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CENTRE FOR MEDIA TRANSITION

Inquiry into the Communications Legislation Amendment (Combatting Misinformation and Disinformation Bill) 2024

Submission from UTS Centre for Media Transition to the Senate Environment and Communications Legislation Committee

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About the Centre for Media Transition

The Centre (CMT) was established in 2017 as an applied research unit based at the University of Technology Sydney (UTS). It is an interdisciplinary initiative of the Faculty of Arts and Social Sciences and the Faculty of Law, sitting at the intersection of media, journalism, technology, ethics, regulation and business.

Working with industry, academia, government and others, the CMT aims to understand media transition and digital disruption, with a view to recommending legal reform and other measures that promote the public interest. In addition, the CMT aims to assist news media to adapt for a digital environment, including by identifying potentially sustainable business models, develop suitable ethical and regulatory frameworks for a fast-changing digital ecosystem, foster quality journalism, and develop a diverse media environment that embraces local/regional, international and transnational issues and debate.

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Thank you for the opportunity to contribute to this inquiry into the Communications Legislation Amendment (Combatting Misinformation and Disinformation Bill) 2024. The following statement summarises our principal views on the bill.

1. Overview

- The bill includes positive changes from the 2023 exposure draft that improve protections for freedom of expression and increase the ability to hold digital platforms accountable for how they address misinformation and disinformation (hereafter, misinformation) on their services.
- However, limitations to the scope of the bill – designed to protect freedom of expression and media freedom – undermine its ability to hold platforms to account. These include the exemption for professional news, the effect of which is that ACMA will have no power to ensure platforms are accountable for action they may take against news content – such as removing it for including misinformation.
- In our view, mechanisms to limit ACMA powers included in the bill, such as cl. 67, mean the scope limitations are largely unnecessary. These could be supplemented by some added protections outlined in section 2 below.
- We also consider that the bill should provide for a process for complaints to be made to ACMA about a platform's failure to comply with its obligations under an approved code or standard. ACMA should be required to keep a public register of complaints, investigations and enforcement actions.
- The enforcement regime under the Bill is well designed. However, the requirement to issue formal warning before seeking a civil penalty order is restrictive and may impact the efficacy of the enforcement framework.
- The first review of the bill should consider whether a more broad-based approach to digital platform regulation would be beneficial. This might include consideration of the suitability of imposing a duty of care on platforms, such as that currently being considered in the review of the Online Safety Act.

2. Scope limitations, freedom of expression and platform accountability

- In the 2023 exposure draft it was unclear how the bill would provide ACMA with powers to regulate digital platform systems and processes (the professed objective) without having unreasonable power over online content, and consequently user expression.
- Clause 67 of the current bill clarifies this by ensuring that ACMA has no power over a platform's content-moderation actions or user accounts, leaving these at the discretion of platforms. This is a welcome inclusion.
- The inclusion of ACMA powers to make rules relating to risk management, media literacy, complaints and dispute handling, in addition to transparency and record-keeping, also substantially increase the clarity of the bill's approach to empowering ACMA oversight of platform systems and processes.
- Despite these improvements, the limitations on the scope of the bill set by the definitions of misinformation, disinformation and serious harm, and by the various exclusions of particular kinds of content, serve to undermine the bill's effectiveness in

making digital platforms accountable for how they address misinformation and for their content-moderation actions more broadly.

- A narrow scope protects freedom of expression from government overreach. But it also limits accountability by excluding the majority of platform content moderation from its scope.
- A particularly pointed example of this is YouTube's decision to remove several Sky News videos and suspend its account in August 2021 for violating its medical misinformation policies. Because professional news is excluded from the scope of the bill, ACMA would have no power in such a circumstance to hold YouTube accountable for its actions, for example by ensuring that YouTube provided Sky with the opportunity to lodge a complaint.
- The same point applies, but more subtly, to the threshold of serious harm. As a matter of course, platforms moderate user content that falls well under this threshold. Algorithmic promotion and demotion of particular content is an example of such moderation. Facebook, for example, demotes content that its algorithms determine to be close to violating its terms of service. But if this content does not surpass the serious harm threshold, ACMA has no power to hold platforms to account for the operation of their content-moderation algorithms.
- A key point to consider here is that digital platform content moderation limits the free expression of users. This may not attract the same concern as the potential for government overreach, but a key purpose of the bill is to ensure that platform content moderation is principled and consistent and appropriately balances freedom of expression with other rights. The benefit of requiring ACMA to ensure registered codes and standards do not unreasonably burden free expression is hampered by the limited scope of the bill outlined above.
- A related point is that whether content comes in over or under the serious harm threshold will naturally be a matter of ongoing contestation. If ACMA is only empowered to assess platform actions applying to content over the threshold, then its oversight will be significantly hampered, and platforms will not be incentivised to be transparent about actions that come under that threshold.
- In our view, clause 67 ensures that ACMA cannot exercise power over individual content-moderation decisions. For this reason, there is no need to limit the scope of the bill. A more-effective approach would be to maintain a broad scope, with the regulator empowered to require platforms to ensure they have effective systems and processes across the full spectrum of their content.
- A further concern, however, is that ACMA's powers don't just extend to assessing whether a platform has a misinformation policy in place: it extends to assessing whether the policy is appropriate and consistently applied. To do this, ACMA will need to make a judgment about whether the content meets the definitions of misinformation under the Act. The explanatory memorandum outlines some considerations for deciding whether content meets the definitions of misinformation and disinformation. However, it is not clear whether these are intended to also guide ACMA decision making or only that of platforms. This may in effect make ACMA an indirect arbiter of truth – even if, in practice, this only occurs in a limited number of cases where ACMA is called on to make decisions other than whether processes such as reference to fact checkers, previous complaints, and so forth are in place.

