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Our Ref: LS/RLR/Gen/2019/COU(OnlineFalsehoods)/GG/jt/lf

2 May 2019

IMMEDIATE
BY EMAIL AND POST
(sarala_subramaniam@mlaw.gov.sg)

Legal Policy Division
Ministry of Law
100 High Street, #08-02
The Treasury
Singapore 179434

Attention: Ms Sarala Subramaniam
Director (Civil and Legislative Policy), Legal Policy Division

Dear Sarala,

THE LAW SOCIETY OF SINGAPORE'S MEMBERS' CONSOLIDATED FEEDBACK – CONSULTATION ON THE PROTECTION FROM ONLINE FALSEHOODS AND MANIPULATION BILL

1. Further to our earlier letter dated 30 April 2019, we write to clarify that approximately 5,000 members on the email subscription list of were given an opportunity to share feedback with us on the Bill from 17 April to 26 April 2019 by way of an email blast from the Law Society. Our members' consolidated feedback submitted for the Ministry of Law's consideration by way of our earlier letter was based on 3 members' feedback. We attach herewith an additional feedback from a member via a late submission on 29 April 2019.

2. To clarify, these four members' views have been consolidated for the Law Ministry's consideration through the Law Society of Singapore. These views do not represent Council's or the general membership's views. Law Society Council members have previously shared our views on 17 April 2019 during the consultation meeting with Senior Minister of State, Ministry of Law referred to in Paragraph 1 of our earlier letter.

3. Please feel free to reach out to Ms Delphine Loo, CEO or myself should you have any clarifications or queries on this letter and our earlier letter.

Yours faithfully,

Mr Gregory Vijayendran, SC
President, The Law Society of Singapore

(Enclosure)

Submissions to Law Society on Protection From Online Falsehoods and Manipulation Bill

Introduction

1. In 1986, the Legal Profession Act (Cap 161)(the **"Act"**) was amended such that the Law Society's powers in respect of legislation were limited to *"assist(ing) the Government and the courts in all matters affecting legislation submitted to it and the administration and practice of the law in Singapore."*[1] Notwithstanding section 38(1)(f) of the Act, which provides that it is also one of the powers of the Law Society to *"protect and assist the public in Singapore in all matters touching or ancillary or incidental to the law"*, the view has been taken that section 38(1)(c) of the Act prohibits the Law Society from commenting on any legislation that is not *"submitted to it"* by the Government.

2. Public hearings were held by the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures between 14 and 29 March 2018. The Law Society did not participate. Whether this was because of s 38(1)(c) of the Act, or because of apathy among the council or sub committees of the Law Society is not clear.

3. On 9 April 2019, an article appeared in the Online Citizen titled *"Silence of the Law Society in the wake of the "fake news" bill is deafening."*

4. On 15 April 2019, the Straits Times carried a report in which the President of the Law Society said that the Law Society had in fact been consulted and would give its "perspectives" to "policymakers". Nothing was said about precisely when the Government commenced its consultation with the Law Society. The President of the Law Society also said that the consultations were "confidential". No reason was given as to why such consultations were confidential.

5. On 17 April 2019, the Council of the Law Society issued an email to members seeking feedback on POFMA. Members were given until 26 April to respond.

6. By the time of the email, the Protection From Online Falsehoods And Manipulation Bill (**"POFMA Bill"**) had been read once. It is scheduled to be read a second time at the next available sitting of Parliament. The time given for feedback was unnecessarily limited, and detailed studies of the issues are not possible given this.

7. The email itself reads like a pre-emptive defence of the POFMA Bill. It contained statements of fact (such as "the falsehood will not be removed") and other assertions (such as "criminal offences apply only to malicious actors" and "the Bill will not affect most average citizens") which are not consistent with the words of the POFMA Bill. Further, there was a link in the EDM to a Ministry of Law posting dated 1 April 2019 extoling the virtues of the Bill. This is, with respect, not the way to obtain constructive, critical feedback from members.

