

The Communications Legislative Amendment (Combating Misinformation and Disinformation) Bill 2023 (“the Bill”).

The fundamental principles of a successful classical liberal democracy which are relevant to this Bill include:

1. The Freedom of Speech, Expression, Thought and Beliefs;
2. The Separation of Legislative, Executive, Judiciary and Journalist roles and bodies;
3. Appropriate Recognition and Treatment of Conflicts of Interest;
4. Transparency;
5. Limited Government Control and Intervention;
6. The Non-Exemption of Government from its own Legislation and Regulations;
7. A well informed people; and
8. Multiple political parties and opponents.

These principles are not only characteristics of a liberal democracy but more importantly sustain, strengthen and indeed safeguard liberal democracies.

This Bill is a direct threat to a Liberal Democracy in that it undermines each of these principles and safeguards.

1. The Principle of Freedom of Speech, Expression, Thought and Beliefs

By allowing the government the right to censor information on social and digital media platforms this Bill presents a clear and present threat to the Principle of Freedom of Speech, Expression, Thought and Beliefs

The United Nations considers this principle to be a fundamental human right of freedom. On whether Australia protects Freedom of Speech, The Australian Human Rights Commission states that “The Australian Constitution does not explicitly protect freedom of expression. However, the High Court has held that an implied freedom of political communication exists as an indispensable part of the system of representative and responsible government created by the Constitution.”

This Bill therefore directly contravenes the United Nation’s Declaration of Human Rights and the implied freedom of political communication in the Australian Constitution as interpreted by the High Court.

Pro-censorship justification to limit or censure the freedom of speech often revolves around the need to rid content calling for violence, threats to life, criminal activities but it is now being extended to protection against perceived threats to democracy and “wrongthink” of its people. Whilst there is justification for censoring content calling for violence, threats to life and criminal activities this argument cannot and should not be extended to censoring certain “misinformation” or “disinformation” for the protection of democracy or its people.

In the first instance, and problematic to the practical operation of this Bill, is the issue of what actually constitutes “misinformation” and “disinformation”? How does one distinguish between misinformation, disinformation, an educated guess, opinion or a fact? What happens when an opinion becomes a fact, or when facts and evidence change as more is known about an issue or when a fact is inconvenient?

The Bill contemplates determining “misinformation” and “disinformation” and limiting the reach of the Bill by reference to that information which causes “harm” and ‘serious harm”. However, the difficulty with this approach is the definition of “harm”. Harm and serious harm are subjective these days and often revolve around “feelings”. The inclusion of “harm” can also be used to justify views or facts as being misinformation or disinformation because it doesn’t agree with one’s ideology or agenda. The wide-reaching nature of this Bill will therefore not be lessened by including the limitation of “serious

harm” given what is defined to be harm but is likely to broaden the definition of Misinformation and Disinformation.

The best way to counter information deemed to be misinformation or disinformation is to provide facts and evidence that prove that information to be false, flawed, illogical or just plain silly rather than to rely on censorship. As lawyer, Justine Quill, opined in his recent article published in The Australian, “The best way to stop mis- and dis-information is to call it out. Let the discussion occur and the truth will prevail”. If the government is convinced that information is mis- or dis- information then let them prove that this is the case by providing facts, evidence and a logical argument.

2. The Separation of Legislative, Executive, Judiciary and Journalist roles and bodies

The separation of the powers and roles of the Legislative, Executive, Judiciary and Journalist “Estate Pillars”, their independence and their strength provides checks and balances in a liberal democracy.

As recently reported in The Australian, Lawyer Justine Quill states that “The Bill proposes enormous power be given to ACMA to force social media companies to take down posts or tweets” and that it is ACMA who “decides what is false and causes serious harm”. Quill concludes that “The govt can appoint ACMA, direct ACMA and sack AMA, which is hardly independent.”

The government as the Legislative and the ACMA as the Executive determining what is mis- and dis-information as contemplated by this Bill contravenes the principle of the separation and independence of the “Estate Pillars”. There is always undoubtedly the risk that the different Estate Pillars work together to the detriment of the people, however their relationship and operation under this Bill increases significantly the risk of collusion. Even where the government claims that ACMA will solely determine misinformation and disinformation can we ever be sure that ACMA doesn’t do the government’s bidding in censoring information not favourable to the government?

