

CORRECTED EVIDENCE

ELECTORAL MATTERS COMMITTEE

Inquiry into the impact of social media on Victorian elections and Victoria's electoral administration

Melbourne — 18 June 2014

Members

Mr H. Delahunty

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Chair: Mr B. Finn

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Witnesses

Mr W. Gately, Electoral Commissioner,

Ms E. Williams, Deputy Electoral Commissioner, and

Ms S. Lang, manager, communication, education and research, Victorian Electoral Commission.

**Necessary corrections to be notified to
executive officer of committee**

The CHAIR — Welcome to the public hearing of the Electoral Matters Committee inquiry into the impact of social media on Victorian elections and Victoria’s electoral administration. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and where applicable the provisions of reciprocal legislation in other Australian states and territories. I also wish to advise witnesses that any comments you make outside the hearing may not be afforded such privilege. Have you read the guide to giving evidence at a public hearing pamphlet that the committee provided?

Mr GATELY — Yes.

The CHAIR — Marvellous, thank you. I ask you to state your full name and business address, whether you are attending in a private capacity or representing an organisation, which I suspect you are, and what position you hold in that organisation.

Mr GATELY — Warwick Gately, the Electoral Commissioner in Collins Street.

Ms WILLIAMS — Liz Williams, Deputy Electoral Commissioner, 530 Collins Street.

Ms LANG — Sue Lang, of the Victorian Electoral Commission, 530 Collins Street, Melbourne.

The CHAIR — I now ask you to give a verbal submission, after which we will open up to questions.

Mr GATELY — Thank you for the opportunity to provide the committee with a written response to this important inquiry and also for the chance today to address the committee. I am joined by Liz Williams, the Deputy Electoral Commissioner, and Sue Lang, who is the manager of the communication, education and research branch of the VEC.

As was stated in the VEC’s written response, social media is having a significant effect on societal norms in terms of worldwide connectedness and issues-based media coverage. With social media now permeating all elements of our lives, it is natural that the electoral process would be included. From the terms of reference for this inquiry there are two elements for consideration. First, whether political communication using social media and online political advertising is appropriately regulated, and second, how social media can be used to better engage Victorians and improve their knowledge of electoral processes.

On the first point, the VEC has not experienced an explosion in complaints about electoral matters, misleading or deceptive matters, or anonymous material transmitted via social media to warrant more restrictive regulation. Regardless of whether social media or traditional media is utilised, most offenders respond quickly to remedy any possible breaches of the act once contacted. However, anonymous online posts, like anonymous letterbox drops, are difficult to regulate. I note from the 2010 state election, and it has been supported in this inquiry by the submission from Mr Peter Holland, that there was an issue with regard to Google’s advertising service AdWords and the placement of potentially defamatory advertisements relating to a candidate. While Google did respond to a take-down request, it would not reveal the identity of the advertiser, therefore limiting any possible disciplinary proceedings. The VEC did not have the power to compel Google Incorporated in California to make this information known.

As to whether the VEC requires such powers and how they would operate, I will leave that for the committee to consider, but I have included some points in our written submission as to how social media commentary generally could be managed. I would add that the impact of social media upon the Victorian political process to date has been negligible. A regulatory response now may be ineffective in the near future as the direction and format of information technologies and messaging is difficult to forecast. It is also relevant, as I note from one submission, that the elector is well able to find their way through electoral advertisements and related material however those messages are delivered. This should not be underestimated in considering a need for further regulation.

On the second matter, for the VEC, like other electoral commissions in Australia, a cautious approach has been taken in adopting social media as a communication platform, but it is being used effectively. Invariably the Victorian Electoral Commission’s involvement in social media, which is limited to Facebook and Twitter, is

event based. It presents electors with appropriate information at the right time, be it enrolment or voting, and it encourages a dialogue on the democratic process. There are, however, policy or governance considerations. I am mindful of the need for impartiality in any communication, along with the VEC's ability to monitor and moderate dialogue as it occurs, which can be many hundreds of posts and extend over many hours. This editorial and moderation function is entrusted to a few select officers. Further, I remain very conscious of the potential for criticism online and having any commission failings amplified and rebroadcast, but I accept that as being part of being involved.

As to engagement with the community through social media, I note a comment from Dr Peter Chen in November 2012 at an AEC research forum where he offered:

Social media used for political purposes is likely though, in the first instance, to attract those with pre-existing strong political interests.

