

## PROTECTION FROM ONLINE FALSEHOODS AND MANIPULATION ACT AND THE ROLES OF INTERNET INTERMEDIARIES IN REGULATING ONLINE FALSEHOODS

This article proposes that intermediaries should adopt proactive roles in regulating online falsehoods. The relevant Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) (“POFMA”) and tort case law are analysed, in so doing illustrating how tort case law has influenced the interpretation of POFMA in terms of (a) distinguishing between facts and opinions; (b) determining the reasonable meaning of the published statement; and (c) determining whether the statement false *or* misleading. Certain guidelines as informed by the case law are formulated to assist intermediaries. Using these guidelines, a multi-pronged approach is encouraged where intermediaries can collaborate with the governmental authorities and other segments of society in regulating online falsehoods.

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### I. Introduction

1 The Protection from Online Falsehoods and Manipulation Act 2019<sup>2</sup> (“POFMA”), Singapore’s anti-fake news law, came into effect on 2 October 2019.<sup>3</sup> POFMA aims to combat online falsehoods in support of the “infrastructure of fact” for a functioning democracy in Singapore.<sup>4</sup> At

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2 Act 18 of 2019.

3 Ng Jun Sen, “Singapore’s Fake News Law Kicked in on Oct 2. Here Is How It Works” *Today* (2 October 2019).

4 *Singapore Parliamentary Debates, Official Report* (8 May 2019) vol 94 (K Shanmugam, Minister for Home Affairs and Law); Faris Mokhtar, “With Democracy at Stake, Fake News Laws Will Support ‘Infrastructure of Fact’: Shanmugam” *Today* (7 May 2019).

the time of writing, POFMA has been used a total of 72 times.<sup>5</sup> There are two main categories that POFMA orders target among others: political issues about the government's policies,<sup>6</sup> and COVID-19 related issues.<sup>7</sup> In the recent General Elections ("GE") 2020, 16 Correction Directions ("CDs") were issued to various entities or individuals on five separate occasions within the nine days of campaigning period.<sup>8</sup> This has raised concerns about the overuse of POFMA to silence political dissension on the Internet, especially during elections.<sup>9</sup>

2 As the gatekeepers of online information, Internet intermediaries are required to comply with the POFMA directions issued by a minister.<sup>10</sup> To date, Facebook has complied with various targeted CDs,<sup>11</sup> as well as Access Blocking Orders that disabled the Facebook page of the Australia-based *States Times Review* due to its designation as a Declared Online Location.<sup>12</sup> This was despite Facebook's "deep concern" that the Access Blocking Orders would stifle the freedom of expression.<sup>13</sup> Different intermediaries adopt different standards of self-regulatory measures. In the US, although Twitter had censured US president Donald Trump's racially charged posts for "glorifying violence",<sup>14</sup> Facebook had refused to take action, which resulted in a rare virtual "walkout" by hundreds

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- 5 *POFMA*ed website <http://pofmaed.com/data/>. The database on this website compiles the public data released by the POFMA Office <https://www.pofmaoffice.gov.sg/about-us/> (accessed 15 July 2020).
  - 6 Rei Kurohi, "Parliament: Use of Fake News Law against Opposition Politicians Is 'the Consequence of Their Actions', says Iswaran" *The Straits Times* (6 January 2020).
  - 7 "Clarifications on Misinformation Regarding the Coronavirus Disease 2019" <<https://www.gov.sg/article/covid-19-clarifications>> (accessed 20 April 2020).
  - 8 See POFMA Office, "Press Release" <<https://www.pofmaoffice.gov.sg/media-centre/>> (accessed 15 July 2020).
  - 9 Grace Ho & Yuen Sin, "Singapore GE2020: A Watershed Election and New Normal?" *The Straits Times* (12 July 2020).
  - 10 Protection from Online Falsehoods and Manipulation Act 2009 (Act 18 of 2019) Pts 4, 5 and 6.
  - 11 "Facebook Issues Correction Notice on States Times Review's Post" *Channel NewsAsia* (30 November 2019); "Wuhan Virus: POFMA Office Issues Correction Direction to Facebook over Posts Claiming Woodlands MRT closure" *Channel NewsAsia* (28 January 2020); Ng Keng Gene, "Correction Directions Issued to Two Facebook Pages by Pofma Office" *The Straits Times* (29 June 2020).
  - 12 Tham Yuen-C, "Facebook Ordered to Disable Access to States Times Review Facebook Page for Singapore User" *The Straits Times* (17 February 2020).
  - 13 "Facebook Expresses 'Deep Concern' after Singapore Orders Page Block" *BBC News* (19 February 2020).
  - 14 Alex Hern, "Twitter Hides Donald Trump Tweet for 'Glorifying Violence'" *The Guardian* (29 May 2020). Donald Trump had tweeted "when the looting starts, the shooting starts" as a warning to the people in Minneapolis protesting against the killing of a black man, George Floyd, by a white police officer.

of its employees.<sup>15</sup> Hence, the main question in Singapore is: should intermediaries be merely reactive under POFMA, and acquiescently wait for the minister's directions before acting?

3 This article argues for intermediaries to be proactive as part of the “multi-pronged approach” recommended by the Select Committee on Deliberate Online Falsehoods (“Select Committee”) that involved various stakeholders in regulating online falsehoods.<sup>16</sup> However, it is acknowledged that there is a danger of over-regulation, especially when some definitions, such as what constitutes “false or misleading” under s 2(2)(b) of POFMA, are unclear. In GE 2020, questions on how the law defines a falsehood under POFMA has resurfaced.<sup>17</sup> Therefore, it is proposed that there should be clearer guidelines for intermediaries based on principles as elucidated by case law. There is less risk of over-regulation if there are guidelines for intermediaries based on case law principles, and intermediaries may then work together with the authorities and other segments of society in regulating online falsehoods.

4 Firstly, the self-regulatory roles adopted by intermediaries, as well as the benefits and challenges in regulating online falsehoods, will be explored. Secondly, the author will examine the provisions under POFMA, and explore why intermediaries should adopt proactive roles under POFMA. Thirdly, comparisons will be made with Germany, where the onus has been placed on Internet intermediaries in regulating online falsehoods. Fourthly, the author will examine the body of case law, including cases under POFMA, and cases under tort law, that is, tort of defamation, malicious falsehood and negligence respectively. Guidelines from these cases will then be formulated to assist intermediaries in their review and fact-checking processes. Lastly, the author will propose recommendations for intermediaries to adopt proactive roles in regulating online falsehoods.

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15 Sheera Frenkel *et al*, “Facebook Employees Stage Virtual Walkout to Protest Trump Posts” *The New York Times* (1 June 2020). In the US where the First Amendment protects a wide array of different kinds of speech, Donald Trump has signed an executive order that calls for the Federal Communications Commission to review the immunity of social media companies from liability pursuant to § 230(c) of the Communications Decency Act 47 USC. See “Trump Signs Executive Order Targeting Twitter after Fact-checking Row” *BBC News* (29 May 2020).

16 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 66 and 164.

17 “Singapore GE2020: WP Chief Pritam Singh Says There Is Room for Fair Comment on Population Numbers” *The Straits Times* (3 July 2020).

## II. Background

### A. *The need to regulate online falsehoods*

5 The Select Committee raised the issue that online falsehoods can spread easily and quickly through Internet intermediaries.<sup>18</sup> Malicious actors are using digital technologies which are continuously improving to disseminate online falsehoods:<sup>19</sup> (a) fake social media accounts are created to infiltrate local communities and create disarray among the population;<sup>20</sup> (b) disinformation is rapidly re-posted by human trolls or automated bots to create a viral effect;<sup>21</sup> (c) digital advertising tools on social platforms are exploited to deceive susceptible readers; and (d) algorithms of intermediaries are manipulated to increase the visibility of online falsehoods to users.<sup>22</sup>

6 Online falsehoods can have great impact on the society, such as threatening national security and undermining democratic institutions.<sup>23</sup> For instance, bots can be used to disseminate low-credibility content and amplify misinformation on social media platforms during elections, such as the “Pizzagate” scandal during the 2016 US President Election.<sup>24</sup> Besides having an immediate one-off effect, online falsehoods can also insidiously generate a “slow burn” effect by exposing users to biased information with strong extremist or partisan views over an extended period of time. Consequentially, the social fabric of the society is polarised without much realisation.<sup>25</sup>

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18 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 14.

