

**SUBMISSION OF JOHN GARNSEY KC ON THE
EXPOSURE DRAFT BILL FOR THE
COMMUNICATIONS LEGISLATION AMENDMENT (COMBATting MISINFORMATION AND
DISINFORMATION) ACT 2023**

Sunday 6 August 2023

Generally:

1. The proposed legislation in its substance and in its drafting is inconsistent with freedom of speech and opinion and a dangerous threat to the rights of Australian citizens and others freely to hold and express opinions, ideas and views on any subject not otherwise in contravention of existing specific laws.
2. The undefined and undefinable boundaries of the so-called definitions in section 7 and section 3 of the Exposure Draft are incapable of meaningful analysis and do not and cannot form a basis for the attempted imposition of the severe restrictions on freedom of speech and opinion in the Exposure Draft.
3. The proposed legislation should be wholly abandoned.
4. The proposed legislation in its substance and intent is also inconsistent with the implied right to political communication held by the High Court to exist in the Australian Constitution. See *inter alia* *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *David Lange v Australian Broadcasting Corporation (ABC)* (1997) 189 CLR 520; *McLoy v New South Wales* (2015) 257 CLR 17.
5. The provisions dealing with Misinformation Codes and Standards are a temptation and incitement to governmental and bureaucratic control of free speech and opinion and represent a further dangerous threat to the rights of Australian citizens and others freely to hold and express opinions, ideas and views factual or otherwise.

The definitions:

6. Considered separately and cumulatively, the elements of the critical definitions of "disinformation" and "misinformation" in section 7 of the Exposure Draft are ill-defined, ambiguous, imprecise, lacking boundaries, impose an impossible task on a decision maker, and invite and enable a decision maker to apply his or her own views, prejudices and agendas:
 - * the term "content" does not distinguish between "information" which is fact and information which is opinion but extends to opinions which may be *bona fide* held even if incorrect as an opinion (as in defences of comment in defamation law so long as there is a connection with appropriate facts),

- * the term "content" obliges the decision maker to determine whether "the content" is "false, misleading or deceptive" in an unspecified and undefined manner or respect (is this to "the public" or "end users" whoever they may be - see section 3 of the Exposure Draft),
- * the decision maker is then obliged to determine whether the provision of the content is "reasonably likely" to "cause or contribute" serious harm (whatever that is) or the person disseminating it intended to deceive "another person" whoever that is.,
- * in subsection 7(3) paragraphs (a) to (i) the decision maker is "assisted" to determine whether the provision of the content is "reasonably likely" to "cause or contribute" (to some undefined extent) serious harm (whatever that is) by having regard to a wide range of matters including "anything at all" considered relevant,
- * the essentially undefined task of the decision maker is further compounded by the "definition" of "harm" in section 3 of the Exposure Draft which "defines" harm as "meaning" any of the following:
 - (a) hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability;
 - (b) disruption of public order or society in Australia;
 - (c) harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions;
 - (d) harm to the health of Australians;
 - (e) harm to the Australian environment;
 - (f) economic or financial harm to Australians, the Australian economy or a sector of the Australian economy.
- * These underlined categories are so wide as to be meaningless as a definition of any relevant and particular "harm" attracting liability.

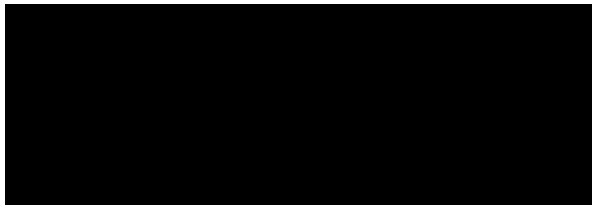
The misconceptions of the drafter

7. Proposed legislation which modifies or detracts from existing freedoms or rights should be expressed in clear and precisely defined terms and limited to an extent strictly necessary. The use of ambiguous, imprecise terms or ill-defined language or concepts should be avoided. The late Professor Julius Stone identified and deplored what he called "categories of indeterminate reference" in legal language, especially in statutes. The definitions in the Exposure Draft specialise in indeterminacy and the absence of boundaries, to make the task of the decisionmaker and enforcer easier. signature

8. It is evident from the elementary analysis of the so-called definitions in section 7 and section 3 of the Exposure Draft above that the terms, concepts and categories used in the drafting impose an impossible burden on a decision maker in a government department and indeed they would impose a heavy if not impossible burden on a judge in a fully resourced court case.

The other provisions of the Exposure Draft

9. The other provisions of the Exposure Draft should fall with the definitions. The provisions dealing with Misinformation Codes and Standards are an incitement to governmental and bureaucratic control of free speech and opinion and reinforce what is a dangerous threat to the rights of Australian citizens and others freely to hold and express opinions, ideas and views factual or otherwise.
10. The proposed legislation should be wholly abandoned.



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