



24 May 2024

Committee Secretary

Joint Standing Committee on Electoral Matters

Dear Secretary,

Submission to the Joint Standing Committee on Electoral Matters (JSCEM) inquiry into civics education, engagement, and participation in Australia

Thank you for the opportunity to make a submission to the Joint Standing Committee on Electoral Matters (JSCEM) inquiry into civics education, engagement, and participation in Australia. I note that the inquiry focuses on a range of issues. I make this submission in my capacity as a member of the Gilbert + Tobin Centre of Public Law based at UNSW Sydney. My research connects media law, human rights and international law. I direct a new project for the Centre on freedom of expression, social media and online speech. I will focus these submissions on the following issues raised by the terms of reference:

- the vast array of informal mechanisms through which Australians seek and receive information about Australia's democracy, electoral events, and voting; and how governments and the community might leverage these mechanisms to improve the quality of information and help Australians be better informed about, and better participate in, the electoral system;
- the mechanisms available to assist voters in understanding the legitimacy of information about electoral matters; the impact of artificial intelligence, foreign interference, social media and mis- and disinformation; and how governments and the community can prevent or limit inaccurate or false information influencing electoral outcomes.

General Reflections

I support the strengthening of civics education and measures to improve engagement and participation in public life and specifically in the electoral process. I note that civics education takes place within a broader informational ecosystem involving both traditional and social media. Measures to protect media freedom and journalism in the public interest will contribute then to such education. The traditional media have been relied upon to provide political and electoral information to citizens so that they may be adequately informed and able to make decisions about how to cast their votes in elections and referenda that are grounded in accuracy and also broad and balanced exposure to the various policies and alternatives available. This is a matter of classic democratic theory and has placed the media in a role of trusted messenger, information source, forum for debate, and also watchdog as policies and positions are tested by journalists and the electorate more broadly.¹

This interrelationship between media and politics is both fundamental to how our democratic system works, and yet also increasingly under strain. There are various tensions in play, including concern that our politics and direct forms of political participation have become overly mediated. But in the digital era where the traditional media and its economic model have been disrupted, perhaps the greatest factor is the turn away from traditional media sources of information and the move online and to alternative forms of social media as sources of news and information.

Initially these changes were welcomed and many felt that social media in the web 2.0 era would encourage further civic participation and generate new spaces for rational deliberation and reflection that would revive our tired democracies. There are undoubtedly some benefits in the diversification of media, in the ability to connect and participate with others in the electorate more directly, and even for traditional media which has had to engage more directly with its audiences through social media platforms. However, more recently the harms caused by social media, including in terms of mis- and disinformation, have been made more apparent.² Increasing reliance on social media for news and electoral information has made our democratic system more vulnerable to manipulation and in the process has also damaged trust in media (both old and new) as a source of information. Key examples include the Cambridge Analytica scandal, interference in elections in the US and the Brexit referendum in the UK. Indeed, Australia has also had its own experiences of the

¹ See further David Rolph et al, *Media Law: Cases, Materials and Commentary*, Third Edition (Oxford University Press, 2022) chapter 2 on freedom of expression.

² See for example pioneering work on computational propaganda and its intersection with social media: Samuel C Woolley and Philip N Howard (eds), *Computational Propaganda: Political Parties, Politicians, and Political Manipulation on Social Media* (Oxford University Press, 2019). A more contemporary study points to new methods of analysing what is occurring: Daniel Angus, Axel Bruns, Edward Hurcombe, Stephen Harrington and Xue Ying (Jane) Tan, 'Computational Communication Methods for Examining Problematic News-Sharing Practices on Facebook at Scale' (2023) 9(3) *Social Media + Society* 1-18.

effects of social media on information with the Voice Referendum held in 2023.³ Pushback by platforms such as Meta in relation to efforts to better distribute revenue from news content through a News Media Bargaining Code illustrate the dangers of overreliance on social media for news.⁴

Social Media and Mis- and Disinformation

In response to growing recognition of the potential for mis- and disinformation in social media environments, there is now a push to better regulate digital platforms. I welcome new thinking on how best to regulate digital platforms, but this is not an easy task. It is further complicated by the fact that the platforms are for-profit global private actors, often based in different jurisdictions and lacking the interest or incentive to fulfill the functional democratic watchdog role the media has sometimes played.⁵

In response to increasing regulatory and consumer pressure, some of these platforms have become more engaged with and transparent about their approaches to content moderation.⁶ The Meta Oversight Board is a leading example and much can be learned from its efforts to better calibrate its methods and to align them with international human rights standards. Some of the cases it has considered involve civic and electoral settings and the Oversight Board has recently released a useful report charting some of the challenges involved and its recommendations to Meta.⁷ Key reflections include the need for greater transparency and for basic global standards grounded in human rights law, for better protections for journalists, in guarding against use of laws to suppress speech and to censor, and also highlighting the need to focus energies and scale efforts where real world harms are apparent. But reliance on the goodwill of private actors as regulators in the public interest provides no guarantee for effective regulation, although it is clearly an important ingredient. One can, for example, contrast the self-regulatory evolution of Meta here with the approach of X. There are also concerns about the connections of some platforms such as TikTok to states. But even where platforms like Meta develop their

³ Linton Besser, 'The Voice campaign was infected with disinformation. Who's in charge of inoculating Australians against lies?', *ABC News*, 17 October 2023, available at: <<https://www.abc.net.au/news/2023-10-17/voice-referendum-infected-disinformation-australians-lies/102981108>>.

