

(Attached)



Legal Briefing:
Protection from Online Falsehoods and Manipulation Bill No. 10/2019
as of 12 April 2019

I. Background

The Protection from Online Falsehoods and Manipulation Bill No. 10/2019 (hereinafter 'Online Falsehoods Bill') was introduced to the Parliament of the Republic of Singapore and underwent its First Reading on 1 April 2019. It was published in the Bills Supplement on the same date.

The Online Falsehoods Bill was introduced, according to its Preamble, to "prevent the electronic communication in Singapore of false statements of fact, to suppress support for and counteract the effects of such communication, to safeguard against the use of online accounts for such communication and for information manipulation, to enable measures to be taken to enhance transparency of online political advertisements, and for related matters".

II. Applicable international human rights law and standards

The right to freedom of expression and opinion is an integral part of international human rights law and standards, affirmed by international treaties, and part of customary international law. Article 19 of the UN Declaration of Human Rights (UDHR) and article 19 of the International Covenant on Civil and Political Rights (ICCPR) affirm the right of every individual to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Singapore is not among the 172 States Parties to the ICCPR. However, the rights protected under article 19 of the ICCPR are founded upon the general right to freedom of expression, reflected in such instruments as article 19 of the UDHR. The ICCPR and the UN Human Rights Committee, the body mandated to interpret its provisions, therefore provide authoritative and persuasive guidance as to the scope and nature of Singapore's obligations to protect and promote these fundamental rights and freedoms in practice.¹

The UN Human Rights Committee has clarified that "freedom of opinion and freedom of expression are indispensable conditions for the full development of the person" and "any society" as they form the basis for the enjoyment of other rights, including the "rights to freedom of assembly and association, and the exercise of the right to vote".²

It has also recognized the necessity of a free, uncensored media to ensure "free communication of information and ideas about public and political issues between

¹ The rights to freedom of expression, opinion and information are also protected under article 21 of the Convention on the Rights of Persons with Disabilities and article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which Singapore has ratified, and article 13 of the Convention on the Rights of the Child (CRC), to which Singapore has acceded. It is also protected under core rights contained in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Singapore has acceded.

² The UN Human Rights Committee has adopted an authoritative General Comment on the scope of article 19 providing a detailed clarification of the scope of the right. See UN Human Rights Committee, General Comment No. 34, CCPR/C/GC 34, 12 September 2011, paras 2, 4. Available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> ('UN HRC, GC No. 34')

(Attached)

citizens, candidates and elected representatives”, “inform public opinion” and protect the right of the public to “receive media output”.³

In this respect, “harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation” and “any form of effort to coerce the holding or not holding of any opinion is prohibited” under international law.⁴

In line with the UDHR and ICCPR, article 14(1)(a) of Singapore’s Constitution protects the right to freedom of speech and expression.

i. Limitations on the right to freedom of expression and opinion

Article 14 of Singapore’s Constitution protects the right to freedom of speech, assembly and association, wherein article 14(2) specifically provides for the possibility of limitations that may be imposed on the exercise of the right to freedom of speech and expression.

It states:

“14.—(1) Subject to clauses (2) and (3) —

- (a) every citizen of Singapore has the right to freedom of speech and expression;*
- (b) all citizens of Singapore have the right to assemble peaceably and without arms; and*
- (c) all citizens of Singapore have the right to form associations.*

(2) Parliament may by law impose —

- (a) on the rights conferred 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 against contempt of court, defamation or incitement to any offence;*
- (b) on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and*
- (c) on the right conferred by clause (1)(c), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.*

(3) Restrictions on the right to form associations conferred by clause (1) (c) may also be imposed by any law relating to labour or education.”

The interpretation and implementation of article 14 should be guided by international law and standards. In this regard, international law is clear that the rights to free expression, opinion and information can be subject only to certain limitations, which may be adopted only in line with the tests of legality, legitimacy of purpose, necessity and proportionality.

ii. Legality

Restrictions or limitations on the rights to free expression and opinion must be provided by law, which entails that laws must:

³ UN HRC, GC No. 34, para 13.

⁴ UN HRC, GC No. 34, paras 9, 10.

