

Dictating the Internet: A Human Rights Assessment of the Implementation of Singapore's Protection from Online Falsehoods and Manipulation Act 2019

A Briefing Paper
October 2021

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Published in October 2021

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ICJ LEGAL BRIEFING

DICTATING THE INTERNET: A HUMAN RIGHTS ASSESSMENT OF THE IMPLEMENTATION OF SINGAPORE'S PROTECTION FROM ONLINE FALSEHOODS AND MANIPULATION ACT 2019

4 October 2021¹

1. Introduction

On 2 October 2019, the Protection from Online Falsehoods and Manipulation Act 2019 (POFMA) entered into force, having been enacted by Singapore's Parliament on 3 June 2019.² POFMA is aimed at preventing the communication of "false statements of fact" and to "enable measures to be taken to counteract the effects of such communication".³

In the two years since POFMA has been in effect, it has been invoked 83 times, comprising 58 Correction Directions, 12 Targeted Correction Directions, four declarations of a Declared Online Location, four access blocking or disabling orders and five General Correction Directions.⁴ Most of these restrictions have been directed at politicians outside the government and ruling party, government critics and independent media outlets.⁵

The ICJ has previously highlighted how POFMA does not comply with international law and standards protecting the right to freedom of opinion, expression and information. This is due to its vague and overbroad provisions; wide-ranging discretion conferred to the executive; severe penalties, including imprisonment terms and hefty fines; and the lack of adequate oversight, redress and accountability mechanisms.⁶

These concerns have been confirmed by the manner in which POFMA has been invoked and applied. There have been instances where the government has, through the use of POFMA, restricted freedom of expression and information in a manner that contravenes the principles of legitimate purpose, legality, necessity and proportionality under international human rights law.⁷ POFMA has also been applied without sufficient judicial oversight.⁸

Thus, the "calibrated measures"⁹ contemplated under POFMA fail to address the potential harms posed by the spread of false information online in a manner that also ensures the right to freedom of expression can be exercised with the least impediments needed for only a strictly necessary purpose.

¹ The information in this legal briefing is accurate as of 4 October 2021.

² *Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019)* ('POFMA'), available at: <https://sso.agc.gov.sg/Act/POFMA2019>.

³ Section 5(a), POFMA.

⁴ Singapore Internet Watch, 'POFMA'ed Dataset' ('POFMA'ed Dataset'), available at: <https://pofmaed.com>.

⁵ La Trobe University, *Fighting Fake News: A Study of Online Misinformation Regulation in the Asia Pacific*, January 2021, pp. 19 – 20, available at: https://www.latrobe.edu.au/_data/assets/pdf_file/0006/1204548/carson-fakenews.pdf.

⁶ ICJ, *Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia*, December 2019 ('ICJ, Dictating the Internet Regional Report'), available at: <https://www.icj.org/wp-content/uploads/2019/12/Southeast-Asia-Dictating-the-Internet-Publications-Reports-Thematic-reports-2019-ENG.pdf>; ICJ, *Legal Briefing: Protection from Online Falsehoods and Manipulation Bill No. 10/2019*, 12 April 2019 ('ICJ, Legal Briefing on POFMA Bill'), available at: <https://www.icj.org/wp-content/uploads/2019/04/Singapore-online-regulation-bill-briefing-advocacy-open-letter-2019-ENG.pdf>.

⁷ Article 19(3), *International Covenant on Civil and Political Rights*; ICJ, *Legal Briefing on POFMA Bill*, pp. 1 – 4.

⁸ Human Rights Council, *Disinformation and freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan*, UN Doc. A/HRC/47/25, 13 April 2021 ('A/HRC/47/25'), para. 54.

⁹ This is language used by Singapore's "POFMA Office" to describe the powers under POFMA; e.g., POFMA Office, 'Frequently Asked Questions', available at: <https://www.pofmaoffice.gov.sg/documents/POFMA-Office-FAQs.pdf>.

2. International human rights law and standards

While Singapore is not party to the International Covenant on Civil and Political Rights (ICCPR), the right to freedom of expression is a norm of customary international law, incumbent on Singapore.¹⁰ Singapore has affirmed the importance of this right in its endorsement¹¹ of the Vienna Declaration and Programme of Action.¹² The UN Human Rights Council has repeatedly emphasized the universal applicability of this right in consensus resolutions, including in 2020 where it reaffirmed that:

“... the right to freedom of opinion and expression, both online and offline, is a human right guaranteed to all, in accordance with article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, that it constitutes one of the essential foundations of democratic societies and development, and that it is critical to combating corruption”.¹³

Singapore’s Ministry of Foreign Affairs has also specifically referred to the standards under the ICCPR in its defence of the human rights compatibility of POFMA.¹⁴ An assessment of the conformity of the POFMA with international law and standards should be taken with reference to the affirmation of the UN Human Rights Council in its 2020 consensus resolution 44/12 that:

