

**Submission
No 29**

**ADMINISTRATION OF THE 2023 NSW STATE ELECTION AND OTHER
MATTERS**

Organisation: The Law Society of New South Wales

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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 [REDACTED] or [REDACTED].

Yours sincerely

[REDACTED]
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>.