

CORRECTED EVIDENCE

ELECTORAL MATTERS COMMITTEE

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

Melbourne — 18 June 2014

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Witnesses

Mr J. Silver, co-chair,

Mr A. Yu, co-chair,

Ms J. Zhu,

Ms E. Bulmer, and

Mr A. Foster, Law Institute of Victoria, Young Lawyers' Section, Law Reform Committee.

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

The CHAIR — Welcome to the public hearing of the Electoral Matters Committee 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 SILVER — Yes, we have.

The CHAIR — I ask you to state your full name and business address, whether you are appearing as an individual or as a representative of an organisation and if so, what position you hold in that organisation.

Ms ZHU — My name is Jing Zhu; level 12, 469 Latrobe Street, Melbourne. I appear as an individual member of the Young Lawyers’ Section, Law Reform Committee, as part of the Law Institute of Victoria.

Ms BULMER — I am Tenielle Bulmer. I am a member of the Young Lawyers’ Law Reform Committee as well.

Mr SILVER — I am Joel Silver, one of the co-chairs of the Young Lawyers’ Law Reform Committee. I am also a barrister at the Victorian Bar. My business address is level 10, 525 Lonsdale Street, Melbourne, 3000.

Mr YU — My name is Albert Yu. I am also a co-chair of the Young Lawyers’ Law Reform Committee. My business address is 101 Collins Street, Melbourne, Victoria, and I am appearing as an individual.

Mr FOSTER — Alexander Foster, also a member of the Young Lawyers’ Law Reform Committee.

The CHAIR — As you would be aware, your evidence will be recorded and transcribed and will become public at some stage in the not-too-distant future. I now invite you to make a verbal submission, after which we will open the hearing to questions and take it from there. So over to you.

Mr SILVER — Thanks, Mr Finn. I will begin with a background to our committee. The Law Reform Committee is one of eight committees in the Young Lawyers’ Section, membership of which is open to any member of the Law Institute of Victoria below the age of 36 who is studying for a law degree or is in their first six years of legal practice in the state of Victoria. Any section member may opt into and join a committee, including our Law Reform Committee. We are led by chairs who are elected annually. Before I begin my formal remarks, I just want to thank the committee for giving us this opportunity to present evidence. We all very much appreciate the chance. I will be commencing and leading discussions. I will speak partly to my written submission and partly to some other issues, including some raised in the submission of the Victorian Electoral Commission. I will pause to answer any hypotheticals or questions that the committee poses, or to permit my colleagues to speak.

Social media no doubt has changed the way that we use the Internet. It has certainly made sharing information and content far easier. It has created connections between individuals that did not exist before, could not exist before. That is because before, you really needed some basic web design skills to broadcast, not just receive information, whereas now — and I think YouTube is an apt illustration — anyone with a computer and a decent Internet connection is a potential broadcaster of information and views. Some mediums are a bit more conducive to public broadcasting, such as Twitter, while others like Facebook provide users with a great deal more control over what they broadcast. That does not mean that users actually understand those levels of control, in my experience at least.

There are a lot of not-infrequent changes in privacy controls — anyone who uses Facebook would be familiar with this — and it can be quite confusing. For example, you can ‘follow’ a Facebook user instead of being their friend, meaning the information flow is one way. A lot of people do not realise that others are able to follow them, so you might be posting information that you think is private and you would be wrong in that assumption. What that means is that the distinction between public and private political communications is increasingly blurred. The sorts of discussions that you might have only had over dinner at the local pub can now reach a far wider audience. Parliament should, however, be cautious in bringing what were once entirely private conversations under the umbrella of regulation.

I would also just draw the distinction, while discussing the public-private issue, between opt in and other sorts of communication, as with Twitter and some Facebook pages. You do not get the information without opting in

the communication, so by ‘liking’ a Facebook page or ‘following’ somebody on Twitter, you choose to receive content. While that is quite public in nature, I am not sure if there is value in further regulating those communications.