“... responses to the spread of disinformation and misinformation must be grounded in international human rights law, *including the principles of lawfulness, legitimacy, necessity and proportionality*, and underlining the importance of free, independent, plural and diverse media and of providing and promoting access to independent, fact-based and science-based information to counter disinformation and misinformation”.¹⁵

Furthermore, the UN Human Rights Committee has affirmed that States should avoid “penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice”.¹⁶

3. Summary of POFMA

POFMA grants powers to any Minister to issue restrictions under Part 3 of POFMA and to compel internet intermediaries and providers of mass media services to issue restrictions under Part 4 of POFMA if a “false statement of fact” has been or is being communicated in Singapore, and “the Minister is of the opinion that it is in the public interest” to issue a restriction.¹⁷

According to the POFMA Office, the government’s “primary tools” are Correction Directions (CDs) issued under section 11.¹⁸ If a Minister issues a CD, the statement-maker is required to put up a notice stating that “the subject statement is false, or that the specified material contains a false statement of fact”, and a correction to the “false statement of fact” and/or a link to where the correction can be found.¹⁹ The government can also issue Targeted Correction

¹⁰ Chen Siyuan and Chia Chen Wei, ‘Singapore’s latest efforts at regulating online hate speech’, *Research Collection School Of Law*, June 2019 (‘Chen Siyuan and Chia Chen Wei, Singapore’s latest efforts at regulating online hate speech’), para. 34, available at: https://ink.library.smu.edu.sg/sol_research/2921/.

¹¹ See, for example: Ministry of Foreign Affairs, ‘40th HRC – Joint Statement on New and Emerging Technologies and Human Rights, 8 March 2019’, 8 March 2019, available at: https://www.mfa.gov.sg/Overseas-Mission/Geneva/Speeches-and-Statements--Permanent-Mission-to-the-UN/2019/03/press_20190308-1.

¹² *Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights in Vienna on 25 June 1993*, paras. B(1)(22) and C(67).

¹³ Human Rights Council, *Resolution adopted by the Human Rights Council on 16 July 2020: 44/12. Freedom of opinion and expression*, UN Doc. A/HRC/RES/44/12, 24 July 2020 (‘UN Human Rights Council Resolution 44/12’), p. 1.

¹⁴ Ministry of Foreign Affairs, ‘Statement by the Permanent Mission of Singapore during the Interactive Dialogue with the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council’, 10 July 2020 (‘MFA, Statement by the Permanent Mission of Singapore, 10 July 2020’), available at: <https://www.mfa.gov.sg/Overseas-Mission/Geneva/Mission-Updates/2020/07/Statement-Dialogue-with-UN-SR-44th-Session-10-July-2020>.

¹⁵ UN Human Rights Council Resolution 44/12, p. 2 (italics added for emphasis).

¹⁶ Human Rights Committee, *General comment No. 34*, UN Doc. CCPR/C/GC/34, 12 September 2011 (‘General Comment No. 34’), para. 47.

¹⁷ Section 10, POFMA.

¹⁸ POFMA Office, ‘POFMA Office: For the Protection from Online Falsehoods and Manipulation Act’, available at: <https://www.pofmaoffice.gov.sg>.

¹⁹ Section 11, POFMA.

Directions to Internet intermediaries under section 21, which requires the intermediary to communicate a correction notice to end-users who accessed the “false statement of fact” via the intermediary’s service.²⁰

POFMA also grants powers to the Minister to direct the media statutory body, Infocomm Media Development Authority (IMDA) or Internet intermediaries to censor and restrict access to content through access blocking and disabling orders.²¹ Additionally, POFMA introduced criminal sanctions for, *inter alia*, the spreading of a “false statement of fact” knowing it is false, and knowing it will or is likely to harm the public interest;²² as well as for failing to comply, “without reasonable excuse”, with Part 3 restrictions issued by the Minister.²³

4. *Prima facie* limitations on free expression

The invocation of POFMA are *prima facie* limitations on the right to freedom of expression, and are thus subject to the principles of legitimate purpose, legality, necessity and proportionality. For instance, POFMA provides for Ministers to issue CDs under section 11. The Ministry of Communications and Information and the Ministry of Law have made assurances that CDs do not “curtail anyone’s free speech”.²⁴ The government, through a statement issued by the Permanent Mission of Singapore to Geneva during the interactive dialogue with the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, has argued that CDs simply require “facts to be juxtaposed against falsehoods”,²⁵ with the original articles “neither censored nor amended, enabling readers to see both the primary piece and the correction, and to make up their own minds”.²⁶

However, the High Court has held in *Singapore Democratic Party v Attorney-General* [2020] – a case of POFMA being used against a political opposition party – that CDs are attempts to curtail free speech.²⁷ The High Court further noted in this case that this “curtailment may in turn give rise to legal liability”²⁸ for failure to comply with a CD “without reasonable excuse”, including criminal penalties of a fine up to S\$20,000 (approx. US\$14,650), 12 months of imprisonment, or both, for individuals.²⁹ Additionally, the Minister may direct IMDA to order the internet access service provider to disable access to the disfavoured website through an access blocking order under section 16.³⁰

There are also other punitive consequences associated with the issuance of CDs, despite assurances by the Ministry of Law that CDs “are not sanctions”.³¹ A website can be declared a “Declared Online Location” (DOL) under section 32 of POFMA, if the website has been issued CDs three times in a period of six months.³² Such a declaration makes it a criminal offence for

²⁰ Section 21, POFMA.

