Who Will Guard the Free Speech Guardians?

As regards the state of free speech in today's advanced liberal democracies you can find Pollyannas and Cassandras. However, my own sense is that these days there are a good many more commentators and writers who fit into the latter's camp than the former's. Perhaps readers agree; perhaps they disagree. I myself lean more towards thinking the Cassandras[1] have a point, while also recognising that for all free speech-related matters things are still far better in the world's liberal democracies of today than anywhere else. One can, of course, concede that point and still subscribe to the sentiment often – but erroneously – attributed to Thomas Jefferson that 'the price of liberty is eternal vigilance'.

This short paper will be an exercise in rousing the troops here in Australia to start showing a bit more vigilance in defence of the liberty of speech that many consider to be the most important liberty of them all. I will restrict my observations and arguments on the state of free speech to two realms. One I know very well indeed, having worked in university law schools around the world for over three decades (eighteen of them now in Australia) after a handful of years as a corporate litigator in Toronto and as a barrister for a year in London on scholarship. I refer to the present state of free speech in universities in Australia. My view is that viewpoint diversity on campus is collapsing (perhaps the past participle would be more apt here) and that the resulting inroads into academic freedom are insidious and indirect, not often Peter Riddesque in being open and blatant. The other realm is one many of you know

[1] Quibblers will rightfully point out that Cassandra's negativity was grounded in accurate predictions where Pollyanna was unrealistically sunny. My reply is that a bit of poetic license is sometimes needed to help make these sort of papers less dry.

better than I, namely Parliament. I want to consider the inroads many of our elected representatives in this country seem to desire to make on the scope we citizens have to speak our minds and express our views. If it did nothing else the two and a half years of the pandemic showed us that possibility. And we are seeing right now, as well, a desire by parliamentarians on both sides of the aisle to co-opt Big Tech into the banning, censoring, downplaying, and bowdlerising of speech that offends, annoys and discombobulates those in powerful positions. Here I will consider the extent to which claims that another's speech is 'misinformation' or 'disinformation' is clear-cut and factually uncontentious and how often, by contrast, it is contentious, politicised, uncertain and hence just a form of propaganda to throw around these 'misinformation' and 'disinformation' labels with a rather unrestrained abandon. I will make a short digression here, too, to wonder if a remedy might be to make the decisions of our elected legislators subject to oversight by our unelected judges. (Spoiler alert: my take is that irrespective of how pessimistic one might be as regards our politicians' commitment to free speech – and having listened to former Prime Minister Scott Morrison's desiccated understanding of the benefits of free speech during and before his tenure it is hard not to be a tad pessimistic, I know – handing some sort of gainsaying function over to the judges would only make things worse.)

So that is the purview of this paper, an account of what our universities and our legislatures are doing in the way of circumscribing free speech. As it is short I will, of necessity, generalise here and there and I will be blunt. That is because these days the defence of free speech requires – no, it demands – a certain level of bluntness that at times might verge on the rude and the crass.

Realm One: The Universities

Let me start by posing this little thought experiment. Imagine a principality in which, say, 60 percent of the inhabitants are strong proponents of all of today's transgender rights advocates' shibboleths and 40 percent align more with the J.K. Rowling and Martina Navratilova and Riley Gaines worldviews. All the top positions in this principality are held by those in the 60 percent camp. Now these two camps might tick along in relative tolerance or, more likely, they might not. If not, think about the sorts of speech-related codes of conduct and regulations limiting speech that those in the majority might be inclined to impose on the minority as regards these fundamentally different worldviews. These would be legal processes that sometimes would be threatened, sometimes invoked, and would then require a formal dispute-resolution process to resolve (whatever the principality's background constitutional and legal protections of free speech be). Now imagine that over a decade or two the numbers and percentage of J.K. Rowling adherents in this society drops and drops, perhaps through emigration or through highly selective immigration. The principality reaches a point where the ratio in favour of orthodoxy has become, say, 9:1 rather than the earlier 6:4. Viewpoint diversity, in other words, has collapsed and now a massive majority of people share the same outlook. They overwhelmingly agree on their foundational moral and political premises. As a result, those in charge rarely need to invoke speech-limiting codes of conduct, regulations, statutory frameworks and the like. Why would they do any of that against people who share their own core outlooks? Hence this collapse in the numbers of those with unorthodox, heretical, non-conformist, iconoclastic, heterodox, apostatical (call it what you will) views – paradoxically – makes it more likely one could stand up and with some plausibility say 'there is no free speech problem in this principality'. At least that would be the case if all one

