Submission on the Exposure Draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

About Us

Thankyou for the opportunity to comment on this far-reaching and important legislation.

This submission is on behalf of, and co-signed by:

- Australian Baptist Ministries
- Australian Christian Churches
- Anglican Church Diocese of Sydney
- Seventh-day Adventist Church

The submission was coordinated by Freedom for Faith, a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. Freedom for Faith is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic Church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.

We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows:

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Summary

We have serious concerns about the proposed legislation, which will require digital platform providers to identify and control 'misinformation' or 'disinformation' (as defined in the Bill), backed up with the threat of huge financial penalties.

Our concerns about the control of 'misinformation' are on general freedom of speech grounds. Because of the massive volume of material posted daily on social media, digital platform providers will have to use automated means of identifying speech that might constitute 'misinformation'. They are highly likely, for this reason, to over-identify and censor material that might meet the criteria. Furthermore, we consider the legislation is likely to be weaponised by organisations or individual activists who want to suppress truthful information that they would rather not see disseminated. The legislation provides no support for organisations to allow free, vigorous and respectful debate on controversial matters. Rather, they will be incentivised to 'play it safe' and censor inconvenient truths about at least some matters that require frank and free discussion. There is also no means for members of the public to identify what content has been censored. Decisions as to what is 'misinformation' or 'disinformation' and the resulting removal of that content will occur without the public being aware that content has been removed.

While our concerns are broadly based, our specific concerns about the threats to religious freedom from this legislation could be addressed by including in the definition of 'excluded content', statements concerning religious matters, including those made by bodies established for religious purposes and religious educational institutions and their representatives. If that proposal is not adopted, the proposal should be abandoned. It is most surprising that the legislation should exclude from the scope of the legislation content produced for "entertainment, parody or satire" but does not protect freedom of speech in relation to religious matters.

What problem does the legislation seek to address?

The legislation is intended to give to digital platform providers a very strong incentive to censor information that either it, or the regulator considers to be, misinformation or disinformation. Failure to do so to the satisfaction of the regulator means a risk of enormous fines.

The regulator acts on behalf of the Federal Government, and while it may be notionally independent, the leaders of such regulatory organisations are appointed by the Government in accordance with whatever criteria (including political leanings) that it chooses to adopt. Such appointments are typically not made after an independent assessment of suitability or merit. It is naïve to think that regulators are not subject to political influence or that their policies and practices are not shaped in any way by the government of the day.

The proposed legislation defines misinformation in clause 7 of the new Schedule as being "information that is false, misleading or deceptive"; and "reasonably likely to cause or contribute to serious harm." Disinformation is similarly defined, except that it adds that "the person disseminating, or causing the dissemination of, the content intends that the content deceive another person." This requires digital

platform providers to make a judgment about what the intent of a person is who makes statements that it considers to be false, misleading or deceptive.

The definition of harm is very broad:

> ***harm*** means 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.

The test, however, is not whether the speech is likely to cause harm but whether it meets the threshold of being reasonably likely to cause 'serious' harm. That is not defined, and maybe cannot be defined. Seriousness is in the 'eye of the beholder', at least to some extent.

What will the legislation require of digital platform providers?

Central to the legislation is proposed section 14 of a new Schedule 9 to the *Broadcasting Services Act 1992*:

> The digital platform rules may require a digital platform provider of:
>
> (a) a digital platform service specified in the rules; or
>
> (b) a digital platform service in a class of digital platform services specified in the rules;
>
> to make and retain records relating to the following:
>
> (c) misinformation or disinformation on the service;
>
> (d) measures implemented by the provider to prevent or respond to misinformation or disinformation on the service, including the effectiveness of the measures;
>
> (e) the prevalence of content containing false, misleading or deceptive information provided on the service (other than excluded content for misinformation purposes).

