Written evidence submitted by Jacob Rowbottom¹ (FNW0070)

1. In this evidence, I make the following points with regards to fake news:

- ‘Fake news’ can refer to stories with false content and that misrepresent the identity of the author. The term normally refers to content that the initial authors or source knows to be false.
- Counter-speech is the most obvious remedy for falsity, but may not always work due to constraints in the ‘marketplace of ideas’ and the way people process information.
- Knowingly false statements typically receive little protection under free speech doctrine. However, there are risks that certain measures to combat fake news could chill or inhibit genuine exercises of expression rights.
- Measures to combat fake news undertaken by digital intermediaries should be transparent and accompanied by channels of accountability and appeal.

What is fake news?

2. The economist Joseph Schumpeter once wrote that the term ‘propaganda’ was being used to refer to ‘any statement emanating from a source that we do not like’.² The same may be happening with fake news. The term is sometimes bandied around to dismiss criticism and opposing views. It is therefore important to focus on some of the key elements of ‘fake news’.

3. The presence of any error or mistake in a news item does not mean that it should be written off as fake. The presence of some errors is inevitable in a healthy system that permits open debate. A distinction can be drawn between statements that are (a) knowingly false, (b) careless or (c) researched with due care, but are nonetheless incorrect in a significant way. The clearest example of fake news is a knowingly false statement put into circulation to further the speaker’s goals (whether ideological or financial) through deception or distraction.

4. The lines between the deliberate, the negligent and genuine error can become blurred as content is republished. For example, a person may initially publish content knowing it to be false, which is then repeated in the media as a result of poor verification systems. The same content may then be repeated and commented on by social media users that genuinely believe it to be true. The different parts of the chain may take on different levels of responsibly which warrant different responses.

5. There are different types of falsity that can be associated with ‘fake news’:

   (i) **Falsity in substantive content.** A statement may mislead by carrying a meaning that is incorrect. A statement that ‘the Queen was born in France’ provides a simple example. The false substantive content can also come in

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the form of fabricated evidence in support of the claim, such as a forged birth certificate or manipulated photograph.

When looking at falsity in the meaning, it is also important to distinguish statements of opinion and fact. The distinction has a long history in defamation law, but the basic point is that greater freedom is normally left to statements of opinion (assuming that it is clear to the audience that the matter is one of opinion).

(ii) Misrepresenting the identity of a speaker. A speaker may conceal his or her true identity so that people are less able to assess credibility and identify any conflict of interest or agenda. An obvious example arises with ‘astroturfing’ or front organisations, where seemingly credible research is published by an organisation that is secretly financed and directed by a person or company with a vested interest. Withholding the true identity of the source prevents the audience discounting for the vested interest when evaluating the research.

Some websites producing fake news have names and formats that resemble established and professional news organisations. Such sites thereby implicitly hold themselves out to be fulfilling the processes of research and verification expected of a professional journalist (even if that is not said directly) and may gain the misplaced trust of audience members.

6. There is no general law prohibiting false statements and lies. Instead, controls are imposed on false statements in specific settings and where certain interests are at stake. For example, in the context of an election, certain types of false statements are prohibited (regulating the substantive content) and election posters are not to be published anonymously (regulating the disclosure of identity). Other limits on certain false statements include defamation law, declarations on official forms, the law of fraud and certain media regulations. One issue the Committee may wish to consider is whether any measures (whether regulatory or through company policy, as opposed to law) should be taken to combat fake news in general or only where fake news relates to a right or other interest (for example, where the statement relates to an individual).

The problem with ‘more speech’ as an antidote to fake news

7. The normal thinking in relation to false statements (at least for a false substantive meaning) is that ‘more speech’ is the preferred solution. The argument runs that a false statement will trigger a counter-statement to refute the falsity. The ideal is that once a statement has been revealed to be false, the audience will no longer be persuaded by it. That approach also prevents the use of coercive powers to maintain orthodox views. However, there are a number of reasons why the ‘marketplace of ideas’ does not always function this way in practice.

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3 For example, see Representation of the People Act 1983, s.106, s.110 and s.115.
8. **Corrections may not reach the audience in time** - In some settings, time constraints may mean that a correction is not heard prior to a relevant decision, which the false statement sought to influence. One example is where a person makes a false statement the day before an election. There may be little time for a correction to circulate and neutralise the falsity before people cast their votes.

9. **Not every speaker has access to the same audience, so a correction may not reach the people that received the fake news.** Three possible mechanisms illustrate how this problem may arise:\(^4\)

   (i) The marketplace of ideas is not a level playing field and different speakers have different communicative resources. If a celebrity on Twitter or an established media outlet makes a false statement, then an ordinary member of the public may struggle to get the correction heard.

   (ii) An echo-chamber effect is said to arise where people select news sources that reflect existing views.\(^5\) If that happens, then some people may see a false statement in their favoured website, but not the correct counter-statement carried in a rival website with a different political slant. The extent to which there is an echo-chamber effect is the subject of debate,\(^6\) but the argument provides one possible way for fake news to escape correction.

