circumstances that justify ACMA to act (cl 59).

72. Thirdly, ACMA is given extensive information gathering power with associated civil penalties for resisting invasive inquiries. ACMA may require information or documents from a provider (cl 33) or from any other person if it has 'reasonable grounds to believe that the person has information or a document (other than source code) that … is relevant to … misinformation or disinformation' (cl 34). Despite limitations on the information obtainable, the scope is still very broad. The choice of what to investigate, and how to compel information and documentation, will send messages as to what forms of speech ACMA considers to be acceptable and what speech it wishes to place pressure on.

73. Finally, as time progresses, the forms of guidance and direction that ACMA gives to providers will set a 'case law' of what is misinformation and what is not. Cautious content providers will seek to fit within this precedent, which will only serve to enforce ACMA's understanding of misinformation and disinformation, and therefore what ideas, opinions and facts are allowed on digital platforms.

74. These powers are not neutral. The regulator acts on behalf of the Federal Government, and while it may be notionally independent, the leaders of such regulatory organisations are appointed by the Government in accordance with whatever criteria (including political leanings) that it chooses to adopt.

75. Additionally, we note that clause 5(7) states that the Minister may 'determine that a kind of digital service is a digital communications platform', hence expanding which services are covered by this Bill outside of Parliamentary amendment.

Conclusion

76. The *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill* 2024 poses a significant risk to freedom of speech – including religious speech – by incentivising private companies to over-censor content online.

77. For the Bill to protect against corporate overreach, it would need to incorporate greater clarity, stronger protections and mandatory mechanisms for transparency and appeals. This would include:

    1. Remove or clarify the terms “misleading” and “deceptive”.
    2. Clear definition of ‘vilification’ that accords with the definitions in the ‘Hate Crimes’ bill and similar legislation.
    3. Clarification of religious protections to remove the ‘reasonableness’ test and replace with language compatible with the ICCPR.
    4. A speedy independent appeals process with enforceable decisions.
    5. Regular data from providers regarding their removal of content made available for transparency.

78. Thank you for the opportunity to make this submission. We would value the opportunity to answer further questions and participate in any hearings.

79. For more information, contact:

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Appendix 1 - The need to protect religious speech

80. The Bill is clearly inconsistent with the protections to religious speech under international law. Article 18 of the *International Covenant on Civil and Political Rights 1966* (ICCPR) states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

81. Australia holds a distinguished place in the history of the adoption of Article 18(2), one that is relevant to the terms of the Bill. During the debate in 1952 the Australian delegate wanted it clarified that 'that the expression 'coercion' would not include persuasion or appeals to conscience', making it abundantly clear that such matters would be protected by Article 18.[11] Over seventy years later it is upon that very freedom that the Australian Government now proposes to impose unprecedented restrictions.

82. Article 6(d) of the United Nations General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* states that 'the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms: … (d) To write, issue and disseminate relevant publications in these areas'.[12] The Religious Declaration has been relied upon by the United Nations Human Rights Committee in interpreting the scope of actions protected by Article 18 of the ICCPR. In *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka* the Committee observed:

> that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.[13]

[11] E/CN.4/SR.319 (1952), 7 (Australia) cited in Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 504.
[12] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, (25 November 1981) ('Religious Declaration').
[13] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005) [7.2].

83. Relevantly, Article 19 of the ICCPR provides the right to freedom of opinion and sets out the grounds on which that right may be limited:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
>   a. For respect of the rights or reputations of others;
>
>   b. For the protection of national security or of public order (ordre public), or of public health or morals.

84. In its General Comment on Article 19 the United Nations Human Rights Committee states: 'In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.'[14] The Government has not offered any justifications for the very broad ranging powers that it proposes within the Bill which are commensurate with the standards expected under Article 19.

85. In light of these protections, we would like to see robust protection for speech on matters of religious belief, including in relation to the norms of conduct that the great world religions require of adherents. Some statements of fact in relation to religious matters may cause offence – for example, what the Bible or Koran says about an issue. As noted above, so elastic has the definition of 'hate speech' become in certain quarters that even factual statements about what holy writings teach can be denounced by those with different views on the matter.

86. However much people may disagree on matters of faith or conduct, censorship of certain views will be to the detriment of the society as a whole and breach Australia's international commitments to protect freedom of religion. Our concern is that the imprecise 'reasonableness' test offers an exceedingly insecure basis on which to rest such a foundational and important freedom as religious conscience.

87. Moreover, to apply a 'reasonableness' requirement to online religious statements would introduce a double standard, with the ACMA regime adopting a more restrictive limitation for statements made online than that permitted under other laws. The exception adopted under the Bill should also take the benefit of the recent extensive consultation processes on the Religious Discrimination Bill, whose exemptions were modelled upon, but contained some modifications to the equivalent phraseology of clause 37.

[14] United Nations Human Rights Committee, General Comment 34, [50]-[51].