²¹ Sections 16 and 22, POFMA.

²² Section 7, POFMA.

²³ Section 15, POFMA.

²⁴ The Straits Times, ‘Rights to free speech not hit by use of fake news law: Ministries’, 11 December 2019, available at: <https://www.straitstimes.com/politics/psp-members-post-remains-online-after-pofma-order-showing-rights-to-free-speech-not>.

²⁵ MFA, Statement by the Permanent Mission of Singapore, 10 July 2020.

²⁶ Ministry of Law, ‘Response by the Ministry of Law to Voice of America’, 5 May 2020, available at:

<https://www.mlaw.gov.sg/news/replies/ministry-of-law-response-to-voice-of-america>.

²⁷ *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 (‘SDP case’), at [37], available at:

<https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2020-sghc-25-pdf.pdf>. In contrast, in *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 (‘TOC case’) at [35], the High Court held that misinformation is not a category of speech protected by article 14 of the Constitution: available at:

<https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2020-sghc-36-pdf.pdf>. These cases will be discussed in further detail in Section 8.

²⁸ SDP case, at [37].

²⁹ Section 15, POFMA.

³⁰ Section 16, POFMA.

³¹ The Straits Times, ‘Singapore clarifies on Pofma, death penalty at UN review of its human rights record’, 12 May 2021, available at: <https://www.straitstimes.com/singapore/politics/spore-clarifies-on-pofma-and-death-penalty-at-un-review-of-its-human-rights>.

³² Section 32, POFMA. This argument has also been made by Mr Eugene Thuraingam, legal counsel for The Online Citizen, in the ongoing appeal in the Court of Appeal; see, Channel News Asia, ‘Judgment reserved in The Online Citizen, SDP’s POFMA appeals, as court grapples with legal issues including burden of proof’, 17 September 2020, available at: <https://www.channelnewsasia.com/singapore/toc-sdp-pofma-appeals-judgement-court-appeal-593466>.

the owner of the website to communicate paid content on the website;³³ or for the provision of financial support that “supports, helps or promotes the communication of false statements of facts in Singapore on a declared online location”.³⁴ These restrictions ultimately result in punitive or “sanction”-like impacts on websites deemed to fall foul of the law.

5. Legality

The use of CDs and other POFMA powers is based on imprecise notions of “falsehood” allowing for arbitrary executive interpretation in implementation. This is contrary to the principle of legality, which not only requires precision in the expression of the law, but also that laws not “confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”.³⁵

POFMA defines what is “false” as “false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears”.³⁶ This definition is vague and circular.³⁷ The Minister for Law has elaborated that what is or is not fact can be drawn from existing case law,³⁸ which the High Court in *SDP* has clarified as referring to the “principles applicable to the defence of fair comment in defamation law”.³⁹

However, even in defamation law, it “will often be very difficult to decide whether a given statement expresses a comment or [an] opinion, or by contrast constitutes an allegation of fact”, as has been noted by the Court of Appeal.⁴⁰ This complexity reinforces how the courts are best-placed to conduct these assessments at first instance, not the government, especially since the fact-opinion determination involves interpretation of often complex areas of law, whether international, constitutional, statutory or case law.⁴¹

This difficulty is evident from the CD issued on 13 May 2020 against a YouTube video on the scope of POFMA posted on a channel run by independent online media platform, New Naratif,⁴² and the CDs issued on 5 July 2020 in relation to comments made by Dr Paul Tambyah, an opposition politician and infectious diseases expert, about how the Ministry of Manpower handled the COVID-19 outbreak in migrant worker dormitories.⁴³ In both instances, there was a degree of ambiguity over whether the disfavoured statements were plain statements of fact, rather than statements of opinion.⁴⁴

³³ Section 37, POFMA. Failure to comply may result in a fine not exceeding S\$20,000 (approx. US\$15,000) or imprisonment for a term not exceeding 12 months, or to both for individuals; and a fine not exceeding S\$500,000 (approx. US\$370,000) for other cases; see, section 37(6), POFMA.

³⁴ Section 38, POFMA. Failure to comply may result in a fine not exceeding S\$40,000 (approx. US\$30,000) or imprisonment for a term not exceeding three years, or to both for individuals; and a fine not exceeding S\$500,000 (approx. US\$370,000) for other cases; see, section 38(3), POFMA.

³⁵ General Comment No. 34, para. 25; A/HRC/47/25, para. 40.

³⁶ Section 2(2)(a) – (b), POFMA.