   (iii) The marketplace of ideas is now a marketplace of attention.\(^7\) As more and more people get to publish content, the significant challenge is being heard. There are various ways that a speaker can gain attention and for content to go viral. One hypothesis is that the outrageous, unusual and controversial has a better chance of standing out and being shared (especially if it confirms what people want to hear). A sober statement that debunks the outrageous (yet entertaining) false statement seems less likely to go viral. In short, while the marketplace of ideas assumes that convincing reasons will prevail, the marketplace of attention can reward very different qualities.

10. None of these possible mechanisms should be over-stated and the changes in the media are complex. For example, while the information system is more fragmented and decentralised than before, in the UK the mainstream media still commands a considerable audience and provides a forum for national debate. The media can still play an important role in checking claims being made and ensuring appropriate corrections are heard.

11. **Information processing** - Even if all the problems mentioned above are addressed and the audience hears a correct counter-statement, in some circumstances people will continue to believe the false statement. One study even found that a correction can

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\(^4\) I provide the three examples as hypotheses to illustrate the types of challenges that can arise in getting a correction to the relevant audience. I do not attempt to quantify or prove the extent of these problems.  
\(^6\) For example, see discussion in S Flaxman, ‘Filter Bubbles, Echo Chambers, and Online News Consumption’ (2016) 80 *Public Opinion Quarterly* 298.  
\(^7\) I take the term from James Webster, *The Marketplace of Attention* (MIT Press, 2014).
strengthen the belief in a false statement. Political psychologists have conducted research into these issues. For example, Flynn, Nyhan and Reifler discuss the role of ‘motivated reasoning’ in which people process information with a desire to reach a particular conclusion. Consequently, people with a particular political outlook may be more willing to accept certain false statements when it supports an existing belief. While I leave it to the psychologists to explain the causes and test these findings, the implications are troubling because it shows that ‘more speech’ and corrections alone will not always be effective in combatting falsities.

12. The research by political psychologists also provides some perspective, looking at how false statements tend to be effective in certain contexts, but not others. For example, some scholars see the polarised political environment as one factor. Not all the people can be fooled all the time. That may be small comfort, but there is also hope that further research may reveal the most effective strategies to counter falsities in political debate.

13. **Detours in political debate and time wasting** - Even where fake news is corrected, the audience hears the correction and rejects the falsity, a further problem is that the process takes up time, energy and resources. Given the constraints on attention, if people have to pay attention to a person debunking a conspiracy theory, that is time lost that could be spent on other issues. The false statement can thereby be used strategically. For example, making a false allegation in an election campaign may force an opposing candidate to use limited time and resources defending his or her record. Fake news may also divert the audience’s attention, providing a smokescreen to avoid publicity in other areas.

14. More generally, if people become accustomed to allegations of ‘fake news’, but lack any obvious way to distinguish the reliable from unreliable sources, then many news sources may be tarred with the same brush. Audiences may conclude that politicians and pundits are all as bad as each other. The purveyors of false stories can then abuse charges of ‘fake news’ to rebut their critics.

15. If any measures are taken to combat fake news, then it is important to understand which of the above problems are being targeted. For example, promoting links to a counter-message in search engine results will help get a correction to the audience, but will not address the problems related to information processing or time wasting.

**Fake news and free speech**

16. In the marketplace of ideas (or at least political debate) ‘caveat emptor’ is said to be the norm, reflecting the right to freedom of expression. There are, however,

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different views about whether the free speech principle should apply to knowingly false statements. In *Woolas*, Thomas LJ stated that the ‘the right to freedom of expression under art 10 does not extend to a right to be dishonest and tell lies’.\textsuperscript{12} By contrast, others argue that false statement may have some social value and should not be so quickly dismissed. In the US Supreme Court, Justices Breyer and Kagan argued that some knowingly false statements can be used to ‘stop a panic or otherwise preserve calm in the face of danger’.\textsuperscript{13} For the present purposes, I accept that many of the usual positive arguments for freedom of speech have little application to deliberate attempts to mislead.\textsuperscript{14} Instead, the more compelling free speech issues at stake in this context relate to the effects of any measures taken – in particular that a measure may be overbroad, chill expression and be open to abuse.

17. I understand the Committee is not considering legal controls to curb fake news, but wishes to explore the role of digital intermediaries. There are good reasons to expect intermediaries to take some responsibility, given that certain companies now perform gatekeeping roles that are comparable to the media. The choices that the search engine or social network makes in prioritising content are not neutral, so it is appropriate to ask questions about how existing algorithms shape the distribution of attention. At the same, there are reasons for caution. While internet companies are not public bodies, the impact of their decisions on freedom of expression should not be underestimated. If the companies do take measures to address fake news, then the following considerations need to be taken into account.

