

Submission on Exposure Draft Bill

**Communications Legislation Amendment (Combatting
Misinformation and Disinformation) Bill 2023**

A New Approach (ANA)

About A New Approach (ANA)

A New Approach (ANA) is Australia's leading think tank focused on arts and culture.

Through credible and independent public leadership, ANA helps build an ambitious and innovative policy and investment environment for arts, culture and creativity.

We work to ensure Australia can be a great place for creators and audiences, whoever they are and wherever they live.

ANA acknowledges the cultures of Aboriginal and Torres Strait Islander peoples in Australia and their continuing cultural and creative practices in this land.

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Genevieve Lacey (Chair), Ben Au, Julian Canny, Jane Curry, Professor John Daley AM, Damien Miller, Rupert Myer AO, Alison Page, Laura Tingle and Dr Mathew Trinca AM.

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This submission has been prepared by ANA and the opinions expressed do not necessarily represent the views of ANA's funding partners, or advisory groups, or others who have provided input.

Contact: hello@newapproach.org.au

www.newapproach.org.au

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We confirm that this submission can be made public.

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A New Approach (ANA)

1 August 2023

Australian Government

Department of Infrastructure, Transport, Regional Development, Communications and the Arts
Platform and News Branch
information.integrity@infrastructure.gov.au

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Exposure Draft Bill)

A New Approach (ANA) welcomes this opportunity to comment on the Exposure Draft Bill to enhance the powers of the Australian Communications and Media Authority (ACMA). ANA recognises the Australian Government's efforts to combat misinformation (including disinformation), such as the Exposure Draft Bill, the Government's request for the DIGI voluntary code and the establishment of the Strengthening Democracy Taskforce. ANA also recognises the efforts of digital platforms, including under the voluntary code.

We are pleased to provide comments on the Exposure Draft Bill. ANA's research demonstrates freedom of expression is important to middle Australians, who are grateful for this freedom and consider it an important democratic value.¹ While freedom of expression is an important right, ANA also recognises that no right is absolute. ANA recognises striking the right balance between combating misinformation and the right to freedom of expression (as well as other rights) is a necessary and delicate exercise.

ANA encourages the Department to continue working with the Department of Industry, Science and Resources (DISR) and other agencies on governance of artificial intelligence (AI), which can generate, spread and combat misinformation. ANA believes that with the right governance and collaboration, artificial intelligence (AI) can be a part of Australia reaching its full potential as a cultural powerhouse. No matter the cultural form, content platform or community, the opportunities and risks of AI are real. AI has the potential to affect incentives to create as well as cultural and social inclusion and freedom of expression in arts, culture and creativity. This is true of AI-generated deepfakes, and many applications of AI.

Please find our detailed comments on the Exposure Draft Bill below. In our role as a philanthropically funded, independent think tank, ANA is ready to provide further information about the recommendations outlined in this submission and would welcome the opportunity to discuss them.

Warm regards,



Kate Fielding, CEO, A New Approach (ANA)

Contact

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Detailed comments on exposure draft bill

Graduated application of ACMA powers (Part 3 of Schedule 9)

ANA welcomes the graduated application of ACMA powers that would be established by the Exposure Draft Bill, which has the potential to be part of a proportionate, risk-based approach. ANA encourages the Department to continue working with DISR, the ACMA and other agencies involved in AI governance to work towards a cohesive risk-based approach. AI can be applied to generate, spread and combat misinformation. To respond systematically to AI risks, including those relating to misinformation, ANA supports a risk-based approach to AI governance. See our submission to the DISR for details.² ANA understands, at a high level, the graduated application of ACMA powers would work as follows:

	The DIGI voluntary code (or any future voluntary code)	Information gathering rules (Division 3)*	Misinformation codes (Division 4)*	Misinformation standards (Division 5)*
Applies to which digital platform providers?	Providers that are signatories	Any providers ACMA chooses	Any providers ACMA chooses	Any providers ACMA chooses
Who chooses rules?	Providers that are signatories	ACMA	Providers that are signatories	ACMA
Who enforces rules?	Providers that are signatories	ACMA	ACMA	ACMA

*For digital platform services other than those excluded by Clause 6.

Information gathering rules (Division 3)

ANA welcomes these rules, which provide transparency and accountability on the effectiveness of platform efforts to combat misinformation. This could form part of a risk-based approach to AI governance. For example, the proposed EU AI Act includes transparency requirements as part of its risk-based approach.³

As digital platform providers and the ACMA continue to address misinformation, ANA would welcome transparency on the use of AI in content, which helps to mitigate misinformation risks while separating creators from content they did not generate. For example, the European Union Digital Services Act suggests 'prominent markings' for deepfakes as a one mitigation of AI risks.⁴ Likewise, the United States has obtained a pledge from major AI companies to watermark AI-generated content.⁵

Excluded content for misinformation purposes (Clause 2)

ANA welcomes protection of the right to freedom of expression while empowering the ACMA to regulate efforts to combat misinformation. Consistent with the view of the Australian Law Reform Commission, ANA considers the right to freedom of expression is essential to arts and culture, but not absolute.⁶