³⁷ The circularity of the definition of what is “false” under POFMA has been noted by the Special Rapporteur on freedom of opinion and expression; see, A/HRC/47/25, para. 54. The ICJ has also previously highlighted the “breadth and opacity” of these provisions; see, ICJ, Legal Briefing on POFMA Bill, p. 4; ICJ, Dictating the Internet Regional Report, p. 120. See also, Chen Siyuan and Chia Chen Wei, Singapore’s latest efforts at regulating online hate speech, para. 6, for a critique of how it is “not always easy to distinguish between facts and opinions, characterisations, and misimpressions that result from decontextualisation.”

³⁸ The Straits Times, ‘Parliament: Shanmugam addresses 5 concerns over proposed fake news law’, 8 May 2019, available at: <https://www.straitstimes.com/politics/parliament-law-minister-shanmugam-addresses-five-concerns-over-proposed-fake-news-law>; Ministry of Law, ‘Protection from Online Falsehoods and Manipulation Act: FAQ’, para. 2, available at: <https://www.mlaw.gov.sg/files/news/others/POFMA-FAQs.pdf>.

³⁹ *SDP* case, [29] – [30].

⁴⁰ *Review Publishing Co Ltd and Another v Lee Hsien Loong and Another Appeal* [2009] SGCA 46, at [140], available at: <https://www.supremecourt.gov.sg/docs/default-source/module-document/iudgement/2009-sgca-46.pdf>.

⁴¹ Individuals affected by POFMA restrictions can appeal to the Courts against the restriction, under section 17 of POFMA. However, it will be argued in Section 6 how restrictions should not be issued by the executive at first instance.

⁴² POFMA Office, ‘Minister for Law Instructs POFMA Office to Issue Correction Directions’, 13 May 2020, available at: <https://www.pofmaoffice.gov.sg/documents/media-releases/2020/May/pofma-pr-minlaw-13may2020-01.pdf>.

⁴³ Ministry of Health and Ministry of Manpower, ‘Joint MOM-MOH Statement on the Issuance of Correction Directions under the Protection from Online Falsehoods and Manipulation Act (POFMA) against National University of Singapore Society (NUSS), The Online Citizen Asia (TOC), CAN and New Naratif’, 5 July 2020, available at: <https://www.pofmaoffice.gov.sg/documents/media-releases/2020/July/pofma-pr-mom-05jul2020-01.pdf>.

⁴⁴ See, for instance, New Naratif’s response to the CD: New Naratif, ‘New Naratif’s Response to the POFMA Correction Direction’, 14 May 2020, available at: <https://newnaratif.com/new-naratifs-response-to-the-pofma-correction-direction/>; The Straits Times, ‘Singapore GE2020: Tambyah says it’s inappropriate to use Pofma over his Covid-19 remarks’, 7 July 2020, available at: <https://www.straitstimes.com/politics/tambyah-says-its-inappropriate-to-use-pofma-over-his-covid-19-remarks>.

6. Legitimate purpose

Ministers have issued CDs and other POFMA restrictions for purposes beyond the closed list of permissible purposes for which freedom of expression may be limited under international law, i.e. respect of the rights or reputations of others; protection of national security, public order, public health or morals.⁴⁵ In addition, there is a requirement to prohibit advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁴⁶

This has in part been enabled by the vague and overbroad language of POFMA,⁴⁷ which allows the government to issue restrictions if it considers them to be in the “public interest”. Section 4 of POFMA makes clear that what constitutes “public interest” is a non-exhaustive list,⁴⁸ which effectively provides the government unfettered powers to issue restrictions. This is contrary to the principle of legality, as discussed above.

“Public interest”, by itself, is not a sufficient rationale to restrict expression; rather it must be only those categories of public interest specified under international law and standards. Accordingly, some of the examples provided under POFMA explicating what may be considered “public interest” are not permissible aims to restrict expression, including preventing “diminution of public confidence” in government authorities.⁴⁹ Several CDs have been issued ostensibly for this overbroad and impermissible purpose. CDs were issued against statements alleging that the police had abused their authority and bullied an elderly woman;⁵⁰ and against statements alleging the use of “unlawful methods in judicial executions conducted in Changi Prison”.⁵¹ Irrespective of whether the statements were true or not, or whether or not there was a malicious intent to spread “false information”, international human rights law is clear that the prohibition of “false information” is “not in itself a legitimate aim”.⁵²

There also has been a lack of transparency about the exact purpose for which each CD or POFMA restriction has been issued, partly because POFMA does not require the Ministers to explicitly state how a restriction serves the “public interest”.⁵³ This issue surfaced when the Minister for Finance issued CDs on several online posts carrying an allegedly “false statement” about the salary of Ho Ching, CEO of State-owned investment company Temasek Holdings Limited and wife of Prime Minister Lee Hsien Loong on 19 April 2020.⁵⁴ The lack of clarity and transparency of the purpose of these CDs was raised in Parliament by the Workers’ Party, the largest opposition party in Parliament.⁵⁵ In response, Second Minister for Finance responded that this was an issue for the High Court to decide,⁵⁶ as The Online Citizen (TOC), an independent online media platform, had filed an application in May 2020 to the High Court seeking judicial review of the CDs and how it relates to the “public interest” after being issued

⁴⁵ Article 19(3), ICCPR.

