

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

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

21 August 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide feedback to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts as part of its consultation on the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 ('Bill').
2. The ALA acknowledges that the intention underpinning the Bill is to equip the Australian Communications and Media Authority (ACMA) with specific powers and processes for responding to the dissemination of misinformation and disinformation "on certain kinds of digital platform services".²
3. We agree that online spaces should be safe and productive, and so the effects of misinformation and disinformation being spread online must be addressed – especially where this poses a threat to public safety and Australia's democracy.
4. Equally, the ALA is concerned to ensure that human rights are honoured in the process of enacting these reforms. This will be the focus of the ALA's submission, namely with regard to freedom of speech considerations and the need to enact a federal Human Rights Act.

Freedom of speech considerations

5. The ALA notes significant commentary from the Federal Government, media and stakeholders in relation to what impact the reforms outlined in the Bill might have on freedom of speech,³ including from the Honourable Michelle Rowland MP, Minister for Communications, who has stated that the Bill "aims to strike the right balance between protection from harmful mis and

² Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) Schedule 1, clause 1.

³ See, egs, Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 — Fact sheet* (June 2023) 2; Nabil Al-Nashar, 'Millions of dollars in fines to punish online misinformation under new draft bill', *ABC News* (online, 25 June 2023) <<https://www.abc.net.au/news/2023-06-25/fines-to-punish-online-misinformation-under-new-draft-bill/102521500>>; Lauren Croft, 'Draft misinformation bill will create 'illiberal double standard': Victorian Bar', *Lawyers Weekly* (online, 31 July 2023) <<https://www.lawyersweekly.com.au/wig-chamber/37834-draft-misinformation-bill-will-create-illiberal-double-standard-vic-bar>>.

disinformation online and freedom of speech”.⁴ The Bill itself only explicitly references freedom of speech once, briefly noting the Commonwealth Parliament’s intention for digital platform services to be regulated in a manner that “has regard to freedom of expression”.⁵

6. The ALA is a strong supporter of freedom of speech, also referred to as ‘freedom of expression’ in international law (for example, in article 19 of the *International Covenant on Civil and Political Rights*) and in this Bill (as above).
7. The High Court of Australia has affirmed that freedom of speech is one of the “fundamental values protected by the common law”.⁶ We believe it is fundamental in any society for individuals to be able to discuss all matters fully and frankly.
8. Freedom of speech, however, carries with it special responsibilities. These responsibilities are founded in the understanding that speech can be incredibly powerful and has the potential to undermine other human rights if not reasonably constrained in certain limited circumstances.
 - a. One of these responsibilities relates to discrimination, in recognition that discriminatory speech can have very serious consequences, both for the individuals concerned and the broader community. Misinformation grounded in hatred is one of many harms to be captured by the reforms outlined in this Bill to quash the spread of misinformation online through action directed by the ACMA.⁷
 - b. **The ALA submits that the Federal Government must demonstrate that the resultant limiting or abrogation of freedom of speech will lead directly to the prevention of discrimination, in order for that limitation or abrogation to ultimately be justified.**

⁴ The Hon Michelle Rowland MP, Minister for Communications, ‘Consultation opens on new laws to tackle online misinformation and disinformation’ (Media Release, 25 June 2023) <<https://minister.infrastructure.gov.au/rowland/media-release/consultation-opens-new-laws-tackle-online-misinformation-and-disinformation>>.

⁵ Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) Schedule 2, clause 7.

⁶ *Nationwide News v Wills* (1992) 177 CLR 1, 31.

⁷ See, Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 — Fact sheet* (June 2023) 4.