19 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 21.

20 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 15 and 161.

21 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 15 and 163.

22 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 17–18 and 163.

23 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 23–33.

24 Kai-Cheng Yang *et al*, “Arming the Public with Artificial Intelligence to Counter Social Bots” (2019) 1(1) *Hum Behav & Emerg Tech* 1 at 5. In the US, the “Pizzagate” incident occurred where foreign influence attempted to discredit then-presidential candidate Hillary Clinton as someone who managed a paedophile ring from a pizzeria in Washington DC.

25 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 54–56 and 218–220.

## B. Present self-regulatory roles of Internet intermediaries

7 Major intermediaries, including Facebook, Google and Twitter, have acknowledged the problems regarding online falsehoods, and have taken self-regulatory measures to combat them.<sup>26</sup> In general, all intermediaries restrict some content in their guidelines or terms of service.<sup>27</sup> For example, Facebook has “Facebook Community Standards”, and Twitter has “The Twitter Rules”. Hence, social media companies could remove privileges, suspend, or even terminate user accounts that violate their terms of service.<sup>28</sup>

8 The reporting mechanism by users is a common measure used by intermediaries to regulate their platforms.<sup>29</sup> Particularly, users could report either content or individual users that contravene the intermediaries’ terms of services.<sup>30</sup> Facebook enables users to report alleged online falsehoods through clicking on a dialogue window on its interface.<sup>31</sup> If there is a sufficient number of users reporting a post, that impugned content will be conveyed to independent fact-checkers.<sup>32</sup> The content will be flagged if it violates Facebook’s “Community Standards”.<sup>33</sup> Other users will be alerted if the flagged content is shared.<sup>34</sup> Additionally, Google’s YouTube has a complaint reporting tool to flag inappropriate content for review.<sup>35</sup> Twitter also has channels for users to report content via web forms.<sup>36</sup>

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26 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 270–272.

27 Rebecca MacKinnon *et al*, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO Series on Internet Freedom, 2014) at p 146.

28 Rebecca MacKinnon *et al*, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO Series on Internet Freedom, 2014) at p 146.

29 Rebecca MacKinnon *et al*, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO Series on Internet Freedom, 2014) at p 147.

30 Rebecca MacKinnon *et al*, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO Series on Internet Freedom, 2014) at p 147.

31 Konrad Niklewicz, “Weeding out Fake News: An Approach to Social Media Regulation” (2017) 16(2) *European View* 1 at 33.

32 Konrad Niklewicz, “Weeding out Fake News: An Approach to Social Media Regulation” (2017) 16(2) *European View* 1 at 33.

33 Rebecca MacKinnon *et al*, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO Series on Internet Freedom, 2014) at p 147.

34 Konrad Niklewicz, “Weeding out Fake News: An Approach to Social Media Regulation” (2017) 16 *European View* 1 at 33.

35 Terry Flewcor, Fiona Martincor & Nicolas Suzor “Internet Regulation as Media Policy: Rethinking the Question of Digital Communication Platform Governance” (2019) 10(1) *Journal of Digital Media & Policy* 33 at 41; YouTube Help website, “Report inappropriate content” <https://support.google.com/youtube/answer/2802027?co=GENIE.Platform%3DDesktop&hl=en> (accessed 10 June 2020).

36 Rebecca MacKinnon *et al*, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO Series on Internet Freedom, 2014) at p 149; Twitter Help (*cont’d on the next page*)

9 Further, intermediaries also utilise algorithms to weed out fake news. To illustrate, Google performs automatic searches using algorithms in identifying spam and malware.<sup>37</sup> Google also continually improves its algorithms to surface more credible content from legitimate news outlets.<sup>38</sup> Similarly, Facebook uses algorithms and machine learning to detect and “downrank” online falsehoods and low-credibility content in the news feed, such as spam, sensationalism and “click-bait” articles.<sup>39</sup> Algorithms could detect and block malicious automation by bots and accounts that exhibit co-ordinated and abusive behaviour on Twitter too.<sup>40</sup>

10 Additionally, intermediaries are working to empower the community in understanding the content displayed on their platforms. For example, Facebook is working with third-party fact-checking organisations to review false content which will appear lower in the news feed, and its fact-checking programme was expanded to Singapore last year.<sup>41</sup> Facebook is also testing a button to provide easier access to additional information, and prioritising reliable news rated by the community as “trustworthy” in the news feed.<sup>42</sup> Likewise, Google is also partnering with independent fact-checkers to provide fact-checking labels in its search results. Subsequently, Google will link users to the fact-checking work. Whenever possible, Google will also display a second labelled article alongside the top headlines.<sup>43</sup> Twitter has also

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website, “Twitter rules and policies: report violations” <https://help.twitter.com/en/rules-and-policies/twitter-report-violation> (accessed 10 June 2020).

37 Rebecca MacKinnon *et al*, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO Series on Internet Freedom, 2014) at p 108.

38 Google, “Written Representation 138” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1237; Google website, “How Search Algorithms Work” <https://www.google.com/search/howsearchworks/algorithms/> (accessed 10 June 2020).

39 Facebook, “Written Representation 104” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp B1003–B1004; Adam Mosseri, “Working to Stop Misinformation and False News” *Facebook for Media* (7 April 2017).

40 Twitter Inc, “Written Representation 153” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp B1347–B1348. See Phillip George Efthimion, Scott Payne & Nick Proferes, “Supervised Machine Learning Bot Detection Techniques to Identify Social Twitter Bots” 1(2) *SMU Data Science Review*.

41 Janice Lim, “Facebook Launches Fact-checking Programme in Singapore; False Stories Will Appear Lower in News Feed” *Today* (2 May 2019).

42 Facebook, “Written Representation 104” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1004; Leo Kelion, “Facebook Gives Users Trustworthiness Score” *BBC News* (21 August 2018).

43 Google, “Written Representation 138” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, (cont’d on the next page)



recently added fact-checking labels to tweets that are potentially false or misleading which include links to information without removing the original tweet.<sup>44</sup>

11 Notably, even as algorithms and the technology used by intermediaries are increasingly sophisticated, the human factor remains essential. For example, Google partners with external Search Quality Raters with humans involved to benchmark and evaluate its search results.<sup>45</sup> In essence, while the existing review mechanisms by intermediaries remain highly relevant, technology is moving towards providing users with better access to information that is accurate and trustworthy in nature.

### C. *Benefits and challenges in regulating online falsehoods*

12 Despite the self-regulatory measures taken by intermediaries, they are unwilling, as a matter of policy, to voluntarily remove false online content without legislation.<sup>46</sup> Therefore, the Select Committee recognised the need for legislation to counter online falsehoods in Singapore.<sup>47</sup> There are valid reasons to hold intermediaries responsible for the content posted on their platforms. Particularly, although falsehoods can be countered through fact-checking and flagging systems, these self-regulatory measures may be insufficient, or even counterproductive.<sup>48</sup> For instance, the review mechanisms can be clogged when several malicious actors co-ordinate to report legitimate content as false.<sup>49</sup>

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19 September 2018) at pp B1235–B1236. See also Samuel Gibbs, “Google to Display Fact-checking Labels to Show if News is True or False” *The Guardian* (7 April 2017).

44 Kate Conger & Mike Isaac, “Defying Trump, Twitter Doubles Down on Labeling Tweets” *The New York Times* (28 May 2020); Elizabeth Culliford & Katie Paul, “With Fact-checks, Twitter Takes on a New Kind of Task” *Reuters* (31 May 2020).

45 Google, “Written Representation 138” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1237; “How Search Algorithms Work” *Google website* <https://www.google.com/search/howsearchworks/algorithms/> (accessed 10 June 2020).

46 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 109.

47 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 169–170. See David Tan & Jessica Teng, “Fake News, Free Speech and Finding Constitutional Congruence” (2020) 32 SAclJ 207 at 208.

48 Terry Flewcor, Fiona Martincor & Nicolas Suzor “Internet Regulation as Media Policy: Rethinking the Question of Digital Communication Platform Governance” (2019) 10(1) *Journal of Digital Media & Policy* 33 at 36.

49 Konrad Niklewicz, “Weeding out Fake News: An Approach to Social Media Regulation” (2017) 16(2) *European View* 1 at 36–37.