⁴⁶ Article 20(2), ICCPR.

⁴⁷ This has been previously noted by the ICJ: see, ICJ, Dictating the Internet Regional Report, p. 120; ICJ, Legal Briefing on POFMA Bill, pp. 4 – 5.

⁴⁸ Section 4, POFMA provides that the examples given of what constitutes “public interest” are not meant to limit “the generality of the expression”.

⁴⁹ Section 4(b) and (f), POFMA.

⁵⁰ Ministry of Home Affairs, ‘Press Release: Issuance of Correction Directions and Targeted Correction Direction under the Protection from Online Falsehoods and Manipulation Act 2019 on Falsehoods Regarding Alleged Police Bullying’, 21 May 2021, available at: <https://www.pofmaoffice.gov.sg/documents/media-releases/2021/May/pofma-pr-mha-21May2021-01.pdf>.

⁵¹ Ministry of Home Affairs, ‘Press Release: Baseless Allegations of Unlawful Methods of Judicial Execution & Issuance of Correction Directions under the Protection from Online Falsehoods and Manipulation Act’, 22 January 2020, available at: <https://www.pofmaoffice.gov.sg/documents/media-releases/2020/January/MHA%20CD%20Statement.pdf>. Lawyers For Liberty’s website was later blocked in Singapore through an access blocking order for not complying with the CD; see, Ministry of Communications and Information, ‘Minister for Communications and Information Directs IMDA to Issue Access Blocking Orders’, 23 January 2020, available at: <https://www.pofmaoffice.gov.sg/documents/media-releases/2020/January/mci-imda-abo-23-jan.pdf>.

⁵² A/HRC/47/25, para. 38, 40. It is worth noting that in *Chee Siok Chin v Minister for Home Affairs* [2005] SGHC 216, the High Court noted at [135] that “[d]isseminating false or inaccurate information or claims can harm and threaten public order” for the purposes of article 14(2) of the Singapore Constitution; this was similarly noted in *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [120]. This interpretation of “public order”, however, appears overly expansive when compared against international law and standards.

⁵³ Chen Siyuan and Chia Chen Wei, Singapore’s latest efforts at regulating online hate speech, para. 38.

⁵⁴ POFMA Office, ‘Media Release: Minister for Finance Instructs POFMA Office to Issue Correction Directions’, 19 April 2020, available at: <https://www.pofmaoffice.gov.sg/documents/media-releases/2020/April/pofma-pr-mof-19-apr-2020.pdf>.

⁵⁵ Mothership, ‘Is the claim about Ho Ching’s salary a public interest under POFMA? High Court will decide.’, 5 May 2020, available at: <https://mothership.sg/2020/05/pofma-temasek-public-interest/>.

⁵⁶ *Ibid.*

a CD for publishing information on this.⁵⁷ According to information the ICJ received from TOC, the judicial review application is currently on hold while waiting for the Court of Appeal to decide on the ongoing *SDP* and *TOC* cases.⁵⁸

7. Necessity and proportionality

Declaring websites as DOLs and blocking access to entire websites and Facebook pages, as previously noted in Section 2, is not necessary to achieve one of the legitimate purposes under international law, i.e. respect of the rights or reputations of others; protection of national security, public order, public health or morals.⁵⁹ To this date, four Facebook pages have been deemed DOLs after being issued three or more CDs.⁶⁰ They were subsequently blocked in Singapore through disabling orders for failing to publish that they had been declared DOLs under section 34 of POFMA.⁶¹ One website has been blocked through a section 16 access blocking order for not complying with a CD.⁶²

Furthermore, criminal sanctions, including hefty fines and imprisonment, may be imposed under POFMA on a wide range of potential victims.⁶³ Under international law, criminal sanctions constitute “serious interference with the freedom of expression and are disproportionate responses in all but the most egregious cases”.⁶⁴

For instance, failure to comply with a CD may result in criminal sanctions, as previously noted in Section 2, even if the government has asserted that CDs, by themselves, are not sanctions.⁶⁵ Additionally, even though the government has assured that CDs are the “primary tools to counter online falsehoods”,⁶⁶ it is still a criminal offence under section 7 to spread a “false statement of fact” knowing it is false, and knowing it will or is likely to harm the public interest, and may result in a fine of up to SGD\$50,000 (approx. US\$37,000) or five years’ imprisonment or both for individuals.⁶⁷ While there is a need to restrict the intentional dissemination of harmful false information to protect, for instance, public health, these limitations should not impose excessive and disproportionate punishments, which section 7 appears to impose.