[1] S. 38(1)(c) Legal Profession Act

Executive Summary

8. Article 14 of the Constitution of the Republic of Singapore guarantees freedom of speech to Singaporeans, as follows:

> *"14(1) Subject to clauses (2) and (3)*
>
> *(a) Every citizen of Singapore has the right of freedom of speech and expression*
> ...
>
> *(2) Parliament may by law impose –*
>
> *(a) On the rights imposed by clause (1) (a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide for contempt of court, defamation or incitement to any offence..."*

9. While the Constitution, rightly or wrongly, does allow restrictions to be placed on free speech, it is not at all clear that the Constitution allows such restrictions to extend to speech that may affect the outcome of an election or speech that may undermine confidence in the Government, even if the statement made is untrue.

10. Even if the Constitution does allow for such restrictions, that does not mean that such restrictions should be put in place. In the context of Singapore's existing laws, which already severely restrict free speech, it is important that any effort to enhance restrictions on our Constitutional rights must be met with severe critical examination and utmost respect for our fundamental liberties.

11. The POFMA Bill lends itself to abuse and is unnecessary. There exist laws in Singapore, such as Singapore's defamation laws, the Sedition Act, the Films Act, and the Protection from Harassment Act ("**POHA**"), all of which have been used fairly liberally, with the deterrent effect of such ubiquitous self-censorship that the focus of policymakers should be on rolling back restrictions rather than adding to them.

12. That there has been such effective deterrence of dangerous speech in Singapore is clear from the fact that in the Ministry's own deck giving examples of the negative consequences of fake news[2], there is not a single Singapore example.

13. The POFMA Bill also extends well beyond what is needed for national security. Legislation that prohibited hate speech on the basis of race or religion, or incitement to violence, may be defensible, but legislation that prohibits the making of comments that may diminish public confidence in the Government (even if they are inaccurate in some respect) is doomed to be seen, rightly or wrongly, as petty politics.

14. No legislation should be passed that is so totally dependent on the good faith of the Government of the day. Governments come and go, and legislation remains the same.

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[2] Annex A to Ministry of Law's post dated 1 April 2019 titled *"New Bill to Protect Society from Online Falsehoods and Malicious Actors"*, which was linked to the Law Society's EDM of 17 April 2019

Legislation needs to work in the hands of both good and bad actors. This proposed Act signally fails in this regard.

15. The POFMA Bill also ignores the norms of ordinary communication. People do not speak only after they have investigated all facts, inspected all documents and interviewed all witnesses such as to be sure that there is no reason to believe that what they say may possibly be false. Neither should communication be limited in that way. The truth frequently emerges out of rumour, and rumours frequently emerge out of efforts to conceal the truth. If the restrictions of the POFMA Bill had been in place at the time, it is highly unlikely that the Watergate scandal would ever have seen the light of day.

16. The POFMA Bill does provide for a right of appeal, but does not provide for who has the burden of proof on appeal, and does not permit the Court to inquire into whether the false statement touched on an issue of public interest.

17. Finally, it is clear that the proposed Act will be given the broadest possible remit. That this is so is clear from the comments of a police spokesman in relation to the fan meet for vlogger Nuseir Yassin, in response to complaints that the fact that Mr Yussein did not require a police permit for his fan meet reflected a double standard. The police spokesman said that *"these allegations which suggest that the police have been biased and shown favouritism are untrue and baseless, and maliciously seek to undermine confidence in public institutions."*[3] Other legislation, considered below, has also been given very wide application.

Comments on the provisions of the POFMA Bill

A. S 4 -Meaning of "in the public interest"

18. Section 4(a) – this section provides that it is in the "public interest" to do anything "in the interests of the security of Singapore". At first blush this enables steps to be taken to protect Singapore from violent or terrorist insurrection. However provisions such as this have been given a very much broader meaning.

