THE UNIVERSITY OF QUEENSLAND
AUSTRALIA

School of Political Science and International Studies
CRICOS PROVIDER NUMBER 00025B

Professor Katharine Gelber
Head of School
Professor of Politics & Public Policy

Digital Industry Group Inc.
hello@digi.org.au

30 October 2020

Submission to the Consultation on Disinformation Industry Code

Thank you for the opportunity to make a submission to the consultation on the Disinformation Industry Code.

I am an academic with over 20 years' expertise in freedom of speech and the regulation of harmful, and allegedly harmful, speech. I have published widely in this field, and worked with organisations including the Australian Human Rights Commission, and Facebook.

I would like to comment on three matters:

1. Implications for the Draft Code from the lack of a statutory human rights framework in Australian federal law
2. The Draft Code's treatment of 'harm'
3. Protection of academic research

1. Implications for the Draft Code from the lack of a statutory human rights framework in Australian federal law

The Draft Code draws heavily from the EU Code of Practice on Disinformation. There is much that Australia can learn from the EU Code. However, there is a distinctive feature of the operation of the EU Code that is absent in Australia, and that is the existence of the European Convention on Human Rights, and its enforceability both through domestic integration of the European Convention in national law (eg Human Rights Act 1998 UK) and through the jurisprudence and authority of the European Court of Human Rights. This context ensures that the protection of human rights occurs through mechanisms well outside the remit of the EU Code, and that the Code was drafted in this knowledge.

Australia has no comparable regional or federal statutory framework for the protection of human rights. While in Australia we have a Parliamentary Joint Committee on Human Rights, its role is to highlight potential incompatibilities between proposed legislation and human rights and to report on such incompatibilities to parliament. There is no enforceability mechanism for an exogenous standard of human rights protection in the Australian legal framework.

In this context, it is important for the Draft Code to recognise the inherent, inalienable and universal nature of human rights including the right to freedom of speech, subject to lawful and reasonable restrictions in the interests of protecting other human rights. A good model for this would be the preamble to the Victorian *Charter of Human Rights and Responsibilities Act 2006*, which reads (in relevant part) as follows:

This Charter is founded on the following principles —

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others.

Recommendation 1: That the Draft Code incorporate express recognition of the importance of human rights, and recognition of commensurate responsibilities to respect the rights of others.

---

2. The Draft Code's treatment of 'harm'

I recognise that the Draft Code draws its definition of harm (in clause 3.3) from the EU Code. This clause defines harm in the following way:

> Harm means an imminent and serious threat to:
> A) democratic political and policymaking processes; or
> B) public goods such as the protection of citizens' health, the environment or security.

Part A of this definition focusses on broader harms to democracy and to the 'state', the most powerful entity in a democratic polity. Arguably, the state should tolerate quite high levels of dissent and disagreement before speech is identified as being capable of actually harming. This applies both during periods of elections and referenda, and at other times as well. Core to democratic governing is the principle that citizens need to become informed to be able to make choices about how to live well, and what to believe. This requires a high level of information to be made available, and for high levels of peaceful, albeit caustic, dissent to be tolerated. This was recognised by the High Court of Australia in in *Coleman v Power* (2004) 220 CLR 1. The understanding of the types of communication that might 'harm' the state, or democracy, therefore needs to be narrowly constructed so as not to result in government regulatory overreach.

Part B of this definition includes some of these broader harms as well, specifically in relation to 'security'. Yet the term 'security' is broad and usually poorly understood. Moreover, there is considerable evidence that governments including Australia's tend to overreach in restricting human rights and freedom of speech in the context of the invocation of 'national security' (see, eg, Gelber 2016 *Free Speech After 9/11*, Oxford University Press). Therefore, the idea of 'security' also needs to be treated with caution so as not to result in government regulatory overreach.

Importantly, Part B also includes a different set of targets by focussing on ordinary citizens' health. Further, it omits to include those citizens who are vulnerable to harm due to their membership of targeted, marginalised, vulnerable groups (eg those who are targeted by hate speech). Yet ordinary citizens are capable of being harmed by speech in both constitutive and causal ways by speech, and ought not to be expected to tolerate those harms in the same way as the state ought to tolerate a high level of dissent. The two phenomena ought not to be confused: one is targeted at the state, the other at vulnerable individuals and communities.

I therefore recommend that the definition of harm recognise more explicitly than it currently does, that harm may occur on the one hand to state mechanisms such as elections, democratic governing, and that harm may occur on the other hand to vulnerable individuals and communities. In operationalising this distinction, there should be an assumption of a high threshold for regulatory intervention in the case of the former, and a harm-based threshold for regulatory intervention for the latter that draws on the extensive existing scholarship on how speech can harm the vulnerable (see eg Gelber, K 2019'Differentiating Hate Speech: A Systemic Discrimination Approach', *Critical Review of International Social and Political Philosophy*, online 4 February, https://doi.org/10.1080/13698230.2019.1576006).

Recommendation 2: Amend the definition of harm to differentiate between harms to the state on the one hand, and harms to vulnerable individuals and communities on the other.

---

3. Protection of academic research

It would be helpful if the Draft Code were to be explicit about its protection of the need for academic research. This would be easily achievable in Objective 5 (Strengthen Public Understanding of Disinformation through Support of Strategic Research), Outcome 5. Clause 5.20 could be amended to incorporate an explicit mention of academic research, to ensure that platforms recognise its importance. Clause 5.20 could be amended to state that signatories commit not to prohibit or discourage academic research, and other good faith research, into Disinformation on their platforms.

Recommendation 3: Amend clause 5.20 to state: Signatories commit not to prohibit or discourage academic research, and other good faith research, into Disinformation on their platforms.

Yours sincerely

K Gelber

Professor Katharine Gelber