



Law Council
OF AUSTRALIA

Office of the President

21 February 2023

Senator James Paterson
Chair
Select Committee on Foreign Interference through Social Media
PO Box 6100
CANBERRA ACT 2600

By email: foreigninterference47parl.sen@aph.gov.au

Dear Chair

Inquiry of the Select Committee on Foreign Interference through Social Media

1. The Law Council is grateful for the opportunity to provide a submission to the Select Committee on Foreign Interference through Social Media (**Committee**) regarding its inquiry into 'the risk posed to Australia's democracy by foreign interference through social media'.
2. The Law Council recognises the assistance of the Law Society of South Australia in preparing this submission.
3. The Law Council notes that an earlier iteration of the Committee was established by the previous Parliament in December 2019 with similar terms of reference (**Previous Committee**). The Previous Committee tabled an Interim Report (**Interim Report**) on 17 December 2021 and a Progress Report on 21 April 2022. Due to the proroguing of Parliament before the 2022 Federal Election, the Previous Committee was dissolved prior to the making of a final report.
4. The Law Council provided a submission to the Previous Committee on 25 March 2020.¹ In that submission, the Law Council outlines the risks posed by foreign interference through social media to Australia's democracy and considers a number of ongoing and potential responses to mitigate these risks. The Law Council commends that submission for consideration by the Committee.
5. The Law Council now seeks to build on the discussion in the previous submission of potential initiatives to mitigate foreign interference and disinformation-for-hire.²

¹ Law Council of Australia, Submission No 18 to Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (25 March 2020) <<https://www.lawcouncil.asn.au/resources/submissions/inquiry-of-the-select-joint-committee-on-foreign-interference-through-social-media>>.

² Ibid

6. The Interim Report of the Previous Committee identified Coordinated Inauthentic Behaviour (**CIB**) as one of the challenges faced by social media platforms.³ While CIB has historically been undertaken by foreign governments or entities with links to a foreign government, the Law Council suggests that the growing market of influence-for-hire warrants closer examination. Media reports indicate that disinformation-for-hire is becoming more common and may be outpacing operations conducted directly by governments.⁴
7. Some influence-for-hire may deploy CIB as part of its strategy. The Interim Report recorded evidence of extensive efforts taken by the companies who operate the major social media platforms to implement counter-measures against CIB activities. It is not clear whether those counter-measures address the commercialisation aspect of CIB activities. One think-tank predicts that commercial influence-for-hire services will continue to proliferate ‘for as long as there’s a market and cheap digital labour to deliver them’.⁵ The Law Council suggests that consideration be given to potential measures for preventing the commercialisation of such activities.
8. The Interim Report identified the practical difficulty of tracing the source or mastermind behind influence-for-hire operations.⁶ The Interim Report noted evidence that such operations have been outsourced to legitimate public relations (**PR**) communications or strategy firms, and are carried out under the guise of genuine political campaigns.⁷ The Law Council notes that influence-for-hire differs from genuine political campaigns because it is covert, deceptive, and manipulates public discourse to undermine democratic participation. In this context as well, not all influence-for-hire operations are foreign interference—some operations may be carried out entirely by domestic actors.
9. The *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (**EFI Act**) amended the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to introduce Division 92 into Part 5.2 of the Criminal Code which contains several offences relating to foreign interference. The offences within Division 92 apply to a person who seeks to influence the Australian democratic process in collaboration with, or on behalf of a foreign principal.⁸
10. These offences potentially apply to persons who utilise various forms of social media to influence the Australian democratic process in a broad sense on behalf of a foreign actor. While the Explanatory Memorandum to the EFI Bill did not refer to the use of social media to commit the offence, it is clear that the intention of the offences introduced by the EFI Act into the Criminal Code could apply to such conduct where the use of

³ Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Select Committee on Foreign Interference through Social Media* (First Interim Report, 2021), 23-34 (*Interim Report*).

⁴ Max Fisher, ‘Disinformation for Hire, a Shadow Industry, Is Quietly Booming’, *New York Times* (online, 25 July 2021) <<https://www.nytimes.com/2021/07/25/world/europe/disinformation-social-media.html>>.

⁵ Jake Wallis, ‘Influence for hire: the Asia-Pacific’s online shadow economy’, *Australian Strategic Policy Institute* (Web Page, 10 August 2021) <<https://www.aspistrategist.org.au/influence-for-hire-the-asia-pacifics-online-shadow-economy/>>.