does is look at how often the speech-inhibiting regulations, codes and statutes were invoked and applied.

And so it is in our Australian universities today, at least in my view. The collapse of viewpoint diversity is well-documented around the Anglosphere.[2] If any readers doubt that progressive-left orthodoxy reigns supreme on our campuses then they need only make a quick visit to one nearby. I can assure you that our universities are bastions of monolithic orthodoxy, of left-wing, progressive conformism and genuflecting at the foot of received identity politics wisdom, in an ideological, not party-political, sense. At least that is so outwardly and openly. There are myriad acknowledgements of country (soon there will be one before you can order a coffee on campus), various sectarian flags on buildings that always fly, implicit demands to celebrate this supposedly oppressed group or that, you get the idea. More to my overall point, this collapse of outlook diversity works indirectly and insidiously affecting promotions, grant-getting, the willingness to work in a university and more. Many dissenters and apostates from the university orthodoxy (students included) learn to self-censor, to keep quiet, to ride out the one-sided indoctrination sessions without comment. Put bluntly, free speech declines and its absence becomes a big problem. And yet you simply cannot see it solely by looking at university Codes of Conduct, policies, statutory frameworks and the like. These tertiary institutions supposedly dedicated to the free flow and competition of ideas have become very uncongenial places for those with the broadly conservative core views shared by at least half the wider population –

[2] See, *inter alia*, Jonathan Haidt, 'Intimidation is the New Normal on Campus' (The Chronicle of Higher Education, 26 April 2017); Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (Penguin, 2013); Keith Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton University Press, 2nd ed., 2019); and James Phillips "Why Are There so Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses" (2016) 39 *Harvard Journal of Law & Public Policy* 153–206. Phillips weighs various explanations by looking at citation and publication rates of law professors at the top 16 United States law schools. After subjecting the data to regression analysis, propensity score matching and reweighting, nearest neighbour matching and coarsened exact matching Phillips concludes that the clear explanation for the lack of conservatives was discrimination – not conservatives' greater greed, lesser brainpower or lack of interest in such jobs.

sufficiently unpleasant that many just opt to leave their jobs in the university sector.

Let me give you just one example of what happens on campus when a progressive-left bromide becomes held by the preponderance of academics and near-on all the senior managers. I refer to how our universities have handled the s.128 constitutional Voice referendum. More than half of Australia's 42 universities have come out and publicly backed the 'Yes' campaign, including five of the purportedly elite Group of Eight universities. UNSW has even lit up one of its main buildings with a big 'Yes'. As for the remainder of Australia's universities, not a single one of them has come out for the 'No' side; they have opted officially to stay neutral. Even there, though, plenty of windows in the main university registry offices are filled with 'Yes' posters; you will not find one housing a 'No' poster. That is as close to balance and impartiality as we get. This is rather remarkable when all the polls since about July have shown the 'No' side to have a considerable lead with the public. Now I realise that these universities who live off taxpayers' monies and who are using those monies to support the 'Yes' side are also insisting that they nevertheless support free speech. But frankly, that beggars belief in any sense related to how things work on the ground. For instance, if we move down to a more granular level of what is happening on campuses (and I mean on both the universities that have officially come out for 'Yes' *and* those that have officially stayed neutral) let me point out that many universities are putting on 'information sessions' that overwhelmingly support the 'Yes' side. At some it is wall-to-wall supporters of the Voice speaking and supposedly giving students some sort of balanced information about the Voice. It would be laughable, if it weren't. And if you query this – as I have at a high level – you get this sort of basic answer: 'We've briefed one of the 'Yes' speakers to give the 'No' side.' Got that? Because the great free speech philosopher John Stuart Mill is rolling in his grave. No one