Conversely, you can distinguish opt in public from paid public content. If you do not opt in to it, somebody might pay for their content to appear in your feed. Facebook pages often do that. Google AdWords is the other good example. I have searched for one thing, my data shows that I have such and such an interest and accordingly a certain result comes up and it is listed as ‘sponsored’, and that is quite different from other opt in content. If a communication is preaching to the converted, even if it is a bit misleading or an exaggeration, I am not sure what value there is in regulating it.

The main point about social media is that what it has not done is make the audience more naive. You can certainly lead a horse to water but you cannot make it drink. It is the same with any other information. Just because something is on Facebook or Twitter or any other network that comes about, it does not make it any more effective or any more believable, and it would be an exaggeration to say that it has changed the way that we vote. It certainly makes it a lot harder to keep things private or to stop the spread of misinformation. Nevertheless, on the impact of information, if information placed on social media is no different from that published in one of the dailies — say, the *Herald Sun*, the *Age* or the *Australian* — it might be observed that a political party concerned first and foremost by what is being said on Twitter has probably lost the election, because, at least in my view, it is only a select group who, use Twitter.

Speaking from a young professional perspective, although I maintain a Twitter account, I do not have time to post on it. I occasionally share things through my interconnected LinkedIn profile, which is another network, but I will not talk about that much. The point is I just, along with others, do not have time to be a social media dedicatee. Twitter is a different way of communicating than meeting up with people for a beer, but the substance is really no greater. There are some other regulatory issues which I may address, but I might see if any of my colleagues have something to say.

Mr YU — I will add to Mr Silver’s submission by pointing to two issues. Firstly, there is the cost of regulating social media, given that any regulation has to have a cost-benefit analysis. I have not done any extensive research into this, but I envisage that the cost of regulating social media would be quite burdensome on the Victorian government. Secondly, the internet and social media are ever-changing media, and what we contemplate now might be completely different to what is reality 5 or 10 years down the track. They are my additions to the submission.

Ms ZHU — I have a few comments. I have had a chance to read some of the submissions made to the committee which have been posted online. From my perspective, I would say that in this online sphere less regulation and more education is probably the way to go. As Albert pointed out, even leaving aside whether we should regulate or not, the cost of regulating and enforcing that regulation in an online sphere which is ever changing is quite significant, keeping in mind that what we are looking at is balancing the implied freedom of political communication, which is one of the few rights that has been read into the Constitution by the courts, against the issues in terms of being able to be protected from certain communications. We have to be very careful before regulating and infringing upon that very fundamental right. Elections and communications are part of political communication as part of those elections. That is one of the holy grails of the democratic system in Australia. Before regulating this very-difficult-to-regulate area, we would have to look very closely at whether that regulation is warranted.

Mr SILVER — I might add to that point. I have made mention in my written submission of the *Unions NSW v State of New South Wales* [2013] HCA 58 case that went before the High Court, the relevance of which is that this implied freedom of political communication, which exists at a Commonwealth level, has trickled down somewhat through that decision to a state level. That matter was in the context of the ban in New South Wales on political donations being made by anyone other than an enrolled voter. Obviously it is in a completely different context, but it is something to be wary of, whether or not one agrees with the Court in that respect. Certainly freedom of speech as distinct from freedom of communication is worthwhile upholding.

I might speak to some of the other issues I have got, identified in the legislation and also from the VEC’s submission. Under the current legislation there may be some ambiguity in relation to what is meant by the term ‘publish’. It is unclear to what extent postings on social media are covered. Personally I suggest that the

easiest content to regulate is where it comes directly from a political party or election candidate. That said, a view expressed that reflects a certain political view alone should not be the test. For example, volunteer office-bearers in the major and minor parties will often post content of a political nature online, but that does not mean that during an election period, it should have to be authorised and regulated. Although it is public in nature, I think it would be going a bit far, and its effectiveness is perhaps overstated.