13 However, the Select Committee has also acknowledged several difficulties to enact legislation in regulating online falsehoods.<sup>50</sup> Firstly, falsehoods have a stronger psychological effect, and readers are likely to reject corrections contrary to their beliefs. Due to the “echo chamber” effect,<sup>51</sup> heuristics and cognitive biases have greater impact in online spaces.<sup>52</sup> Secondly, falsehoods spread further and faster than facts online, leading to a “crowding-out” effect.<sup>53</sup> Thirdly, the corrections might not reach those readers who were already exposed to falsehoods.<sup>54</sup>

14 Significantly, aside from the challenges raised above, there is a fear of a “chilling effect” on free speech. The Select Committee was cognisant of the possibility of free speech being restricted, and thus proposed for a multi-pronged “calibrated” approach that involved multiple stakeholders in the society.<sup>55</sup> Nevertheless, Goh Yihan had highlighted that the previous legislative framework in Singapore was too limited in scope, speed and adaptability to handle real life situations involving online falsehoods.<sup>56</sup> Hence, POFMA was enacted to address this lacuna in local legislation.<sup>57</sup>

15 In summary, the speed and scale of the dissemination of online falsehoods threaten the social fabric of society. Internet intermediaries have adopted various self-regulatory measures which are insufficient

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50 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 35.

51 “Echo chambers”, also known as social media bubbles, occur where a group of Internet users consume – whether consciously or not – similar content based on their previous online behaviour as directed by social media algorithms. See Konrad Niklewicz, “Weeding out Fake News: An Approach to Social Media Regulation” (2017) 16 *European View* 1 at 17.

52 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 36–39.

53 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 39–41 and 247.

54 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 41.

55 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 164 and 169–170.

56 Goh Yihan, “Written Representation 129” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp B1114–B1128. These include (a) criminal offences under the s 45 of the Telecommunications Act (Cap 323, 2000 Rev Ed), ss 298 and 298A of the Penal Code (Cap 224, 2008 Rev Ed), s 4 of the Sedition Act (Cap 290, 2013 Rev Ed), and s 26 of the Internal Security Act (Cap 143, 1985 Rev Ed); (b) judicial remedies under s 15 of the Protection from Harassment Act (Cap 256A, 2015 Rev Ed), and s 10 of the Sedition Act; and (c) executive action under the Broadcasting Act (Cap 28, 2012 Rev Ed).

57 David Tan & Jessica Teng, “Fake News, Free Speech and Finding Constitutional Congruence” (2020) 32 SAclJ 207 at 237–245.



to counter online falsehoods without any proper legislation in place. Therefore, POFMA was enacted as part of a multi-pronged approach to counter online falsehoods.<sup>58</sup>

### III. POFMA provisions and areas for improvement

16 After setting out the context behind POFMA, the author will examine the POFMA provisions and thereafter suggest some areas for improvement.

#### A. POFMA provisions

##### (1) Part 1 definitions

17 POFMA targets the communication of false statements of fact to one or more end-users in Singapore, which could be either on or through the Internet, MMS or SMS.<sup>59</sup> Under s 2 of POFMA, a statement is defined as one “which a reasonable person seeing, hearing or otherwise perceiving it would consider to be a representation of fact”,<sup>60</sup> and is considered false if it is “false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears”.<sup>61</sup> “Public interest” is defined non-exhaustively under s 4 of POFMA,<sup>62</sup> which includes six categories such as the interest of national security,<sup>63</sup> friendly relations of Singapore with other countries *etc.*<sup>64</sup> Opinions, criticism, satire and parody are not covered under POFMA.<sup>65</sup>

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58 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 164.

59 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) ss 3 and 5.

60 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 2(2)(a).

61 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 2(2)(b).

62 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 4.

63 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 4(a).

64 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 4(c).

65 *Singapore Parliamentary Debates, Official Report* (7 May 2019) vol 94 (K Shanmugam, Minister for Law): “opinions, comments, criticisms, are not covered by the Bill”; “Law Minister K Shanmugam Addresses Concerns over Proposed Online Falsehoods and Manipulation Law” *Channel NewsAsia* (7 May 2019).

(2) *Part 2 prohibitions*

18 Under Part 2, a person must *not* communicate a false statement of fact in or outside Singapore,<sup>66</sup> which includes making or altering bots for such purposes.<sup>67</sup> Under s 7 of POFMA, *mens rea* is required, that is, knowing or having reason to believe that it is a false statement of fact. The communication of false statement must also likely cause harm in one of the six categories under s 4 of POFMA.<sup>68</sup> In violation of these provisions, criminal sanctions include a fine not exceeding \$50,000 and/or imprisonment for a term not exceeding five years for an individual,<sup>69</sup> or a fine not exceeding \$500,000 for a non-individual.<sup>70</sup>

(3) *Part 3 directions*

19 Under s 10 of POFMA, any minister can issue a Part 3 Direction 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 act.<sup>71</sup> These directions include a CD,<sup>72</sup> a Stop Communication Direction,<sup>73</sup> and an Access Blocking Order should a person fail to comply with a Part 3 Direction.<sup>74</sup> Under s 15 of POFMA, individuals who do not comply shall be fined not exceeding \$20,000 and/or be imprisoned for a term

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66 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 7.

67 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 8.

68 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 4.

69 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 7(2)(a).

70 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 7(2)(b).

71 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 10(1).

72 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 11. Under s 11, a Correction Direction requires the individual to place the correction notice in a specified proximity to every copy of the false statement of fact, and to publish the correction in a newspaper or other publication of Singapore.

73 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 12. Under s 12, a Stop Communication Direction requires the individual to stop communicating the false statement of fact in Singapore.

74 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 16. Under s 16(2), the minister may direct the Infocomm Media Development Authority (“IMDA”) to order the Internet access service provider to take reasonable steps to disable access by end-users in Singapore to the online, and the IMDA must give the Internet access service provider an Access Blocking Order.

not exceeding 12 months.<sup>75</sup> Non-individuals shall be fined not exceeding \$500,000.<sup>76</sup> Appeals may be made to the High Court.<sup>77</sup>

(4) *Part 4 directions*

20 Under s 20 of POFMA, any minister can issue a Part 4 Direction to prescribed Internet intermediaries and providers of mass media services,<sup>78</sup> if a material that consists of a false statement of fact is being communicated in Singapore, and it is in the public interest to do so.<sup>79</sup> These directions include a Targeted Correction Direction,<sup>80</sup> a Disabling Direction,<sup>81</sup> a General Correction Direction,<sup>82</sup> and an Access Blocking Order should a person fail to comply with a Part 4 Direction.<sup>83</sup> Under s 27 of POFMA, individuals who do not comply shall be fined not exceeding \$20,000 and/or be imprisoned for a term not exceeding 12 months.<sup>84</sup>

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75 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 15(1)(a).

76 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 15(1)(b).

77 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 17.

78 Protection from Online Falsehoods and Manipulation Regulations 2019 (S 662/2019) s 3(1). The subsidiary legislation identified “prescribed internet intermediaries” as: (a) Google LLC, including (i) Google Search; and (ii) YouTube; (b) Facebook, Inc., in respect of (i) Facebook; (ii) Instagram; (iii) Facebook Messenger; and (iv) Whatsapp; (c) Twitter International Company, in respect of Twitter; (d) SPH Magazines Pte Ltd, in respect of HardwareZone.com; (e) Baidu, Inc, in respect of Baidu; and (f) WeChat International Pte Ltd, in respect of WeChat.

79 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 20.

80 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 21. Under s 21, a Targeted Correction Direction requires the Internet intermediary whose service is used in communicating the falsehood in Singapore to communicate a *correction* notice to all end-users who accessed such statement via that service.

81 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 22. Under s 22, a Disabling Direction requires the Internet intermediary to disable end-user access to the material, or to communicate a correction notice by a specified time.

82 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 23. Under s 23, a General Correction Direction requires prescribed Internet intermediaries and providers of mass media services to communicate a correction notice to its end-users in Singapore, either via publication, broadcast, or transmission.

83 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 28. Under s 28, the minister may direct the Infocomm Media Development Authority (“IMDA”) to order the Internet access service provider to take reasonable steps to disable access by end-users in Singapore to the online, and the IMDA must give the Internet access service provider an Access Blocking Order.