19. As an illustration, on 10 September 2014, Tan Pin Pin's film, "To Singapore with Love" was effectively banned (it was classified "Not Allowed for All Ratings") under the Film Classification Guidelines because the Media Development Authority assessed that the contents of the film "undermined national security" because *"legitimate actions of the security agencies to protect the national security and stability of Singapore are presented in a distorted way as acts that victimized innocent individuals."*[4] In Parliament, Dr Yaacob Ibrahim, at that time the Minister for Communications and Information said that *"not taking action against films which contained 'distorted and untruthful accounts' would give the false impression that there is*

[3] Straits Times. 20 April 2019, Ng Jun Sen

[4] Infocomm Media Development Development Authority website, article "MDA has classified the film "To Singapore, with Love" as Not Allowed for All Ratings", Last Updated 3 November 2017 https://www.imda.gov.sg/about/newsroom/archived/mda/media-releases/2014/mda-has-classified-the-film-to-singapore-with-love-as-not-allowed-for-all-ratings-nar

truth to their claims and that the Government's actions against these individuals were therefore unwarranted."[5]

20. Section 4(b) - defines doing something in the "public interest" as including doing something to protect "public tranquility". Any statement that can give rise to disagreement has the ability to affect public tranquility. Any matter that impairs public tranquility to the extent that legislative action must address it must also be a threat to public security, which would be caught by section 4(a). The inclusion of "public tranquility" in the definition of "public interest" is thus overly broad and unnecessary.

21. Section 4(d) – defines doing something in the "public interest" as including doing something to *"prevent any influence of the outcome of an election to the office of President, a general election of Members of Parliament, a by-election of a Member of Parliament, or a referendum"*. The effect of this is to prevent a citizen from communicating anything that may influence in an election if he has *"reason to believe"* that it might not be true. So long as there is a smidgen of doubt there is a reason to believe that something is not true, and a great number of matters can be said in one way or another *to "influence the outcome of an election"*. The overriding public interest is to ensure that politicians are held accountable; not that the electorate is held accountable for what they say about politicians.

22. Further it is not at all clear that section 4(d) is Constitutional.

23. Section 4(e) – defines doing something in the "public interest" as including doing something to *"prevent incitement feeling of enmity hatred or ill will between different groups of persons"*. The communication of any view may be said to "incite feelings of ill will" against those who hold a contrary view, and legislation such as this is bound to be interpreted in the widest possible way. For instance, Amos Yee was charged under s 4(1) of the POHA for uploading a video to You Tube which allegedly contained remarks about Mr Lee Kuan Yew which was intended to be heard and seen by persons likely to be distressed by the clip. That charge was stood down, and its current status is unclear. The effect of the charge is that a person may already be charged under the POHA for saying anything that may offend any segment of the population, be it supporters of a particular political party, nationals of a particular country or indeed (to take it to the absurd logical limits) supporters of a particular football team. The existing law is so broad that it already has a chilling, deterrent effect. Policymakers ought to be concerned with addressing the lack of free speech, not in putting in place more restrictions on it.

24. Section 4(f) – defines doing something in the "public interest" as including doing something to *"prevent a diminution of public confidence in the performance of any duty or function of, or in the exercise of any power by, the Government, an Organ of State, a statutory board, or a part of the Government, an Organ of State or a statutory board."* Again, the effect of this is to prevent a citizen from communicating anything that may diminish public confidence in an act of government if he has *"reason to believe"* that it might not be true. This is an extraordinary and unwarranted restriction on free speech.

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[5] Straits Times, 7 October 2014, article titled "Parliament: "To Singapore with Love" has 'distorted and untruthful' accounts of past history: Yaacob", Nur Asyiqin Mohamad Saleh

25. To understand how such a power is likely to be used, we must consider the manner in which a similar power was exercised in relation to the film, *"Zahari's 17 years"* by Martyn See. This film was banned in 2007 under section 35(1) of the Films Act, which provides that the Minister may prohibit the possession or distribution of any film that *"would be contrary to the public interest."* The film was banned because it was said to *"give a distorted and misleading portrayal of Said Zahari's arrest and detention under the Internal Security Act (ISA) in 1963 and is an attempt to exculpate himself from his past involvement in communist united front activities against the interests of Singapore. The Government will not allow people who had posed a security threat to the country in the past, to exploit the use of films to purvey a false and distorted portrayal of their past actions and detention by the Government. This could undermine confidence in the Government.*[6]" Hence a similar rule has been used to limit or shut down debate about important historical events.

