

SUBMISSION to the Australian Government, Department of Infrastructure, regarding an exposure draft of the Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

— Gary Shapcott, July 2023

After 40 years of neoliberalism, we know that deregulation, self-regulation, small government and all the rest of the neoliberal ideological package serve simply to allow corporations to pursue profits without regard to the toxic effects of their activities on our society. In the sphere of communications, we know already that industry efforts in regard to misinformation and disinformation are inadequate and will remain so until governments step up and start applying regulation with teeth.

ACMA needs to move immediately to create and enforce an industry standard—with public consultation—and to have the power to request specific content or posts be removed from digital platform services—allowing for public debate in each case under the auspices of an ACMA tribunal.

The Bill in its current form is continued deregulation with regulation held in reserve—for another 40 years?

While in my view the proposed Bill does not go far enough, it nonetheless represents a step in the right direction and should be supported. Critics are already saying it represents an attack on 'free speech'. Here then I direct the bulk of my comments to **a refutation of the view that, in the public sphere, individuals somehow have a 'right' to unrestrained 'freedom of expression' or 'free speech'.**

There is nothing self-evident about such a right; ideas about liberty, freedom, human rights, popular sovereignty and so on are contested concepts. There are those who identify two main strands of theory: liberal and republican. See on YouTube, for a good overview, Quentin Skinner 'On the liberty of republics' <[here](#)> and 'A genealogy of liberty' <[here](#)>. See also 'Freedom with Philip Pettit: conversations with history' <[here](#)>.

We would do well to read or re-read Tocqueville's *Democracy in America*: 'In the United States ... it was never claimed that man in a free country has the right to do whatever he pleases. Indeed, the range of social obligations imposed on him was wider than in other countries'; a kind of freedom realised in mutual obligation. [Tocqueville, A 2004 (c. 1850), *Democracy in America*, trans. A Goldhammer, The Library of America, New York: Vol 1, Part 1, Chap 5, pp. 79-80; see also Vol 1, Part 1, Chap 2, p. 48.]

And read or re-read John Stuart Mill. Mill, in his famous essay *On liberty* (1859), sought to define 'the nature and limits of the power which can be legitimately exercised by society over the individual'. He came up with two maxims: 'the individual is not

accountable to society for his actions, in so far as these concern the interests of no person but himself' but 'for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection'. For Mill there were two kinds of liberty, the liberty that could be exercised by individuals in accordance with his first maxim and, secondly, 'civil or social liberty', the liberty that could be exercised by society in accordance with his second maxim. Mill, like many other Western political thinkers from the 1500s, placed freedom centre stage in his political theory but did not see it as something belonging exclusively to individuals; there was also 'civil or social liberty'. [Mill, J S 1998 (1859), *On liberty and other essays*, ed. John Gray, Oxford University Press: pp. 5, 104]

The republicanism of Philip Pettit is particularly instructive:

"Government inevitably involves interference in the lives of citizens, whether via legislation, punishment, or taxation. ... this interference need not be dominating, however—and need not be inherently inimical to freedom—so long as the people affected by the interference share equally in controlling the form that it takes. Let state interference be guided equally by the citizenry and it will not reflect an alien power or will in their lives. ... [It will be] a regime under which the interference of government is exercised on terms laid down by the people and not at the unlimited discretion of those in power. Such a regime would count in a strict and demanding sense as a democracy. It would live up to the Greek etymology of the word, providing the people, or *demos*, with power, or *kratos*, in relation to their government." [Philip Pettit 2014, *Just freedom: a moral compass for a complex world*, W. W. Norton & Company, New York, p. xx]

Instructive also is the republicanism of Zygmunt Bauman. In our communal search for the common good, Bauman says, favouring republican over liberal democratic theory, we have 'to strike a balance between *the individual's liberty from interference* and *the citizen's right to interfere*', in the end making laws together—with as many people as possible participating in that process—that best reflect the public interest. [Zygmunt Bauman 1999, *In search of politics*, Polity Press, UK, pp. 4, 166]

Let us ask **what exactly is 'free speech'?** 'Free' is an adjective and 'speech' is a noun, so let's look at the noun first. We all mutter to ourselves from time to time but typically speech is an act of communication that involves two or more people engaged alternately as speaker / listener(s), writer / reader(s), sender / receiver(s). It is fundamentally a social phenomenon and best described as conversation, dialogue, discussion, debate, deliberation, and all the kinds of communication that create what is called the public sphere. The question then really is **what makes a free conversation (or debate etc), or a free public sphere, or 'freedom of political communication'** as the High Court of

Australia has put it? I'll use the term 'public debate' below as shorthand for all the relevant categories of communication because we are primarily concerned here with speech that occurs in public rather than in private.

Let's start again, this time with debate as the noun and public debate our focus.

In a public debate, ideally, people listen to others and in turn expect to be listened to. They deliberate on issues not behind closed doors, not secretly, but in full view of one another and of anyone else who cares to see and hear. They encounter alternative perspectives, not just those of like-minded persons within their familiar circle. They learn to articulate their goals and priorities in ways that appeal to others, to sharpen their sense of the realistic options and necessary trade-offs, to abandon support for indefensible positions, and to develop with those with whom they are in dialogue a mutual respect that allows them to coexist and cooperate when they disagree. They ask other people, especially their opponents, exactly what they mean, asking them to spell out, elaborate on, articulate their view. They know when it is appropriate to express an opinion and when it is necessary to defer to experts.