9. In addition, the ALA is concerned about some extremely broad qualifiers and seemingly low thresholds within the Bill's provisions for establishing whether shared content is misinformation and/or disinformation. This has the potential to compromise freedom of speech in the absence of constitutional and legislative human rights protections in Australia.
 - a. For example, one of the criteria for content being classified as misinformation and/or disinformation for the purposes of activating the ACMA's proposed new powers is that "the content contains information that is false, misleading or deceptive".⁸ The ALA has not seen further guidance on these qualifiers in the legislation or in the relevant external materials. These qualifiers are subjective and it is unclear how this threshold is met – for instance, who or how many people must have been misled or deceived?
 - b. The ALA submits that guidance and clarification, as well as refinement of broad terms, are essential with respect to all criteria, qualifiers and threshold terminology used in the Bill, in order to ensure it is clear to digital service providers and to the general public in what circumstances the ACMA's proposed new powers would be activated.
10. **The ALA believes that an analysis of how all reforms outlined in this Bill might affect freedom of speech, as well as other internationally-recognised human rights, must be more closely considered by the Federal Government. Any relevant amendments to strengthen rights protections must then be made to the Bill before it is introduced into Parliament.**

The need to enact a federal Human Rights Act

11. In addition to freedom of speech, the ALA notes that the Department has also proactively addressed other rights-related matters in the Bill and in supplementary materials, including requirements for the ACMA to consider privacy interests and freedom of political communication when developing any industry codes of conduct or misinformation/disinformation standards.⁹

⁸ Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) Schedule 1, clauses 7(1)(a) and 7(2)(a).

⁹ Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) Schedule 2, clause 7; Communications Legislation Amendment (Combatting Misinformation and

12. The ALA contends that it is currently inevitable that tensions will arise between communications reform and many internationally-accepted human rights. In the continued absence of a federal Human Rights Act, the ALA submits that those concerns will continue to be raised – and raised frequently – about the impact on the public’s rights that current and future Commonwealth reforms (on this subject matter and more generally) may have.
13. This is especially so when there are criminal penalties applicable to individuals, as well as corporations, being proposed – as this Bill intends.¹⁰
14. **As such, the ALA reiterates our long-held position that the Federal Government should legislate a federal Human Rights Act as a matter of priority.**
- a. The ALA has made this recommendation for many years and in a variety of fora, including to multiple inquiries conducted through the Commonwealth Parliament.
 - b. Most recently, the ALA has detailed the need for a federal Human Rights Act in our June 2023 submission to the Parliamentary Joint Committee on Human Rights’ ongoing *Inquiry into Australia’s Human Rights Framework*.¹¹
15. The ALA considers that a federal Human Rights Act would ensure that those who wield power within Australia’s federal institutions are subject to a clear set of expectations concerning the rights of people domiciled in Australia or under Australian jurisdiction and, further, that those decisionmakers would be prevented from exercising power in such a way as to infringe upon those rights.
16. A federal Human Rights Act could be a powerful tool not only in keeping society diverse, fair, respectful and inclusive, but also being an essential adjunct to the institutions of parliamentary democracy and the common law. Importantly, it would also give domestic

Disinformation) Bill 2023 (Cth) Schedule 1, clauses 37(d)(i), 40(d)(i), 45, 51(2)(a) and 60; Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023 — Fact sheet* (June 2023) 8–9.

¹⁰ See, Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023 — Fact sheet* (June 2023) 8.

¹¹ Australian Lawyers alliance, Submission No 83 to the Parliamentary Joint Committee on Human Rights, *Inquiry into Australia’s Human Rights Framework* (30 June 2023) <<https://www.lawyersalliance.com.au/documents/item/2499>>.

effect to Australia's international human rights obligations, including but not limited to freedom of speech.

17. The ALA contends that a federal Human Rights Act would offer protection for the rights of the Australian public (and in turn their trust that Federal Government reforms will not infringe on those rights), while the Federal Government can continue to pursue accountability for digital platform services regarding the dissemination of misinformation and disinformation.

18. **The ALA submits that the Federal Government should enact a federal Human Rights Act in order to achieve a true balance between, on the one hand, pursuing impactful legislative reforms and, on the other hand, safeguarding the rights of those subject to the Federal Government's legislation, policies and programs.**

Conclusion

19. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input on the exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.

20. The ALA is available to provide further assistance to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts on the issues raised in this submission.



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