Proposed

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023

The proposed legislation is, in my opinion, wrong in principle, and is an attempt to silence those people who express views that the Australian Government wants to silence.

Some of the basic concepts of a democracy are the rule of law, freedom of thought, freedom of expression, freedom of movement, with individual freedoms and rights being protected by and under the law.

With the American system of democracy and government, the citizens of each State have shared sovereignty between that State and the Federal government, with the American Declaration of Independence outlining three basic tenets: (1) God made all men (and women) equal and gave them the rights of life, liberty, and the pursuit of happiness; (2) the main business of government is to protect these rights; (3) if a government tries to withhold these rights, the people are free to revolt and to set up a new government. The American Bill of Rights guarantees personal freedoms and rights, as well as limiting the Federal Government's powers.

When the Australian Constitution took effect in 1901 it was envisaged that we would have a somewhat similar system to that of America. Our Federal Government was granted specific 'heads of power' and the State Governments could enact laws outside those federal 'heads of power'. In particular, Section 51(xxix) of the Australian Constitution gives the Federal Parliament the power to legislate with respect to external affairs - the clear implication of this is that Australia was asserted to be a sovereign country, with the Federal Government being given power to enter into agreements/treaties with other countries about affairs (i.e. matters) external to Australia.

In the late 1940s and the early 1950s the High Court of Australia had to determine the limits of the Federal Parliament's powers. The two major cases of that time were Bank of New South Wales v The Commonwealth (1948) 76 CLR 1 and Australian Communist Party v Commonwealth (1953) 83 CLR 1. The High Court determined in those cases that the Federal Parliament did not have unlimited unfettered powers to make laws and is constrained by the Australian Constitution (which lists those areas where the Federal Parliament has power to make laws). If a proposed federal law is not supported by one of the 'heads of power', it is 'beyond power' (i.e. it is invalid and ultra vires). Additionally, the Communist Party case was also important in outlining the rights of Australian citizens.

However, in 1983 in the Franklin Dam case (Commonwealth v Tasmania ("Tasmanian Dam case") [1983] HCA 21; (1983) 158 CLR 1 (1 July 1983)) the High Court determined (by a majority of 4 to 3) that there is a major qualification to this broad principle - if the Federal Government enters into an "external affairs" agreement/convention/treaty and then enacts laws to support that agreement/convention/treaty, then the enacted laws are valid.

Australia has now entered into a number of agreements/conventions/treaties with various countries and organisations external to Australia, and sometimes these involve membership obligations or requirements which may have ramifications for Australia. As an example, the International Monetary Fund in February 2019 published its IMF Country Report No. 19/54 and recommended, inter alia, "APRA should be given clear powers in relation to prudential standard setting by removing the legal provision that subjects APRA prudential standards to being disallowed by the parliament". In this instance the democracy and sovereignty of Australia was clearly put into question by an (external) international organisation (of which Australia is a member).

In June 2021 ACMA released its report "A report to government on the adequacy of digital platforms' disinformation and news quality measures", which states, inter alia, "Over the previous 18 months, we have seen increasing concern within the community over the 'infodemic' of online disinformation and misinformation, particularly in relation to the real-world impacts of COVID-19. The propagation of these falsehoods and conspiracies undermines public health efforts, causes harm to individuals, businesses and democratic institutions, and in some cases, incites individuals to carry out acts of violence."

At that time it was clear that the Federal and State governments saw the need to protect the Australian community from the COVID-19 pandemic, and that those people who did not agree with the enacted government measures, and who spoke out, were seen by the various governments as troublemakers who should be silenced. The worst of the pandemic is now largely over, but the thrust of the proposed legislation is on a broad scale, without there being an imminent substantial threat to the Australian community.

The right of individuals to hold and express views (that are not intended to incite others to violence), even though those views may be strongly disagreed with by the majority of society, is a basic right in a democracy that should only be over-written in times of war or national emergency.

In summary, the Communist Party case, although decided 70 years ago, is still recognised as one of the High Court's most important judgements in relation to the Australian Constitution and the rights of Australian citizens, and the proposed legislation is, in my opinion, wrong in principle, and is an attempt to silence those people who express views that the Australian Government wants to silence.