84 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 27(1)(a).

Non-individuals shall be fined not exceeding \$1,000,000.<sup>85</sup> Appeals may be made to the High Court.<sup>86</sup>

(5) *Part 5 directions*

21 Under s 32 of POFMA, a minister may declare an online location as a “declared online location” if certain conditions are satisfied.<sup>87</sup> An Access Blocking Order may be issued under s 34 of POFMA to order an Internet intermediary to disable access to a declared online location.<sup>88</sup> Internet intermediaries who do not comply shall be fined not exceeding \$20,000 for each day, up to a total of \$500,000.<sup>89</sup>

(6) *Part 6 directions*

22 Under s 40 of POFMA, any minister may issue an Account Restriction Direction to a prescribed Internet intermediary, to counteract online accounts which are fake or controlled by bots, whether in or outside Singapore.<sup>90</sup> Under s 42 of POFMA, Internet intermediaries who do not comply face a fine not exceeding \$1m.<sup>91</sup> Appeals may be made to the High Court.<sup>92</sup>

**B. *A shift to proactive roles by intermediaries***

23 The current tenor of POFMA might give the impression that intermediaries take on a more passive role, and merely wait for a minister to issue CDs before moving in to regulate online falsehoods.<sup>93</sup> This sentiment was raised by Chen Siyuan regarding online hate speech

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85 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 27(1)(b).

86 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 29.

87 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 32.

88 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 34.

89 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 34(5).

90 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 40.

91 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 42.

92 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 44.

93 Chen Siyuan & Chia Chen Wei, “Singapore’s Latest Efforts at Regulating Online Hate Speech” Research Collection School of Law (June 2019) at para 36.

under POFMA.<sup>94</sup> On one hand, intermediaries might lack the time and manpower in regulating online falsehoods.<sup>95</sup> Moreover, private censorship by intermediaries might result in over-regulation if such measures are non-transparent and arbitrary in nature.<sup>96</sup> On the other hand, although the Government has better institutional competence and authority, the self-regulatory tools that intermediaries possess (including filters, reporting mechanisms and moderators) remain useful in regulating online falsehoods.<sup>97</sup> Indeed, intermediaries can possibly respond faster as compared to the authorities when they are notified of potentially contentious issues, such as terrorist threats, through their reporting mechanisms.<sup>98</sup> Therefore, there is room for both government and private entities to work together in regulating online falsehoods.<sup>99</sup>

24 However, this shift might require intermediaries to exercise more discretion if they adopt proactive roles in regulating online falsehoods. Particularly, intermediaries would have to decide whether the online content contains false statements of facts in Singapore, and subsequently implement corrective measures such as flagging or downranking the content. This is problematic because parts of the definition on what constitutes online falsehoods under POFMA are unclear. For example, s 2(2)(b) of POFMA states that “a statement is false if it is false *or* misleading” [emphasis added]. Yet, the term “misleading” is undefined. Moreover, the distinction between facts and opinions is not covered in the legislation. Instead, the Minister of Law, Shanmugam, remarked that it is “better to rely on existing case law” in determining what is a fact or an opinion.<sup>100</sup> These issues will be examined in detail below.

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94 Chen Siyuan & Chia Chen Wei, “Singapore’s Latest Efforts at Regulating Online Hate Speech” Research Collection School of Law (June 2019) at para 36.

95 Heidi Tworek, “An Analysis of Germany’s NetzDG Law” *Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression* (15 April 2019) at p 3.

96 Konrad Niklewicz, “Weeding out Fake News: An Approach to Social Media Regulation” (2017) 16 *European View* 1 at 36–37.

97 Chen Siyuan & Chia Chen Wei, “Singapore’s Latest Efforts at Regulating Online Hate Speech” Research Collection School of Law (June 2019) at para 37.

98 Chen Siyuan & Chia Chen Wei, “Singapore’s Latest Efforts at Regulating Online Hate Speech” Research Collection School of Law (June 2019) at para 37.

99 Chen Siyuan & Chia Chen Wei, “Singapore’s Latest Efforts at Regulating Online Hate Speech” Research Collection School of Law (June 2019) at para 37.

100 *Parliamentary Debates, Official Report* (7 May 2019) vol 94 “Second Reading Bills: Protection from Online Falsehoods and Manipulation Bill” (K Shanmugam, Minister for Home Affairs and Law): “Then, it has been said: why not define ‘fact’ and state that ‘opinion’ is not covered. We have considered this carefully and decided better not. There is a body of case law on what is “fact” and what is not fact. It is better to rely on existing case law.”

25 Ideally, the public should be involved in any decisions made by the intermediaries working with the Government to a certain extent, thus preventing a “hybrid form of private-public censorship”.<sup>101</sup> For instance, Facebook’s sweeping ban on public figures in the US and UK is possibly influenced by Facebook’s political inclinations rather than objective facts.<sup>102</sup>

26 As noted by David Tan and Jessica Teng, it is not difficult for POFMA to be constitutionally permissible in Singapore due to the restrictive role of the Judiciary as a fetter on Parliament’s power in restricting free speech and the strong presumption of legislative constitutionality.<sup>103</sup> However, the legitimacy of POFMA lies in whether a “calibrated approach” is achieved that strikes an appropriate balance between freedom of speech and the ill effects of falsehoods.<sup>104</sup> Hence, clear guidelines are necessary in the application of the law.

27 In summary, intermediaries can be issued directions and Access Blocking Orders by a minister. In response, Facebook has responded swiftly to date. However, it is proposed that intermediaries should be more proactive, rather than reactive, under POFMA. Therefore, in order to ameliorate the concerns of over-regulation, it is important for intermediaries (and possibly the Government too) to have clearer guidelines in regulating online falsehoods.

#### IV. Comparisons with Germany

28 In Germany, Internet intermediaries are required by law to be proactive in regulating online content. The Germany Network Enforcement Act<sup>105</sup> (“NetzDG”) was enacted to target fake news related to hate speech.<sup>106</sup> NetzDG, however, does not define either hate speech or

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101 Chen Siyuan & Chia Chen Wei, “Singapore’s Latest Efforts at Regulating Online Hate Speech” Research Collection School of Law (June 2019) at para 37.

102 Chen Siyuan & Chia Chen Wei, “Singapore’s Latest Efforts at Regulating Online Hate Speech” Research Collection School of Law (June 2019) at para 37, citing Katie Paul, “Facebook Bans Alex Jones, Other Extremist Figures” *Reuters* (3 May 2019).

103 David Tan & Jessica Teng, “Fake News, Free Speech and Finding Constitutional Congruence” (2020) 32 SAclJ 207 at 224.

104 David Tan & Jessica Teng, “Fake News, Free Speech and Finding Constitutional Congruence” (2020) 32 SAclJ 207 at 211 and 247–248. See *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp 170.

105 The Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act) (12 July 2017) (hereinafter “NetzDG”).

106 Wolfgang Schulz, “Regulating Intermediaries to Protect Privacy Online – The Case of the German NetzDG” in *Personality and Data Protection Rights on the Internet* (Marion Albers & Ingo Sarlet eds) (New York: Springer, forthcoming) at p 5.



fake news.<sup>107</sup> Instead, it uses the term “unlawful content”, which covers an extensive list of offences under the German Criminal Code.<sup>108</sup> Hence, fake news could be covered under public offences like incitement of masses,<sup>109</sup> or individual rights like defamation, among others.<sup>110</sup>

29 Under NetzDG, social media networks with two million or more registered users in Germany are required to remove “*manifestly unlawful*” [emphasis added] contents within 24 hours of receiving users’ complaints.<sup>111</sup> The deadline is only extended by seven days if the content is not *prima facie* unlawful.<sup>112</sup> Additionally, intermediaries have to implement user-friendly complaint mechanisms, and publish biannual reports if more than 100 complaints are received *per year*.<sup>113</sup> Violations can result in fines up to €50m by the court.<sup>114</sup>

30 A main difference with POFMA is the primary response under both legislations: NetzDG requires content removal by intermediaries, whereas POFMA mainly requires CDs issued by the minister.<sup>115</sup> Arguably, POFMA appears less restrictive as content providers are not required to remove the original publication under the CDs issued. Hence, readers can still compare both sources of information and arrive at their own conclusions.<sup>116</sup>

31 A main similarity is that NetzDG also faced criticisms for its unclear definitions of legal terms.<sup>117</sup> For example, the term “manifestly” under s 3(2) of NetzDG is undefined, which possibly conferred wide discretion on intermediaries in removing online content.<sup>118</sup> This is challenging for more ambiguous “unlawful content”, especially when

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107 Wolfgang Schulz “Regulating Intermediaries to Protect Privacy Online – The Case of the German NetzDG” in *Personality and Data Protection Rights on the Internet* (Marion Albers & Ingo Sarlet eds) (New York: Springer, forthcoming) at p 5.