⁴ Josh Taylor, 'Meta says Facebook cannot solve media industry's "issues" as it defends ending payments for news in Australia', *The Guardian*, 14 March 2024, available at: <<https://www.theguardian.com/media/2024/mar/14/meta-facebook-news-media-bargaining-code>>.

⁵ See further Daniel Joyce, *Informed Publics, Media and International Law* (Hart Publishing, 2020) pp 110-114. In the Australian context see also, ACCC, 'Digital Platforms Inquiry – Final Report', 26 July 2019, available at: <<https://www.accc.gov.au/about-us/publications/digital-platforms-inquiry-final-report>>.

⁶ For a classic study of the role played by platforms in content moderation see Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press, 2018).

⁷ The Oversight Board, 'Content Moderation in a Historic Election Year: Key Lessons for Industry', May 2024, available at: <<https://www.oversightboard.com/news/content-moderation-in-a-historic-election-year-key-lessons-for-industry/>>.

processes, problems persist.⁸ Ultimately it is my view that overreliance on for-profit private actors to enforce and self-regulate is a part of the problem here.

There are clear risks of both over- and under-regulation. An enduring concern is free speech-related, especially if the government takes too heavy handed an approach to regulating mis- and disinformation. There are many concerning comparative examples of such laws being used to censor and to suppress dissent, critique and political speech.⁹ It is helpful here to draw on comparative and international approaches to addressing mis- and disinformation.¹⁰ There is a new Australian resource, the International Digital Policy Observatory, that is useful too.¹¹ Indeed the comparative picture emerging is mixed, but there are clearly efforts underway to better regulate platforms and to encourage more transparency around their processes of content moderation. AI developments are fuelling some of this and Australia can benefit from considering emerging European efforts to address AI and digital platforms, including the recent EU *Digital Services Act*.¹²

As well as addressing new technologies and contexts for the manipulation of information, there are some older problems that persist in the Australian context. As is well known, Australia does not have a bill of rights and this makes efforts to address mis- and disinformation particularly challenging. There are international human rights law standards regarding free speech, propaganda and offensive speech which assist, but in addition we need better conceptual tools for regulators and the courts in the form of a bill of rights. Without such a framework criticisms of government 'censorship' are hard to counter. Fashionable risk-based approaches to regulation of harms go some way to filling the regulatory void, but continue to largely rely on private forms of self-regulation and interpretation of those harms.¹³ If there were clearer constitutional protections for speech in place then the Commonwealth and citizens

⁸ Hannah Ellis-Petersen, 'Revealed: Meta approved political ads in India that incited violence', *The Guardian*, 20 May 2024, available at: <<https://www.theguardian.com/world/article/2024/may/20/revealed-meta-approved-political-ads-in-india-that-incited-violence>>.

⁹ UN Special Rapporteur on Freedom of Opinion and Expression, 'Disinformation and freedom of opinion and expression - Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', A/HRC/47/25, 13 April 2021, available at: <<https://www.ohchr.org/en/documents/thematic-reports/ahrc4725-disinformation-and-freedom-opinion-and-expression-report>>.

¹⁰ See for example, the Oxford Process, 'The Oxford Statement on International Law Protections in Cyberspace: The Regulation of Information Operations and Activities', available at: <<https://www.elac.ox.ac.uk/the-oxford-process/the-statements-overview/the-oxford-statement-on-the-regulation-of-information-operations-and-activities/>>; see also the Oxford Process, 'The Oxford Statement on International Law Protections Against Foreign Electoral Interference Through Digital Means', available at: <<https://www.elac.ox.ac.uk/the-oxford-process/the-statements-overview/the-oxford-statement-on-international-law-protections-against-foreign-electoral-interference/>>.

¹¹ Available at: <<https://www.idpo.org.au/>>.

¹² See further: <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en>. It may be useful also to consider emerging resources here providing analysis of the impact and utility of such developments, including those compiled by Martin Husovec of LSE Law School: <<https://husovec.eu/dsa/>>.

¹³ See, for example, criticisms voiced of developing regulation from industry codes in Josh Taylor, 'Thinktank warns Australian misinformation laws should not be based on voluntary industry code', *The Guardian*, 3 May 2024, available at: <<https://www.theguardian.com/australia-news/article/2024/may/03/thinktank-warns-australian-misinformation-laws-should-not-be-based-on-voluntary-industry-code>>.

could have greater confidence in legislative proposals to address mis- and disinformation.

I support efforts to develop legislation such as the *Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill* (2023), but without a bill of rights and wider protection for media freedom and pluralism, there is the risk that such efforts will stall in the face of anxieties regarding state control of speech. Here it must also be noted that without protection for media freedom the broader media law landscape remains fragmented. There is also room to better equip and co-ordinate existing regulators, to develop social media literacy and education strategies, and to properly fund public service broadcasting in traditional contexts and online.

There is a clear need to address the absence of regulation of social media platforms in Australia. This needs to be developed with an eye to evolving comparative and international norms and practices, grounded in a clearer domestic constitutional framework and in international human rights law.¹⁴

Yours sincerely,

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[Redacted signature]

¹⁴ The UN Special Rapporteur on Freedom of Opinion and Expression has joined other mandate holders in an important 'Joint declaration on media freedom and democracy', 2 May 2023, available at: <<https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression>>.