A good public debate is one where all participants have a good understanding of what makes a statement true or false, well-argued or just a series of unfounded assertions, morally right or morally wrong, or in the public interest rather than in the private interests of the few—common ground, in other words, on which communication can proceed. Participants also need to be committed to telling the truth, seeking the truth and finding solutions to problems that affect our common future—a common purpose, in other words, and that being the common good.

In a good public debate, which is what should happen in the political public sphere especially, where so much is at stake, nothing is left to 'common sense', left in that shadowy world of the unsaid where things 'go without saying'. Ideas are teased out, dispersed across numerous attempts at articulation, each person expressing to the other what they think the other is saying as much as expressing their own point of view.

A conversation about politics, in a democratic society, Christopher Lasch tells us, provides the opportunity for people to 'go beyond their circle', '... to mingle on an equal footing with persons from all realms of life, to gain access to larger currents of opinion, and to exercise the rights and duties of citizenship'. [Christopher Lasch 1996, *The revolt of the elites and the betrayal of democracy*, W. W. Norton & Company, New York, p. 58]

To measure the extent to which a public debate embodies freedom, we then have to ask: Who gets to speak and who does not? Who is listened to and who is not? Who is respected and who is not? Who is considered to be our equal and who is considered inferior? Who can be trusted to tell the truth and to seek the truth and who not? Who is

committed to a resolution of the issues at stake and who would rather they not be resolved? To what extent do online communication behaviours depart from the norms of face-to-face communication? To all of these questions we would have to append 'Why?', if we are interested in freeing freedom from its shackles.

Freedom is not a pure substance, easily distilled from its social context and other social values, easily defined as something pure and simple. In our time we now know that granting unfettered 'freedom of speech' to individuals can lead to lies and deception rather than truth and knowledge (contra J S Mill) and injustice rather than justice. A free public debate, I suggest then, is one where everyone (or a good cross-section of everyone) who wants to is able to participate, is respected and listened to, and is committed to telling the truth, seeking the truth and finding solutions to problems that affect our common future.

In reality in Australia, of course, we don't have good public debates and we don't have free public debates.

As Sky Croeser says: "In Australia access to a wide range of political ideas and diverse engagement in political debate is, arguably, significantly undermined by media centralisation and huge cuts to public broadcasting services." [Sky Croeser in 'Thinking beyond 'free speech' in responding to online harassment', Ada New Media, Issue No. 10, Nov 2016, <<https://ad anewmedia.org/>>]

Social inequalities, bigotry and the dead weight of 'common sense' also play a role in limiting whose perspectives are listened to, respected, amplified. Belittling of people based on skin colour, gender, sexual preference or on their simply having unpopular views (think climate scientists or epidemiologists recommending that we wear masks) occurs frequently and effectively silences these people. Online harassment is notorious for this.

Misinformation and disinformation are rife. Sources of 'the truth' are contested: science is considered to be 'opinion', educated opinion is considered to be 'elite' opinion, anything that departs from 'common sense' is met with ridicule rather than inquiry. People don't make the effort to understand issues in depth and instead rely on soundbites, misleading political advertising and other unreliable sources of information, which have been allowed to proliferate under the banner of 'free speech'.

Anything that unjustifiably belittles people and makes them withdraw from the public sphere has to be seen as deleterious to freedom in the public sphere or as an attack on freedom of political communication as the case may be. 'Unjustifiably' can be defined as 'for reasons that can not withstand public scrutiny, i.e reasons like racism, bigotry (religious or not), ignorance, deliberate deception or intimidation intended to suppress

the view of an opponent'. Any social conditions that lead to the exclusion of certain groups of people from the public sphere have to be seen likewise. Any participants in the public sphere who undermine trust in communication in the public sphere through promotion of misinformation or disinformation have also to be seen as corrosive of free public debate, because they muddy the waters and stymie attempts to reach agreement on a way forward, and because they betray our trust in them.

'The market' doesn't tolerate deception because it threatens money-making. ASIC is onto it, to stamp it out, and rightly so. Society should not tolerate deception either, because it threatens our society-making.

In working together to find solutions to the problems of our times, we need to agree to constraints on one another's behaviour, for our common good. In order to exist, freedom needs social conditions that embody appropriate constraints. All successful communication is based on rules, beginning with the rules of the language used to communicate, and extending to the social norms and etiquette—all of which can be seen as constraints—in place to allow people to navigate the world together. Measures that ensure the maintenance and protection of those rules are the foundation stones of freedom, not its enemy. Given the power and reach of the communications media today, civil society is unable to implement such measures; only the state is able to do so.

#### **Other references that I found to be insightful:**

Zaphir and Ellerton sum it up well: "It is possible to have unlimited freedom of expression — just not in a democracy. If someone can say what they want without any regard or consequence, then they've merely reached the top of a dictatorship." [Luke Zaphir & Peter Ellerton, 'Free speech doesn't mean you can say whatever you want, wherever. Here's how to explain this to kids', *The Conversation*, 28 Sep 2021, available <[here](#)>.

Louise Richardson-Self: "What I'd like to do, though, is point out an often invisible element of the "freedom of speech" defence. Specifically, that hate speech privileges certain social groups, and completely unfettered speech – in the context of the West – has a tendency to privilege men. It also privileges heterosexuals, able-bodied people, white people, and secular (or moderately Christian) people, among others. And this sustains hierarchies of oppression. ... To understand the harm of unrestricted speech, we need to understand the workings of inequality in our society today, and (relatedly) have an understanding of the history of subordination and privileging of certain groups." [Louise Richardson-Self, 'Who really benefits from freedom of speech?', *The Conversation*, 8 Mar 2016, available <[here](#)>.

Nesrine Malik, 'The myth of the free speech crisis', *Guardian*, available <[here](#)>.