(Attached)

- (i) be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly;
- (ii) not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution;
- (iii) provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not;
- (iv) not in themselves contravene international human rights law or standards.⁵

iii. Legitimate purpose

The only purposes for which the rights may be limited or restricted are:

- (i) to ensure respect of the rights or reputations of others, or
- (ii) to protect national security, public order or public health or morals.

iv. Necessity and proportionality

Even where there is legitimate purpose for which a State authority seeks to restrict or limit a right, such restriction must:

- (i) be necessary for a legitimate purpose. The test of necessity is violated if protection can be provided in other ways that do not restrict freedom of expression and opinion;
- (ii) not be overbroad and be proportionate to their function. They must be the least intrusive instrument amongst others which may achieve their protective function;
- (iii) demonstrate in specific and individualized fashion the precise nature of the threat and establish a direct and immediate connection between the expression and the threat.⁶

Restrictions must “not put in jeopardy the right itself” and only be implemented narrowly for above-noted purposes. It is imperative that the “relation between right and restriction and between norm and exception must not be reversed”.⁷

v. Right to effective remedy

International law and standards are also clear that States are obliged to provide all victims of violations with equal and effective access to justice which provides effective remedies to victims, including reparation.⁸

Article 8 of the UDHR clarifies that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law”, while article 2(3) of the ICCPR provides that effective remedy should be granted “notwithstanding that the violation has been committed by persons acting in an official capacity” and that the State should ensure “competent authorities shall enforce such remedies when granted”.⁹

The right to remedy also includes the State’s obligation to “take appropriate legislative and administrative and other appropriate measures to prevent violations” and “investigate violations effectively, promptly, thoroughly and impartially”.¹⁰

⁵ UN HRC, GC No. 34, paras 25, 26.

⁶ UN HRC, GC No. 34, paras 33 to 35.

⁷ UN HRC, GC No. 34, paras 21, 22.

⁸ Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

⁹ The right to remedy is also enshrined under article 6 of the CERD, article 39 of the CRC and article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

¹⁰ Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

(Attached)

States must take measures to ensure remedies should be accessible, prompt, effective and available before an independent authority.¹¹

III. Online Falsehoods Bill

This legal briefing highlights the following provisions of the Online Falsehoods Bill which the ICJ considers to exceed permissible limitations to the rights to freedom of expression, opinion and information.

i. Vague, overbroad provisions in law

Vague and overbroad provisions in the bill, particularly in defining terms fundamental to its implementation, prevents precise and general understanding of its provisions so that individuals are able to regulate their conduct accordingly and officials charged with administering the law themselves cannot discharge their responsibilities effectively.

Whether or not any official is acting in good faith, this necessarily opens the law up to a real risk of misuse by government authorities charged with its implementation.

'False statement of fact'

Section 2(2) of the bill defines 'false statement of fact' as a 'statement which a reasonable person seeing, hearing or otherwise perceiving it would consider to be a representation of fact' that is 'false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears'.

Section 2(1) clarifies that a 'statement' can mean 'any word (including abbreviation and initial), number, image (moving or otherwise), sound, symbol or other representation, or a combination of any of these'.

The breadth and opacity of these provisions mean that potentially any form of communication – written, visual, audio or otherwise – can fall under the scope of this bill, making it extremely difficult for an individual or non-individual to ascertain whether their communication of a statement, opinion, idea or mere acknowledgement of someone else's statement, opinion or idea can fall foul of the law.

Furthermore, problematically, the veracity or reliability of a 'statement' appears to be ascertainable by means of a 'reasonable person's perception' of it, which could result in a situation where a matter of real fact that was thereafter proven to be true could potentially be classified as a 'false statement' on the basis that this was not apparent to a reasonable person.

While the Ministry of Law has clarified that criticism, opinions, satire and parody will not in practice be covered under the scope of this bill, these assurances are not specifically provided in the bill, which makes it vulnerable to misuse to clamp down on precisely these forms of expression.

'Public interest'

Section 7(1) of the bill criminalizes the communication of any false statement of fact where such communication in Singapore is likely to 'be prejudicial to the security of Singapore', 'be prejudicial to public health, public safety, public tranquility', 'influence the outcome of an election', 'incite feelings of enmity, hatred or ill-will' or 'diminish 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 any part thereof.