They are an ideal audience for information to be delivered through them to their less-informed social peers. It goes on:

These opinion leaders' validation of content potentially developed by electoral agencies will be more effective in reaching less-informed consumers than strategies that are directly aimed at these non-political media consumers.

While there are risks and costs associated with an involvement in social media, there is almost an obligation to be active. But for the VEC it will be only one part of a wider communication strategy.

Mr DELAHUNTY — Can I just go to your submission, Warwick, appendix C, where you talk about the other states. In Victoria we say there are requirements in relation to printed, published or distributed material. There is a bit of a definition of 'published', and we know about the printed material, but is there a definition in Victorian legislation for material that is distributed?

Mr GATELY — Not the word 'distributed' itself, with respect — —

Mr DELAHUNTY — So the internet and social media is not covered in our legislation?

Mr GATELY — Is it prescriptive — —

Ms WILLIAMS — In the Electoral Act there is a definition of 'publish' that says:

publish means publish by any means including by publication on the Internet ...

So those authorisation provisions also apply to the internet.

Mr DELAHUNTY — To the internet too?

Ms WILLIAMS — Yes. Sections 83 and 84 apply to the internet; section 86 applies only to printed material.

Mr DELAHUNTY — I apologise, but in the reference material we have here, it does not mention the word 'internet' at all.

Ms WILLIAMS — In appendix C of our submission, under Victoria it says:

Authorisation requirements ... Publish means publish by any means including by publication on the internet.

The CHAIR — Liz, are you telling us that all advertising via social media should be authorised now?

Ms WILLIAMS — As is currently legislated.

The CHAIR — Has that been pursued and policed that you are aware of?

Ms WILLIAMS — In responding to complaints. There are details about the number of complaints. We had that situation with the Holland example, where there was not a link to who was authorising that material. That is the only case where we found that. But in terms of us looking through the internet to see what is authorised, clearly with the volume we cannot do that. There are restrictions. There are difficulties in applying the current

legislation, given the word limits around Twitter and even some of those advertisements that link to other websites. We have provided information to participants in elections for those things that they should at least be linking to somewhere that will identify who they are.

Mr GATELY — But there will be an expectation that it is authorised, so if it is called to our attention that internet material is not, then we will make contact and get it authorised or get it taken down.

Mr DELAHUNTY — Just so I can understand this, is it covered for the internet? Some of the states have different regulations during their election period. We know that here in Victoria there is that three-day window of opportunity — the last three days I think it is — where there is no TV or print media advertising. Does that apply to the internet or any other forms of social media?

Mr GATELY — For that commonwealth provision that you are talking about, no, that does not apply. That is TV and/or radio, so that is that period — —

Mr DELAHUNTY — But we have that in Victoria too.

Mr GATELY — But the internet would not come under that umbrella.

Mr DELAHUNTY — Why not?

Mr GATELY — I do not know the answer to that particularly, but it is not legislated.

Mr DELAHUNTY — But if you are talking about published material, you seem to agree that the internet is published material.

Mr GATELY — Yes.

Mr DELAHUNTY — So why does that not get picked up under the fact that there is a law or regulation that stops printed or TV material coming on for the last three days?

Ms LANG — That actual provision — the commonwealth provision — is in relation to broadcast material. That has been around for quite some time now and is specifically defined to cover radio and television, not the print media.

Mr DELAHUNTY — That is correct. I apologise.

Ms LANG — It is not in the Electoral Act.

Mr DELAHUNTY — It is not in the Victorian Electoral Act?

Ms LANG — It is not in the Victorian act at all; it is in the commonwealth act.

Mr DELAHUNTY — We do not have it in Victoria at all?

Ms LANG — It does cover the Victorian election scenario, but it only covers paid political advertising from midnight on the Thursday night before election day, and only on television and radio. So print advertisements can still be run by anyone who wants to run them. The term ‘broadcast’ has come from ACMA, the Australian Communications and Media Authority, so it is a piece of commonwealth legislation specifically set up for them. It does cover political advertising but is restricted around the country just to television and radio.

Mr SOMYUREK — So not YouTube?

Ms LANG — No.

Mr DELAHUNTY — I am sorry. I am being a bit repetitive here, but we keep going back to the commonwealth legislation. We are talking about Victorian legislation here.

Ms LANG — Yes, I understand that.

Mr DELAHUNTY — I would have asked a question about other states and other countries, but I want to know what applies to us in Victoria now. You have said it covers radio and TV.

Ms LANG — Yes.

Mr DELAHUNTY — You are saying that it does not cover the internet or social media.