108 NetzDG Art 1 s 1(3).

109 German Criminal Code (13 November 1998) s 130.

110 German Criminal Code (13 November 1998) ss 186–187.

111 NetzDG Art 1 s 3(2) No 2.

112 NetzDG Art 1 s 3(3) No 3.

113 NetzDG Art 1 s 2.

114 Heidi Tworek, “An Analysis of Germany’s NetzDG Law” *Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression* (15 April 2019) at p 2.

115 *Parliamentary Debates, Official Report* (8 May 2019) vol 94 (K Shanmugam, Minister for Home Affairs and Law).

116 *Parliamentary Debates, Official Report* (8 May 2019) vol 94 (K Shanmugam, Minister for Home Affairs and Law).

117 Amélie Heldt, “Reading between the Lines and the Numbers: An Analysis of the First NetzDG Reports” (2019) 8(2) *Internet Policy Review* 1 at 5.

118 Amélie Heldt, “Reading between the Lines and the Numbers: An Analysis of the First NetzDG Reports” (2019) 8(2) *Internet Policy Review* 1 at 5.

statements of facts are not easily distinguishable from opinions under German law.<sup>119</sup> Consequently, there might be over-regulation as online content is not assessed properly before any removal, partly due to the tight deadlines and possible heavy fines imposed on intermediaries for non-compliance.<sup>120</sup>

32 Several observations can be drawn from NetzDG since its implementation. Firstly, there is a great disparity between the number of complaints received amongst intermediaries as NetzDG does not require a standardised reporting mechanism by the various companies.<sup>121</sup> Despite its size, Facebook had a much lower number of complaints because its NetzDG's reporting mechanism was harder to access by users. For example, YouTube and Twitter NetzDG complaints were integrated with their "flagging" interface through direct links, whereas Facebook's complaint form could only be found on a separate page that was relatively "well-hidden".<sup>122</sup> Secondly, NetzDG managed to achieve its initial objective to swiftly remove "unlawful content" within Germany.<sup>123</sup> Thirdly, human reviewers still play an important role in content moderation, especially for ambiguous cases.<sup>124</sup>

33 It is suggested that intermediaries need not implement any additional reporting mechanisms under POFMA beyond their existing capabilities. Arguably, there might be more problems such as achieving a uniform standard between intermediaries as illustrated by NetzDG. Moving forward, while community guidelines by intermediaries play an important role, there is a need for clearer guidelines under POFMA based on case law principles to aid intermediaries in reviewing online content in Singapore.

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119 Wolfgang Schulz, "Regulating Intermediaries to Protect Privacy Online – The Case of the German NetzDG" in *Personality and Data Protection Rights on the Internet* (Marion Albers & Ingo Sarlet eds) (New York: Springer, forthcoming) at p 8.

120 Heidi Tworek, "An Analysis of Germany's NetzDG Law" Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression (15 April 2019) at p 3.

121 Amélie Heldt, "Reading between the Lines and the Numbers: An Analysis of the First NetzDG Reports" (2019) 8(2) *Internet Policy Review* 1 at 12.

122 Amélie Heldt, "Reading between the Lines and the Numbers: An Analysis of the First NetzDG Reports" (2019) 8(2) *Internet Policy Review* 1 at 12.

123 Amélie Heldt, "Reading between the Lines and the Numbers: An Analysis of the First NetzDG Reports" (2019) 8(2) *Internet Policy Review* 1 at 13.

124 Amélie Heldt, "Reading between the Lines and the Numbers: An Analysis of the First NetzDG Reports" (2019) 8(2) *Internet Policy Review* 1 at 9.

## V. Body of case law and guidelines

### A. POFMA case law

34 The recent cases related to POFMA will first be examined below.

#### (1) Singapore Democratic Party v Attorney-General

35 In *Singapore Democratic Party v Attorney-General*<sup>125</sup> (“SDP”), three CDs were issued to the Singapore Democratic Party (“SDP”) by the Ministry of Manpower (“MOM”). These CDs by MOM targeted an article on SDP’s website (“the SDP Article”) (“CD-1”) and two Facebook posts with hyperlinks to the article (“CD-2” and “CD-3”).<sup>126</sup> SDP thus applied to set aside the CDs under s17(5)(b) of POFMA.<sup>127</sup>

36 SDP’s appeal was dismissed by the Singapore High Court. For CD-1, the SDP Article presented SDP’s population policy as coming “amidst a rising proportion of Singapore PMETs getting retrenched” [emphasis added],<sup>128</sup> and the subject statement was identified as “[l]ocal PMET retrenchment has been increasing”.<sup>129</sup> The High Court held that this was a statement of fact rather than an opinion.<sup>130</sup> Particularly, a reasonable reader would regard the SDP Article as making a factual assertion.<sup>131</sup>

37 To ascertain the meaning of the subject statement, the High Court affirmed that the ordinary reasonable reader’s perspective was applicable.<sup>132</sup> Three possible meanings were raised by the parties, and the Attorney-General’s alternative meaning, that is, “the share of retrenched local PMETs as a proportion of all local PMET employees has been increasing” was accepted.<sup>133</sup> Particularly, this meaning accounted for the word “proportion”,<sup>134</sup> and was a “meaningful statistical indicator” of the vulnerability of local professionals, managers, executives and technicians (“PMETs”) in losing their jobs.<sup>135</sup>

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125 [2020] SGHC 25.

126 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [16].

127 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [15].

128 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [16]; “PMET” is an acronym for professionals, managers, executives and technicians.

129 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [16].

130 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [27] and [30].

131 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [27] and [30].

132 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [70].

133 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [88].

134 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [86].

135 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [87].

38 To determine falsity, the Attorney-General had proved that the number of retrenched local PMETs per 1,000 local PMET employees decreased from 2015 to 2018.<sup>136</sup> Importantly, SDP did not challenge the veracity of MOM's statistics used by the Attorney-General.<sup>137</sup> Moreover, the Attorney-General's recent timeframe from 2015 to 2018 was reasonable as "amidst" was used to describe the retrenchment trend.<sup>138</sup> Conversely, the High Court considered that SDP's time frame from 2010 to 2018 was arbitrary and misleading.<sup>139</sup>

39 CD-2 and CD-3 were not set aside. Specifically, the Facebook posts of CD-2 and CD-3 had recomunicated the SDP Article's content through hyperlinks to the SDP Article.<sup>140</sup>

40 Additionally, CD-3 had a graphical illustration labelled "Local PMET employment" with a downward-pointing arrow,<sup>141</sup> and the subject statement was identified as "[l]ocal PMET employment has gone down".<sup>142</sup> The High Court approved of the Attorney-General's data that showed the number of local PMETs employed, in terms of *absolute numbers*, had been steadily increasing from 2015 to 2018.<sup>143</sup> The High Court rejected SDP's contention that the Attorney-General's time frame was "too narrow".<sup>144</sup> Surely, SDP was not entitled to assert any time frame of its choosing without labelling the axes of the graphical illustration.<sup>145</sup>

## (2) The Online Citizen Pte Ltd v Attorney-General

41 In *The Online Citizen Pte Ltd v Attorney-General* ("TOC"),<sup>146</sup> The Online Citizen Pte Ltd ("TOC") published an article that reported a press statement made by Lawyers for Liberty ("LFL").<sup>147</sup> The Minister of Home Affairs issued TOC with a CD pursuant to s 11 of POFMA.<sup>148</sup> The subject statement concerned quotations from LFL's press statement, which laid out a step-by-step account of an unlawful hanging method to

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136 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [91] and [100]–[101].

137 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [93].

138 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [99].

139 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [94]–[96] and [98]–[99].

140 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [102] and [112].

141 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [18].

142 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [113] and [120].

143 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [113] and [120].