Even though there have been no recorded instances of criminal sanctions being imposed under POFMA thus far,⁶⁸ the potential of such criminal penalties is likely to pose a chilling effect on the free communication of ideas, opinions or information, particularly as it encourages individuals to self-censor or otherwise constrain their exercise of the rights to free expression and information, to pre-empt and protect themselves from incurring severe penalties.⁶⁹ According to New Naratif, POFMA has “created mental stress and paranoia” not only for their reporters, but also their sources, because of the fear of running afoul of the law.⁷⁰

⁵⁷ Today, ‘High Court to decide if minister’s Pofma order should be upheld in case related to Temasek CEO’s salary’, 6 May 2020, available at: <https://www.todayonline.com/singapore/high-court-decide-if-ministers-pofma-order-should-be-upheld-case-related-temasek-ceos>.

⁵⁸ ICJ communication with Terry Xu, chief editor of The Online Citizen.

⁵⁹ Article 19(30), ICCPR; General Comment No. 34, para. 34. The government could, for instance, issue timely, regular and clear rebuttals on what they deem to be false information, or, if strictly necessary for a legitimate purpose, obtain an order from an independent judicial authority to restrict access to the specific content.

⁶⁰ POFMA Office, ‘Registry of Declared Online Locations’, available at: <https://www.pofmaoffice.gov.sg/registry/declared-online-locations/>.

⁶¹ Section 34, POFMA; POFMA’ed Dataset.

⁶² POFMA’ed Dataset.

⁶³ ICJ, Legal Briefing on POFMA Bill, pp. 8 – 11.

⁶⁴ A/HRC/47/25, para. 41.

⁶⁵ The Straits Times, ‘Singapore clarifies on Pofma, death penalty at UN Review of its human rights record’, 12 May 2021, available at: <https://www.straitstimes.com/singapore/politics/spore-clarifies-on-pofma-and-death-penalty-at-un-review-of-its-human-rights>.

⁶⁶ POFMA Office, ‘Protection from Online Falsehoods and Manipulation Act (POFMA)’, available at:

<https://www.pofmaoffice.gov.sg/regulations/protection-from-online-falsehoods-and-manipulation-act/>.

⁶⁷ Section 7, POFMA; Ministry of Law, ‘Protection from Online Falsehoods and Manipulation Act: Snapshot’, p. 3, available at: <https://www.mlaw.gov.sg/files/news/others/POFMABrochure.pdf>.

⁶⁸ POFMA’ed Dataset.

⁶⁹ See, *Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Reference: OL SGP 3/2019, 24 April 2019, p. 6, available at:

https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_SGP_3_2019.pdf.

⁷⁰ ICJ communication with Dr Thum Ping Tjin, Managing Director of New Naratif.

8. Judicial oversight

As previously noted, POFMA has been unilaterally invoked 83 times by the government to not only issue CDs, but also declare DOLs and block websites and Facebook pages. This contravenes the international law principle that any attempt by the State to regulate content should be undertaken by “an independent and impartial judicial authority” at first instance, “in accordance with due process and standards of legality, necessity and legitimacy”.⁷¹ Even though the Ministry of Law has argued that it is necessary for the government to issue the CDs at first instance to “break [the] virality” of “falsehoods” quickly,⁷² the efficacy of this approach is contentious.⁷³

The Ministry of Law has asserted that POFMA provides for “checks and balances” as POFMA restrictions can be challenged in court, with the court being the “final arbiter of whether there is a false statement of fact”.⁷⁴ To this date, there have been three appeals to the courts to set aside CDs. The Court of Appeal has reserved judgment on the appeals filed by the Singapore Democratic Party (SDP) and TOC since 17 September 2020; and TOC’s other appeal on the CD about Ho Ching’s salary is currently on hold.⁷⁵

Notably, there are procedural hurdles to meaningfully accessing this right to appeal. Under section 17 of POFMA, the first stage of recourse available to an aggrieved party is not an appeal to the High Court, but an administrative appeal to the Minister who issued the restriction in the first place.⁷⁶ As the ICJ has underscored, this results in a self-checking process still embedded in executive control.⁷⁷ There have been no successful appeals to a Minister to cancel or vary POFMA restrictions thus far.⁷⁸

Additionally, the ICJ has expressed concern that the subsequent submission of an appeal to the High Court under section 17 of POFMA is a costly process that not all aggrieved parties can engage in within a limited time frame.⁷⁹ The Minister for Law has provided assurances that in order to facilitate such appeals, the process will be made “fast and inexpensive”,⁸⁰ with the filing of an originating summons costing S\$200 (approx. US\$150), and the cost of the first three days of hearing fees waived.⁸¹ However, these will necessarily remain burdensome for many applicants as hearings may exceed three days for more complex or contentious appeals, resulting in hefty costs to the applicant.⁸² Further, despite assurances that the appeal process

⁷¹ Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/HRC/38/35, 6 April 2018, para. 66.

⁷² Channel News Asia, ‘IN FOCUS: Has POFMA been effective? A look at the fake news since it kicked in’, 3 October 2020, available at: <https://www.channelnewsasia.com/singapore/singapore-pofma-fake-news-law-1-year-kicked-in-688816>.