- A solution to this problem is to build further protections into the bill. These might include empowering an independent body to make these assessments. Given the importance of protecting user expression and maintaining a healthy public sphere, this could operate on a multi-stakeholder or participatory model. ACMA's enforcement decisions would be required to follow the body's advice. To increase industry accountability, platforms could also be required under the legislation to implement the body's recommendations on the shape and implementation of their content-moderation policies. In this way, the power of platforms to arbitrate truth would be moderated by a public accountability mechanism.

- Even without going this far, added protections could be provided to certain excluded content. For example, the bill could require platforms to provide professional news publications with recourse if their content is moderated or account suspended, even though professional news content is excluded for misinformation purposes. The UK Online Safety Act, for example, contains provisions to ensure platform moderation of professional news content takes into account the importance of media freedom.

- Finally, if parliament decides to proceed with the bill without considering these changes to its scope, we restate the point we have made in other regulatory contexts that involve the identification of professional news services; namely, that they should be subject to some recognised, independent standards and complaints scheme, not simply internal codes.

- It is also not clear why the community broadcasting sector is not included in the news exemption, given it is subject to the same regulatory oversight as commercial broadcasting.

3. Complaints, investigations and enforcement

3.1 Complaints to the ACMA

- Clause 25 of the bill allows ACMA to make digital platform rules in relation to complaints and dispute resolution. These arrangements concern the platforms' actions in handling 'misinformation complaints', defined in clause 2. The effect is that these complaints will be complaints made by users to platforms about specific instances of misinformation and disinformation or about the removal of content that has been identified by the platform as mis- or disinformation. ACMA is not involved in making judgements about specific instances.

- These arrangements help to remove the government regulator from decisions about truth and falsity and they are desirable features of this bill.

- However, the bill does not provide a process for complaints to be made to ACMA about a platform's failure to comply with its obligations under an approved code or an ACMA standard. This is separate from a platform's failure to take action in response to specific instances of mis- and disinformation (described above). Part 11 of the *Broadcasting Services Act 1992* allows for complaints to be made to ACMA about alleged breaches of codes and standards but as this part only applies to broadcasting services, it will have no application to a misinformation code. Currently, the DIGI self-regulatory code includes a scheme for complaints about failure to implement the measures required under that code. It was in response to a complaint from Reset Australia that DIGI's independent panel found that the platform X had failed to implement measures required under the code, leading to the cancellation of its status as a signatory.

- We think that the co-regulatory scheme anticipated under the bill should at least match the practice under the current self-regulatory scheme and should recognise complaints such as the Reset complaint. This could be achieved by adding to Schedule 9 similar provisions to those in Part 11. We also think there should be an obligation on ACMA to investigate valid complaints.

3.2 Register of investigations and enforcement action

- This bill provides an opportunity for an improvement in the transparency of investigation and enforcement action by ACMA. In our recent report on the enforcement of telecommunications consumer protections we observed that there is no comprehensive and reliable public record about investigations by ACMA under the *Telecommunications Act 1997* and how they have been handled.

- An improvement in transparency could be achieved by requiring ACMA to keep a public register of complaints made to it, its investigations, and any enforcement action taken in respect of the misinformation codes and standards.

- Further information on our previous recommendations for a register of investigations and enforcement action in relation to telecommunications consumer protection measures can be found at pp 81-83 of this report: Karen Lee, Derek Wilding, Kieran Lindsay & Vidya Kathirgamalingam, *The Enforcement of Telecommunications Consumer Protections* (UTS Centre for Media Transition, 2024). https://www.uts.edu.au/research/centre-media-transition/projects-and-research/enforcement-telecommunications-consumer-protections

3.3 Enforcement

- Overall, we think the enforcement regime under the bill is well-designed and improves on other parts of the Broadcasting Services Act in offering ACMA a more extensive range of enforcement options.

- We note that the draft bill allowed for an application for a civil penalty order following a code breach without the intervening step of a formal warning, as cl 43 of the draft bill said that ACMA 'may' issue a formal warning whereas cl 52(3) of the bill requires this step. There is no explanation for this change in the explanatory memorandum. The effect of this is that ACMA is prevented from seeking a civil penalty order in cases of very serious, but one-off, contraventions of applicable code provisions. Nevertheless, we welcome the statement in the notes to cl 52 of the EM that a civil penalty application need not be brought in relation to the *same* provision as the first breach: 'a civil penalty order may be brought against that provider in relation to either its earlier or later contravention – without any requirement for a warning to be provided in relation to the later contravention'. Given the need to provide a warning, limiting the civil penalty application to breaches of the same provision would risk undermining the efficacy of the enforcement framework.

- We also note the inclusion in clause 74(1)(j) of a power to issue a formal warning where ACMA has found a breach of a standard. While this might be appropriate in a limited number of cases, we hope it does not lead to an expectation that a formal warning would, as a matter of practice, be issued on the occasion of a first breach. Civil penalty powers should act as a strong incentive to comply with regulator-initiated rules. In all but a limited range of (mostly technical) breaches of standards,

this incentive could be undermined by the insertion of an additional step between beach and civil penalty proceedings.