¹¹ See ICJ, 'The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide, Revised Edition 2018', Available at: <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/>

(Attached)

Accordingly, *Parts 3 and 4* of the bill allow for any Minister to issue directions to control and prevent the communication of false statements of fact where he or she 'is of the opinion that it is in the public interest' to do so. On the basis of this determination, a Minister can make further orders to block access to or restrict online locations and accounts pursuant to *Parts 5 and 6*.

The terms 'public safety', 'public tranquility' and 'public interest' are left undefined, which leaves open a worryingly wide scope of interpretation by government authorities. While 'public safety' is a legitimate purpose for a restriction, 'public tranquility' is vague, and 'public interest' is overbroad.

Notably, virtually all laws, policies and unilateral acts taken by the State are necessarily purported to be undertaken for the 'public interest'. Restrictions in law on fundamental freedoms should therefore prescribe much narrower justifications than such highly elastic criteria.

An absence of clear, specified definitions of what constitute 'public safety' or 'public interest' can result in potential abuse by implementing authorities who can be guided by political criteria or justifications in determining which matters of discussion are in the public's interest and which are not. Furthermore, such opacity allows for 'public safety' or 'public interest' to be influenced by the inclinations of the executive branch in power, implementation of which thereafter places too much reliance on the good faith of particular ministers, rather than on the letter of the law.

In addition, control of 'statements' which 'incite feelings of enmity, hatred or ill-will' is similarly not a legitimate purpose for restrictions, particularly since it refers to 'feelings' rather than acts.

International law contemplates restrictions on "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." However, these relate to acts, not feelings. Perception of a threat should be not conflated in law with a real threat. For the latter, an independent, impartial authority must identify "some degree of risk of harm" and "reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct."¹²

This is of particular concern when one recognizes that ministerial discretion also applies to determination of which 'statements' amount to 'influencing of an election's outcome' and 'diminishing of public confidence' in the performance of the State. Members of a ruling government, holding political office, cannot be deemed, under the law, to be impartial, reliable arbiters of what constitutes 'legitimate' criticism of their performance or what 'influences' an election, in which they are likely to have particular interest or bias.

This is especially problematic when the bill appears to offer minimal judicial oversight or review of such executive powers. (*see II(ii) below*)

The bill also extends executive powers of discretion under *Part 7* to 'Competent Authorities' where ministers can instruct such authorities to censor flow of information through digital advertising or internet intermediaries through 'codes of practice'.

In particular, *section 48(1)* under *Part 7* confers on a Competent Authority the power to issue 'one of more codes of practice' to digital advertising or internet intermediaries to 'enhance disclosure of the sponsor and other information concerning any paid content that is directed towards a political end, that is communicated in Singapore'.

¹² Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, para 29. Available at: https://www.ohchr.org/documents/issues/opinion/seminarrabat/rabat_draft_outcome.pdf

(Attached)

Section 48(9) of the bill clarifies that 'towards a political end' includes communication 'to promote the interests of a political party or other group of persons organized in Singapore for political objects', 'to influence or seek to influence the outcome of an election', 'to influence or seek to influence public opinion on a matter of public interest or controversy' or to 'bring about or seek to bring about changes of the law, the legislative process or outcome in Singapore'.

The discretion of these government authorities is also unfettered, leaving not only specific statements open to governmental control, but also entire 'sources of information', which authorities can order to be denied 'prominence' on the platforms of intermediaries. (*Section 48(2)(c)*)

It should be recalled that restrictions on freedom of expression must meet the tests of necessity and proportionality. If the only identified criterion for restriction is a single minister's determination that a restriction is in the public interest, that falls far short of these tests, as executive discretion is overbroad and disproportionate and measures falling under such discretion do not amount to the least restrictive means of achieving a legitimate purpose. (*see II(iii) below*)

ii. Unfettered discretion to ministers and government authorities

Overbroad powers granted to ministers and government authorities under the bill enshrine within the law blunt tools which can be wielded to improperly restrict freedom of expression, opinion or information.

While laws may be subject to a certain degree of executive discretion in implementation, the current bill fails to include sufficient oversight measures to protect against arbitrariness or improper means of implementation.

