AUSTRALIAN FEMINISTS FOR WOMEN'S RIGHTS

Australian Feminists for Women's Rights (AF4WR) welcome the opportunity to provide input into this Review of the legislation governing ACMA. We are a feminist group whose object is research-based advocacy on women's rights.

In preparing this submission, we have consulted, in addition to the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023: Exposure Draft (hereinafter the Bill), the following documents:

- Guidance Note and Fact Sheet accompanying the Bill
- Digital Platforms Inquiry: Final Report (ACCC, 2019)
- A Report to government on the adequacy of digital platforms' disinformation and news quality measures (ACMA, 2021)
- Relevant legislation in other comparable jurisdictions.

We also attempted to consult the Attorney General's 2023 Report of its Review of the 1988 Privacy Act, but were unable to access the documents via the website.

We focus on three key, and somewhat related, problems with the proposed legislation:

1) The omission of *sex* as a protected category in Schedule 9, Part I(2): Definition of *harm*;
2) the conceptual vagueness of the terms *harm* and *hatred*; and
3) the potential of the Bill to place limits on freedom of information and expression.

1. Omission of *sex* as a protected category

In Schedule 9, Part I(2) 'Definitions', the Bill offers the following definition of *harm* to mean '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.

Some elements of this definition, which is referred to throughout the Bill, are problematic and we will return to another major problem area below, but the first of them is the inclusion of *gender* and *sexual orientation* but not of *sex.* Misogyny continues to have material impacts on Australian women's lives—that is, the lives of people of female sex—whether we are talking about:

- the pay gap (women earn 87 cents for every $1 earned by men [Workplace Gender Equality Agency 2023]) ;

- sexual violence and sexual harassment (one in three women experience physical violence and 22% experience sexual assault [ABS 2023]);
- the significantly higher risk of living in poverty (ACOSS 2023);
- discrimination in health care (such as the alarming rate of obstetric violence in Australia [Keedle et al 2022]); or
- simply the everyday impacts of prejudice against women in our culture.

It is because of this misogyny and its deleterious material consequences for women, which range from everyday humiliation to assault and indeed death (one woman per week murdered in Australia by a current or former partner), that the 1979 UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was drawn up and signed, including by Australia. Women experience these acts of violence and discrimination not because of *gender*, which is a social construct, but because of their *sex*, as CEDAW clearly states: in fact, the sex-role stereotypes we understand as *gender* are identified by CEDAW as instrumental in discrimination against women (UN 1979, Article 5).

Moreover, in the current political context, *sex* and *gender identity* are coming into conflict as concerns, among other things: the right to freedom of expression and to protected spaces; freedom from vilification, harassment and violence; health; and child welfare. The conflation of both sex and gender identity under the non-defined term *gender* presumes a common interest between women (that is, people of female sex) and people with a gender identity (usually known as transgender). This is far from being the case, as is evidenced by often heated public debate over such matters as the transgendering of children; access of male-bodied people with a "woman" gender identity to, among others, women's hospital wards, toilets and changing rooms, domestic violence shelters, women's sports, and prisons; and even over whether sex is a biological reality or a persona one individually identifies into.

If one of the Bill's main objectives is to protect specific rights constituencies as established by the UN treaties to which Australia is a signatory, then the term *gender* must be replaced by the terms *sex* and *gender identity*, and Australia's other human rights instruments (such as, it is hoped, a future Federal Human Rights Act) must concurrently provide guidelines for addressing actual or perceived conflicts of rights.

2. The conceptual vagueness of the terms *harm* and *hatred*

In its 2021 Report, ACMA raised concerns that

> the scope of the [existing voluntary] code is limited by its definitions. In particular, a threshold of both 'serious' and 'imminent' harm must be reached before action is required under the code. The effect of this is that signatories could comply with the code without having to take any action on the type of information which can, over time, contribute to a range of chronic harms, such as reductions in community cohesion and a lessening of trust in public institutions (ACMA 2021, 3).