⁶ Senate Select Committee on Foreign Interference through Social Media, Interim Report, [4.26]. See also Asha Barbaschow, ‘Disinformation for hire: PR firms are the new battleground for Facebook’, *ZD NET* (Web Page 29 July 2021) <<https://www.zdnet.com/article/disinformation-for-hire-pr-firms-are-the-newbattleground-for-facebook/>>.

⁷ Senate Select Committee on Foreign Interference through Social Media, Interim Report, [4.14], [4.25]; see also Ann Lewandowski, ‘Disinformation-for-hire: the pollution of news ecosystems and erosion of public trust’, *Center for International Media Assistance* (Web Page, 8 December 2021) <<https://www.cima.ned.org/blog/disinformation-for-hire-the-pollution-of-news-ecosystems-and-erosion-of-public-trust/>>.

⁸ See *Criminal Code Act 1995* (Cth) ss 92.2-92.4.

social media is the means to exert the influence on behalf of a foreign actor by deceptive or covert means.⁹

11. However, the Law Council queries the capability of the current offence provisions being widely used against instances of foreign interference through social media, given the challenges that exist in relation to successfully investigating and prosecuting persons who commit this offence when the ‘conduct’ occurs outside Australia.
12. While the current offences alone may not be a solution to the problem of preventing foreign influence through social media, they may still prove useful in conjunction with a range of other measures. Accordingly, there may be scope to develop further measures which target foreign interference through social media specifically, and outside of the Criminal Code.
13. In 2021, the Digital Industry Group Inc (**DIGI**) introduced the Australian Code of Practice on Disinformation and Misinformation (**Code**), a voluntary code of practice that commits several technology companies (including a number of social media companies) to reducing the risk of online misinformation causing harm to Australians.¹⁰ This followed the recommendation of the Australian Competition and Consumer Commission in the Final Report of the Digital Platforms Inquiry that an industry code of conduct be established to govern the handling of complaints about disinformation on social media services.¹¹ The Law Council suggests that the Committee seek information from the signatories of the Code and the Australian Communications and Media Authority regarding the implementation and impact of the Code since its introduction. The Committee should consider how the Code might be improved—including whether requiring the notification of foreign interference or suspected foreign interference activities might be appropriate.
14. Additionally, consideration could also be given to:
 - (a) the role of PR agencies and communications firms, including how these firms should support the government’s foreign interference counter-initiatives and law enforcement activities;
 - (b) improving the visibility of the scale of foreign interference in Australia, including improving communications around this issue to improve digital literacy and awareness, as well as to build resilience to misinformation and disinformation; and
 - (c) whether it may be appropriate to require social media organisations to indicate to users whether a social media account originated in Australia and potentially the percentage of ‘likes’ or other unattributed support which also originate in Australia. It is likely that some campaign supporters are also foreign actors, and it may influence Australian account holders to have this information.

⁹ For the purpose of the foreign interference offences ‘deception’ is defined in section 92.1 of the Criminal Code as an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law, and includes: (a) a deception as to the intentions of the person using the deception or any other person; and (b) conduct by a person that causes a computer, a machine or an electronic device to make a response that the person is not authorised to cause it to do.

¹⁰ Digital Industry Group Inc, Australian Code of Practice on Disinformation and Misinformation (Updated 22 December 2022) <<https://digi.org.au/disinformation-code/>>.

¹¹ Australian Competition and Consumer Commission, Digital Platforms Inquiry (Final Report, June 2019) rec 15.

15. As noted in the Law Council's previous submission, any options to further strengthen Australia's resilience against foreign interference and disinformation through social media should be:
- (a) appropriately balanced against the right to freedom of expression and the constitutionally implied freedom of political communication;
 - (b) proportionate and practicable; and
 - (c) take the form of a multi-faceted approach, involving coordinated and collaborative action by the Australian Government, social media platforms, and civil society.¹²

Contact

16. Please contact Mr John Farrell, Senior Policy Lawyer, on (02) 6246 3714 or at john.farrell@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Luke Murphy', with a large, stylized flourish extending upwards and to the right.

Luke Murphy
President

¹² Law Council of Australia, Submission No 18 to Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Inquiry of the Select Committee on Foreign Interference through Social Media* (25 March 2020) 24, [87].