

# The law is closing in on Facebook and the 'digital gangsters'

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For social media and search engines, the law is back in town.

Prompted by privacy invasions, the spread of misinformation, a crisis in

news funding and potential interference in elections, regulators in several countries now propose a range of interventions to curb the power of [digital platforms](#).

A newly published UK inquiry is part of this building global momentum.

Shortly after Valentine's Day, a committee of the British House of Commons [published its final report](#) into disinformation and "fake news". It was explicitly directed at Facebook CEO Mark Zuckerberg, and it was less a love letter than a challenge to a duel.

The report found: "Companies like Facebook should not be allowed to behave like 'digital gangsters' in the online world, considering themselves to be ahead of and beyond the law."

The committee was particularly vexed by Zuckerberg himself, concluding: "By choosing not to appear before the Committee ... Mark Zuckerberg has shown contempt."

Its far-reaching recommendations included giving the UK's Information Commissioner greater capacity to be "... an effective 'sheriff in the Wild West of the Internet'."

## **The law is back in town**

In December 2018, the Australian Competition and Consumer Commission ([ACCC](#)) handed down [its preliminary report](#) into the impact of digital platforms. It tabled a series of bold proposals.

Then, on February 12, the Cairncross Review – an independent analysis led by UK economist and journalist Frances Cairncross – handed down its report, [A Sustainable Future for Journalism](#).

Referring to sustainability of the production and distribution of high-quality journalism, "Public intervention may be the only remedy," wrote Cairncross. "The future of a healthy democracy depends on it."

And a week later, the Digital, Culture, Media and Sport Committee of the House of Commons issued its challenge in its final report on disinformation and "fake news": "The big tech companies must not be allowed to expand exponentially, without constraint or proper regulatory oversight ... only governments and the law are powerful enough to contain them."

How do the responses of the three reports compare?

## **ACCC inquiry broadest in scope**

First, it's important to note that the scope of these three inquiries varied significantly.

The ongoing ACCC inquiry, [billed as a world-first](#) and set to hand down its [final report](#) in June, is seeking to assess the impact of digital platforms on media and advertising, with a focus on news.

The Cairncross Review was narrower in intent, addressing "the sustainability of the production and distribution of high quality journalism, and especially the future of the press, in this dramatically changing market."

And the House of Commons committee had a very direct brief to investigate fake news. It then chose to focus on Facebook.

As such, the three inquiries overlap substantially, but the ACCC investigation is unequivocally the broadest in scope.

## **Not just distribution platforms**

However, all three reports land in roughly the same place when it comes to characterising these businesses. They all see digital platforms as more than just conduits of other people's content – and this brings certain responsibilities.

The ACCC says digital intermediaries are "considerably more than mere distributors or pure intermediaries" when it comes to the supply of news and journalism.

The Cairncross Review stresses there is a "fundamental difference" between distributors and content creators.

The House of Commons committee proposes "a new category of tech company" as a legal mechanism for having digital platforms assume liability for harmful content.

## **Need more oversight**

A related important point is that all three reviews recommend that digital platforms are brought more squarely into the legal and regulatory environment.

By this, they don't just mean cross-industry laws that apply to all businesses. There is some of that – for example, adapting competition laws so certain conduct is regulated.

But these inquiries also raise the prospect of specific rules for platforms as part of communications regulation. How they go about this shows the point at which the inquiries diverge.

## News reliability

The ACCC has flagged the need for further work on a platforms code of practice that would bring them into the orbit of the communications [regulator](#), the ACMA.

The platforms would be bound to the code, which would require them to badge content produced under established journalistic standards. It would be the content creators – publishers and broadcasters, not platforms – that would be subject to these standards.

In the UK, Cairncross proposes a collaborative approach under which a new regulator would monitor and report on platforms' initiatives to improve reliability of news – perhaps, in time, moving to specific regulatory obligations.

## Algorithms regulator

In Australia, the ACCC has proposed what others refer to as a new "algorithms regulator". This would look at how ads and news are ranked in search results or placed in news feeds, and whether vertically integrated digital platforms that arrange advertising favour their own services.

The algorithms regulator would monitor, investigate and report on activity, but would rely on referral to other regulators rather than have its own enforcement powers.

Unsurprisingly, the leading digital platforms in Australia [oppose the new algorithms regulator](#). Equally unsurprisingly, [media companies think the proposal doesn't go far enough](#).

For its part, Cairncross does recommend new codes on aspects such as indexing and ranking of content and treatment of advertising. The codes would be overseen by a new regulator but they would be developed by platforms and a move to a statutory code would only occur if they were inadequate.

In contrast to both these reviews, the House of Commons committee's Code of Ethics is concerned with "online harms". Right from the outset, it would be drawn up and enforced by a new regulator in a similar way to Ofcom, the UK communications regulator, enforcing its [Broadcasting Code](#).

It says this would create "a regulatory system for online content that is as effective as that for offline content industries". Its forcefulness on this is matched by its recommendation on algorithms: it says the new regulator should have access to "tech companies' security mechanisms and algorithms, to ensure they are operating responsibly".

Both the ACCC and Cairncross pointedly avoid this level of intervention.

However, the ACCC does raise the prospect of a new digital platforms ombudsman. Apart from delivering 11 preliminary recommendations, the ACCC also specified nine proposed areas for further analysis and assessment. Among these areas, the ACCC suggested the idea of such an ombudsman to deal with complaints about digital platforms from consumers, advertisers, media companies and businesses.

## **Data privacy**

And then there is data privacy.

This is where the ACCC and the House of Commons committee

delivered some of their most significant recommendations. It's also where regulators in other jurisdictions have been turning their attention, often on the understanding that the market power of digital platforms is largely derived from their ability to access user data.

Earlier this month, [Germany's Federal Cartel Office](#) (Bundeskartellamt) found that Facebook could no longer merge a person's data from their Instagram, Facebook and WhatsApp accounts, without their explicit consent.

In Germany, the law has spoken. In Australia and the UK, it's still clearing its throat.

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