⁷³ Kirsten Han, ‘POFMA: Singapore’s Clumsy “Fake News” Hammer’, *New Naratif*, 12 June 2020, available at: <https://newnaratif.com/pofma-fake-news-hammer/>; Ng Hui Xian Lynette and Loke Jia Yuan, *Is this pofma? Analysing public opinion and misinformation in a COVID-19 Telegram group chat*, 20 October 2020, available at: <https://arxiv.org/abs/2010.10113>.

⁷⁴ Section 17, POFMA. The Straits Times, ‘Singapore clarifies on Pofma, death penalty at UN review of its human rights record’, 12 May 2021, available at: <https://www.straitstimes.com/singapore/politics/spore-clarifies-on-pofma-and-death-penalty-at-un-review-of-its-human-rights>.

⁷⁵ Channel News Asia, ‘Judgment reserved in The Online Citizen, SDP’s POFMA appeals, as court grapples with legal issues including burden of proof’, 17 September 2020, available at: <https://www.channelnewsasia.com/singapore/toc-sdp-pofma-appeals-judgement-court-appeal-593466>; ICJ communication with Terry Xu, chief editor of The Online Citizen.

⁷⁶ Section 17, POFMA.

⁷⁷ ICJ, Legal Briefing on POFMA Bill, p. 7; Section 17, POFMA.

⁷⁸ See, for instance: The Straits Times, ‘Home Affairs Minister Shanmugam rejects TOC’s application to cancel Pofma correction order’, 24 January 2020, available at: <https://www.straitstimes.com/singapore/home-affairs-minister-rejects-tocs-application-to-cancel-pofma-correction-order>; The Straits Times, ‘MHA rejects TOC’s application to cancel Pofma order over police bullying claims’, 31 May 2021, available at: <https://www.straitstimes.com/singapore/mha-rejects-tocs-application-to-cancel-pofma-order-over-police-bullying-claims>.

⁷⁹ ICJ, Legal Briefing on POFMA Bill, p. 7.

⁸⁰ Ministry of Law, ‘Second Reading Speech by Minister for Law, K Shanmugam on The Protection from Online Falsehoods and Manipulation Bill’, 7 May 2019, para. 27, available at: <https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-minister-for-law-k-shanmugam-on-the-protection-from-online-falsehoods-and-manipulation-bill>.

⁸¹ Parts 1 and 2, *Supreme Court of Judicature (Protection from Online Falsehoods and Manipulation) Rules 2019* (‘POFMA Court Rules’), available at: <https://sso.agc.gov.sg/SL-Supp/S665-2019/Published/20191001?DocDate=20191001>; Supreme Court, ‘Appeals to High Court (“General Division”) under POFMA’, available at: <https://www.supremecourt.gov.sg/rules/court-processes/appeals-to-high-court-under-pofma>.

⁸² *Ibid.* The fourth day of hearing costs S\$6,000 (approx. US\$4,400), the fifth day costs S\$2,000 (approx. US\$1,500), the sixth to tenth day costs S\$3,000/day (approx. US\$2,200), and subsequent days after will cost S\$5,000/day (approx. US\$3,700). It is possible for applicants, under section 14 of the POFMA Court Rules to apply to the Court hearing the appeal for a waiver or refund of the fees, if the appellant is unable to pay the court fees or hearing fees, but the criteria for this waiver is unclear.

may “take no more than nine days” after initiating a challenge to the Minister,⁸³ the ICJ notes with concern the protracted timeline of the SDP’s and TOC’s appeals,⁸⁴ which may dissuade others affected by POFMA restrictions from appealing. According to New Naratif, the appeal process against POFMA restrictions is “time-consuming and expensive, and requires compliance with directions before one can appeal”.⁸⁵

Finally, the right to appeal may be further undermined if the Court of Appeal rules in the SDP’s and TOC’s appeals that the statement-maker bears the burden of proof in appeals against CDs. Several experts have argued that the government issuing the CD should bear the burden of proof as a matter of constitutional law.⁸⁶ As a matter of international law, it is the duty of the State invoking a legitimate ground for restricting expression to “demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken.”⁸⁷ This obligation necessarily extends to the judicial setting, where the State authorities should bear the burden of proof to demonstrate specifically: (1) how the disfavoured statement is a “false statement of fact”; (2) what legitimate purpose is served by restricting the statement; (3) how the statement is at odds with that legitimate aim; and (4) how the POFMA restriction is necessary and proportionate to achieving this, including why there were no less restrictive measure that could have been pursued. Otherwise, this would place an overly onerous burden on those seeking to appeal against a *prima facie* restriction on their right to free expression.