The notion of 'chronic harm' is an interesting one and worthy of reflection. Its cumulative impact is, however, difficult to assess, as women the world over who deal with everyday sexism, including humiliation, marginalisation and vilification can attest. The cumulative effect of such everyday sexism can have extremely deleterious, even debilitating, even fatal, impacts on women, yet how to address it has never met with full consensus among either political or civil society actors, or even, for that matter, among feminists.

This does not mean that *nothing* can be done, but it is not certain that the problem can be addressed by penalising every instance of displays of such sexism (for example, wolf whistles and catcalls), even if such displays can reasonably be assessed as contributing to a pattern of chronic harm to women. What is needed is a much broader ranging and more in-depth culture change, and it is not certain that immediate censorship of all sexist remarks, albeit desirable from a feminist-utopian point of view, will get that job done effectively. For a start, who would decide what is sexist and what is not, and what is sexist *enough* to warrant censorship? In any case, as we discussed above, *sex* is not considered a protected category in the current draft of the Bill, so the argument is perhaps moot at this stage.

What, then, would constitute ACMA's 'tipping point' at which presumably milder 'harms' become 'chronic harms' that undermine community cohesion and lead to a lessening of trust in public institutions? And who would make that assessment? And is suppression of information and opinions that *might* be deemed to lead at some stage to 'chronic harm' the correct instrument to address the problem? In our view, it is a rather blunt instrument, of which one should be wary.

We again refer to the above-cited definition of *harm* (the term *serious harm* is also used elsewhere in the Bill but the difference between *harm* and *serious harm* is not specified). The term is defined to mean 'hatred' without further qualification. Yet, 'hatred' on its own is not a sufficient criterion for establishing harm, as, first, it is impossible to identify and define in any meaningful or legally sustainable way, and second, it is not reasonable to submit simple *emotions* to sanction. In comparable jurisdictions such as the EU or the US, and indeed, following the guidance provided by the UN itself, 'hate speech' must do more than be hateful:

> Addressing hate speech does not mean limiting or prohibiting freedom of speech. It means keeping hate speech from escalating into something more dangerous, particularly incitement to discrimination, hostility and violence, which is prohibited under international law (UN Secretary-General António Guterres, May 2019).[1]

Simply defining *harm* as 'hatred' does not contain this element of *incitement* to 'something more dangerous' such as discrimination or violence. It is worrying that the Bill does not include this element, because it leaves the way open, first, to vexatious complaints, which at the very least are time-wasting. In this respect, we are reassured to note that both the Australian Human Rights Commission and the Federal and High Courts have set a high bar for demonstration of 'insult' or 'harm' with regard to the Racial Discrimination Act, as noted in several submissions to the 2016 Inquiry concerning this Act, in particular its Clause 18(C). That said, the thing about movable bars is that they are, precisely, movable, and while AHCR case history and the case law of the country's highest courts encourage confidence, there is nothing to stop ideological interpretations of vaguely worded laws creeping in with regard to specific types of complaint or complainant.

The second opening created by this minimalist definition wherein production of an emotion (hatred) is provided as the sole defining evidence of *harm*, is for ideologically-driven agendas to be pushed. Already, we have seen social media platforms use algorithms as a blunt instrument to apply ideologically-defined 'community standards' in censoring the posts of individual users. To cite a recent example, in July 2023 a Facebook group related to a class

[1] https://www.un.org/en/hate-speech/understanding-hate-speech/hate-speech-versus-freedom-of-speech. Accessed 24 July 2023.

taught by a US academic on 'Privilege: Race, Class, Gender and Nation' was disabled by Meta because it 'did not follow community standards'.[2] Even if the platforms themselves rather than individuals or groups using them are targeted by the Bill, the platforms may, in response to the proposed increases in ACMA powers to target misinformation and disinformation, set up even more ridiculously restrictive algorithms to censor users (see also [3] below).

More generally, statements of scientific fact can and currently are framed as 'hateful' and thus, according to the Bill's proposed definition, 'harmful' by some groups, such as the fact that humans cannot change sex. A Bill that fails to exclude statements of fact from its interpretation of 'harm' and 'hatred' has serious flaws.