Importantly, the ACMA's proposed regulatory powers extend beyond content that is 'misinformation' and 'disinformation'. The ACMA may also require a digital platform provider to identify and provide to ACMA content which does not meet the threshold tests for misinformation and disinformation but is otherwise 'false, misleading and deceptive'. ACMA may publish this information on its register.[1]

As the Guidance Note accompanying the Exposure Draft makes clear, determinations as to what is misinformation or disinformation will be enforceable in respect of any 'digital service', which includes 'any and all websites, streaming services, social media, email services [apart from those that do not

[1] See proposed sub-sections 14(1)(e), 18(2)(c), 19(2)(c) and 25(1)(c).

have an interactive function] and other networks available in Australia.'[2] This is an ambition of Herculean proportions.

The legislation will extend to acts, omissions, matters and things outside Australia, and so applies to a digital platform accessed in Australia whereever in the world its management may be located.

On any given day, millions of communications are likely to be made on the larger digital platforms. What the legislation requires of the digital platform provider is to comply with whatever digital platform rules the regulator decides upon to address misinformation or disinformation. It would seem that the intent of the legislation is that the digital platform provider must keep records of every instance of misinformation or disinformation because it must report on what misinformation or disinformation is to be found on the platform, or alternatively its "prevalence" (the Bill is less than clear on this) and then what measures it has taken to address these issues.

So putting together the various requirements, the digital platform rules are likely to require platform providers to say of every communication, other than a private message, that is disseminated on its platform whether:

a) it purports to make a statement of fact;
b) that purported fact is false, or the account of it is misleading or deceptive;
c) the false statement is reasonably likely to cause harm within any of the six categories listed;
d) that likely harm reaches a sufficient level of seriousness to justify measures to restrict its dissemination or to remove it, or its author, from the platform;
e) for the purpose of recording incidents of disinformation, the statement was made with an intention to deceive.

While harm is defined with reference to Australia, this does not limit much the scope of the platform provider's responsibilities. If the false statement is, for example, that Joseph Biden's 2020 presidential election win in the USA was procured by voting fraud, this will not harm "the integrity of Australian democratic processes". However, many of the other categories of harm have a universal character. When it comes to climate change, every false statement that could be said to harm the global environment could also be said to harm the Australian environment. Such is true also in relation to health. The same universality applies to hatred expressed towards any group listed in the definition which is represented amongst the Australian population.

So the obligation on digital platform providers first to identify 'misinformation' or 'disinformation', then to 'record' it, and then to provide an estimate of its 'prevalence', presumably as a percentage of all communications on the platform, is really very onerous. It requires the platform provider to have a

[2] Commonwealth of Australia *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 Guidance Note* (June 2023) https://www.infrastructure.gov.au/sites/default/files/documents/communications-legislation-amendment-combatting-misinformation-and-disinformation-bill-2023-guidance-note-june2023_2.pdf, 9 (Guidance Note).

way of scrutinising every communication to see if it satisfies the criteria listed above, and if so, whether it should be recorded as 'misinformation' or 'disinformation'.

How will it do this? We are not technical experts, and so are hesitant to offer an opinion; but it is likely that it will be achieved by automation. The incentive will be to over-identify, censor and exclude from the platform as default positions. There might be rights of appeal to a human decision-maker, but this is likely to depend upon the willingness of the platform to incur that expense, the volume of appeals and the quality of human decision-making. Such is the wide scope of the legislation, that the automated triggers for censorship and exclusion are likely to involve words or phrases that might, in the view of the writer of the algorithmic code, be the kind of communication that *might* need to be recorded for Australian regulatory purposes. There is no proposal that providers should identify the means by which such processes will be effected, or the content that is determined to be 'misinformation' or disinformation' and thus removed from public deliberation. The public will remain completely ignorant of the fact that these determinations have been made. They will be ignorant of the content that has been removed.

What harms could the proposed regulation of misinformation cause?