9. Recommendations

In light of the above-mentioned concerns, the ICJ reiterates its call for POFMA to be repealed, as it is not compliant with international human rights law and standards and has in practice been used in a manner that contravenes these standards. Amending the law to bring it in line with international human rights law and standards would require substantive and a near-overhaul of existing provisions, to which, at present, the ICJ believes repeal is a more effective and rights-respecting option. Alternatively, the law should be amended, and in this respect, the ICJ recommends the Parliament to:

- Include in the law the duty of the authorities to treat restrictions issued under Part 3 and 4 of POFMA as *prima facie* restrictions on the right to freedom of expression, which should be undertaken only after a full analysis that effectively applies international standards of legitimate purpose, legality, necessity and proportionality and non-discrimination;
- Ensure that any restriction issued under POFMA, including CDs, DOLs, access blocking orders and disabling orders, is authorized pursuant to an order by an independent and impartial judicial authority at first instance, in accordance with due process and international law and standards;
- Require that restrictions issued under POFMA are clearly, transparently and regularly publicized, with specific and individualized explanations of the legitimate aim served by the restriction, the precise nature of the threat, an evaluation of the necessity and proportionality of the specific restriction taken, and steps taken to protect the right to free expression in the imposition of such a restriction;
- Amend the definition of “public interest” under section 4 to align with the closed list of permissible purposes set out in UN Human Rights Council resolutions (also reflecting

⁸³ The Straits Times, ‘Fake news Act: Speed, cost of appeals process set out’, 2 October 2019, available at: <https://www.straitstimes.com/politics/fake-news-act-speed-cost-of-appeals-process-set-out>.

⁸⁴ This timeline may be attributed to the fact that the Court of Appeal, which reserved judgment on 17 September 2020, has to consider larger questions of law on the burden of proof and POFMA’s effect on responsible journalism, beyond just whether the statements the CDs were issued to were “false statements of fact”; see, Channel News Asia, ‘Judgment reserved in The Online Citizen, SDP’s POFMA appeal, as court grapples with legal issues including burden of proof’, 17 September 2020, available at: <https://www.channelnewsasia.com/singapore/toc-sdp-pofma-appeals-judgement-court-appeal-593466>. SDP was issued their CD on 14 December 2019, and TOC was issued their CD on 22 January 2020; the High Court dismissed their appeals on 5 February 2020 and 19 February 2020 respectively.

⁸⁵ ICJ communication with Dr Thum Ping Tjin, Managing Director of New Naratif.

⁸⁶ The burden of proof question as a matter of constitutional law is beyond the scope of this paper. For more, see, Marcus Teo Wei Ren and Kiu Yan Yu, ‘Burden of Proof and False Statements of Fact under the Protection from Online Falsehoods and Manipulation Act 2019’ in Singapore Academy of Law Journal, Volume 33, 2021, pp. 760 – 776; and Jack Tsen-Ta Lee, ‘Topical Storm Approaching: Regulating Public Assemblies and Responding to Online Falsehoods in the City State of Singapore’, in European Yearbook of Constitutional Law, 2020, pp. 225 – 227.

⁸⁷ General Comment No. 34, para. 35.

article 19(3) of the ICCPR), namely that any limitations on the right to freedom of expression are only such as are provided by law and are necessary for the respect of the rights and reputations of others, or for the protection of national security or of public order, or of public health or morals;⁸⁸

- Remove the use of criminal sanctions in relation to restrictions issued under POFMA, except for very exceptional and most egregious circumstances of incitement to violence;
- Amend section 17 such that the first recourse for a POFMA restriction is an appeal to an independent and impartial judicial authority, not the Minister issuing the POFMA restriction; and
- Reduce the procedural hurdles that may hinder the meaningful access to the right to appeal, such as the cost and time of the appeal process, including through the removal of provision for, or waiving, legal costs for a longer period of the process. In addition, specific State-funded legal aid support should be made available for cases falling under POFMA, particularly where the content in question is disseminated by journalists, opposition politicians, academics, human rights defenders, civil society or others tasked to conduct a professional duty to reveal and raise information in the public interest.

The ICJ recognizes the complexities and challenges posed by the spread of false information online, especially during the uncertainty of the COVID-19 pandemic.⁸⁹ In this regard, the ICJ notes that the government has already been putting out timely, regular and clear rebuttals on what they deem to be false information about COVID-19,⁹⁰ which, where the subject has been thoroughly and empirically evaluated and carefully formulated, can serve the legitimate purpose of protecting public health while still respecting the rights to free expression and information. This is a positive standard for pandemic management which is commendable, and which should be considered by other States, particularly within Southeast Asia. The ICJ echoes the suggestions from the UN Special Rapporteur on freedom of expression, that “access to reliable information sources, free, independent and diverse media, digital literacy and smart regulation of social media” is the “obvious antidote to disinformation”.⁹¹

⁸⁸ Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 12/16. *Freedom of opinion and expression*, UN Doc. A/HRC/RES/12/16, 12 October 2009, para. 5(n); UN Human Rights Council Resolution 44/12, p. 2.

⁸⁹ The government has invoked POFMA 43 times in relation to COVID-19; POFMA'ed Dataset.

⁹⁰ Ministry of Health, 'Falsehoods and Clarifications', available at: <https://www.moh.gov.sg/covid-19/general/clarifications>.

⁹¹ OHCHR, 'Access to reliable information sources is the obvious antidote to disinformation', Special Rapporteur on freedom of opinion and expression tells Human Rights Council', 2 July 2021, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27256&LangID=E>.

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