

**POSITION PAPER**  
**submitted in response to the**  
**INQUIRY INTO THE IMPACT OF SOCIAL MEDIA ON ELECTIONS**  
**AND ELECTORAL ADMINISTRATION**

**commissioned by the Victorian Parliament's Electoral Matters Committee**

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**WHAT DO YOU THINK ABOUT THE FOLLOWING IDEAS?**

**Q1.** Encouraging social media platforms to take more action against inappropriate activities (such as bots, harassment, trolling, spreading fake news).

**Good idea**

**WHY DO YOU THINK THAT?**

Encouraging social media to take more actions against inappropriate activities could be a potential path to remedy the spread of false content online. The increasing role of social media in governing the flow of information online would lead public actors to rely on the technical expertise and organization of these private actors as proxies to tackle disinformation. At the same time, introducing new obligations on social media could lead to negative effects on users' fundamental rights and freedoms. Social media make decisions on the removal and blocking of content according to standards based on the business interest to avoid any monetary penalty or reputational damage. Therefore, any attempt to make online platforms liable for failure to comply with obligations like removal could encourage platforms to delete content to escape from liability. Such a situation is usually defined as collateral censorship (Jack M. Balkin, 'Old-School/New-School Speech Regulation' (2014) 127 Harvard Law Review 2296). Moreover, requiring an extensive activity of content moderation to detect illicit content can also affect the right

to privacy and data protection. Indeed, users could fear to be subject under a regime of private surveillance. This situation could also affect freedom of expression since users could refrain to share their opinion and ideas online due to broad surveillance activities. Despite these challenges, it is worth stressing that leaving content moderation without any safeguard could undermine democratic value. The international relevance of content moderation can be understood even by looking at how this activity has led to escalating violent conflict in countries like Myanmar or Sri Lanka, so that some States decided to shut down social media as increasingly happening in African countries (Giovanni De Gregorio & Nicole Stremlau, 'Internet Shutdowns and the Limits of Law' (2020) 14 *International Journal of Communication* 1). When making decisions on content, social media platforms rely on a complex system of norms, driven by commercial interests, social norms, liability rules and regulatory duties (Luca Belli and Nicolò Zingales (eds), *Platform Regulations. How Platforms are Regulated and How They Regulate Us* (FGV Rio 2017)). Since social media autonomously determine how freedom of expression online is protected on a global scale, it is critical to take into consideration the challenges for the rule of law (Nicolas Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press 2019)). Online platforms can freely choose which values they want to protect and promote based on their business purposes. As private businesses, they would naturally tend to focus on minimising economic risks rather than protecting constitutional values when moderating content (Giovanni De Gregorio, 'From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society' (2019) 11(2) *European Journal of Legal Studies* 65). Therefore, the primary point is how to address the challenges of content moderation without undermining the freedom of social media to conduct their business. Scholars have proposed to protect the system of immunity (Daphne Keller, 'Internet Platforms: Observations on Speech, Danger, and Money' (2018) Hoover Institution's Aegis Paper Series, No. 1807) or reinterpret its characteristics (Annemarie Bridy, 'Remediating Social Media: A Layer-Conscious Approach' (2018) 24 *Boston University Journal of Science and Technology Law* 193), building an administrative monitoring-and-compliance regime (Kyle Langvardt, 'Regulating Online Content Moderation' (2017) 106(5) *Georgetown Law Journal* 1353), or introducing more safeguards in the process of moderation (Giovanni De Gregorio, 'Democratising Content Moderation: A Constitutional Perspective' (2020) 36 *Computer Law & Security Review*). It is possible to observe how the focus has moved from liability to responsibility for disseminating illegal content. To achieve this purpose, transparency and accountability safeguards could help to understand how speech is governed behind the scenes without overwhelming platforms with disproportionate monitoring obligations. Within this framework, even co-regulatory solution could play a critical role to tackle disinformation while finding an appropriate legal framework where online platforms can enjoy their freedom to conduct business based on the safeguards determined by public actors.