Generally, ANA supports carving out content for purposes such as 'satire', 'parody', 'professional news content' and 'educational content' from the scope of 'misinformation'.⁷ ANA welcomes the carveout for 'entertainment, parody or satire' being subject to a 'good faith' requirement.⁸ ANA suggests this carveout only applies where the content is 'produced and disseminated in good faith', not where content is 'produced in good faith'. This is because even content produced in good faith for 'entertainment, parody or satire' could be disseminated by another person with the intent and effect to misinform.⁹

Matters relevant to serious harm for misinformation and disinformation purposes (Clause 7)

ANA welcomes a non-exhaustive list of matters relevant to determining any link between provision of content and 'serious harm', to help enable proportionate regulation.

ANA notes 'the author of the information' is on this list, which also includes 'any other relevant matter'. ANA suggests also including 'the disseminator of the information' on the list. This would also avoid the perception of singling out creators of cultural content.¹⁰

Endnotes

- 1 Our national focus group study highlighted many reasons for this importance from expressing views about one's religion, building confidence and self-esteem for school children. See Fielding, Kate, and Jodie-Lee Trembath. "A View from Middle Australia: Perceptions of Arts, Culture and Creativity." Insight Series. Canberra: A New Approach and the Australian Academy of the Humanities, May 2020. <https://newapproach.org.au/wp-content/uploads/2021/07/3-ANA-InsightReportThree-FullReport.pdf>. See also Fielding, Kate, and Jodie-Lee Trembath. "Twenty-First Century Priorities for Australian Arts and Culture Policy: What's New, What's Endured, What's Next." Analysis Papers. Canberra: A New Approach, October 2021. <https://newapproach.org.au/analysis-papers/twenty-first-century-priorities-for-australian-arts-and-culture-policy-whats-new-whats-endured-whats-next/>. Likewise, the Australian Law Reform Commission (ALRC) has highlighted the importance of freedom of speech. See Australian Law Reform Commission. "Traditional Rights and Freedoms— Encroachments by Commonwealth Laws," 2015. https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf.
- 2 A New Approach. "For Australians, by AI? Supporting Safe and Responsible AI in Australia Submission," July 18, 2023. <https://newapproach.org.au/wp-content/uploads/2023/07/ANA-Safe-Responsible-AI-submission-2023.pdf>. See also DISR (2023). See also Department of Industry, Science and Resources. "Safe and Responsible AI in Australia: Discussion Paper," June 2023. https://storage.googleapis.com/converlens-au-industry/industry/p/prj2452c8e24d7a400c72429/public_assets/Safe-and-responsible-AI-in-Australia-discussion-paper.pdf.
- 3 European Commission. Proposal for an Artificial Intelligence Act, COM/2021/206 final (2021). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>.
- 4 European Parliament and Council. Digital Services Act, Regulation (EU) 2022/2065 (2022). <https://eur-lex.europa.eu/eli/reg/2022/2065/oj>, article 35
- 5 Bartz, Diane, and Krystal Hu. "OpenAI, Google, Others Pledge to Watermark AI Content for Safety, White House Says." Reuters, July 21, 2023, sec. Technology. <https://www.reuters.com/technology/openai-google-others-pledge-watermark-ai-content-safety-white-house-2023-07-21/>
- 6 The ALRC has said 'it is widely recognised that freedom of speech is not absolute'. Australian Law Reform Commission. "Traditional Rights and Freedoms— Encroachments by Commonwealth Laws," 2015. https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf, p.78
- 7 ANA notes the EU voluntary code carves out a similar range of content from the scope of 'disinformation'. European Commission. "2022 Strengthened Code of Practice on Disinformation | Shaping Europe's Digital Future." Shaping Europe's digital future, June 16, 2022. <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.
- 8 In particular, there is a risk that 'entertainment' could be overly broad without an effective 'good faith' requirement. The term 'entertainment' is used by at least one digital platform provider under the DIGI voluntary code to describe all content on that platform. 'TikTok is first and foremost an entertainment platform... that brings people together over creative and entertaining content'. TikTok Australia. "Submission to Select Committee on Foreign Interference through Social Media." Department of the Senate, March 1, 2023. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Interference_Social_Media/ForeignInterference47/Public_Hearings
- 9 ANA understands this is the reason for the DIGI voluntary code providing that otherwise excluded content may be 'disinformation' when propagated by 'inauthentic behaviours'. Digital Industry Group Inc. "Australian Code of Practice on Disinformation and Misinformation," December 22, 2022. <https://digi.org.au/wp-content/uploads/2022/12/Australian-Code-of-Practice-on-Disinformation-and-Misinformation-FINAL--December-22-2022.docx.pdf>, clause 4.4
- 10 Commonwealth of Australia. "Revive: A Place for Every Story, a Story for Every Place – Australia's Cultural Policy for the next Five Years," January 2023. <https://www.arts.gov.au/publications/national-cultural-policy-revive-place-every-story-story-every-place>.