



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC:BMvk090524

9 May 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
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By email: ashna.taneja@lawcouncil.asn.au

Dear Dr Popple,

Inquiry into civics education, engagement, and participation in Australia

Thank you for the opportunity to contribute to the Law Council's submission to the Joint Standing Committee on Electoral Matters inquiry into civics education, engagement and participation in Australia.

We note that the Law Council intends to focus its submission on the interaction between civics education and First Nations legal issues. We support the inclusion of the Law Council's past submissions. We take this opportunity to reiterate the views set out in a 2022 submission we made to the Law Council on the administration of the 2022 federal election on the need to invest in more voting options (telephone and mobile voting) as well as to further investigate the availability of online voting.¹ These measures are directly relevant to lifting the enfranchisement of First Nations people, people with disability, and people who live in regional, rural and remote areas.

However, in our view, there is an opportunity to comment more broadly within the terms of reference of this inquiry.

An issue of pressing and ongoing concern is how governments and democracies respond to misinformation and disinformation, which can be disseminated very widely, and extraordinarily quickly. Effective responses will be multi-faceted, and should include a civics educational curriculum at age appropriate levels, throughout primary and secondary schooling. In an era where there are many sources of content, including content claiming to be credible news, as well as generative AI, civics education should be accompanied by more general education aimed at building media literacy skills, including in respect of how to critically assess the factual accuracy and general credibility of content.

Our members note that, in their experience, the school curriculum coverage of fundamental

¹ Law Society of NSW submission to the Law Council of Australia dated 4 October 2022, online: <https://www.lawsociety.com.au/sites/default/files/2023-03/Letter%20to%20Law%20Council%20of%20Australia%20-%20Inquiry%20into%20the%202022%20Federal%20Election%20-%204%20October%202022.pdf>.

concepts of parliamentary democracy, our federal system of government, and electoral systems and laws has diminished over time. As this is a matter outside of the Law Society's remit, we make only a general suggestion that it may be beneficial to standardise the minimum requirements of the educational curriculum on civics education, and critical thinking skills in respect of media and other relevant content, that should be taught in both government and non-government schools.

Further, given Australia has compulsory voting, it is incumbent on Parliaments to ensure that voters are given the opportunity to understand concepts fundamental to our model of democracy, as well as concepts fundamental to the specific contested matters, to allow meaningful participation.

Broader education efforts for the voting population should also take into account that demographic diversity requires more nuanced and considered efforts. Education should be provided in plain English and presented in an accessible way, including consideration of visual layout and appeal. It should also take into account the needs of younger voters, culturally and linguistically diverse voters, people with disability, and people who live in regional, rural and remote areas. It is likely that, in order to be effective, there will need to be tailored programs to provide information in a number of community languages, and in different accessible formats, including in formats suitable for popular social media dissemination. There may need to be efforts to proactively target common myths arising out of voters living in an increasingly globalised setting (for example, that Australia has a Bill of Rights or an unfettered right to free speech).

Electoral Commissions are unlikely to be able to fulfill these educational and engagement needs without specific separate funding and broadened functions to include formal and informal education and fostering awareness. While we understand that the Australian Electoral Commission (**AEC**) carries out some educational and informational activities, currently, the AEC is:

funded to deliver one purpose and one outcome:

Maintain an impartial and independent electoral system for eligible voters through active electoral roll management, efficient delivery of polling services, and targeted education and public awareness programs.²

Further:

The AEC has one program:
1.1 To deliver electoral events.³

From the perspective of ensuring that information available has integrity, one recent example demonstrates where this narrow role has not served the electorate well. The AEC website currently has a factsheet titled "Stop, Check and Think"⁴ which was directed at First Nations people in the context of the 2023 Voice Referendum. The factsheet did not disclose that the information contained in the Yes/No pamphlets had not been fact checked, nor that it may include inaccurate and misleading information. The "factsheet" tended to suggest the opposite.

² Australian Electoral Commission, *Annual Report 2022-23*, 6 online: https://www.aec.gov.au/About_AEC/Publications/annual-report/files/aec-annual-report-2022-23.pdf.

³ Ibid.

⁴ Australian Electoral Commission, "Stop, Check and Think" factsheet, online: <https://www.aec.gov.au/indigenous/files/factsheets/Stop-check-and-think-factsheet.pdf>.

The rise of political and electoral misinformation and disinformation presents increasing challenges that work against the fostering of a well-informed electorate. The need and community expectation for “truth in political advertising” laws are therefore increasing too.

While it is challenging to find a balance between protection against inaccurate and misleading information that harms our democracy, and the protection of free speech that enhances it, such legislation, if carefully framed, is likely to assist governments and the community to prevent or limit inaccurate or false information influencing electoral outcomes.

The Law Society has made submissions relevant to regulating truth in political advertising; one in 2022 in respect of the administration of the 2022 Federal Election,⁵ and the second in respect of the administration of the 2023 NSW state election (attached for your information).