The serious objections to this have already been stated well by numerous commentators. It is claimed that 'ACMA would have no role in determining truthfulness' of content.[3] Ironically, this claim is itself misleading. The entire regime pivots upon definitional sub-sections 7(1) and (2), which both require digital platform providers to discern content that is 'false'. The digital platforms need to be able to identify, with a precision sufficient to satisfy the regulators, what communications purport to be factual, which of those purported facts are not facts at all, that is, they are false, and whether the false statement falls within one of the relevant categories of harm. If digital platform providers fail to do so, ACMA may issue directions and settle industry codes that provide directions as to what is 'false, misleading and deceptive'. As Gibbs CJ has recognised, there is 'considerable difficulty' in discerning what is 'misleading and deceptive'.[4]

Necessarily therefore, on a whole raft of matters potentially encompassed by the legislation, the digital platform has to determine what is true and what is not. Worse, its own judgment on this is not sufficient. The regulator, led by government-appointed people, may have its own views on what is true or false and so the digital platform either has to guess what view the regulator will take on the truth or otherwise of a matter, or ask its opinion. It may indeed be told what the regulator considers to be untrue, misleading and seriously harmful. Actually, in the course of time, the digital platform provider probably *will* be told by the regulator what kinds of false statement to censor, because this obviates the need to guess. The potential for conflicts of interest, abuse of power and censorship of 'inconvenient truths' is enormous.

[3] Commonwealth of Australia *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023—Fact sheet* (June 2023) https://www.infrastructure.gov.au/sites/default/files/documents/communications-legislation-amendment-combatting-misinformation-and-disinformation-bill-2023-factsheet-june2023.pdf 9 (Fact Sheet).
[4] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197 (Gibbs CJ).

To take one contemporary example, there is huge controversy in Australia and elsewhere, about some of the claims of those associated with the transgender movement. We would consider a lot of these claims to be verifiably false, for example, that there are multiple genders, that it is possible to change sex, that gender identity is somehow innate and awaits a child's discovery, that there is some kind of objective reality to being 'non-binary' other than as a descriptor of those who have intersex conditions, and a range of other purported facts. When it comes to the controversies about medicalisation of children and young people who experience gender incongruence, another purported fact is that puberty blockers are completely safe and reversible. Another is that if children and teenagers are not given 'gender-affirming care' they are likely to try to kill themselves.

All of these propositions, or purported facts, have been debunked by scientists and medical experts of great distinction. None are supported by the current state of the research on these matters. Some of these ideas at least, are reasonably likely to cause serious harm to the health of Australians, and are in fact causing harm.

However, these are very fashionable ideas, and they continue to be disseminated by organisations associated with, or funded by, the Australian government (directly or through grants to the States). Contrary views on any or all of these matters are regularly denounced as 'transphobic' or 'anti-trans'.

People have lost their jobs for asserting basic scientific truths. People of faith are amongst those whose views have already been censored, or who have experienced adverse consequences in the course of their employment because they have resisted such harmful ideas.

Activists will no doubt lobby the digital platforms to drive out such 'misinformation' on the basis that it is promoting 'hate', as they have been doing in the last few years. The proposed legislation will give them new ammunition. We note in this respect that one of the categories in the definition of harm is 'gender' (not 'sex'). 'Gender' is not defined in the Bill and will most likely to be understood to encompass gender identity, particularly for those who have registered a change of gender under the liberal 'self-id' laws in a number of States.

We have absolutely no confidence that if this legislation is passed, any of the false and harmful communications of those who promote unscientific ideas about gender identity or matters related to the treatment of gender incongruence will be identified as either 'misinformation' or 'disinformation'. However, the experience of the last few years across the western world would give reasonable cause for concern that statements of those who assert basic scientific truths, or who disseminate information about the latest research findings on such matters, will be censored.

> However, our concerns are not just limited to questions of contested scientific fact, they also extend to the proposal's impact upon the teaching of basic religious truths. Take, for example, the following orthodox statement made by a Christian minister on social media:

> Jesus said "I am the way and the truth and the life. No one comes to the Father except through me".[5] This is a claim to absolute truth with eternal consequence. However, God is a God of love and "desires that none should perish."[6]

Because there is no specific exemption for religious speech, to escape ACMA's regulatory powers the Christian Minister would need to satisfy the threshold test that his or her claim is not 'false, misleading or deceptive'. Evidencing or determining the truthfulness of such a claim in a court of law is beyond the wit and capability of any mortal.