26. Further, it is not at all clear that section 4(f) is constitutional.

27. Again, the overriding public interest must be to ensure that the Government and its organs are held accountable; not that the public is held accountable for what they say about the exercise of powers by the Government. The provision is overly broad, it is unnecessary and it will result in diminished accountability of civil servants.

Section 7 – Communication of false statements of fact in Singapore

28. Section 7 (1) of the POFMA Bill provides that *"a person must not do any act in or outside Singapore in order to communicate in Singapore a statement knowing or having reason to believe that: - (a) it is a false statement of fact and (b).."* that the communication of the statement in Singapore is likely essentially to offend any of the matters that factors that constitute "public interest" in section 4.

29. The points made above as to the factors that constitute public interest in section 4 are repeated.

30. Of present concern is the prohibition against doing an act in order to communicate a statement *"having reason to believe"* that it is a false statement of fact. There is *"reason to believe"* that a great number of facts are not fact – for instance many people believe that *"there is reason to believe"* that evolution is not fact. Further, stating that evolution is fact may indeed cause ill will between atheists and religious people. Hence a person who says, on the internet, that evolution is fact may be guilty of a crime? The provision is overly broad and liable to be abused. Its effect would be (among other things) to make it illegal for anyone to say anything that affects the affairs of government online unless he has first collected documentation to which he cannot have access, interviewed (and recorded) people who will not speak to him, and investigate every minute fact that he might find not only online, but also in textbooks, on documentaries or indeed from Government sources, because all sources are known to have been wrong or misleading from time to time.

31. It must be added that a person who makes a statement with "reason to believe" that it may false is by no means necessarily a malicious actor, and the Law Society's EDM, insofar as it

[6] Ministry of Information, Communication and the Arts, Press Statement, 12 April 2007

states that "criminal offences apply only to malicious actors" is inconsistent with the words of the POFMA Bill.

Section 10 – Conditions For Issue of Part 3 Directions

32. Section 10 – Any Minister may issue a Part 3 Direction. Part 3 Directions include Correction Directions and Stop Communication Directions. The power given to Ministers is extraordinary. This is especially so given that the Minister may give such directions to, among other things, correct or take down statements that a person may only "have reason to believe" is false, and which diminish public confidence in the exercise of *his own* powers. The opportunity for abuse is obvious.

33. A related question that arises is this: what happens if the untruthful statement is made by a Minister? Can it be that a Minister's statement which is untrue and which offends the public interest (as defined in POFMA) is to be treated differently from such a statement by any other person? The concern is heightened by the fact that under section 61, the Minister may exempt anyone from the Act. This means that the exemptions will not need to be debated in Parliament as legislation, and lends itself to the objection that it is opaque and applies different rules to different people.

Section 11 – Correction Direction

34. Section 11 - The terms of the correction are to be in a "specified form and manner". That "specified form and manner" will include either or both of these: a statement that the subject statement is false (subsection (1)(a)); and/or (b) a specified statement of fact.

35. It has been repeatedly stated in the media, in defence of this legislation, that the ultimate arbiter of truth is the Court. Hence it is extraordinary that a person may be required to "confess" that a statement of his has been untruthful, or to publish an alternative statement as truth when there has not even been an adjudication of the truth or otherwise of the original statement. That this is extraordinary is underlined by the fact that, for a correction order to be issued, the maker of the statement does not even need to have any reason to believe that his statement is untrue (subsection (4)).

36. Further still, there is no requirement that a correction order must clearly identify the specific fact that it is alleged is false, or what the correct facts are, as alleged by the Minister, or that, in issuing the order, the Minister must provide evidence of the correctness of the "alternative" facts such as to establish that there is no reason to believe that alternative facts too, are false. If there exist such grounds, then the correction itself must be subject to the same sanctions as the original statement.