We reiterate our views in respect of the need for legislation at Commonwealth level in this regard. As noted in our past advocacy, the South Australian legislation (s 113 of the *Electoral Act 1985* (SA)), is a useful starting point. It has withstood constitutional challenge, is supported by significant case law, has been shown to be enforceable, and we understand that it has provided an effective deterrent.

We support the development of exposure draft legislation to regulate truth in political advertising, and its release for wide and meaningful consultation, including within the legal profession and academia.

Thank you once again for the opportunity to provide comments. At first instance, questions may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on 02 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



Brett McGrath
President

Encl.

⁵ Note 1.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC:BMvk010324

1 March 2024

Hon Peter Primrose MLC
Chair
Joint Standing Committee on Electoral Matters
Parliament of NSW
Parliament House
Macquarie Street
Sydney NSW 2000

By email: electoralmatters@parliament.nsw.gov.au

Dear Mr Primrose,

Inquiry into the administration of the 2023 NSW state election: truth in political advertising

Thank you for the opportunity to provide a submission to this inquiry. The Law Society's submission, informed by its Public Law Committee, addresses terms of reference 3(iii), in respect of whether truth in political advertising laws for New South Wales state elections would enhance the integrity and transparency of the electoral system.

We note developments internationally have highlighted the pervasiveness, sophistication and effectiveness of misinformation and disinformation campaigns to undermine and distort election outcomes. For example, the 2022 Australian Election saw the troubling development of disinformation about the Australian Electoral Commission (**AEC**) being published. Given the very significant potential costs of misinformation and disinformation on the integrity of election outcomes, the Law Society supports the enactment of legislation to regulate the issue of truth in political advertising in NSW.

We suggest that the South Australian legislation (s 113 of the *Electoral Act 1985 (SA)*), is a useful starting point. It has withstood constitutional challenge, is supported by significant case law, has been shown to be enforceable, and we understand that it has provided an effective deterrent. In considering the potential applicability of a version of s 113 in NSW, we also suggest that the Committee refer to the chapter by Lisa Hill, Max Douglass & Ravi Baltutis, "Implementation of s 113: Lessons to Adopt, Pitfalls to Avoid and Refinements to Pursue" in *How and Why to Regulate False Political Advertising in Australia*.¹ For example, we note the authors' recommendation, on p 126, that the regulators of political advertising be empowered to be able make their own public statement or notice correcting an advertisement if that advertisement infringes the relevant legislative provisions.

We suggest that the following issues would require close consideration:

- Certain key concepts will require clearer definition, to ensure that all mass communication,

¹ Available online: https://link.springer.com/chapter/10.1007/978-981-19-2123-0_9.

including social media, is covered and in a Constitutionally-compliant way. We note that the *Electoral Act 1985* (SA) does not define “advertising” and “publish”, for example.

- Whether the law would apply only to paid advertising and, if so, appropriate anti-avoidance measures, such as capturing in-kind or indirect payment.
- Responsibility for administration and enforcement, including adequacy of resourcing, and any necessary transitional arrangements until the relevant agency, likely the NSW Electoral Commission (**NSWEC**), has acquired the relevant expertise and resourcing to support the enforcement of truth in political advertising laws. We note that the effectiveness of any statutory regime regulating political advertising will be dependent upon the relevant agency being appropriately resourced to respond to allegations in a timely manner during the course of an election campaign.
- Consideration should be given to appropriate information sharing with other state, territory and Commonwealth Electoral Commissions, and training for the NSWEC.
- Close consideration of the remedies available. For example, remedies might include injunctive relief. In our view, on balance, it is likely to be undesirable for remedies to include calling into question or otherwise affecting the outcomes of elections, which should expressly be excluded in our view.
- While the law needs to provide effective deterrents, these might not necessarily include criminal penalties, which would likely increase the risk of the law being found to be unconstitutional. Nonetheless, any financial penalties should be of sufficient magnitude to realistically deter potential offenders.

We are aware that this issue is complex, and that striking the appropriate balance between protection against inaccurate or misleading information that harms our democracy, and protection of free speech that enhances it, will be challenging. We also note that, at the Commonwealth level, both of the major parties have committed to strengthening legislation to combat misinformation and disinformation online,² with the Government’s exposure draft of the *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023*³ having received detailed feedback, including from the Law Council of Australia.⁴

We acknowledge those challenges and submit that, while harmony with any Commonwealth regime is desirable, NSW should not be deterred from proceeding with its own legislation as a priority.

Thank you once again for the opportunity to comment. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform at 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely



Brett McGrath
President

² Nell Fraser, “Media literacy and misinformation,” 30 October 2023, *Commonwealth Parliamentary Library Flagpost*, online: https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/FlagPost/2023/October/media-literacy.

³ Exposure draft Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023, 24 June 2023, online: <https://www.infrastructure.gov.au/department/media/publications/communications-legislation-amendment-combatting-misinformation-and-disinformation-bill-2023>.

⁴ Law Council of Australia, *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 – Exposure Draft*, submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 29 August 2023, online: <https://lawcouncil.au/publicassets/5b25938f-d346-ee11-948a-005056be13b5/4410%20-%20S%20-%20Combating%20Misinformation%20and%20Disinformation.pdf>.