Extent of executive overreach

Parts 3 and 4 of the bill allow for ministers to issue directions to the makers of a false statement of fact – whether individual or non-individual – and internet intermediaries to 'correct' a false statement of fact through a correction notice (*Sections 11, 21, 23, 24*), 'stop communication' of such statement (*Section 12*), order or 'direct the IMDA'¹³ to order an internet access provider or internet intermediary to 'disable access by end-users in Singapore to an online location' (*Sections 16, 22, 43*). These orders can be 'varied or cancelled' as per the discretion of the minister (*Sections 19, 31*).

These orders can be made even if 'a subject statement has been amended or ceased to be communicated in Singapore' (*Sections 10(2); 20(2)*).

Part 5 then allows for any minister to designate an online location as a 'declared online location' (hereinafter 'DOL') if at least three false statements of fact were communicated on the platform (*Section 32(1)*), before he or she then also has the power to order internet intermediaries to 'block' or 'disable' access to the DOL. (*Sections 33, 34*) This Declaration can also be 'suspended, varied or cancelled' as per the minister's discretion (*Section 32(9)*).

Part 6 confers upon a minister the power to instruct a 'Competent Authority' to direct any internet intermediary to 'disallow' its services from being used by any individual or non-individual found in breach of the law to communicate any false statement of fact or 'interact with any end-user of its service in Singapore' (*Section 40*). The minister can instruct the same 'Competent Authority' to 'vary or cancel' any such direction (*Section 46*).

¹³ Info-communications Media Development Authority established by Section 3 of the Info-communications Media Development Authority Act 2016 (Act 22 of 2016).

(Attached)

Part 7 allows 'Competent Authorities' to control the flow of information through digital advertising or internet intermediaries through 'codes of practice' which 'give prominence to credible sources of information' and 'not give prominence to a DOL or an online location which has material subject to Part 3 or Part 4 directions' (Section 48(2)(b); 48(2)(c)). (as noted above) These 'codes of practice' can be varied, revoked or waived by the 'Competent Authority' at 'any time' (Section 48(4), 48(7)).

Lack of judicial oversight

None of the above-detailed powers granted to ministers or government authorities are subject to judicial review, such that an aggrieved party can bring a complaint against directions or orders made by such authorities from the date such direction or order is made – which is in line with the State's obligation to provide access to prompt and effective remedy.

The bill only provides that aggrieved parties are allowed to submit an appeal to the High Court to challenge the legality of such direction or order after the party has first applied to the minister who made the direction, and the minister has refused this application (Sections 17(2), 29(2), 35(2), 44(2)). Further appeal to the Court of Appeal is permitted (Sections 17(8), 29(9), 35(7), 44(9)).

First, the first stage of recourse available to an aggrieved party is not an independent, impartial mechanism that can look into the matter without prejudice. The bill in fact confers this responsibility to the individual who made the direction or order in the first place, which results in a self-checking process still embedded in executive control.

Secondly, the submission of an appeal to the High Court to challenge the legality of a direction or order is subject to the time limit imposed by the Rules of Court, which under O.55 r.3(2) dictates that any such appeal must be made 'within 28 days after the date of the judgment, order... against which the appeal is brought'. This gives an aggrieved party less than a month to make a first-stage application to a minister for review and receive a rejection from him or her before an appeal can be brought. Any delay beyond a month by the minister can result in the prospect of no recourse at all provided to an aggrieved party.

Thirdly, the submission of an appeal to the High Court is a costly process that not all aggrieved parties, particularly lay individuals and operators of independent online sites, can engage in within a limited time frame. This is especially so as any offence deemed to have been committed under the bill is considered to run throughout the process of any ministerial review or High Court appeal, which can further increase costs for aggrieved parties. (see II(iii) below)

Finally, for internet or digital advertising intermediaries who wish to review codes of practice issued by a Competent Authority under Part 7, the option of review by a court does not exist at all, with appeals only available to be made to a minister, and within '14 days of the date of the code of practice' or 'such longer period as the minister may allow in the appellant's case' (Sections 49(1),(2)).