can seriously believe that a person strongly committed to one side of a highly contentious and moralised issue can do even a half-decent job of giving the other side's case. Or consider that at the University of Sydney the self-styled 'important information on the Voice' includes videos of high-profile Voice supporters such as Noel Pearson and Marcia Langton on the official website. And there is a 'Voice to Parliament Handbook'[3] written by Kerry O'Brien and Thomas Mayo freely available to staff and students. To call this a one-sided briefing is to undersell the degree of partisanship, slant and skew of what is being offered to faculty and students.

Now I will lay my cards on the table. I am a longtime (and out of the closet) political conservative. I have a weekly *Spectator Australia* column. I write occasionally for *The Australian* and for a good few overseas outlets. I have a very high appetite for work-related risk. I may have been the first person in the country to come out in print predicting this Voice referendum would lose (back when it was first officially confirmed it would be held and polls had support for it up around 70 percent approval) and from the start to take some friendly bets on the outcome – though no one on the 'Yes' side is taking my bets now. I don't hide my right-of-centre views nor why I believe the Voice proposal is a very bad idea.[4] But there are very, very few academics in this country who mimic my willingness to articulate and fight for (openly and publicly) right-of-centre positions. In the law school context my opposition to the Voice led in part to one of Australia's oldest peer-reviewed law journals publishing what can only be described as a diatribe against me and a fair few former senior Liberal Party politicians,[5] to which I responded in a different peer-reviewed law journal (the

[3] Which is wrong on its face as the Voice, were it successful, would be to Parliament *and the Executive*.
[4] In fact, I was invited by the editor of the *Australian Law Journal* to make the 'No' case in response to former Chief Justice French's article in favour of the 'Yes' case. See James Allan, 'Very High Risk, Very Low Reward: This Voice Referendum Deserves to be Defeated' (2023) 97 *Australian Law Journal* 411-420.
[5] See Harry Hobbs, 'The New Right and Aboriginal Rights in the High Court of Australia' (2022) *Federal Law Review* cite.

one running the diatribe having refused to run my reply).[6] I regularly get phone calls (there is a fear by some of using university email accounts, I kid you not) from academics – working at other universities and sometimes at my own – who say they are right-of-centre and dare not speak their minds. They worry about promotion applications. Students, too, come to see me. They worry about grades on assignments. Yes, this is all anecdotal, I know. But the evidence of the left-wing, progressive bias of our universities and of those across the anglosphere cannot plausibly be denied. And nor can the effect this rather massive one-sidedness of outlook has on the willingness of academics and students to speak their minds. Bluntly put, it stifles free speech. Just go back to our taxpayer-funded universities. They are using the tax dollars of a citizenry that polls show lean noticeably one way on a big constitutional issue to support the other side; to virtue-signal with other people's monies. These same universities purport to hold impartial and moderately balanced information sessions to faculty and students when often the views expressed cover the whole range of outlooks from A all the way still to A ('getting to Yes' as it were). Of course, students and faculty notice this one-sidedness and what the approved, recommended, 'respectable' position is according to university elites. Remarkably, it is always in the same political direction too. Many, if not most, dissenters and non-conformists therefore say nothing; they self-censor; they think about what is most prudential given the upcoming promotion application or essay to hand in. And they keep shtum.

[6] See James Allan, 'Attacking the "New Right", Australian Law Reviews and the Peer Review Process' (2023) 42 *University of Queensland Law Journal* 145. I there set out the incredible vitriol Hobbs directs at 'No' supporters including me; I set out what I argue are his wrong-headed assumptions of what motivates 'No' supporters like me; why a piece such as Hobbs's was more suitable as an op-ed in a weekly than in a peer-reviewed law journal; and how we all know that an exactly similar sort of submitted article coming from the other the side of politics and attacking those with left-leaning views would never – there is zero chance – make it through the peer-review process and be published, let alone in a highly ranked law review. As it happened, this reply by me was in the US's SSRN top ten list of downloads for law for a couple of months. So at least a good few Americans enjoyed my reply. It will surprise no one working in our tertiary education sector that after these articles appeared Dr Hobbs was awarded a big ARC grant to work in this area.