As for the term *serious harm,* used several times in the Bill, it is not defined at all. If *harm* is something that causes 'hatred', then is *serious harm* something that causes some extreme of hatred? And how serious is 'serious'? Without more rigorous or even intelligible definitions of these terms, it is impossible to understand where, exactly, the bar might be set for assessing misinformation or disinformation.

3. The potential of the Bill to place limits on freedom of information and expression

The above discussion leads to our third concern, that of limitations on freedoms of information and expression. Although the Bill makes it clear that individuals are not targeted, but digital media and social platforms themselves, there is nothing in the Bill to stop such platforms using the law to set their own restrictive ideological agendas involving censorship of individuals, in a country that currently has weak legal protections of freedom of opinion and expression. A positive reading of the Bill could suggest that digital platforms could be required to be more transparent and accountable to users concerning the algorithms used to censor certain opinions, but our experience suggests the contrary will be the case.

Our concerns are reinforced by the fact that there is nothing in the Bill to stop the government itself pushing an ideological agenda, because unfortunately, governments are also frequently agents of misinformation and disinformation, the recent Robodebt affair being but one example. It is arguable, even demonstrable, that a proportion of existing legislation and regulations at federal, state and local levels is driven by ideology rather than hard evidence: laws are only ever as good and as neutral as those who make and apply them. The fate of laws on women's reproductive rights is a case in point. Exempting all Australian governments and educational institutions including their accredited foreign partners from the scope of this Bill means misinformation and disinformation from these sources provides these actors an undeserved appearance of legitimacy. It is a cornerstone of democracy that in our digital world, the government itself be open to public scrutiny and diverse critiques, and be held accountable for the information it provides.

In its February, 2023 submission to the Senate Select Committee on Foreign Interference through Social Media, the Australian Human Rights Commission (AHRC) raised concerns with regard to the potential for harsher crackdowns on misinformation and disinformation to place unreasonable limits on freedoms of information and expression. '[I]f we fail to ensure robust safeguards for freedom of expression online,' the AHRC warned, 'then the very measures taken to combat misinformation and disinformation could themselves risk undermining Australia's democracy and values' (AHRC 2023, 8–9). It further warned of

[2] Judith Ezekiel, personal communication (ironically, via Facebook), 26 July 2023.

> dangers inherent in allowing any one body—be it government, a government taskforce, or a social media platform— to become the sole arbiter of 'truth'. There is a real risk that efforts to combat online misinformation and disinformation by foreign actors could be used to legitimise attempts to restrict public debate, censor unpopular opinions and enforce ideological conformity in Australia. All efforts to combat misinformation and disinformation need to be accompanied by transparency and scrutiny safeguards to ensure that any limitations imposed upon freedom of expression are no greater than absolutely necessary and are strictly justified (AHRC 2023, 9).

AF4WR shares this concern, given our experience of federal or state governments, as well as social media platforms, having intervened on several occasions to shut down public debate in a range of areas, whether we are speaking of the raft of post-9/11 anti-terrorism and anti-sedition legislation or of the current wave of censorship of views critical of the ideology of gender, accompanied by vilification and even potentially actionable defamation of the individuals expressing such views, by media and political actors alike.

We are keenly aware of the extent to which certain individuals and organisations can intervene in digital platforms to influence public opinion through disinformation campaigns. The Russian trolls and bots and Cambridge Analytica scandals are two of the most notorious examples, but we have also seen the influence of social media contagion in spreading disinformation among young people, impacting severely on their self-image and mental health. We thus do not contest the need to address such disinformation, but we are not convinced that the Bill provides sufficient counterbalancing protections of freedom of information and expression through the sorts of scrutiny and safeguards the AHRC suggests.

Once again, we are concerned that the Bill as it stands is likely to multiply the already large number of blunt instruments restricting freedom of expression on digital platforms, at times idiosyncratically and at times, it would appear, for deeper ideological reasons.

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