Denial of right to effective remedy

The extent of executive overreach and lack of judicial oversight in the bill denies parties of the right to an effective remedy, including of judicial remedy. Under the bill, provisions do not provide sufficient legislative, administrative or other appropriate measures to prevent violations of the rights to freedom of expression, opinion and information, but in fact widen the scope for potential abuse. In particular, the bill does not include provisions that will ensure an aggrieved party has prompt access to an independent and impartial authority – judicial or otherwise – who can thoroughly, promptly and impartially consider any claim of abuse of executive power under the law.

(Attached)

The bill also does not include specific provisions guaranteeing that aggrieved parties can seek prompt and effective remedies or reparation, including compensation, satisfaction, restitution and/or guarantees of non-repetition, should a court of law find that their rights were violated.¹⁴

These concerns are exacerbated by severe penalties provided for under the bill, as the harm incurred by an aggrieved party can potentially be highly disproportionate to the aim or function of an executive order made under the bill. (see II(iii) below)

iii. Non-compliance with 'least restrictive means' principle

Severe penalties which can be imposed under the bill contravene the principles of necessity and proportionality, in not providing for the least restrictive means to achieve a legitimate purpose. These penalties, if implemented in an arbitrary and overbroad manner, can result in a chilling effect on the free communication of ideas, opinions or information, especially with respect to public and political discussion.

Continuing offence during period of review/appeal

The bill provides that during the period of an application to a minister, the High Court or the Court of Appeal for review of a direction or order, an aggrieved party remains subject to any direction or order made under its provisions until an executive or judicial order has been made for it to be set aside. (Sections 17(6), 29(7), 35(6), 44(7)) Aggrieved parties will therefore be obliged to comply with directions or orders to 'correct', 'block', 'disable' or 'stop communication' of subject statements during the time period of a review.

This is particularly problematic as the bill does not provide clarity on exactly what kinds of information or statements can be targeted and, at the same time, allows for unfettered discretion of ministers to make such determinations. Should the time period of a review or appeal fall, for example, during periods of discussions about issues of public interest or controversy, including following the introduction of a new bill, law or policy that requires public debate, or prior to or during elections, this can result in the preemptive restraint on expression or imparting of information which may be vital to public interest – regardless of whether the court ultimately deems the measure to be lawful.

Furthermore, there is no procedure provided for under the bill for a party to seek suspension of the operation of a restrictive measure in advance of a challenge to such measure to avoid irreparable harm to the rights of the parties claiming to be aggrieved, or indeed the public.

The bill also provides for penalties to accrue on a daily or 'part-of-day' basis for certain offences, which can increase the financial liability of any aggrieved party who wishes to keep information online in defiance of a ministerial direction or authority's order (see below). Considering the term 'part-of-day' is not defined, this can mean that certain penalties can accrue on an arbitrary basis – whether hourly or otherwise.

Wide range of potential victims

Penalties, including serious penalties, may be imposed on a wide range of potential victims, extending beyond makers of an alleged false statement of fact – which is a category that can in itself be interpreted in an overbroad manner – to internet service providers, internet and digital advertising intermediaries.

This can result in potential exacerbation of the negative impact of an order made under the bill to not only violate the rights of a particular individual or non-individual directly

¹⁴ ICJ, 'The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide, Revised Edition 2018', pp. 53, 54.

(Attached)

targeted by the law, but also confer potentially disproportionate secondary or vicarious liability upon individuals or non-individuals who merely facilitate the communication of a subject statement.

Attempts to legally regulate information online must be informed, consistently applied, nuanced and explicitly provide for protection of rights to free expression, opinion and information to ensure that online regulation in fact protects the security and privacy of individuals. (see *II(iv) below*)

These provisions appear to aim to control potential spread of misinformation on platforms which allow for speedy amplification of messages, but are more likely to violate fundamental freedoms to the detriment of the public need for access to information. They are also disproportionate to the purported aim of preventing negative effects that may follow the amplification of certain false facts.

Those directly making subject statements

Section 7 of the bill criminalizes the communication in Singapore of a false statement of fact – in or outside of Singapore – by an individual with a fine of up to S\$50,000 or five years' imprisonment or both. Non-individuals¹⁵ can be fined up to S\$500,000. (*Sections 7(1), (2)*) If such communication is made via 'an inauthentic online account', an individual can be fined up to S\$100,000 or 10 years' imprisonment or both. Non-individuals can be fined up to S\$1 million (*Section 7(3)*).