If the Minister cannot establish the truthfulness of their claim, the Minister must then establish that their comment did not inflict 'serious harm'. The test required of a decision-maker under the proposed legislation is whether the Minister's statement 'is reasonably likely to cause or contribute to serious harm.' There are two elements to the definition of 'harm' that may be relevant to the Minister's statement. The first is 'hatred against a group in Australian society on the basis of … gender, sexual orientation [or] religion'. Claims to exclusive truth with eternal consequence are often asserted to be 'hateful' in contemporary Australia. The second element is 'harm to the health of Australians'. It is frequently claimed that exclusive claims to eternal truth can harm psychological health. We are provided with no certainty as to whether the Minister's assertion of traditional religious truth would successively run the gauntlet of ACMA's power to compel the clandestine disappearance of claims to truth.

The limited scope of the educational exemption

Some speech will be protected by the definition of 'excluded content for misinformation purposes" because it covers "content produced by or for an educational institution". However, it doesn't protect content disseminated for an educational purpose or published in scientific journals by people who are not employed by an educational institution. The latter include, for example, practising clinicians who do not hold a university appointment, and staff of pure research institutions. Satire is better protected under this legislation than knowledge.

At the very least, this part of the exclusion ought to be drafted as broadly as other similar clauses, protecting, for example, "any statement…made…for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest" (s.18D, *Racial Discrimination Act 1975*).

The uncertain scope of the professional news exemption

As the Guidance Note accompanying the legislation clarifies: 'Professional news content will not be within the scope of the new powers.'[7] However, there is an important proviso to this exception. To be out of scope, a news outlet must establish to the ACMA that it **'**has editorial independence from the subjects of the news source's news coverage.'[8] Precisely what is required to establish to the satisfaction

[5] *The Holy Bible: New International Version*, (Biblica, 2011) John 14:6.
[6] Ibid 2 Peter 3:9.
[7] Guidance Note 12.
[8] Proposed section 2, definition of 'professional news content'.

of the ACMA that a news outlet is 'independent' is not clarified. If a masthead or other news outlet does not satisfy this test, it will be subject to the full range of ACMA's powers under the proposed regime. Again, this proposes the conferral of unprecedented governmental power over freedom of speech in this country.

But doesn't the legislation provide support for voluntary codes of conduct?

The fact sheet accompanying this Bill presents it as giving the Australian Communications and Media Authority (ACMA) reserve powers to act, if industry efforts in regard to misinformation and disinformation are inadequate. The first line of regulation is to enforce a 'voluntary' code of practice developed with the industry. So arguably the risks associated with the over-identification of potential 'misinformation' are present, whether or not the legislation is enacted.

This is true to some extent, but the legislation adds two new dimensions. First, it specifies what should be considered misinformation and what is excluded. So the code of practice will be greatly shaped by the legislative requirements. If voluntary regulation proves unsatisfactory in the eyes of the Government, ACMA will write its own industry standard, and that is the explicit threat that the legislation will contain. This power to develop an 'enforceable standard' is described as 'the highest level of regulatory action in the regulatory framework.'[9] An enforceable standard is 'a determination written by the ACMA that would require digital platform providers to combat misinformation and disinformation on their services' 'in the event 'previous efforts through a code had not been effective, or a code was not developed, or otherwise in urgent and exceptional circumstances'.[10] Secondly, the legislation will give ACMA the most draconian powers to enforce the legislation. These provide the ACMA an ability to issue formal warnings, infringement notices and remedial directions and to obtain injunctive relief. Civil and criminal penalties may be incurred for non-compliance with requirements posed by the ACMA. That will act as a strong incentive to digital platforms to err on the side of caution, greatly over-identifying and over-excluding.

The ACMA's powers follow from its adoption of an enforceable industry code or standard under Part 3 of the Bill, which it may adopt where it 'is satisfied that it is necessary or convenient'. The boundaries of what are 'necessary' or 'convenient' are undefined and, as noted below, are not clearly subject to rights of appeal. In light of these extreme powers, the claim that it is not 'intended that these powers will be used to remove individual pieces of content on a platform' is misleading.[11] The proposed powers do permit the ACMA to issue directives to require the removal of individual content. However, whether the ACMA exercises that power or not, individual content will be removed as a result of its broad powers to require the adoption of industry codes as digital service providers give effect to those codes in respect of individual content.