Readers, what is that if not a free speech problem broadly understood? It is happening in our tertiary institutions which are supposedly dedicated to the free flow and competition of ideas. Alas, the way this Voice referendum is being handled on campus is just one example (of many) of how groupthink and a sort of monolithic, pervading orthodoxy in our universities are enervating and emasculating free speech on the ground and doing so in a very important sense. I use it simply as an illustration of the larger problem remembering that off-campus and amongst the public at large these on-campus 'accepted' views are highly contested and often quite minority ones. So there you have it, a side of the university free speech problem that I suspect is less well-known.[7]

Realm Two: Parliament

I turn now to Parliament and the desire many of our elected representatives have to make inroads into the scope we citizens have to speak our minds and express our views. We saw that here in Australia, in spades, throughout the two and a half plus years of the Covid pandemic. I fully agree with retired UK Supreme Court Justice Lord Sumption's view that our elected politicians imposed 'the biggest inroads on our civil liberties in the last two hundred years'.[8] In fact, during the lockdown years I made quite a bit of use of my first degree, which was in mathematics, and read more statistical studies to do with

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[7] And although I believe that this *de facto* imposition of a monolithic orthodoxy and the related collapse of viewpoint diversity is the far greater problem as regards the scope to speak one's mind on campus, that is not to say that on the narrowly legalistic plane I think the courts in Australia have done a good job supporting academic freedom and the scope to speak one's mind. I do not. For instance, I have strongly criticised the High Court's decision in the Peter Ridd case (*Ridd v James Cook University* [2021] HCA 32). See, for example, James Allan, 'Universities and Turbulent Academics' in (ed. Morgan Begg) *Peter Ridd and the Case for Academic Freedom* (IPA, 2023), 69-86, in particular 80-86. *Inter alia*: 'In a sentence, the High Court said an academic could not be punished for speaking, but could be punished for complaining about being punished for what we now are told he could rightfully say in the first place.' *Ibid*., p. 85. 'My view is that the High Court of Australia got it badly wrong, and that Ridd was dealt a bad result. His academic freedom was infringed. In the result the High Court only managed to virtue-signal – that is to tell us all how important academic freedom was in the abstract and how much they, these top judges, valued it when it did not matter to the result. But when it did matter the top judges preferred the JCU code of conduct and the acceptability of the university's reprisals against Ridd for his having done his job the way it is supposed to be done.' *Ibid*., p. 80.

[8] See, for example, Jonathan Sumption, *Law in a Time of Crisis* (Profile Books, 2021).

epidemiology and the like than I would ever have imagined. Cards on the table again, I came out in print in the *Spectator Australia* back at the very start of the lockdowns in March 2020 arguing that these civil liberties' emasculating regulations were wrong in principle based on any sort of core commitment to individual freedom first principles; wrong on any sort of cost-benefit analyses, even enfeebled ones that only included the medium term effects of long school closures (whereby only the poor kids get really hammered, of course, and many will never make up the lost schooling) and the inevitable budget blow-out which would inevitably lead to massive debt, enormous printing of money, then asset inflation and hence the huge transfer of wealth from the young to the old and from the poor to the rich;[9] wrong when the costs were borne wholly by the private sector and not at all by the public sector, including the fact that the politicians imposing these draconian regulations did not themselves take even a tiny pay cut while mouthing platitudes that 'we are all in this together'; and so on and so forth. In fact, early on in the pandemic I wrote two peer-reviewed law review articles attacking these lockdowns that I think have stood the test of time pretty well.[10] Whatever one's view on all those issues, I believe the knock-out argument against all these thuggish lockdown rules can be found in the fact that even if your focus is solely and exclusively on total deaths what you find if you look at cumulative excess deaths from the start of the pandemic in March 2020 to now (this criterion being the hardest one by far to game), is that the country that did not lockdown, that did not close schools[11] and that just gave its