There is also the issue I identified earlier that not everybody realises they have left their privacy settings open to public viewing. Identification of authors is an issue that has some merit. I refer, I believe, to Mr Holland's submission concerning the Albert Park campaign. If misleading information is to be conveyed in a paid format, certainly that should be regulated. I think it is problematic when an organisation like Google says, 'Despite the fact we acknowledge that a misleading statement has been made using our service, we are not prepared to divulge the identity of the person'. I do not think that those sorts of communication have much practical impact. Independents in seats like Albert Park do not play a particularly significant role in overall election campaigns. I am not sure if that particular instance had that big an effect, but at the same time, that does not make it any less wrong. Some consideration might be given to empowering the VEC to obtain the court order requiring companies like Google to disgorge that information, but I think it should not get to that stage in the first place.

One might suggest that for areas that are subject to an election period Google might have to consider imposing new requirements on bookings for those ads, such as having the name of the person authorising it displayed in the advertisement. In the case of the Albert Park incident, that did not occur. Having greater disclosure would seem an easy remedy.

One issue that might have some wider public interest is the issue of what you would call the Twitter "troll". There are hundreds of users on Twitter who use false names and profiles on Facebook that are not genuine, and these are often used to communicate things political, or to make an issue "trend". Again, I do not think their impact is particularly great. Sometimes false accounts can have a whistleblower role — similar to that now discontinued website Vexnews. Despite the controversy surrounding that site and its predecessors, it did play an important whistleblower role — not to endorse the legality of some of those disclosures. Yes, it is desirable in an election period for us to know who is making the statement, but at the same time I do see some value in people being able to hide behind a proverbial Guy Fawkes mask, so to speak.

Ms ZHU — There has also been case law that says people who read online comments are less likely to put as much emphasis on them, knowing that they are on an online forum and more casual et cetera than, say, in printed media, radio or maybe even television from quite well-established media outlets. Especially in an election period, it is very important for there to be discussion not only amongst the authorised people running for office or the typical players but for everyone. Even if their comments are not widely socially accepted, they should have a chance to have those comments aired. If those comments are in breach of the current schemes that are already set up in place — such as the Racial Vilification Act, the Racial Discrimination Act or the Defamation Act; all those kinds of safety measures that are already in place — then obviously there are provisions under those schemes to enforce court orders or seek compensation. I think that further regulation in an area which should really encourage active communication and participation amongst all the members, regardless of the content of what they are saying, is quite concerning. Infringing on that is probably not very desirable.

The CHAIR — We have 10 minutes left. I have a number of questions. Are you advocating that we have authorisation on online advertising in the same way we have authorisation of television, newspaper and radio?

Mr SILVER — One might say that there is little need if it is obvious on the face who it is from. That said, not everybody is honest about that. Without putting words in your mouth, that could be appropriate during an election period, but I would be cautious about bringing any private communications under that umbrella, and in the event of ambiguity I prefer to think of something as private and thus remaining unregulated.

The CHAIR — I do not think this committee is going to be suggesting we curtail freedom of speech in any way at all, but there is clearly a responsibility for people to take responsibility themselves for what they say. As has been outlined by other witnesses and to which you made reference earlier, there are sometimes people who say things in the course of an election campaign — not that I would ever be involved in that — that they should

not, so would you be happy to have those people held responsible? What I am trying to do is find a way of actually making people be held responsible for what they say.

Mr SILVER — In that respect the solution is if you are participating as a candidate — that is the maximum I would be comfortable with — you should be bound. If you are participating, you should have to identify yourself. That means that you cannot have political party operatives effectively “trolling”, as you might say, not under their real names. It is problematic because, as you all know, political parties are large and complex organisations, and there are always a few bad eggs among them. I am not referring to members of Parliament — let me make that clear, of course. In any organisation there may be a few bad eggs. It is a difficult issue. I might just leave it at that.

Mr SOMYUREK — As young professionals — young lawyers, in this case — your online profiles are very important to you, no doubt. If you were to leave your current job to seek alternative employment, prospective employers would be looking online to create a bit of a profile of you. Would that stop you from going into politics, knowing that there is a totally unregulated sphere out there and people have carte blanche to attack you in any way they want? Would that stop you from going into politics?

Mr SILVER — So long as you can identify the person putting an accusation to you, you can defeat it. That is why I make the point that as long as somebody is required by law to put their name forward, particularly for what could be a defamatory accusation, you would be all right because you can refute it. But you cannot respond to a voice on the wind.