144 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [121].

145 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [123].

146 [2020] SGHC 36.

147 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [2].

148 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [1].

execute prisoners on death row.<sup>149</sup> TOC applied to set aside the CD under s 17(5)(b) of POFMA.<sup>150</sup>

42 The High Court dismissed TOC's appeal. Belinda Ang Saw Ean J held that there are two limbs to set aside a CD under s 17(5)(b) of POFMA: (a) the subject statement is not a "statement of fact"; and (b) the subject statement is a "true statement of fact".<sup>151</sup>

43 Under the first limb, the High Court found that an ordinary reasonable person would regard the subject statement, specifically a hearsay statement, as a statement of fact.<sup>152</sup> Moreover, there was no need to conduct any verification exercise at this stage.<sup>153</sup>

44 Under the second limb, TOC sought to prove that the subject statement was a "true statement of fact" on the basis that the statement by TOC, that is, that LFL made the press statement, was true.<sup>154</sup> This argument was called the "reporting defence".<sup>155</sup> Firstly, the relevant inquiry under s 17(5)(b) of POFMA was whether the subject statement in the CD was true, and not whether the fact that LFL made a press statement was true.<sup>156</sup> Indeed, TOC had earlier conceded that the subject statement was that identified in the CD.<sup>157</sup> Secondly, s 11(4) of POFMA excluded the "reporting defence". To elaborate, the statement maker's subjective knowledge of whether the statement was true was irrelevant,<sup>158</sup> and TOC had not taken any position regarding its truth.<sup>159</sup> Hence, TOC could not set aside the CD.<sup>160</sup>

45 In the above cases, the High Court occasionally referred to tort law principles, and these will be further examined in the next part.<sup>161</sup>

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149 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [6] and [8].

150 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [10]–[11].

151 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [11]–[13].

152 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [48]–[51].

153 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [49].

154 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [52].

155 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [54].

156 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [55].

157 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [55].

158 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [15] and [56].

159 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [58].

160 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [58].

161 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [29], [53] and [70].

## B. Tort case laws and their application to POFMA

46 In order to provide useful guidelines for intermediaries, it is imperative to examine tort case law principles that are applicable to POFMA. This part therefore aims to examine case laws from the tort of defamation (and some relevant defences), malicious falsehood and negligence.

### (1) Tort of defamation: Establishing a prima facie case

#### (a) Tort case law

47 In Singapore, the tort of defamation aims to balance between protecting the reputation of the plaintiff and the defendant's right of free speech under the Constitution.<sup>162</sup> To establish a *prima facie* case of defamation, the statement must (a) be defamatory in nature; (b) refer to the plaintiff; and (c) be published.<sup>163</sup>

48 Under the first limb, a commonly used test in determining the defamatory nature of a statement is whether the statement tends to lower the plaintiff in the eyes of right-thinking members of society.<sup>164</sup> This is an objective assessment based on how an ordinary reasonable person understands the specific words or statements made.<sup>165</sup>

49 In general, whether a statement is defamatory depends on the natural and ordinary meaning of the words used.<sup>166</sup> The Court of Appeal

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162 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.002; Constitution of the Republic of Singapore (1999 Reprint) Art 14.

163 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.010; see *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [24].

164 *Sim v Stretch* (1936) 52 TLR 669. See Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.015: the other tests include whether the statement caused the plaintiff to be shunned or avoided (eg, *Yousopoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 481); and/or subject the plaintiff to hatred, contempt or ridicule (eg, *Parmiter v Coupland* (1840) 151 ER 340).

165 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [27].

166 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [27]. See also Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.030. It should be noted that besides the natural and ordinary meaning, a statement can also be defamatory based on true innuendos from extrinsic special facts only known by third parties.



in *Review Publishing Co Ltd v Lee Hsien Loong*<sup>167</sup> (“*Review Publishing*”) summarised the applicable principle as follows:<sup>168</sup>

Essentially, the court decides what meaning the words would convey to an ordinary reasonable person, not unduly suspicious or avid for scandal, using his general knowledge and common sense.

50 Indeed, the reasonable person can be described as an average rational layperson who is not naive<sup>169</sup> and possesses a moderate view.<sup>170</sup>

51 Further, the natural and ordinary meaning of the defamatory words can be interpreted either literally or inferentially.<sup>171</sup> Moreover, inferences can be drawn from the general knowledge of the ordinary person,<sup>172</sup> including facts that are well known to members of the public.<sup>173</sup>

52 The “bane and antidote” rule states that a possibly defamatory statement may be neutralised by another statement found elsewhere in the publication, and thus rendered non-defamatory in nature.<sup>174</sup> In *Spicer v Commissioner of Police of the Metropolis*,<sup>175</sup> the alleged defamatory online article’s headline stated, “Two Guilty of Killing a Woman while Racing Their Cars”.<sup>176</sup> However, the article’s text clarified that while the claimant was charged with fines and penalty points for *careless* driving, the other driver was disqualified and imprisoned for *dangerous* driving that resulted

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167 [2010] 1 SLR 52.

168 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [27], citing *Microsoft Corp v SM Summit Holdings Ltd* [1999] 3 SLR(R) 465 at [53].

169 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [30], citing *Skuse v Granada Television Ltd* [1996] EMLR 278 at 285.

170 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [31], citing Lord Reid in *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at 259. See also Gary Chan Kok Yew, “Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities” (2015) 27 SAclJ 694 at 697.

171 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [28], citing *Microsoft Corp v SM Summit Holdings Ltd* [1999] 3 SLR(R) 465 at [53].

172 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [29], citing *Gordon Berkeley Jones v Clement John Skelton* [1963] 1 WLR 1362 at 1370–1371.

173 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.033, citing *Chiam See Tong v Ling How Doong* [1996] 3 SLR(R) 942 at [47]–[48]; *Lee Hsien Loong v Roy Ngerng Yi Ling* [2014] SGHC 230 at [33]; and *Chan Cheng Wah Bernard v Koh Sin Chong Freddie* [2012] 1 SLR 506.

174 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [69], citing *Low Tuck Kwong v Sukamto Sia* [2014] 1 SLR 639 at [44]–[45].

175 *Spicer v Commissioner of Police of the Metropolis* [2019] EWHC 1439 (QB). See also *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB) at [11]–[13], per Nicklin J; *Charleston v NewsGroup Newspapers Ltd* [1995] 2 AC 65.

176 *Spicer v Commissioner of Police of the Metropolis* [2019] EWHC 1439 (QB) at [1].

in death and serious injury.<sup>177</sup> Warby J held that the headline should be read together with the text.<sup>178</sup> Ascertained as a whole, a reasonable reader would not view the claimant as a convicted killer.<sup>179</sup>

53 Under the third limb, the defamatory statement must be published.<sup>180</sup> The “multiple publication” rule allows each republication to give rise to a distinct and separate defamation.<sup>181</sup> For hyperlinks, in the Canadian Supreme court decision of *Crookes v Newton*,<sup>182</sup> the majority held that hyperlinking does not amount to publication of the hyperlinked defamatory content.<sup>183</sup>

(b) Application to POFMA

54 The objective assessment used in defamation law was held to be applicable for determining the meaning of the published statement.<sup>184</sup> This is consistent with s 11(4) of POFMA which states that a statement maker may be issued a CD even if he does not know or has no reason to believe that the statement was false.<sup>185</sup> Hence, the subjective intention of the statement-maker is immaterial.<sup>186</sup> In *SDP*, Ang Cheng Hock J refused to accept SDP’s argument that “locals” only referred to Singaporeans from their experience of meeting voters and citizens through knocking on doors, as it relied on a *subjective* approach in construing the SDP Article.<sup>187</sup> Additionally, in *TOC*, Belinda Ang J precluded the viability of the “reporting defence” under POFMA. It was immaterial whether

177 *Spicer v Commissioner of Police of the Metropolis* [2019] EWHC 1439 (QB) at [1].

178 *Spicer v Commissioner of Police of the Metropolis* [2019] EWHC 1439 (QB) at [35]–[36].

179 *Spicer v Commissioner of Police of the Metropolis* [2019] EWHC 1439 (QB) at [35].

180 *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [24].

181 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.077, citing *Loutchansky v Times Newspapers Ltd (No 2)* [2002] QB 783 and *Dow Jones & Co Inc v Gutnick* [2002] 210 CLR 575.