Whilst Social Media platforms do not strictly come under the traditional Journalist Estate Pillar, these platforms provide another source of information for the people and have become the 21st Century “Town Hall”. In the United States recent Congressional Hearings and court proceedings in Missouri and Louisiana have exposed the co-operation and collaboration of Social Media and the Government in an example of a “Censorship Industrial Complex” and have shown the extent of the censorship of the people on Social Media. This type of censorship has been shown that it is not limited to the US. Freedom of Information requests by Senator Antic reveal that there was co-operation between the Government and Social Media Platforms in Australia as well. This censorship by the Government and Social Media platforms colluding robbed the people of seeing dissenting views and evidence.

An added incentive for Social Media platforms to conform to government requests has been legislation which protects Social Media from normal defamation type claims. In the United States for example Social Media platforms rely on Section 230 to protect their businesses from the regulations on print media. This provides further incentive for the Social Media Platforms to collude with the government to protect these privileges.

This shows that collusion already exists between the government and social media platforms and if anything this collusion should be reduced not increased as would be the case if the Bill was legislated.

Further, the penalties for breaching the Bill are so far-reaching and financially burdensome for Social Media platforms that Social Media platforms will likely err on the side of caution and self-censure, and therefore be overly conservative on what they will allow on their platforms.

3. Appropriate Recognition and Treatment of Conflicts of Interest

The government of the day has an inherent conflict of interest when it comes to what information represents mis-information and dis-information: ultimately the government will want to stay in power.

It therefore has the incentive to censure inconvenient facts and information, to discredit opponents and to press its ideological agenda. Whether through conscious or unconscious bias a government is likely to interpret whether information is mis-information or dis-information through the prism of its desire to win government and through its ideology.

As referred to above ACMA has a conflict of interest to serve the interests of the Government in the best interests of its own survival. Even having comments and feedback on the Bill being submitted to The Department of Infrastructure, Transport, Regional Development and Communications is a conflict of interest, when ACMA is the Government Authority in this department charged with the task of determining mis-information and dis-information. Where is the independence in this?

Fact-checking organisations may also be involved in the operation of this Bill but this in itself does not guarantee that it will any more accurately identify mis and dis information. They are a paid consulting service with an inherent conflict of interest as well. Fact checking organisations also view mis-information and dis-information through the prism of their own ideologies and at the end of the day will want to retain their appointment as a Fact-checker.

Other conflicts of interest may arise from the interests of its political donors. Will the Government be under pressure to appease and support the views and interests of its political donors?

4. Transparency

Censorship raises questions such as what is it that the government does not want its people to know and why does it not want them to know? By censoring information the people will never know what has been censored, why it has been censored and therefore, by definition censorship is not transparent.

5. Limited Government Control and Intervention

This Bill necessarily gives a greater role to the Government and cause for intervention and therefore contravenes the principle of Limited Government Control and Intervention in a liberal democracy.

6. The Non-Exemption of Government from its own Legislation and Regulations;

The government is proposing that it is exempt from the requirements under this Bill. What happens when certain information is an inconvenient truth for the government? Can a government be trusted to determine what is the truth and what are facts in this situation? It is unconscionable that the Government is exempt from legislation and rules and moves a liberal democracy towards authoritarianism.

7. A Well Informed People

An uncensored environment promotes discussions, debates and awareness and leads to a better informed people. A better informed people can lead to improvements in science, medicine, innovation and government policies (for example) and therefore better policies, better decision making and better outcomes. We have recently seen examples of how further evidence and facts can change our understanding of an issue. Information that was once considered to be mis- or dis-information has turned out to be highly probably or even a fact.

Rather than settling for "The Science" to inform us as to what mis-information and dis-information is we need to use "The Scientific Method" to ensure an issue is properly researched, evidenced and debated. The Scientific Method necessarily means that information should not be censored and that people are well informed. This means the people having access to all sorts of information that may or may not be "facts".

8. Multiple political parties and opponents

The power of the government through ACMA to decide what is mis-information and dis-information gives far too much advantage over other parties in the Democracy. As seen above under this Bill the government is exempt from the Bill itself. This could lead to the government censoring information provided by its opponents during election campaigns and who would know. There will not be a level playing field for all candidates.

In summary, censoring perceived mis-information and dis-information is fraught with difficulties and is poor governance. It diminishes the rights of the people, destroys liberal democratic principles and moves us towards authoritarianism.

The great irony is that in thinking that the Government is protecting a liberal democracy through censorship, the very process of censorship destroys a liberal democracy.