The need to protect religious speech

[9] Fact Sheet 8.
[10] Fact Sheet 7.
[11] Guidance Note 7.

The Bill is clearly inconsistent with the protections to religious speech under international law. Article 18 of the *International Covenant on Civil and Political Rights 1966* (ICCPR) states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Australia holds a distinguished place in the history of the adoption of Article 18(2), one that is relevant to the terms of the Bill. During the debate in 1952 the Australian delegate wanted it clarified that 'that the expression "coercion" would not include persuasion or appeals to conscience', making it abundantly clear that such matters would be protected by Article 18.[12] Over seventy years later it is upon that very freedom that the Australian Government now proposes to impose unprecedented and draconian powers.

Article 6(d) of the United Nations General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* states that 'the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms: … (d) To write, issue and disseminate relevant publications in these areas'.[13] The Religious Declaration has been relied upon by the United Nations Human Rights Committee in interpreting the scope of actions protected by Article 18 of the ICCPR. In *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka* the Committee observed:

> that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.[14]

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[12] E/CN.4/SR.319 (1952), 7 (Australia) cited in Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 504.
[13] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, (25 November 1981) ('Religious Declaration').
[14] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005) [7.2].

Relevantly, Article 19 of the ICCPR provides the right to freedom of opinion and sets out the grounds on which that right may be limited:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    a. For respect of the rights or reputations of others;
    b. For the protection of national security or of public order (ordre public), or of public health or morals.

In its General Comment on Article 19 the United Nations Human Rights Committee states: 'In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.'[15] The Government has not offered any justifications for the very broad ranging powers that it proposes within the Bill which are commensurate with the standards expected under Article 19.

In light of these protections, Freedom for Faith would like to see robust protection for speech on matters of religious belief, including in relation to the norms of conduct that the great world religions require of adherents. It is surprising that content produced in good faith for the purposes of entertainment, parody or satire is protected but not content produced by religious institutions in relation to religious matters. Some statements of fact in relation to religious matters may cause offence – for example, what the Bible or Koran says about an issue. As noted above, so elastic has the definition of 'hate speech' become in certain quarters that even factual statements about what holy writings teach can be denounced by those with different views on the matter.

However much people may disagree on matters of faith or conduct, censorship of certain views will be to the detriment of the society as a whole and breach Australia's international commitments to protect freedom of religion.

While the Bill provides an exception to entertainment, parody or satire undertaken in good faith we are of the view that a good faith requirement should be inapplicable to religious statements. That position is adopted in light of the extraordinarily broad reach of the Bill and the dramatic subjection of freedom of religion to State discretion that it proposes.

Our concern is that the imprecise 'good faith' test offers an exceedingly insecure basis on which to rest such a foundational and important freedom as religious conscience. The courts have varied significantly in their understanding of those actions that are performed in 'good faith'. For example, Gleeson CJ and French J have both recognised that the application of the 'reasonableness' and 'good faith' tests in the analogous domain of vilification law (analogous because it also restricts freedom of

[15] United Nations Human Rights Committee, General Comment 34, [50]-[51].

speech) can be subject to disagreement by reasonable minds. In *Bropho v Human Rights & Equal Opportunity Commission* ('*Bropho*') French J recognised the vagaries of the good faith test when his Honour said (with reference to s 18D of the *Racial Discrimination Act 1975*):

> … the judgment which the Court is called upon to make in deciding whether an act falls within s 18D has the character of judicial opinion and assessment in the application of legal standards of ill-defined content. In difficult or borderline cases judicial opinions may differ.[16]

Similarly, in declining the appeal from the Federal Court, Gleeson CJ stated '[t]he issue of whether the conduct in question in this case was reasonable and in good faith involved a matter of judgement on which minds might differ.'[17] Religious institutions should not be subject to such an indeterminate test in order to be exempt from the Bill's regime.