182 [2011] 3 SCR 269; See Gary Chan Kok Yew, “Defamation via Hyperlinks: More Than Meets the Eye” (2012) 128 LQR 346; Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.093.

183 *Crookes v Newton* [2011] 3 SCR 269 at [26]–[28]. Two concurring judges, McLachlin CJ and Fish J, however, added that a hyperlink constitutes publication if the article, read contextually, indicates “adoption or endorsement” of the hyperlinked defamatory content (at [48]–[50]). Deschamp J, the dissenting judge, focused instead on the plaintiff’s burden to show that the defendant, through deliberate acts, provided third parties ready access to the defamatory material, who then received and understood the defamatory information (at [62]–[63]).

184 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [70]–[71].

185 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 11(4).

186 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [70]; *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [14]–[15].

187 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [75].

TOC, by claiming to merely report LFL's press statement, had *subjective* knowledge that the subject statement was true.<sup>188</sup>

55 One possible difference with defamation law is that the “bane and antidote” rule may not apply to POFMA.<sup>189</sup> Indeed, s 2(2)(b) of POFMA reads, “a statement is false if it is false or misleading, whether wholly or *in part*, and whether *on its own* or in the context in which it appears” [emphasis added]. Therefore, under POFMA, a statement can be false “in part” or “on its own”, and does *not* have to be read contextually with the entire publication.<sup>190</sup>

56 Although Ang Cheng Hock J stated that the “bane and antidote” rule does not appear to apply to POFMA,<sup>191</sup> he considered how the meaning of the impugned statements cohered with the message conveyed by the entire publication. To elaborate, the Attorney-General's alternative case, that is, “the share of retrenched local PMETs as a *proportion* of all local PMET employees has been increasing” [emphasis in original] was held to be aligned with the broader *sentiment* evoked in the SDP Article.<sup>192</sup> Particularly, local PMETs would be concerned about a larger *proportion* of them being retrenched.<sup>193</sup> Moreover, this interpretation would *not* involve “reading out” other portions of the SDP Article, including the term “proportion”.<sup>194</sup> Therefore, a reasonable reader would understand from the statement that more local PMET jobs were in danger of being displaced.<sup>195</sup>

57 In contrast, Belinda Ang J in *TOC* adopted a literal interpretation of s 2(2)(b) of POFMA, and rejected the contextual rule in ascertaining meaning of the subject statement.<sup>196</sup> *TOC* had argued that the subject statement must be read in the context of the published material, and the use of quotation marks and quoted extracts would indicate that *TOC* simply reported that allegations have been made by LFL.<sup>197</sup> However, Belinda Ang J disagreed as *TOC*'s argument “implicitly relies on a reinterpretation of the ‘subject statement’ that includes *TOC*'s own

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188 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [56].

189 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [69].

190 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [69].

191 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [69].

192 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [86].

193 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [86].

194 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [86].

195 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [85]–[88].

196 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [52]–[55].

197 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [52].

reporting of the Subject Statement”.<sup>198</sup> As such, the context in which the statement appears to a reasonable reader seemed to be less relevant.<sup>199</sup>

58 Arguably, in determining the defamatory meaning, the statements in question should be read in the context of the entire publication.<sup>200</sup> Locally, the court seemed inclined to even read Internet postings and their comments as a whole, depending on how the reasonable reader would comprehend them.<sup>201</sup> In *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd*,<sup>202</sup> George Wei JC (as he was then) opined that a Facebook post and its thread of comments resembled a “conversation” and read as a single publication.<sup>203</sup> Moreover, this “conversation” changes as threads of comments are added.<sup>204</sup> Arguably, the contextual rule from a reasonable reader’s perspective should also apply to POFMA.

59 Separately, in the *obiter dicta* of *SDP*, the High Court seemed inclined to adopt the “multiple meanings” rule rather than the “single meaning” rule.<sup>205</sup> For the multiple meanings rule in defamation, a single statement can give rise to two or more defamatory meanings. However, since there was only one reasonable interpretation, Ang Cheng Hock J held that there was no need to apply the multiple meanings rule to the facts.<sup>206</sup> The multiple meanings rule will be further discussed under the tort of malicious falsehood.

60 Another issue raised was that hyperlinks of the false statement on the intermediaries’ platform, such as through Facebook posts, sufficed to constitute republication of that statement.<sup>207</sup> To elaborate, s 3(1) of POFMA defines the meaning of “communicate” as making the information “available to one or more end-users in Singapore on or through the internet”.<sup>208</sup> Under defamation law, each republication of the

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198 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [55].

199 See Marcus Teo & Jonathan Hew, “Context and Meaning in the Interpretation of Statements Under POFMA” *Singapore Law Gazette* (June 2020).

200 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.031. See *Crookes v Newton* [2011] 3 SCR 269.

201 Gary Chan Kok Yew, “Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities” (2015) 27 SAclJ 694 at 720, citing *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751.

202 [2015] 2 SLR 751.

203 *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751 at [55].

204 *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751 at [55].

205 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [89].

206 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [63] and [89].

207 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [56].

208 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [52].

defamatory statement results in a fresh and separate defamation action.<sup>209</sup> Consequently, under the “multiple publication” rule, re-publishers will be liable for each repeated defamatory statement.<sup>210</sup> Similarly, a CD could be issued for each communication of the false statement of fact under POFMA.<sup>211</sup>

61 The question then is whether hyperlinking of a false statement of fact may constitute republication. The High Court answered affirmatively: hyperlinking meant that SDP endorsed the hyperlinked material and invited readers to access the content.<sup>212</sup> Conversely, in the Canadian Supreme Court decision of *Crookes v Newton*, the majority held that hyperlinking would not amount to publication of the hyperlinked defamatory content, even if the reader was invited to access the content.<sup>213</sup> The High Court’s reasoning in *SDP* resembles the approach taken by McLachlin CJ and Fish J in *Crookes v Newton* who agreed with the majority, but added that a hyperlink would amount to publication if the text indicated “adoption or endorsement of the content of the hyperlinked text” [emphasis in original; other emphasis omitted] when read contextually.<sup>214</sup> The English courts may be more willing to find that hyperlinking does give rise to republication. In *McGrath v Dawkins*,<sup>215</sup> the English High Court held that the operator of a website could be liable for allegedly defamatory postings on a website that it linked to, even though it carried no defamatory content by itself.

(2) *Tort of defamation: Defence of justification*

(a) Tort case law

62 The defence of justification is a complete defence against the plaintiff’s claim which cannot be defeated by malice.<sup>216</sup> The defendant must prove that the defamatory statement is true in substance and in

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209 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.077, citing *Loutchansky v Times Newspaper Ltd (No 2)* [2002] QB 783; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

210 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.077, citing *Loutchansky v Times Newspaper Ltd (No 2)* [2002] QB 783; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

211 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [53] and [56].

212 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [55]–[56].

213 *Crookes v Newton* [2011] 3 SCR 269 at [14].

214 *Crookes v Newton* [2011] 3 SCR 269 at [48] and [50].

215 [2012] EWHC B3 (QB).

216 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 13.003.

fact, and the pleading of the meaning must be precise.<sup>217</sup> The defendant is only required to prove that the “substance or gist” of the statement is true.<sup>218</sup> If there are several defamatory allegations with a common sting, the defendant may succeed by proving the truth of the common sting.<sup>219</sup>

(b) Application to POFMA

63 The defence of justification resembles the approach taken by Belinda Ang J in *TOC*. Particularly, the legal burden of proof lies on the defendant to prove that the statement made was “true” to set aside a CD issued by the minister under s 17(5)(b) of POFMA.<sup>220</sup>

64 Under POFMA, it is not necessary to refer to any common sting with defamatory content. Arguably, if there is more than one statement and each statement has only one meaning, common sting can be applied to show the truth or falsity of these statements in general. This would depend on whether the reasonable reader can identify commonalities between the statements in question, and the perspective of the reasonable reader in ascertaining the statements is critical.

(3) *Tort of defamation: Defence of fair comment*

(a) Tort case law

65 The defence of fair comment applies only to comments, and can be defeated by malice.<sup>221</sup> This defence aims to promote open discussion on matters of public interest.<sup>222</sup> To successfully raise this defence, the defendant must, *inter alia*, prove that (a) the impugned words are comments; and (b) the comment is based on true facts.<sup>223</sup>

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217 *Aaron v Cheong Yip Seng v Cheong Yip Seng* [1996] 1 SLR(R) 258 at [68]; *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147 at 153.