**Q2.** The government funding media literacy campaigns to help people know what they can trust online.

**Very good idea**

#### **WHY DO YOU THINK THAT?**

The challenges of regulating content moderation would also suggest focusing on other ways to tackle the dissemination of false content online. Precisely, media literacy campaign can provide important tools in the offline world to prevent and mitigate the information disorder (Claire Wardle and Hossein Derakhshan, 'Information Disorder: Towards an Interdisciplinary Framework for Research and Policy Making' Council of Europe report DGI(2017)09). Media and information literacy are important tools to increase the ability of citizens to understand the logics of the media landscape and exercise their rights and freedoms in a democratic society. Media literacy campaign also ensures that the digital information ecosystem is trustworthy. Critical citizens will give an incentive to media companies to continuously improve their products and services while countering the spread of disinformation. The promotion of fact-checking activities, supporting professional media outlets and investing resources for digital literacy campaigns could play a critical role (Cherilyn Ireton and Julie Posetti (eds), *Journalism, 'Fake News' & Disinformation* (2018) UNESCO). At the level of the European Union, the High Level Expert Group on Disinformation stressed the role of media literacy as an important action line as a response to disinformation because it can empower individual users as suggested above and mass empowerment of users will lead to greater social resilience against disinformation and perhaps other disorders of the information age (European Commission, *A Multi-Dimensional Approach to Disinformation. Final report of the High-Level Expert Group on Fake News and Online Disinformation*' (2018)).

The role of media literacy campaign funded by Government can play a critical role to support the initiative from the private sector in this field. Public funding can also provide more resources to independent educational institution and professional media outlets to provide content and increase information quality. This approach should be comprehensive involving all media and technologies. Indeed, today, within the framework of the information society, citizens do not need only to understand the role of traditional media outlets but also digital media. Since the role of social media in spreading false content, it is critical to focus on the role of these entities in moderating content by using artificial intelligence technologies. This also leads to focus media literacy campaigns on the role of data in the information society and its connection with the media landscape. The processing of data on electoral preferences online provides an example showing why it is critical to think media literacy broadly including artificial intelligence literacy. Besides, media literacy should not be limited to young or elder people but provide comprehensive skills according to specific targets. This includes training teachers as well as media professionals to increase the attention on these topics in the sector of education and professional information.

**Q3.** Requiring public disclosure of all online political advertising (for example, webpages created by social media platforms showing all of the political advertising on their platform and who paid for it, or webpages created by parties/candidates showing all of the online ads they have run).

**Very good idea**

#### **WHY DO YOU THINK THAT?**

Transparency of political advertising and, generally speaking, of messages amounting to political propaganda is often referred to as a very important condition of the flourishing of a democratic debate. Since political propaganda is more and more carried out by the Internet, a question to be addressed by regulators is whether this pieces of content should be subject to different legal rules compared to the 'real world'. Legislation in force governing traditional political propaganda generally requires the identification of the persons entitled to purchase advertising services and engage in political propaganda. Under Italian law, for instance, only candidate, candidates' agents, or the executive secretaries or the persons delegated for political propaganda are entitled to purchase election-related messages to be disseminated by means of newspapers and/or radio or television broadcasters. The latter have an obligation to ascertain the identity of the purchaser and to make sure that the same falls within one of the three categories of subjects. Italian law also requires that all pieces of election-related advertising feature the name of the person in charge of the political propaganda (*committente responsabile*).

These rules apply as far as traditional election-related messages are concerned, however it is debated whether the same could bind also social media and thus cover the circulation of political advertising online. Requiring the identification of the purchaser and of the person responsible for political propaganda does not per se exclude that individuals and groups engage in other forms of political propaganda (i.e. running their own website) but certainly discourage persons other than those legally authorized to contribute in political advertising. Limiting the number of persons who can purchase these services also allows avoiding, at least prima facie, the risks of foreign propaganda in the dissemination of disinformation, most notably if such restrictions are associated with a regulation of the financing of political parties or candidates. Even if foreign entities may not be prevented as such from acting on behalf of a candidate, of course these restrictions may most likely affect them. Besides, from a general standpoint, transparency may have an important role in the context of the Internet.