Ms LANG — I am not an expert on commonwealth legislation — —

Mr DELAHUNTY — No, I am talking about Victorian legislation. You are the Victorian Electoral Commission. I am trying to get you to talk about Victorian legislation.

Mr GATELY — It does not.

Mr DELAHUNTY — Right. That is what I meant.

The CHAIR — Should it?

Mr GATELY — I guess it comes back to the point as to how much regulation you want to impose.

The CHAIR — Do you see any need for it at this point?

Mr GATELY — I guess it gets into the whole issue now of regulation. We have heard other commentators on that as well and other submissions. Is regulation necessary? One of the principles under which we operate is the guiding principle to avoid anonymous, mischievous conduct. We have had legislation for that Australia-wide. It still has not prevented anonymous letterbox drops; it is not necessarily preventing use of social media in that context as well.

But it comes back to that balance between regulating — overregulating — political communication and allowing the elector to make their own determination as to what is truthful, what is not truthful and what is the issue or the matter. You asked me whether it is necessary to regulate. I would say, in accordance with my opening statement, that I think we are sufficiently regulated at this point in time. We have not seen an explosion in this that I would be cautious about regulating — overregulating — and cautious about who becomes the regulator.

The electoral commission is a service delivery office, if you like; it is not an ICAC, it is not an IBAC, it is not an ACCC. We are not resourced for that. That is a matter I would ask the committee to give some consideration to. But I am satisfied that regulation at this point is sufficient.

Mr DELAHUNTY — In your response to the Holland submission, you have made a recommendation:

... the VEC with the power to require information to be provided to it concerning the name and address and any other identifying detail of any person publishing electoral advertisements or electoral matter online.

Mr GATELY — Mr Delahunty, coming out of the 2010 election — and I was not here for that, but I do not have the same conviction that perhaps the Electoral Commissioner at that time had in relation to that matter — I see some issues there with respect to providing the electoral commission with compulsory powers to investigate. The Electoral Act is not written to that end at this point in time; the Electoral Act is written such that it regulates elections. My role is to deliver an election to maintain a register. I am not an investigative agency, so I do not have the same conviction that perhaps was there in 2010, and I would proceed cautiously down that path.

There are a number of offences in the Electoral Act. Why give the Electoral Commissioner a very narrow investigative power over, say, a social media component and not over the wide range of offences that exist in the Electoral Act? If you do that, it is a significant policy shift away from the office of the Electoral Commissioner being a service delivery office. As I said, I am not an IBAC; I am not an ACCC.

The CHAIR — So should any breach in the law be referred to the police?

Mr GATELY — Absolutely.

Mr DELAHUNTY — Hang on, we are thinking about whether we change the law. Obviously if you get an advertisement now, you check that they have been authorised.

Mr GATELY — Yes.

Mr DELAHUNTY — It is a hypothetical question, I know, but why do we not have the same sort of law regarding print media, pamphlet material, TV and radio advertising — which there are laws around — administered by the VEC? Why do we not go to that next level for social media?

Mr GATELY — Which I will make inquiries on. If evidence is brought to me that there has been a breach, I will conduct a preliminary investigation, and if I can get action to get that dealt with, I will. If it is beyond my resources and ability and I do not have powers to enforce or investigate, I will pass it off to the appropriate agency to do that.

I am suggesting that you could consider some changes to the Electoral Act, particularly, say, in relation to Twitter. Liz mentioned where there might be a link to another site you go to where the authorising officer resides. I think the previous team spoke about putting a name on it as well. I suggest perhaps giving some wording, as other states have done, in relation to that whole idea of a general commentary — for example, blog matter — that that does not need to be authorised because it is fast moving, it is flowing. It moderates itself, as we see, for example, with Antony Green's blog, which moderates very well. The Poll Bludger moderates very well. We moderate our own Facebook and Twitter accounts very well also.

I can see clarification needed in legislation, but I do not see a need to overregulate and particularly to provide the Electoral Commissioner with strong investigative powers. That is a significant policy shift.

Mr DELAHUNTY — They are two issues, though, aren't they? I am sorry, I do not want to take up your time, but one issue is the regulations, and, following up the regulations, the resourcing issue that you talked about.

Mr SOMYUREK — What if there is a huge increase in complaints after the 2014 general election? Would you change your position or not?

Mr GATELY — I think we would need to look at it and see how it goes. There is a whole lot of self-regulation out there as well. The community is not blind to this, and to a certain extent it is our policeman. Community members will alert us— you know, the anonymous letter box drops, unauthorised advertising — and we can look at it and then we can pass it off to the appropriate agency. But as I said earlier, we deal with it, and an offender or potential offender, once it is drawn to their attention that they are operating outside the act — and some of these things are just technical breaches of the act — responds to it.