Section 7(3) is particularly problematic as it does not define what an 'inauthentic online account' means, potentially referring to online accounts which do not have the formal name of an individual or entity, such as an account that uses a pseudonym, nickname or is anonymous.

While we appreciate that the use of bots to spread misinformation online is a genuine problem, there also exist online accounts owned by individuals or entities that may not include personal or formal details for reasons of privacy, which risk being targeted under this provision.

Section 9 penalizes any individual who 'solicits, receives or agrees to receive any financial or other material benefit as an inducement or reward for providing any service, knowing that the service is or will be used in the communication of one or more false statements of fact in Singapore' with a fine of up to S\$30,000 or three years' imprisonment or both. Non-individuals can be fined up to S\$500,000 (*Sections 9(1),(2)*).

The penalties increase to up to S\$60,000 or six years' imprisonment or both for individuals, and a fine of up to S\$1 million, if the statement is 'prejudicial to security of Singapore', 'public tranquility', 'influence the outcome of an election', 'incite feelings of enmity, hatred or ill-will', or 'diminish public confidence in the performance of any duty or function' of a government body (*Section 9(3)*). A convicted party must also pay as penalty the amount of financial or other material benefit received (*Section 9(5)*).

Section 36 thereafter penalizes any individual who 'solicits, receives or agrees to receive any financial or other material benefit as an inducement or reward' for operating a DOL with a fine of up to S\$40,000 or three years' imprisonment or both. Non-individuals can be fined up to S\$500,000. (*Section 36(1)*) A convicted party must also pay as penalty the amount of financial or other material benefit received. (*Section 36(4)*)

Section 38 penalizes any individual – in or outside of Singapore – who 'expends or applies any property knowing or having reason to believe that the expenditure or application supports, helps or promotes the communication of false statements in

¹⁵ The bill also covers offences committed by corporations and unincorporated associations or partnerships. See sections 58, 59.

(Attached)

Singapore on a DOL' with a fine of up to S\$40,000 or three years' imprisonment or both. Non-individuals can be fined up to S\$500,000. (*Sections 38(1); 38(3)*)

These sections pose the risk that the bill will criminalize the work, for example, of independent or freelance journalists or writers who communicate information online for which their services are paid. *Section 9(3)*, particularly, may be used to penalize the free communication of information and opinions when they are especially required on matters of public interest.

Section 15 deals with non-compliance with ministerial directions to makers of a subject statement to 'correct' or 'stop communication' of that statement, where an individual can be fined up to S\$20,000 or one year's imprisonment or both. Non-individuals can be fined up to S\$500,000 (*Section 15(1)*).

Individuals or non-individuals who refuse to comply with ministerial directions to ensure information that is in the public interest remains in the public domain therefore face hefty fines and/or imprisonment, without the ability to defend their actions on the basis of their exercise of the rights to freedom of expression, opinion or information. (see *II(iv)* below)

Considering the wide range of 'statements' covered under *section 2(1)* of the bill, these sections could apply not only to original makers of an alleged false statement of fact, but also potentially those who may inadvertently communicate such fact through 'sharing', 'liking' or 'commenting' on a social media post, including 'comments' such as the posting of an emoticon or other symbols.

Intermediaries/facilitators

Hefty fines and/or imprisonment terms extend to intermediaries who facilitate the communication of alleged false statements of fact. The extent of these penalties, which remain under the purview and powers of government authorities, present a real risk that nearly any form of facilitation of the movement of information by service providers and intermediaries can fall afoul of the bill.

Internet service providers and internet intermediaries which are business enterprises have responsibilities to respect human rights, independent of State obligations or the implementation of these obligations, in line with the UN Guiding Principles on Business and Human Rights.¹⁶

The United Nations Special Rapporteur on the right to freedom of opinion and expression has however noted that State pressure on intermediary liability often "creates a strong incentive to censor (where) providers may find it safest not to challenge... regulation but to over-regulate content such that legitimate and lawful expression also ends up restricted".¹⁷

Penalties provided under the bill for intermediaries appear to be stringent enough to pressure private entities to over-regulate content to the detriment of their users.