Despite some commentators and digital activists may claim the existence of a right to anonymity, it goes without saying that the public disclosure of the identity of persons who launched political campaigns or engaged in propaganda provides voters with the opportunity to know the source of certain pieces of information or content and act accordingly. This holds true regardless of the specific context of electoral campaigning. It is disputed among scholars whether measures against anonymity (such as obligations to publicly disclose certain information) should be generally extended to websites other

than social networks, to the extent the same have become a vehicle for the spread of disinformation. As a general remark, it is worth noting that in the legal systems where rules concerning transparency of political advertising already exist (such as Italy), the same mostly refer to traditional media, giving rise to uncertainty as to their material scope of application and due to the very fragmented legal framework in this matter. It is therefore of utmost importance that regulators consider the need for clear rules regarding online media, whose legal status in respect of political propaganda should not depend on specific and *ex post* interpretations given by courts or other authorities (such as communications authorities).

**Q4.** Requiring online electoral advertising to state who paid for it.

**Not sure**

#### **WHY DO YOU THINK THAT?**

As noted above, the more transparency is pursued when it comes to political propaganda, the more a genuinely democratic debate is likely to flourish. The idea of making the public aware of the fact that certain individuals/entities provided financial support to candidates and/or parties can prove a valuable means to this end; however, it may also give rise to critical issues. It is worth noting, first of all, that mechanisms such as those in force in Italy, if implemented also with respect to online platforms and most notably social networks, could effectively pursue a similar goal without requiring disclosure of the person or entity which paid for purchasing election-related services. In fact, if electoral advertising services can be purchased by specific or duly-empowered subjects only (ie, candidates, agents or other delegated persons), such restrictions constitute a first set of safeguards to the extent political advertising is circulated via third party websites such as social networks. Restrictions on the scope of the subjects entitled to purchase electoral advertising do not per se exclude the possibility that candidates or parties receive financial contribution even from foreign entities which might be interested in influencing electoral campaigns. In this respect, legal systems generally establish provisions regulating contributions aimed at financially supporting candidates or parties during campaigns, including by limiting the amount of money that can be received in the form of contributions and by defining how the relevant expenditures must be carried out and reported.

In Italy, for instance, each candidate is allowed to incur expenses up to the maximum of Euro 52,000 per each electoral district plus Euro 0.01 per each residents of the constituency and the law places restrictions on the maximum amount that can be received as donation. Moreover, candidates must appoint a “campaign agent” (*mandatario elettorale*) and communicate his/her name to the regional office of the Electoral Commission (*Collegio regionale di garanzia elettorale*). The electoral agent is the only person

authorized to handle the collection of funds on behalf of the candidate by which he/she has been appointed. Also, Italian law provides that contributions and services received from natural persons must be analytically reported through a nominal list when they exceed a certain amount. Having that said, if a set of restrictions apply as to the collection of contributions (including as to the identification of the donors), a specific disclosure of the subjects who paid for political advertising may not be necessary, also with a view to minimizing any processing of personal data, if any. In other terms, if limitations were implemented in the context of the number of subjects entitled to purchase advertising services, it would not be necessary to indicate who paid for electoral advertising.

**Q5.** Government support for independent and trust-worthy organisations that can fact-check claims or identify misinformation.

### **Good idea**

#### **WHY DO YOU THINK THAT?**

Internationally, it is widely acknowledged that fact-checkers and research organizations play a key role in tackling the spread of disinformation and helping mitigate its threats. Their activity provides a fundamental contribution in understanding the mechanisms that sustain and disseminate disinformation and raising public awareness. The establishment of mechanisms that offer support to and increase visibility of these entities is an important measure to pursue the fight against disinformation.