Mr SOMYUREK — In terms of Google, what if they do not act very quickly? Or do you have an indication from Google that they will be acting quickly from now on to take advertising off if it is in a similar situation? Do we have a firm indication from them that they will be responsive?

Ms WILLIAMS — Not directly from Google. Our experience is that they are very responsive, and that particular instance — —

Mr SOMYUREK — But we have only one precedent to go on; is that right?

Ms WILLIAMS — We have had situations ourselves where we have had take-down requests, and it generally happens fairly quickly. They are more responsive these days. We included in our submission some court cases that have happened only very recently that are now suggesting that providers such as Google can be deemed liable to be publishers at the point that they know that there is possibly offending material there.

Mr SOMYUREK — If the material breaches legislation.

Ms WILLIAMS — If someone alerts them to the fact that there is potentially offending material on their platform and they do not take it down, then they can be deemed to be liable, and courts have deemed them to be liable, from that point onwards — not from the time of posting but from the time that they became aware that

that was the case. In terms of other tweaks to legislation, consideration could be given to clarifying what the circumstances are in which providers can be considered to be the publisher of that material.

Mr SOMYUREK — Therefore it becomes immaterial whether you chase Google for the identity of the person who actually sponsored the ad; if Google itself is made liable, you do not really need to worry about going after the person.

Ms WILLIAMS — You can go after the provider.

Mr SOMYUREK — That is right.

The CHAIR — And if the provider provides the name of the responsible person, does that absolve them of guilt at that point? What I am trying to say is, if they hand over the name that you are after, does that then absolve them of any guilt so far as a court may view it?

Mr SOMYUREK — If they take it down, that is what absolves them.

Ms WILLIAMS — We are not lawyers either, and I do not know of situations — —

Mr SOMYUREK — That is what you said to me, I think. You said when they become aware of it they have to take it down.

Ms WILLIAMS — When they become aware. The courts have considered in their findings that they may become liable at that point.

Mr SOMYUREK — Do we have an example of a court case?

Ms WILLIAMS — Yes, we have listed some in the submission. Google and ACCC is one. It was not actually the finding, but it was — —

Mr SOMYUREK — You made a quick reference to it, but from what I read you did not go on.

Ms WILLIAMS — Yes. I think the most recent was Google and ACCC, and that went all the way to the High Court.

Mr SOMYUREK — You did not elaborate in your submission. You made a reference to it but did not elaborate.

Ms WILLIAMS — No, the references are there. In the decision of the court it was noted that they believed that Google could become liable. They had taken it down in response to a request, but had they not, the court mentioned, they could have been considered liable from that point on.

Ms LANG — Google's own terms and conditions from their parent company prescribe that in areas where they are present, if you like, and take advertising — and obviously Australia is one of those — they must abide by any laws within the local area. So they need to abide by this law, and I think that is why they have been so cooperative. As soon as it has been pointed out that there is a potential breach, they have taken it down very quickly. Even though there has only been the one instance, in this particular case, via a complaint, we have had other experience of working with Google to take down other things that came to us via other mechanisms.

Mr DELAHUNTY — I pre-empt my question from this point of view — and Warwick, I picked up that you have not been with the Victorian Electoral Commission for a long time — but what I am trying to get at is that over a period of time the VEC has provided information to our communities about elections, whether it be local government elections or state elections. We heard submissions before lunch about how you do that — with outreach programs and pamphlets. Obviously you are using social media also. My question is about what is on page 3 of your submission, where you said:

A review of legislation in terms of its application to electoral campaigning via social media is appropriate —
as a method of providing information. In the third paragraph you said:

Electoral matter is generally defined as matter which is intended or likely to affect voting in an election.

That is where we are concerned. It is about trying to give a fair and democratic process. I use the example — you might have been in the room here before — where I know of a fellow who lost by eight votes. If eight people had changed their vote, it would have been different. Bernie said that a change of a government was on 16 votes. Again, one vote can be so very important. That is what drives me and I am sure drives this committee to make sure we get a fair and democratic process. So the social media, from my understanding — correct me if it is wrong from your point of view — is becoming a very important medium to provide information to the voter.

The CHAIR — Or disinformation, as it turns out.