Mr SOMYUREK — Yes, but as a prospective employer sitting down, looking at a few different CVs, in the online profiles you see that there is one candidate with all these things there and then other ones who are relatively clean and anonymous. He or she may just decide, ‘Look, even if 10 per cent of these things are true, maybe we shouldn’t go down this path and we should just take the safe option and go for someone with a clear profile’. I am just concerned that that would stop young, bright and talented people from entering politics.

Ms ZHU — From my perspective I do not think it would. Everyone is operating in that world anyway now, and if there were a prospective employer who is interested in your profile but had these concerns, I would hope that either you would pre-empt that or, if that were too difficult, you would hope that that employer raises those issues with you and says, ‘Look, I have some concerns. Online there have been these comments made. What is your response in relation to that?’, just as when you fill out some work applications, they say, ‘Please disclose if you have a criminal conviction’, ‘Please disclose if you have driving convictions’ or whatever. I would hope that you would have the chance, in terms of procedural fairness, to then refute those allegations if they are made. My understanding is that, if you are denied that opportunity based on unfair grounds, there are provisions for that in the Fair Work Act.

In any case, I think that at the moment everyone kind of operates in that realm. It is very difficult to regulate that area such as to negate that kind of online activity. If people want to make comments online, even if they were anonymous, it would be so difficult to remove that. As much as it would be nice not to have those comments made, I do not really see how you can in the current environment, really.

Mr SILVER — I might just add to that. One must also acknowledge that a lot of content shared on social media has very little value. To put it a bit more crudely, a lot of nonsense gets put up on social media, and I think that, at least with our generation, we do not take it all seriously. Obviously with past generations when something was public it was because you said it aloud in front of people, and they heard it. Now ‘public’ is whatever you put online, and that is so easy.

Mr SOMYUREK — But it is there, whereas before it was a chat in the pub or something. Now there is a permanent record.

Mr SILVER — Yes, but I think people also are more willing to forgive things that get said on social media because people put rubbish on social media. They really do. I think people used to forgive people up until they were age 18, but I think in social media — this might only be confirmed in years to come — I am not sure that people take this seriously. Just because a journo gets sent somebody’s silly Facebook post when they had one too many on a Saturday night, it does not seem that it is seen as a real story.

Mr SOMYUREK — Depends on the journo!

The CHAIR — Depends on who said it, too!

Ms ZHU — I think we also have to distinguish here between the posts and the information that you yourself or your friends put up as opposed to, say, someone else — the comments that other people are making of, say, your professional opinion or the job you do in a professional capacity — because I think it is every person's responsibility to take responsibility for themselves and ensure that they do not post stupid remarks on social media. That photograph of you when you were partying, out on a Friday night or whatever — that is your own responsibility, and you have to take care of that. I am sure most young professionals are aware of that.

On the other hand, if there are comments that are made in response to something you published or a comment you made or a position you have held and someone has taken issue with that, then I think that is a professional context, and any potential employer would look at that context and I would not have thought necessarily see it as an obstruction to hiring you. In some spheres, if you have published something that has created some controversy or some debate, it might even be seen as a positive thing, again, if it is in a professional context, as opposed to just a normal, drinking, got-smashed kind of thing.

Mr DELAHUNTY — I am finding this really interesting. I have to ask: Joel, you made a submission here, and you talk about social media and the VEC and the state Parliament. You use your comment, and you have used it before, 'A horse to water, can't make it drink'. Are you a country person?

Mr SILVER — Unfortunately not, but my family has — —

Mr DELAHUNTY — That is all right. Not too many people use it these days.

The CHAIR — He spends a lot of time at Flemington!

Mr DELAHUNTY — Seriously, you have spoken here today about social media being a broadcaster, but we are also considering it from the point of view of an information provider. It is a two-way street — you broadcast, but you are also providing information. You compared political parties in that they should have more regulation around them than maybe anyone else. Independents are a political group in their own right, so you cannot differentiate them, whether it be political parties, Independents or individuals. We have regulation around papers, pamphlets, radio and TV advertising — all those types of things. What we are concerned about as a committee, and this is what the terms of reference talk about, is the impact of social media on giving appropriate information. Everyone's definition of appropriate will be different, but at the end of the day it is about being accountable for the advertising that could be used through social media.