Governments are called on to actively engage and step up public funding to support the economic sustainability of these services to ensure a long-term response to disinformation. Government actions should not be limited to financial support schemes that enable fact-checking organizations to perform their debunking activity. They should encompass a diverse range of initiatives that help support fact-checking activities and research in a multifaceted way. Investing in the development of new resources and tools that improve and amplify the ability to identify and expose disinformation and promoting programs that raise visibility and public awareness on these services should also be considered valid alternative solutions (European Commission (2018) *A multi-dimensional approach to disinformation - Report of the independent High level Group on fake news and online disinformation*).

Along with funding individual organizations, support should be provided to initiatives that prompt cooperation and foster the creation of strong networks of multidisciplinary teams of fact-checkers and researchers. At European level, meaningful initiatives in this direction resulted in the establishment of the European Digital Media Observatory and the on-going development of a digital platform with the aim to create a “European hub” for fact-checkers and academics and support the work of an independent multidisciplinary community (European Commission (2018), *Action Plan Against*

*Disinformation*). The goal of these projects is to enhance collaboration not only among fact-checking experts but also with other relevant stakeholders (e.g. media, policy makers), providing a safe environment to exchange best practices and working methods as well as joining efforts in the formulation of common strategies for further limiting the spread of disinformation.

A comprehensive response to disinformation requires a multi-stakeholder engagement. Because fact-checking has proven to be ineffective when confirmation and desirability bias are prevalent, combating fake news requires a combined response that includes also improving news quality and differentiation (Martens, Aguiar, Gomez-Herrera, Mueller-Langer, *The digital transformation of news media and the rise of disinformation and fake news - An economic perspective*; Digital Economy Working Paper 2018-02; JRC Technical Reports). In this sense, government support measures should not be limited to fact-checkers and researches and should include aid schemes to assist independent media and investigative journalists, as they are an essential part of the backbone structure that contributes to the exposure of disinformation and the creation of a healthy digital environment. Hence, the implementation of programs to improve quality and professionalism in journalism and reinforce the network of independent media is another key action to strengthen the long-term response against disinformation.

For any of these measures to produce meaningful impact, trust in institutions and in these organizations must be safeguarded and maintained. (European Commission (2018), *Action Plan Against Disinformation*). It goes without saying that the implementation of government funding schemes in favor of independent fact-checking organizations, whose core activity includes exposing false political news with possible negative impacts in the political arena, requires careful consideration. Against this background, transparency in government action - in terms of criteria, procedures and funds allocation - will be an even more fundamental element to ensure that trust in public institutions and credibility of independent organizations is not called into question and dangerously compromised.

**Q6.** Using independent organisations (e.g. the Victorian Electoral Commission) as a source of reliable information about electoral candidates.

**Very good idea**

#### **WHY DO YOU THINK THAT?**

Reliance on credible and trust-worthy private or public sources of information is the first efficient barrier to limit the dissemination of viral hoaxes and fake news. Since the rise of the Internet and its different manifestations to central means for the consumption and sharing of information in the modern age, the identification of reliable information has become challenging. The ease with which contents are generated, manipulated and

disseminated online, with little or no oversight on the credibility of its sources, has made the line between true and false online information increasingly hard to recognize.

This is all the more true when the context in which information delivery takes place is the political one. The amount of political news that is produced and the speed of its spread, particularly at decisive political moments (e.g. election period), prevents an accurate source-check and fact-check on all the information in circulation. Hence, the identification of reliable sources provides important points of reference to rely on for trust-worthy information on political candidates and related political events.

The question is when a source (be it an online website, an independent organization or a public institution) can be rated as credible and reliable. Public agencies or bodies directly involved in the organization and administration of the election process (e.g. Victorian Electoral Commission) may be good sources for trust-worthy candidates' information, given the direct access they have to this kind of information and the tools they can employ to carry out in-depth source and fact-checking activities before validating an information as reliable. Safeguarding the independence and neutrality of these bodies is crucial to ensure their proper functioning and prevent political interferences that would undermine their activity.