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[9] See, as one of many such claims and this one explicitly from the political left, Toby Green and Thomas Fazi, *The Covid Consensus: The Global Assault on Democracy and the Poor – A Critique from the Left* (Hurst & Co., 2021 – reviewed by me in *Law & Liberty* as it happens). In fact, the Covid years were the two best years ever for billionaires. See *ibid*., and Lucas Chancel et al, 'World Inequality Report 2022' (World Inequality Lab Report, 2022) 3 and 46 *et al*. And remember, it is the grandkids that will be repaying this massively increased debt. Other factors that could go into the 'costs' side of the ledger is the justified loss of trust in the public health caste and in a press that largely refrained from asking any hard questions at all.

[10] See James Allan, 'The Corona Virus: Old vs Young' (2021) 8 *Griffith Journal of Law & Human Dignity* 197 and James Allan, 'Politicians, the Press and "Skin in the Game"' (2020) 11 *The Western Australian Jurist* 41.

[11] None closed at all for primary age students though for a tiny time in 2020 they did close for 15-19 year olds.

citizens the information they needed and trusted them – Sweden – has the lowest cumulative excess deaths in the OECD.[12] The lowest cumulative total right now. And so, yes, lower than hard lockdown Australia (with the gap widening each month) despite the fact we are an island and in the southern hemisphere, both of which the data show to be clear independent advantages.

I bring that up not to relitigate the past, though truth be told the thuggery of the government's actions still makes me angry to this day. Instead, I raise it for two related reasons. The first is a bit of a digression but one I very much wish to make. You see during the entirety of the lockdown years during which democratic countries around the world imposed (again to quote Lord Sumption) 'the biggest inroads on our civil liberties in the last 200 years' not a single jurisdiction with an entrenched (or for that matter statutory) bill of rights saw the judges interpret that list of moral entitlements in a way that did much of anything to lessen the harshness of these myriad Covid restrictions one iota[13] (though the regulations sometimes verged on the irrational, given such things as that it was plain on the data from early on that being outside was better than inside and that sitting in a restaurant was no different than standing, yet masks were demanded standing but not sitting). I'll be blunt. No judges anywhere in the democratic world – including all the jurisdictions with potent bills of rights – did a single thing for freedom or made use of any of the rights enumerated in a bill of rights to try. Nada. Nothing. Zippo. I have long argued that when you buy a bill of rights you buy nothing more and nothing less than the first-order normative views of the unelected judiciary.[14] During Covid, and as a

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[12] See, inter alia, Michael Simmons, 'Sweden, Covid and "Excess Deaths": A Look at the Data' (*The Spectator*, 10 March 2023); Johan Norberg, 'Sweden During the Pandemic' (Policy Analysis No. 959, 29 August 2023) and Green and Fazi, *op. cit*. fn. 9 above.

[13] The only thing you can find at all are in a few US jurisdictions and Scotland – a few cases on freedom of religion where, if big stores could stay open, then churches could too. These came later in the day.

[14] For just a small sample of my three decades of writings against bills of rights see James Allan, *The Age of Foolishness: A Doubter's Guide to Constitutionalism in a Modern Democracy* (Academica Press, 2022); James Allan, *Democracy in Decline: Steps in the Wrong Direction* (McGill-Queen's University Press, 2014); James Allan, 'Bills of Rights and Judicial Power – A Liberal's Quandary' (1996) 16(2) *Oxford Journal of Legal Studies* 337; James Allan and Grant Huscroft, 'Constitutional Rights Coming Home to Roost? Rights