18. *Political speech receives heightened protection under Article 10 of the ECHR.* - Fake news has generated greatest controversy in relation to politics. This is understandable as political lies can cause considerable harm to the democratic process. However, under the current jurisprudence political speech warrants the strongest protection.\textsuperscript{15} The basic reason is that in the political arena, the people are said to have final say and it is not for any authority to impose its preferred view on a matter for democratic debate. That explains why restrictions on false statements in commercial advertising are accepted, but there are concerns about equivalent controls on political advertising.\textsuperscript{16} Any measures undertaken should be designed not to stifle political debate.

19. *Identifying fake news* – There are a number challenges in designing a measure that will tackle fake news that does not incidentally inhibit other types of expression. For example, good faith attempts to challenge prevailing viewpoints or dispute official statistics should not be treated as fake. A key issue is the standard to be applied to determine whether a publication is fake news or not. One approach is to treat news as fake only if uncontroversially and objectively false, and where the publisher knew

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\item \textsuperscript{12} R (on the application of Woolas) v Parliamentary Election Court [2010] EWHC 3169 (Admin) at [106]. That reading of Article 10 of the ECHR contrasts with position under the US First Amendment, where the Supreme Court has rejected an argument that false speech falls outside the constitutional protection for free speech. See *US v Alvarez* (2012) 132 S. Ct. 2537.
\item \textsuperscript{13} *US v Alvarez* (2012) 132 S. Ct. 2537.
\item \textsuperscript{15} For example, see *R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department* at [166].
\item \textsuperscript{16} Political advertising was subject to some regulation under the Advertising Standards Authority, but this was withdrawn from the regulator’s remit in the late 1990s.
\end{itemize}
this. That applies a high threshold that might tackle the blatant examples of fake news, but may be difficult to meet in practice.\textsuperscript{17} While other standards may be cast in broader terms, there are risks of capturing publications beyond the types of fabricated content that are causing the most concern.

20. \textit{Who decides what is fake news?} – In addition to deciding the criteria for fake news, a further question is who will apply that standard. A company could use an algorithm to decide whether a source or story is suspect, or employ people to make the assessment. The algorithm method raises concerns about reliability (especially given the complexities in defining fake news) and potential biases in its operation. The use of human editors raises questions about the criteria for falsity, consistency and potential for abuse.

21. A parallel can be drawn with the ‘right to be forgotten’, which requires search engine companies to decide whether a result contains personal information and where the public interest lies. While such channels of intermediary responsibility are important, there are valid concerns about a private company making the determination. For this reason, it is important that any steps taken to combat fake news are made on a transparent basis and that decisions made are open to appeal.

22. \textit{Avoiding risks of selective enforcement} – A rule or system that targets false statements will potentially apply to a wide range of communications. There are dangers of masses of content being reported as fake news. In addition to the burden of processing claims, the risk is that the rule could be used to selectively suppress or punish expression that is not favoured by the public or private authority, while tolerating other equally misleading statements.\textsuperscript{18}

23. \textit{The proportionality of the measure} - Once content is identified as fake news, there are a number of measures an intermediary could take. Examples include:
   - Tagging the content as ‘disputed’ or ‘false’ in a social network to provide a warning to users. The social network or search engine could also provide a link to a counter-message. Both provide a ‘more speech’ solution and allow the audience to form its own conclusion. As mentioned earlier, such methods may have limited effectiveness.
   - Making the content less visible through changes to the algorithm. For example, such a change could make the fake news story less likely to find its way into a social network newsfeed even if shared by users. Similarly, a search engine could push the fake news item or fake news site further down the rankings.
   - Imposing financial consequences. For example, if a site is found to be repeatedly publishing fake news, it could be excluded from certain internet advertising or credit card services for a period of time.
   - Taking down or blocking the content.

24. There are other examples and my purpose is not to advocate any measures, but to show that the responses have different levels of severity. The appropriateness of a measure may vary with the role of the publisher (for example, we may distinguish the

\textsuperscript{17} Eady J stated in \textit{Hughes v William Risbridger} [2010] EWHC 491 that findings of dishonesty in defamation law are rare.

initial publisher from a person that shares the content). If a more severe measure is taken, then stronger safeguards will be necessary.

25. *Unintended consequences* - Complaints of fake news can be made disingenuously to undermine, discredit or marginalise legitimate opposing views. A digital intermediary may find itself inundated with reports of falsity for such a purpose. Even if the complaint fails, there can be chilling effects if speakers have to defend their statements in a more formal process.

26. To conclude, there are good reasons to be concerned about fake news and to want to take steps to prevent the circulation of blatant falsities. Free speech arguments are less compelling in relation to deliberate lies. However, it is hard to generalise, given that fake news can come in so many different shades. Attempts to tackle such concerns pose a number of challenges, particularly in designing an effective strategy that does not incidentally inhibit legitimate expression. Consequently, there are good reasons to proceed with caution and ensure that any measures taken by intermediaries are transparent and provide a mechanism for challenge.

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