Civil society organizations may also be taken into account as additional sources of reliable information. Independent non-profit and nonpartisan organizations, with an established history of source-checking and provision of accurate, relevant and updated contents would still play a key role in counter-checking and validating information provided by public sources. Qualifying as a reliable source of information should not be understood as a one-time achievement, but rather as an on-going process.

Pluralism of stakeholders remains in a fundamental element to build a healthy environment for the consumption and sharing of truthful information.

## Q7. New laws requiring truth in political advertising

### **Bad idea**

#### **WHY DO YOU THINK THAT?**

Introducing a 'duty of truthfulness' in political advertising does not appear to bring a valuable contribution in the debate on political advertising. First of all, it is worth noting that even if political speech generally enjoys the utmost degree of protection, by reason of its potential for the promotion of a democratic debate on issues of public interest, it is not per se immune from limits. Liberal democracies are generally reluctant to establish limitations to speech which depend on the mere falsity of certain statements. Defamation, for instance, is generally punished because inaccurate and false statements affect individuals' reputation. In other terms, the lack of truthfulness must result in harm for the individual, because of the interference with rights and interests which are given legal

protection. Similarly, dissemination of false statements can be punished as far as it triggers public alarm and therefore affects public order. The lack of truth may perhaps influence the functioning of a genuinely democratic debate but such standard may prove very difficult to assess in the context of political speech. Conceptualizing truth in legal terms requires defining clear boundaries in order to avoid deferring to judges a deeply discretionary assessment. Legal orders generally provide remedies to counter false statements, to the extent they affect certain rights and interests. Accordingly, a new law establishing such a 'duty of truth' is most likely unnecessary, as individuals suffering harm by reason of certain false statements, even if contained in political advertising, may nevertheless resort to already existing remedies to seek legal protection. Also, assessing which statements meet the 'truth' requirement and which fail to do so may prove a very sensitive task for courts, triggering risks in term of mutual delegitimation of judges and politicians and, ultimately, creating potential for affecting the separation of powers between the judicial and executive power. It is also worth noting that, since political advertising is more and more disseminated via the Internet and hosted by service providers, these actors are generally immune from liability for third party content, unless they actually contributed in the illegal conduct (eg, defamation) at hand. Accordingly, a duty to monitor false statements made in the context of political propaganda would conflict with the legal status of digital platforms which provide these services.

**Q8.** Are there other things you'd like to see the government do relating to social media or online advertising and elections?

The solutions proposed worldwide to address disinformation primarily focuses on the promotion of more fact-checking activities, the creation of a new media literacy and the increase in the responsibilities of social media. Besides, it would likely more important to think about the role of traditional media outlets in tackling the online spread of disinformation. In particular, such actors could strongly contribute to increase the quality of the information by providing highly verified information and content.

However, the digitization has dramatically affected the business model of the traditional channel of communication, undermining the entire news and content industry. Therefore, the creation of reliable information would require more investments and resources to achieve this objective. Indeed, while it is quite easy to spread false content on the web, it is much more difficult to build information quality and acquire reliability in the digital environment. In this framework, public actors could support the news industry especially by adapting copyright and press law to provide more resources aimed at tackling online – and offline – disinformation. Traditional media outlets should not merely perform a watchdog function over information but could be supported to produce information whose quality is increasingly considered reliable by the users due to the spread of false content online. For example, the provision of additional restricted

funds to the fight against disinformation could be a great incentive to the production of reliable content.

Public approaches towards the criminalisation for the dissemination of false content or the imposition of removal obligations to online platforms could produce negative effects for individuals' rights and freedoms. For these reasons, lawmakers and Governments should focus more on fostering information quality rather than focusing on tackling the flow of disinformation online.