37. Finally, the issuance of the correction will undoubtedly damage (possibly irreversibly) the reputation of the writer, and compliance with the order is likely to entail cost. Moreover, the issue at hand may have had some immediacy and the purpose of the statement may be frustrated by a wrongful correction or take down order. The POFMA should provide for compensation to the maker of the statement in the event of a successful appeal.

Section 12 – Stop Communication Direction

38. The comments made in respect of section 11 above are repeated, *mutatis* mutandis.

39. It should be noted that the assertion made in the Law Society's EDM – that "the falsehood will not be removed" is incorrect. A Stop Communication Direction requires that a person stop communicating something on the internet – this necessarily entails a taking down of the alleged falsehood.

Section 17 – Appeals to High Court

40. Section 17(1) provides that a recipient of a Part 3 Direction may appeal to the High Court against the Direction.

41. The burden of proof in such an appeal should be clear – is it for the appellant for prove that the statement made by him was correct? Or is it for the respondent to prove that it was not correct? The burden must be on the respondent, and the standard of proof should be beyond reasonable doubt, as the respondent stands in the shoes of a prosecutor. Further, it cannot be that every statement is assumed by the Court to be untrue just because the Minister says so. The respondent should be required to prove the untruth of the statement beyond a reasonable doubt. It is entirely possible to prove the untruth of a fact when the truth is alleged to be alternative facts. All that the respondent has to do is prove his alternative facts.

42. Section 17(2) provides that *"no appeal may be made to the High Court unless the person has first applied to the Minister mentioned in section 19 to vary or cancel the Part 3 Direction...and the Minister refused the application whether in whole or in part."*

43. Section 19 however sets no time limit for the Minister to rule on an application by the affected person. Given this, by the time that a person is able to vindicate himself by appeal to the High Court, not only may his reputation have been damaged irreparably, but the act that he was hoping to prevent by his statement may have been committed in an irremediable way. A Minister who has taken it upon himself to issue a Part 3 Direction must have done so with the full facts in hand. It should therefore be no problem for him to rule on any application to vary or cancel his order within 24 hours.

44. Section S17(5) limits the powers of the High Court in any appeal, in that it limits the grounds court can only set aside if not communicated in Singapore, or it is not a statement of fact or it is a true statement of fact, or if it is technically not possible to comply with the Part 3 Direction. The POFMA Bill does not allow the Court to review whether or not there was an issue of public interest in the first place. Hence, a Minister may decide that a statement contains an inaccuracy and that it affects public confidence in his own exercise of power and issue a Part 3 Direction to have it taken down. So long as there is some misstatement of fact, the Court is obliged to dismiss the appeal, even though it may have nothing objectively to do with the public interest. In this way the Minister may have any negative statement about him taken down so long as he can point to some error of fact, whether it is relevant or not to the issue of public interest.

Section 61 – General exemption

45. Section 61 – this section permits the Minister to exempt anyone from the provisions of the POFMA. The law must equally to all. At the very least, if there are to be exemptions, this should be done by way of amendment to the Act so that the issue gets a full public airing. The exemption of parties by decree of the Minister lends itself to abuse and accusations of arbitrariness and opacity.

Conclusion

46. The POFMA Bill is truly extraordinary in the extent to which it enables the Government to exercise power arbitrarily. It is open to abuse and totally unnecessary.

47. The POFMA is totally unnecessary because Singapore law already has many tools at its disposal to control speech. Singapore's defamation laws, the Sedition Act, the Films Act and POHA are examples. The actions taken under these laws have had a profound deterrent effect on the exercise of free speech in Singapore. That this is the case is clear from the fact that the Ministry's deck on Consequences of Online Falsehoods (which was an annexure to the Ministry's post of 1 April 2019) contains no references to any incident in Singapore. If anything, the deterrent effect of existing legislation has already severely overreached and need to be rolled back, not extended.

48. It is an essential part of any democracy that the Government and the civil service must be held to account. The proposed legislation enables the Government to avoid this, and instead turns the matter on its head – it seeks to hold the public accountable for what the public says about the Government.

Suresh Nair

Dated 29 April 2019