For internet service providers and internet intermediaries who do not comply with orders to 'correct', 'stop communication', 'disable', 'restrict', 'block access to' or 'not facilitate' a subject statement or a DOL, maximum penalties prescribed are fines of up to S\$20,000 or one year's imprisonment or both for individuals, fines of up to S\$1 million for non-individuals, and in the case of a continuing offence, up to fines not

¹⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/35/22, 30 March 2017. Available at: <file:///C:/Users/User/Desktop/2019/SINGAPORE/Online%20Falsehoods%20Bill/Research/UNSR%20FoE%202017.03.30%20A.HRC.35.22.pdf>

¹⁷ Ibid, para 49.

(Attached)

exceeding S\$100,000 for every day or part of day can be imposed during the time of the continuation of the offence (*Sections 16(3), 27(1), 33(4), 42(1), 43(3), 47(4)*).¹⁸

For non-compliance with an order for an online location to declare its DOL status to end-users, individuals can be fined up to S\$40,000 or three year's imprisonment or both. Non-individuals can be fined up to S\$500,000. (*Section 32(6)*) Any service provider, digital advertising intermediary or internet intermediary – both in and outside of Singapore – who does not take 'reasonable steps' to ensure that any paid content it 'includes or causes to be included on a DOL is not communicated in Singapore or the DOL' is liable to a fine of up to S\$20,000 or a year's imprisonment or both for an individual. Non-individuals can be fined up to S\$500,000. (*Sections 37(1); 37(6)*)

Section 50(3) penalizes any digital advertising or internet intermediary – in or outside of Singapore – that does not comply with a code of practice issued by a Competent Authority and is given a notice setting out such non-compliance. An individual can be fined up to S\$20,000 or a year's imprisonment or both. Non-individuals can be fined up to S\$1 million. In the case of a continuing offence, a further fine can be imposed of up to S\$100,000 for every day or part of day during which the offence continues after conviction.

It should be noted that the impact of these penalties to remove content off intermediary networks could not only result in illegitimate and disproportionate limitations on the rights to freedom of expression, opinion and information in Singapore but also impair the enjoyment of rights of users who do not reside within Singapore. (*see II(vi) below*)

Instead of imposing stringent penalties on intermediaries, the Singapore government is urged to engage more proactively and transparently with the private sector in multi-stakeholder engagements which seek to enhance companies' due diligence strategies, rights-oriented design and engineering choices, and mechanisms to prevent risks to human rights and ensure transparency and effective remedies.¹⁹ These engagements between the government and private companies should crucially include input and continual engagement with the public and civil society.²⁰

iv. Absence of clear protections for free expression, opinion and information

The bill fails to provide clear protections for the rights to freedom of expression, opinion or information in its provisions. There are no provisions explicitly granting a defence to an aggrieved party who wishes to contest a direction or order on the basis that:

- (i) it is in violation of these fundamental freedoms, not comporting with legal legality and being neither necessary nor proportionate towards achieving a legitimate purpose, as established under international law and standards,
- (ii) communication of the subject statement is in the public interest, or
- (iii) the direction or order should be quashed on grounds of illegality, irrationality and procedural impropriety in line with judicial review standards under Singapore administrative law.²¹

The bill provides that the High Court may only set aside a direction or order if

- (i) the subject statement was not communicated in Singapore;

¹⁸ See also Section 54 on the appointing of a representative to accept service of orders or directions made under the bill.

¹⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/35/22, 30 March 2017, para 82.

²⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/35/22, 30 March 2017, paras 61 to 63.

²¹ These grounds from English common law were applied in the case of *Chng Suan Tze v. Minister for Home Affairs* (1988), where, at [86], it was clarified that "the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power".

(Attached)

- (ii) the subject statement is not a statement of fact, or is a true statement of fact;
- (iii) it is not technically possible to comply with the direction or order. (*Sections 17(5), 29(5), 44(5)*)

These conditions allow the setting aside of a direction or order only where a statement has either been proven to be true or proven to not be a statement of fact, which appear to invoke defences similar to defences against defamation, which will place the burden of proof on the aggrieved party to show that the statement made was true in substance and in fact, or an expression of opinion or a matter relating to public interest.