generalisation about the caste as a whole, the judges were in favour of these lockdowns.[15] So too, as it happened, appeared to be the entirety of the Australian Human Rights Commission. Not a peep of criticism was heard from any of these incredibly highly paid people (all of them Liberal Party appointees I should add) throughout the entire pandemic years; not a peep about any of the features of what at times looked to me to be brutal government rules, responses and actions. And not a peep about the concomitant restrictions on speech on social media. The same goes for virtually the entirety of the wider and self-styled human rights brigade around the anglosphere. A bill of rights did nothing and neither did they, including as regards failing to safeguard us against free speech incursions. In fact, the only sorts of legal actions against these Covid regulations that worked (and then only in a few jurisdictions and occasionally) were old-fashioned administrative law actions arguing that the Executive was acting *ultra vires* the governing statute. That at least caused the elected legislature to pass an amendment.

Internationalism in American Courts' (2006) 43(1) *San Diego Law Review* 1; James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17(1) *King's College Law Journal* 1; James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Honourable Michael Kirby' (2009) 33(3) *Melbourne University Law Review* 1032; James Allan, 'Why Politics Matters: A Review of Why Law Matters' (2018) 9(1) *Jurisprudence* 132; James Allan, 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky', in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 108.

[15] Or perhaps in part, in a time of moral panic, the judges were politically afraid to rock the boat. Alan Myers KC has written a paper in part attacking the High Court of Australia's decision in *Palmer v Western Australia* [2021] HCA 5 (the s.92 borders case), mocking the reasoning that led our top judges to conclude that 'absolutely free' meant 'not free unless we judges think it is reasonable'. The point here is not just an interpretive critique but to wonder if the result might have been different had the Morrison Commonwealth government joined the Clive Palmer challenge. There are reasons to think it might indeed have been in which case a motivating factor in the outcome was (depending on how charitable you are) the judges' desire to defer to the political branches in a time of widespread moral panic or cowardice. See Allan Myers, 'The Thirteenth Sir Harry Gibbs Memorial Oration' delivered 26 August 2023, Melbourne at the 33rd Conference of The Samuel Griffith Society. The paper is available at: https://mcusercontent.com/a5aba540fd03e717a60317a42/files/26b8a9a5-18f1-6ba9-0b08-44b5c1beee5f/Allan_Myers_Sir_Harry_Gibbs_Oration.pdf

And, of course, the universities were every bit as bad, as monolithicly orthodox and as conformist on this front too. Just consider how world leading epidemiologist Professor Jay Bhattacharya was treated by Stanford University.[16]

The second, and main, reason I bring up the Covid years and the draconian response is because it was during the pandemic that the then Coalition Minister for Communications, Urban Infrastructure, Cities and the Arts, Paul Fletcher, opted to push for a 'New Disinformation Law' and even to urge the Morrison government to take the plan to the 2022 election. Why? It was the public dissent during the Covid years and the picking of holes in the government's response by some individuals online in the various social media outlets. The government – a supposedly Liberal government, to be abundantly clear – apparently decided it needed further and better tools to silence such online dissidents and sceptics. 'The legislation will provide the Australian Communications and Media Authority (ACMA) with new regulatory powers to hold big tech companies to account for harmful content on their platforms'.[17]

Leave aside that one of the world's top epidemiologists, Professor Jay Bhattacharya of Stanford University (who co-authored *The Great Barrington Declaration* with Professor Sunetra Gupta of Oxford and Professor Martin Kulldorff then of Harvard, basically arguing for a targeted, Swedish-type response, and all three of whom thereafter faced attempts to censor their views, limit the reach of their professional opinions and, indeed, much personal abuse) said that 'governments have been the most important and most damaging source of covid misinformation during the pandemic'.[18] These online sceptics doubted and critiqued such widespread governmental and public health officials' claims

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[16] See 'Dr. Jay Bhattacharya Reveals Stanford University's Attempts To Derail COVID Studies' at: https://disinformationchronicle.substack.com/p/dr-jay-bhattacharya-reveals-stanford

[17] Paul Fletcher, 'New Disinformation Laws' (Media Release, 21 March 2022).