Being young people as you are, just about everyone would use social media. What we are interested in from your point of view, and particularly from your law reform committee — you talked about the Holland submission, and that is a good test case — is: do you think it is fair to try to have some control over political advertising that is on social media, as compared to at the moment, when it is only newspapers, pamphlets, radio and TV? That is what we are trying to get our heads around, and we would love to hear your views on that — any of the five of you.

Mr SILVER — I think I probably did not indicate it so articulately before, but paid advertising should be regulated at election time, so this would perhaps be achieved by directly regulating services like Google, Twitter or Facebook and saying, 'If you are to allow political communication to be put up by parties, organisations or individuals with ties to a campaign, that ad must meet the following standards'. I would not recommend that it need be approved by the VEC before you put it up, but the information should at least be given so that people cannot just be a voice in the wind saying something and then disappear.

The CHAIR — There has been some suggestion today that that sort of advertising be restricted to websites that are based in Australia only, because that would give us some control over what is posted and what is advertised on these sites. Whereas if you go to Google in California, for example, they might tell you to go away in perhaps not so many words.

Mr SOMYUREK — No, it would be two words!

The CHAIR — Quite right. Good point.

Mr YU — To my knowledge, if Victoria has regulations restricting advertising, for example, on Google, Google would be obliged to comply with the Victorian regulations in terms of the publication of that advertising in Victoria.

Mr DELAHUNTY — But you know that social media has no borders, so you can connect into social media coming out of America, England or China — anywhere.

Mr SILVER — Paid content, though, is generally targeted based on geographical areas and on users' personal preferences, which is why I would not see David Cameron advertising in my Facebook feed in the lead-up to the next UK election, for instance. That simply does not, or at least should not occur.

Mr DELAHUNTY — We will have an election here in November. The voter populations are about 50 000 people, and I know of one person who got beaten because of eight votes, so social media could influence those eight people to vote differently.

The CHAIR — Go back a few years and the government changed on the basis of 16 votes.

Mr DELAHUNTY — That is right. So what I am saying is that it is an important medium that this committee is grappling with and the Parliament is grappling with, and we value your input. It is a challenge because social media does not have borders.

Mr SILVER — Yes, but at the same time the communications are of no different a nature to those that have occurred before. It is just the form in which they come.

Mr DELAHUNTY — That is correct.

Mr SILVER — I would be cautious about saying that social media can change elections. If I see a newspaper article shared, it is no different than if I read it in the *Australian*, the *Herald Sun*, the *Age* or the *Guardian*, which we have now. In my view at least no election will be determined any differently post-social media than pre-social media. People are not more likely to be convinced by something they see on the Internet than what they see in a newspaper or on a poster that has been sticky taped to the side of a power pole.

Mr DELAHUNTY — Can I ask if the others agree with that comment?

Mr YU — I agree with that. A particular comment made or a thing said on the various kinds of social media, which are borderless as you said, is no different than, say, a conversation Joel and I may have at a local pub or cafe. As Joel said before, it is just that the medium in which it occurs has changed.

Mr SOMYUREK — And it is there permanently.

Mr TARLAMIS — And the audience has changed, because you have gone from two people to — —

The CHAIR — We are fast running out of time. In fact we have run out of time well and truly, but can I just try to get to the pointy end of this. With regard to advertising, you agreed that social media advertising should be authorised. What about those candidates, as we heard discussed earlier, who have had their names blackened by advertising or deliberate dirt campaigns. Previously they would have used a dirt sheet, and let me tell you as a candidate in a marginal seat in previous elections, I can say that you live in fear of what is going to pop up in the letterbox over the last three or four days. However, now it can actually pop up on social media. How do we deal with that, do you think?

Mr SILVER — If somebody is going to make an accusation, they should be prepared to say it openly.