Mr DELAHUNTY — Whatever that information may be. But at the end of the day we are trying to make sure it is a fair and democratic process. In some ways — and I come back to the statement there — you believe a review of the legislation is appropriate. That is why we are looking for your views and what you think is appropriate.

Mr GATELY — Having listened to the young lawyers as well, with respect to social media it is an opt-in process. You have got to want to go there in the first instance.

Mr SOMYUREK — But so is buying a newspaper.

Mr GATELY — Yes, and equally I mention that an anonymous letterbox drop as well could have the same effect. As much as we try to regulate that, there are occasions when that occurs as well. What is the impact of that? It is difficult to gauge. Whether those eight votes could have changed by virtue of social media, I am not sure.

Mr DELAHUNTY — I would back it in that they could.

Mr GATELY — But again, it is for that element that are there in the social media space and have opted in and are taking that message. I also heard the comment that you can be lined up to vote — that is for those who have their smartphone with them at the time and are interested in doing that. At the same time — —

Mr SOMYUREK — If you have got large queues, you are more likely to be playing on there.

Mr GATELY — Possibly, but you are getting a how-to-vote card at the same time as well. It is difficult to gauge the impact of it. We have only been in the social media space now for a number of years. You have to opt in to get the information you want. I put the question back to you, Mr Delahunty: how do we regulate that? I do not necessarily come here with draft legislation, saying, ‘This is what I need to enforce it, to uphold it’. You have to get that balance between freedom of communication and the right of the individual to take what information they want to make an informed decision. And they are making, on the whole, informed decisions, whether we think that is the case or not. Whether they have a smartphone, whether they have an anonymous letterbox drop, they are still making an informed decision of sorts.

Mr DELAHUNTY — I will make a quick comment on that. We have three political parties here, and I think all of us would say that social media is very important. Even the Holland submission used an example where John Kerry spent \$37 000 on online ads to raise nearly \$27 million. From that point of view, it just shows you how important it is and that it can happen.

What we are grappling with — and with people like you who have greater expertise in this area — is to try to make sure we have a fair and democratic process. We are not going to change the legislation overnight here. It is about getting the information to provide a report that can help influence the regulators and the decision-makers and the legislators that we are only representatives of.

Mr GATELY — We do provide — and Sue might be able to talk about it — quite good and clear guides to candidates in the local government elections, and also as we go into November next year —

Mr DELAHUNTY — This year.

Mr GATELY — there will be political party briefings, there will be candidate briefings as well, and we will make it quite clear as to their obligation as the legislation is currently drafted. That is pretty clear if you go onto our Facebook site as well; there are quite clear guidelines on what you can put up and not put up.

Ms LANG — I just want to add, Mr Delahunty, another important point. We refer to social media as this all-pervasive thing, and I just want to go back to the point about opting in. When you are on Facebook as a consumer you are privy to depending on other people's privacy settings. I can have my privacy setting as high as possible, but when I share it with the circle of friends who are permitted to receive my post, if they like it or want to share the post, it then goes on to their circle of friends. It is a little bit like a ripple in a pond. So it is opt in, but unless I am within those circles of communities, if you like, I am not going to necessarily just see opinion and comment and the free political speech that the young lawyers referred to. What I am going to be served up that I do not have any control over is the Facebook advertising, if I am on Facebook. We use it for advertising purposes, and we can do it in a very sophisticated way and target the audiences that we are looking for.

Who any advertiser is wanting to influence in any way will determine the criteria for which they post that advertising. They may want people within a certain geographic area — say, it might be within the Ballarat area — aged 18 to 30 who go out a lot, are mobile or are even train or bus commuters et cetera. It gets down to that granular level. I think we just need to keep the perspective that, yes, social media is out there, but you need to opt in and it depends upon how you opt in, how you set your privacy settings and how many people are in your circles of friends' circles of friends' circles of friends. It does not necessarily mean that something that is posted to you — particularly if it is just commentary — is going to be seen by very many people.

Mr DELAHUNTY — I am not worried about that.

Ms LANG — Unlike the letterbox drops that are dropped around a voting centre the morning of an election or the night before et cetera, which potentially, you could argue, would have a greater impact on the people who were going to the polls that day.

Mr DELAHUNTY — I agree.

The CHAIR — Thank you very much indeed.

Mr GATELY — Thanks.

The CHAIR — You will receive in about a fortnight a transcript of today's proceedings. If you would be kind enough to check for typing errors — not that there would be any, of course — and not change the substance of the discussion, that would be much appreciated. As always, your cooperation and assistance is very much appreciated by this committee. Thank you very much indeed.

Committee adjourned.