[18] Jay Bhattacharya (Twitter, 22 December 2022, 6:19 pm) http://twitter.com/DrJBhattacharya/status/1605840394482130944.

as: that masks work (which is false according to the best studies to date);[19] that the new Covid mRNA vaccines stop transmission and/or infection (neither of which proved remotely to be true); that lockdowns will not cause huge collateral damage (laughably wrong); that the lab leak theory was completely false and perhaps motivated by racism (yet we now know that some of the very same people who were deriding and pooh-poohing the lab leak theory, in private emails at the exact same time they were doing so, were indicating they thought it very plausible indeed that the lab leak theory was correct, while today it is the predominant theory);[20] and that these Covid vaccines do not cause heart injuries and deaths (except that the data is clear that they do, though we can argue about their extent and the relative trade-offs and what the best cost-benefit calls are for the various age groups).

Put bluntly, it was the desire to suppress a good deal of what the then Liberal government Cabinet considered to be 'misinformation' that motivated the Morrison government to push for these significant speech-limiting and speech-infringing new laws. The bitter irony is that much of what the online dissidents claimed has proven to be true and that it was the government itself that was trading in misinformation. For a right-of-centre conservative like me – to say nothing of anyone who has the slightest passing knowledge of John Stuart Mill's famous arguments in favour of free speech[21] – this is a staggering indictment of a political party that sells itself as caring about free speech.

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[19] The gold standard Cochrane Review of all studies finds no evidence for the claim that masks make any difference. See, for instance, Tom Jefferson et al, 'Physical Interventions to Interrupt or Reduce the Spread of Respiratory Viruses' (Cochrane Database of Systematic Reviews, 30 January 2023).

[20] See Michael R Gordon and Warren P Strobel, 'DOE Says Lab Leak is Likely Origin of Covid-19' (*Wall Street Journal*, 27 February 2023). And science writer Matt Ridley has since made it clear that the reason he originally rejected the lab leak theory was because of the official claims by these top scientists and that he only went and relooked at the case for and against after it became clear there had been an attempt to mislead people and a sort of cover-up. Ridley now says the lab leak view is the more convincing theory by some margin. See Matt Ridley and Alina Chan, 'The Covid Lab-Leak Deception' (*Wall Street Journal*, 27 July 2023).

[21] Mill's best-known work in this area is *On Liberty*.

Now let me give you the even more disagreeable news on the free speech front. The Labor Albanese government has proposed a far worse and more speech-inhibiting iteration of this earlier Paul Fletcher flirtation with inroads into the scope for free speech, also by nodding in the general direction of the justificatory labels 'disinformation' and 'misinformation'. This new draft *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* (hereafter 'the ACMA Bill') currently before Parliament in Canberra is very bad indeed for any of us who value free speech. Let me run you through the main features of the Bill, then say a few things about 'misinformation' claims generally, and then conclude.

First off, this ACMA Bill explicitly excludes content produced by government from falling within the ambit of misinformation and disinformation.[22] It also excludes content produced by accredited educational institutions and the legacy press.[23] In other words, the great and the good are to be exempted holus bolus from the charge of producing misinformation and disinformation. This follows from the ACMA Bill's definition of misinformation and disinformation which implicitly presupposes that these sins can attach only to views that contradict the official position. Yet the exemption of such sources from the reach and ambit of charges of being misinformation or disinformation is nowhere justified with the ACMA Bill. And recall, traditional notions of misinformation and disinformation encompass all information deemed to be false or misleading, either unknowingly so (misinformation) or knowingly (disinformation). Traditionally, there is no source-based exception or dispensation as regards 'establishment' sources of information – the ones that got so much factually wrong during Covid, if I can be blunt.

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[22] Exposure Draft: *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023*, sch 1, definition of "excluded content for misinformation purposes" ('ACMA Bill').
[23] *Ibid*.