The CHAIR — I know they should, but they do not. That is what I am saying. You wake up on the Saturday morning and everybody opens their Facebook to find out that Adem Somyurek is a swine. Those of us who know Adem know that is not true — sometimes! — but for the rest of the electorate, they will read that and say, 'I am not voting for a swine'. This is the issue we have to face. People will misuse social media for this purpose: to blacken people's names and to hurt them at the very last minute. We have heard today that people access social media while they are queuing up to vote, and that really is last-minute campaigning. How do we deal with that?

Ms ZHU — I think the smear campaign has been around forever.

The CHAIR — It has, but not on social media.

Mr SOMYUREK — And not as a permanent record.

Ms ZHU — I appreciate that, but if that is a concern, then in the same way you would retaliate if it were print or traditional media, you could have your own Twitter account and say, ‘I cannot identify who this is. If they were ballsy enough, they would identify themselves — “These are my comments in relation to what has been said” — and kind of beat them at their own game if you like.

Mr SOMYUREK — They are online warriors.

The CHAIR — You seem to know a lot about this.

Ms ZHU — If there is a smear campaign in print media, or if it is in the news, that is also on the permanent record, but it is just that the speed at which everyone gets it is probably faster than it is on traditional media. If you want to retaliate against that and there has been a breach, as I said previously, then you can find it that way, or if there has not been, you can retaliate online as you see fit.

Mr DELAHUNTY — Can I just say, we are not after retaliation. We are just trying to give a fair democratic process to all interested.

Ms ZHU — ‘Retaliate’ is perhaps the wrong word, but if you feel you have been slighted and it is not the correct view of a candidate, then you are able to use online media to — —

The CHAIR — What we really want to know is how we formulate a law that protects all involved.

Mr SILVER — Whether you can is a good question.

The CHAIR — That is the other question — whether we can.

Mr SILVER — I would be cautious about penalising people who rely on others. If somebody is handing out an unauthorised flyer, we would all be cautious about penalising that person for the offence of handing out unauthorised material because not everybody knows the requirements.

The CHAIR — Shouldn’t they?

Mr SILVER — In theory, yes, and in theory we should know every page of the Commonwealth Law Reports, but we do not.

Mr DELAHUNTY — That is why we employ lawyers.

Mr SILVER — I am not making a statement on behalf of the profession of course, but it is said lawyers know where to find the law; we do not have to know it. It is a difficult issue, but I think it is a question of giving the VEC the powers it needs to follow the paper trail. That may be through areas that involve commercial-in-confidence information, but at the same time I would say that the value of some of these smears is not that great.

If you do not mind, Mr Finn, I might refer to an example in the *Australian Jewish News* a few weeks back. The Labor candidate in Caulfield misconstrued a remark you were entitled to make. You handled it adequately and nobody took the issue seriously, in my view at least, but that betrays my political allegiances. I do not think the point had any effect. It looked silly. I am not sure if that is playing on your mind particularly.

The CHAIR — No, it is not actually. I had not even thought of it.

Mr SILVER — And it should not, but in relation to most social media things, you cannot make a story out of nothing, and false information is often based on nothing.

The CHAIR — Obviously you are a lawyer and not a journalist!

Mr SILVER — Correct.

Mr SOMYUREK — I do not agree with you. In relation to *Unions NSW and Ors v. State of New South Wales* — and I am not a lawyer, and I realise I am speaking to five lawyers — my reading was that the principle there was that the High Court was against, perhaps, the absolute banning of things. It was against caps because that is an absolute ban. If you were to put it into this context, if we were to ban social media — —

Mr SILVER — No, I did not mean that when I put that. I said that the case was the first one where we are talking about state laws in the context of this federal political communication, the notion being that should somebody challenge these laws — I do not see why they would — that could be a consideration, but I was not intending to make any particular submission in that respect.

The CHAIR — Thank you very much, one and all. A copy of the transcript will be delivered to you in about a fortnight. If you would correct any typos but make no changes to the substance, we would appreciate that very much indeed. The committee appreciates you coming here today; this will be the last time we will ever be able to afford to speak to so many lawyers at the one time. Thank you very much indeed.

Witnesses withdrew.