This is particularly problematic when the scope of this bill is considered, where the making, sharing or other dissemination of any 'word (including abbreviation and initial), number, image (moving or otherwise), sound, symbol or other representation, or a combination of any of these' will result in an undue burden placed on individuals or non-individuals to justify their expression, opinion or communication of information, which can result in disproportionate infringements on their fundamental rights to do so.

Defences of honest mistake, parody and artistic merit are also not provided for under the bill.

v. Designation of alternate authority for election or specified periods

Part 8 of the bill provides that during an election period, an alternate authority can be appointed by a minister before the start of the election period, to exercise the powers granted to ministers under the bill. (*Section 52(3)*) It also provides that a minister may appoint an alternate authority 'for such period, other than an election period', which provides no further clarification on what 'such period' entails. (*Section 53(1)*)

The inclusion of this part of the bill raises a pertinent concern that, if brought into force, this law can be wielded by government-appointed authorities to monitor and control public debate, discussion and the flow of information in the public realm during periods when these are most necessary for Singaporean society.

Even as delegation of ministerial powers to alternate authorities during an election period is not in itself a contentious matter, within the context of this bill, *Part 8* fails to provide clear oversight mechanisms to limit the exercise of unfettered executive discretion during election or other such sensitive periods when such discretion most crucially needs to be restrained to promote free, independent and diverse communication in the interests of the public and society.

vi. Scope of jurisdiction

The bill allows for extraterritorial application, providing that directions or orders can be made against and penalties imposed on individuals or non-individuals 'whether in or outside of Singapore' who communicate or otherwise facilitate the communication of alleged false statements of fact as long as the subject statement is communicated in Singapore. (*see II(iii) above*)

This extended jurisdictional scope is in conflict with international standards to protect the rights to communicate expression, opinions and information "regardless of frontiers", particularly where it can prevent persons in Singapore from access to international sources of information. It also places obstacles and onerous burdens on authorities in other jurisdictions that are implementing their obligations to protect freedom of expression, opinion and information, and raises a concurrent risk that limiting cross-border flow of information will restrict the right to free expression, opinion and information of persons outside of Singapore, where a subject statement is ordered to be removed off a platform that is also accessed by persons outside of the country.

(Attached)

Protection of rights to freedom of expression, opinion and information in accordance with international law and standards must apply equally to communications within Singapore and to cross-border communications.

IV. Conclusion

In summary, the Online Falsehoods Bill in its current form fails to comply with international law and standards.

Its provisions are vague, overbroad, and are likely to be unnecessary and disproportionate in application to legitimate aims of ensuring national security or public order. There are serious risks that they will cause unwarranted interference into the exercise of the rights to freedom of expression, opinion and information. Bases for restrictions, such as 'public tranquility' and 'public interest', left undefined, are too broad to constitute legitimate purposes for restriction.

Its provisions unduly confer upon ministers and government authorities unfettered discretion and contain overbroad language which prevents clear ascertainment by the public – and indeed members of the government – of what constitutes permitted expression and what does not.

The broad scope of the bill covers nearly any manner or means of online communication which can fall under complete executive control, due to its failure to provide adequate judicial review or oversight mechanisms that can limit overreach of executive powers.

Severe penalties prescribed under the bill also clearly do not comply with the tests of necessity and proportionality, in not providing for the least restrictive means of achieving the purported aim of the bill, by penalizing not only makers of alleged false statements of fact, but also individuals, internet service providers, digital advertising intermediaries and internet intermediaries who facilitate communication of such statements.

The bill does not clearly include provisions that ensure protection of the rights to freedom of expression, opinion or information, or include exceptions or defences which would guarantee the same.

The bill also does not provide for prompt access to an effective remedy – judicial or administrative – to those aggrieved in the event of allegedly abusive or otherwise unlawful application of the restrictions contained therein.

For these reasons, provisions of the Protection from Online Falsehoods and Manipulation Bill 2019 are inconsistent with international law and standards.

We urge the Singapore Parliament not to pass the bill into law, at the very least without substantial amendments to address the deficiencies described above.