Then there is the problem of premising the ACMA Bill on the identification of truth, as though social media companies or the courts or any third-party fact-checkers will be able to identify what the true position is in any highly debated or highly moralised case. (Again, look at the track record during the pandemic.) The ACMA Bill also pretends not to be directed at individuals but this is artifice. ACMA will be able to force social media companies to develop a code of practice, or failing one being deemed effective then enforce an industry standard. So while the ACMA Bill itself does not allow ACMA to decide what information is true, misleading or deceptive, it does allow ACMA the power to create these enforceable codes/standards that will do just that. The actual result will be that an individual who posts content online, accessible to more than one person, would need to comply with the industry standard/code of practice that ACMA implements under the Bill. And that makes the individual open to being silenced and the digital media site subject to potentially severe civil and criminal penalties if the codes/standards are breached. Freedom of speech should be made of sterner stuff! This is regulation of speech by the Executive. And pawning off the calls to some supposedly neutral 'fact-checker' body alleviates the awfulness of this not one iota. Fact-checking bodies are not able to give disembodied determinations of what is 'false, misleading or deceptive'[24] (none of which is defined in the ACMA Bill) any more than anyone else. As J.S. Mill argued long ago, it is the open competition of competing views that best gets at the truth. The problems of deeming some body to be authoritative deciders of these matters are myriad. Look at the RMIT fact-checkers as regards the Voice.[25] Look at the Facebook concession in the context of litigation where its officials conceded it was ultimately just a question of opinions.[26] And why should any of us accept the presumption undergirding this

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24 ACMA Bill, section 7(1)(a).

25 See Cassandra Morgan, 'Meta Suspends Fact-Checker Ahead of Voice Referendum' (*National Indigenous Times*, 30 August 2023).

26 https://nypost.com/2021/12/14/facebook-admits-the-truth-fact-checks-are-really-just-lefty-opinion/

ACMA Bill that online censorship (indirect, yes, but that is what it is) of certain information will reduce real world harm? It is more likely to drive dissenting views underground and encourage the use of loopholes, evasions and work-arounds.

I could go on and point to the looseness and amorphousness of the definition of 'serious harm' in the ACMA Bill, itself a big problem.[27] But by now we can see that this ACMA Bill is a huge over-reach; a mighty inroad into free speech; in brief a disgrace.[28] At the heart of the problem is the fact that the very concepts of 'misinformation' or 'disinformation' as applied even to claims that are purely factual become exercises involving contentious, politicised, and uncertain judgement calls. We saw this again and again during the pandemic. When we move away from claims that are overwhelming on the plane of facts, of the copula 'is', and into claims involving value judgements and the copula 'ought' the problems multiply. At this point anyone claiming to be the voice of some disembodied, balanced, disinterested God who can pick between information and misinformation is deluding him or herself. Just look at the many competing assertions surrounding the Voice. For all the claims and assertions from a Robert French or a Brett Walker on one side there is an inconsistent set of claims from an Ian Callinan and a David Jackson on the other. That is one retired High Court Justice and one top silk on each side. Fact-checking is just opinion-giving travelling under the guise of political expediency. Mill was correct. The remedy for speech seen to be misleading is not suppression of speech but more speech on the other side, telling us why you think the first speech was wrong-headed and likely to deceive.

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[27] ACMA Bill, section 7(3) of Schedule 1.

[28] And it is being introduced at the same time as a top US federal court, the Fifth Circuit, has just upheld much of a lower court's findings that the Biden administration violated the free speech rights of Americans with its Covid censorship demands (largely in the name of 'misinformation' and 'disinformation') on Big Tech. See *State of Missouri v Biden* No.23-304445 (5th Cir. 2023).

This ACMA Bill, in my view, is a very serious threat to free speech in this country. It is being offered up to Australians just as a top US Court, the 5th Circuit, has held the Biden administration's collusion with Big Tech to suppress Covid related dissenting views was a breach of the First Amendment.[29] This ACMA Bill needs to be defeated in the court of public opinion and then in Parliament. And to end on a more Pollyanna note, I think it will be. Perhaps not immediately. But it is a sufficiently egregious Bill that the Liberal party might re-discover some core principles and run next election explicitly to repeal it should the Albanese government force it through. You cannot end on a more optimistic note than that.

[29] Cite