The extraordinary power to censor religious teaching unfettered by any real public scrutiny leads us to conclude that the implications for freedom of religion in this country are too great to permit that courts should hold fiat over online religious teaching according to such an imprecise measure. The exception in the Bill should be modelled upon current section 37(1)(d) of the *Sex Discrimination Act 1984* (Cth), which applies currently to religious statements that would otherwise be discriminatory under that Act. Note also that, appropriately, that exception does not apply a 'good faith' requirement.

Moreover, to apply a 'good faith' requirement to online religious statements would introduce a double standard, with the ACMA regime adopting a more restrictive limitation for statements made online than that permitted under the *Sex Discrimination Act 1984.* The exception adopted under the Bill should also take the benefit of the recent extensive consultation processes on the Religious Discrimination Bill, whose exemptions were modelled upon, but contained some modifications to the equivalent phraseology of section 37. Bringing these two threads together, the exemption could be stated as follows:

> Nothing in this Act affects any act or practice of a body established for religious purposes, being an act or practice that is in accordance with the doctrines, tenets or beliefs of that religion or is to avoid injury to the religious susceptibilities of adherents of that religion.

The freedom of political communication

It is also important that we clarify that, while the proposed regime requires that the ACMA must have regard to the freedom of political communication, that freedom itself will not be sufficient to protect religious speech purportedly regulated by the regime. Commencing with two landmark cases in 1992, the High Court has recognised that, given the Australian Constitution establishes a system of representative government, it necessarily implies a freedom of political communication in respect of matters such as the policies of those seeking election to the Federal Parliament. This freedom 'enables

[16] *Bropho v Human Rights & Equal Opportunity Commission* ('*Bropho*') [2004] FCAFC 16 (6 February 2004) [76] (French J).
[17] *Bropho v Human Rights & Equal Opportunity Commission* HCA Transcript 9 (4 February 2005) (Gleeson CJ).

the people to exercise a free and informed choice as electors'.[18] In the context of this submission it is sufficient to make the point that the scope of the freedom is limited. As Williams and Hume argue, it does not appear to extend to non-political communication and non-federal communications concerning discrete state issues.[19] As such, the implied freedom, by itself, will not provide sufficient protection for religious speech against the ACMA's proposed powers.

Transparency and Appeal Rights are Not Guaranteed

Finally, we also note that the Bill does not *guarantee* a right of appeal against any decision made by ACMA. New proposed subsection 204(4A) of the *Broadcasting Services Act 1992* (Cth) delegates the decision as to whether a matter may be subject to appeal to the executive by promulgation of Regulation. The ability to limit the grounds of appeal should require direct Parliamentary endorsement.

Further, as noted above, the regime does not permit the public to have any access to information on what records have been withheld from public consideration and what has been considered to be mis or disinformation. The censorship exercised at the behest of the ACMA will go unpoliced out of the public's view. The public will simply be unaware of the content that has been removed. The appeal regime does not clarify that members of the public who have been affected by a decision of a provider to remove content under the regime have rights of appeal against that decision.

Furthermore, as it is not clarified, presumably the only persons who are to be given appeal rights against a decision of the ACMA to require a code are the providers regulated by that code, being the entities to whom the ACMA's decision directly relates. It is not clear that such providers will share the concerns of religious institutions or religious believers who may object to the code. It is not clear that they will offer any objection to requirements that impose restrictions on religious speech.

Further, the requirements for the registration of a code by ACMA listed at proposed section 37 of the Bill do not require that providers offer rights of appeal to members of the public affected by decisions taken under that code once registered. Consequently, it is not at all clear that there are any appeal rights afforded to religious institutions or believers against a decision that has the effect of imposing limitations on the freedom of religious speech, whether that decision is made by the ACMA to impose a code, or by a provider to remove online content.

[18] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570.
[19] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 184.

Conclusion

There is a huge appetite for censorship among those who believe that certain ideas or 'facts' should not be the subject of public debate. This legislation will provide large doses of steroids to those who would like to increase the level of censorship in Australia.

We do not want it to be thought that if there is better protection for freedom of religious speech, Freedom for Faith will support the enactment of this legislation. We oppose it on principle. However, if the Government decides to persist with this Bill despite the huge opposition it has already generated, we seek at least the modest protections proposed.

We thank you for the opportunity to make this submission,

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