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Dear Registered Officer

### **Social media advertising and section 196 of *Electoral Act 2004***

The State election has seen an unprecedented number of complaints received by this office that advertising on social media platforms such as Facebook, X (formerly Twitter) and TikTok, is in breach of section 196 of the *Electoral Act 2004* ('the Act').

I am therefore writing to you to provide some guidance in this area, and to request that you ensure that any online material published by your candidates or party at a State or national level that is likely to be considered an 'advertisement' or 'notice' is taken down, to ensure compliance with the legislation by all political participants.

As you are no doubt aware, section 196 provides:

A person must not between the issue of the writ for an election and the close of poll at that election print, publish or distribute any advertisement, "how to vote" card, handbill, pamphlet, poster or notice which contains the name, photograph or a likeness of a candidate or intending candidate at that election without the written consent of the candidate.

The definition of 'publish' in section 3 of the Act includes "by publication on the internet".

The words 'notice' and 'advertisement' are not defined, and so should be understood to have their ordinary meaning. As mentioned in the Candidates Handbook, I consider a wide interpretation of the words 'notice' and 'advertisement' could be seen as infringing freedom of political communications. I do not consider that every comment on social media that mentions a candidate's name would not be captured by section 196.

Whether or not something published on the internet is a 'notice' or 'advertisement' is a question of fact, to be determined by considering all the circumstances. As a general guide, these are the types of factors that I consider may be relevant in assessing whether an internet publication is an advertisement or notice:

- whether it gives information to the public, i.e. is widely or 'publicly' published,
- whether the material was paid for (although this is not a requirement for an advertisement),
- the combined effect of the look, sound, level/style of production, content, etc.,
- whether the message is designed or calculated to draw public attention to, or promote a particular message,
- whether it is intended to affect the way in which an elector votes at an election, e.g., intended to draw attention to the electoral policies of various parties or a particular candidate,

- whether it is a genuine use of social media to for the purpose of engaging in discussion or sharing opinions (as opposed to advertising).

I also note that an advertisement may promote or detract from a particular party or candidate.

If a social media post or comment or material published on the internet is reported to me which I consider to be in breach of section 196, my approach will be to contact the party or candidate concerned and request that it is taken down to as soon as possible. Further investigation and prosecution may also be considered, particularly in relation to serious or flagrant breaches.

I urge all parties to take a cautious approach when publishing online material that could be considered an 'advertisement' or 'notice'. I also suggest you check any material you have already published to ensure it complies with this provision. Please feel free to consult with me about any uncertainties.

Please feel free to contact me if you have any queries.

Yours sincerely



Andrew Hawkey

ELECTORAL COMMISSIONER

15 March 2024