218 *Aaron v Cheong Yip Seng* [1996] 1 SLR(R) 258 at [73]; *Chase v Newsgroup Newspapers Ltd* [2003] EMLR at [11]; *Oei Hong Leong v Ban Song Long David* [2005] 1 SLR(R) 277 at [94].

219 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 13.007, citing *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412; *S and K Holdings Ltd v Throgmorton Publications Ltd* [1972] 1 WLR 1036; *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000. In *Khashoggi v IPC Magazines Ltd*, the defamatory statement includes both the plaintiff’s general promiscuous conduct, as well as a specific extramarital affair. The defendant may attempt to justify the common sting, which is the plaintiff’s general promiscuous conduct, even though no evidence may be adduced for the specific affair.

220 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [45].

221 *Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 at [59].

222 *Oversea-Chinese Banking Corp v Wright Norman* [1994] 3 SLR 410 at [32].

223 The other two limbs for fair comments are: (c) the comment must be fair; and (d) the comment must be related to public interest. See Gary Chan Kok Yew & *(cont'd on the next page)*



66 In general, a comment is often equated to a statement of opinion.<sup>224</sup> The objective test requires that an ordinary reasonable reader, on reading the entire article, understand that the words complained of are comments.<sup>225</sup> Specifically, the court would consider the nature of the imputation, the context and circumstances in which the defamatory statements were published.<sup>226</sup> Furthermore, media publishers are required to clearly distinguish which statements are comments, and which statements are facts.<sup>227</sup>

67 Furthermore, the comment must be based on true facts. There are several relevant principles under this requirement. Firstly, the factual basis in support of an alleged comment must be stated.<sup>228</sup> In *Merivale v Carson*,<sup>229</sup> the defence of fair comment failed as there was no adulterous wife in the plaintiff's play, but the defendant had referred to a character in the play as a "naughty wife" in his criticism of the play.<sup>230</sup> Secondly, the defendant bears the burden to show that the comment is based on true facts.<sup>231</sup> In particular, the defendant may not invent facts, or make assumptions that the facts are true.<sup>232</sup> Lastly, where the defamatory statement comprises partly facts and partly expressions of opinion, it is unnecessary to prove the truth of every fact in so far as the expressions of opinions are reasonable based on the facts that can be proved.<sup>233</sup>

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Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 13.013, citing *Chen Cheng v Central Christian Church* [1998] 3 SLR(R) 236.

224 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [141]; see *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd* [1996] 1 MLJ 393 at 408, where it was stated that "it is settled law that a comment is a statement of opinion on facts truly stated"; and *Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1979–1980] SLR(R) 24 at [57], where it was stated that "[a] comment is a statement of opinion on facts".

225 Doris Chia & Rueben Mathiavararam, *Evans on Defamation in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2008) at p 103.

226 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [144]; *Chen Cheng v Central Christian Church* [1998] 3 SLR(R) 236 at [34]–[35].

227 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [145]–[148].

228 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 13.020, citing *Merivale v Carson* (1887) 20 QBD 275.

229 (1887) 20 QBD 275.

230 Locally, in *Hytech Builders Pte Ltd v Goh Teng Poh Karen* [2008] 3 SLR(R) 236, the defence also failed because the defendant did not verify the plaintiff's financial statements, and there was no factual basis for the comment that the plaintiff was "on the verge of collapse".

231 *Oversea-Chinese Banking Corp Ltd v Wright Norman* [1994] 3 SLR(R) 410 at [37]–[39].

232 *Jeyaretnam Joshua Benjamin v Goh Chok Tong* [1989] 2 SLR(R) 130 at [16].

233 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 13.023; Defamation Act (Cap 75, 2014 Rev Ed) s 9.

68 To illustrate, in *Jeyasegaram David v Ban Song Long David*<sup>234</sup> (“*Jeyasegaram David*”), the defendant was quoted in an article published in *The Business Times* which stated that the plaintiff was “playing to the gallery” at an extraordinary general meeting (“EGM”). The defence of fair comment succeeded as the “sheer notoriety” of the plaintiff’s conduct at the EGM had been widely reported in the press.<sup>235</sup> Hence, there was a “sufficient substratum of facts” underlying the defendant’s comment.<sup>236</sup>

(b) Application to POFMA

69 In *SDP, Ang Cheng Hock J* affirmed that the Minister for Law’s reference to “existing case law” to distinguish between fact and opinion stemmed from the defence of fair comment in defamation law.<sup>237</sup> Similar to defamation law, the *context* and the content of the whole publication are relevant considerations.<sup>238</sup> As a question of fact, it is ultimately the court who decides whether a statement is one of fact or opinion based on a reasonable man’s perspective, not the minister.<sup>239</sup>

70 To recap, the High Court held that SDP made an assertion of fact that is, there is “a rising proportion of Singapore PMETs getting retrenched”.<sup>240</sup> Arguably, if SDP had cited MOM’s statistics from 2010 to 2018 in the SDP article to substantiate the statements made, the statement would be an opinion based on defamation law principles.

71 Interestingly, the statement in CD-1, “[t]he SDP’s proposal comes amidst a rising proportion of Singapore PMETs getting retrenched” was shortly followed by another statement, “[s]uch a *trend* is partly the result of hundreds of local companies continuing to discriminate against local workers” [emphasis added].<sup>241</sup> Although this argument was not raised in court, a question is whether the statement relating to the trend may constitute the underlying facts for the subject statement on the rising proportion of Singapore PMETs getting retrenched, and thus render the subject statement a comment.

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234 [2005] 2 SLR(R) 712.

235 *Jeyasegaram David v Ban Song Long David* [2005] 2 SLR(R) 712 at [53].

236 *Jeyasegaram David v Ban Song Long David* [2005] 2 SLR(R) 712 at [53]. This test was endorsed in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [149].

237 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [29].

238 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [28]–[29], citing *Chen Cheng v Central Christian Church* [1998] 3 SLR(R) 236 at [34]–[35].

239 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [29], citing *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751 at [100]; *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [144].

240 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [31]–[32].

241 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [16].

72 Notably, in *TOC*, Belinda Ang J also emphasised that there are only two recognised categories under the first limb of s 17(5)(b) of POFMA: facts and opinions.<sup>242</sup> A hearsay statement was considered a statement of fact despite the statement-maker's lack of knowledge towards its truth.<sup>243</sup> Additionally, a fact-checking exercise was not required to determine whether the subject statement was a fact or an opinion, but whether a fact was true or false.<sup>244</sup> The High Court eventually found that a reasonable reader would regard the subject statement as a statement of fact.<sup>245</sup> This approach therefore affirmed the objective reasonable person test as enunciated in *SDP*. It also illustrated that the semantics of the subject statement is relevant under the first limb, whereas evidence to prove truth or falsity would fall under the second limb.<sup>246</sup>

73 Further, the Court of Appeal in *Review Publishing* also placed the onus on media publishers to clearly state whether the statements are facts or comments in opinion pieces.<sup>247</sup> The rationale is to ensure that readers are not confused between them.<sup>248</sup> However, this was not discussed in the two POFMA cases. Therefore, it remains uncertain whether *TOC* should be regarded as a layperson or held to the same standard as media publishers in clearly distinguishing between facts and opinions when communicating public statements.

(3) *Tort of defamation: Public interest defence*

(a) Tort case law

74 In the UK, the House of Lords in *Reynolds v Times Newspapers Ltd*<sup>249</sup> broadened the ambit of qualified privilege to protect media defendants where the information is “of sufficient value to the public that, in the public interest, it should be protected”.<sup>250</sup> The *Reynolds* privilege espoused *responsible journalism* in publications of public interest made in any medium,<sup>251</sup> and considered a non-exhaustive range of factors which intended to balance free speech and the protection of reputation under defamation law.<sup>252</sup> Such factors include, *inter alia*, the source of the

242 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [48].

243 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [46]–[48].

244 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [49].

245 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [51].

246 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [49].

247 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [145]–[148].

248 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [147].

249 [2001] 2 AC 127.

250 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at [195].

251 *Seaga v Harper* [2009] AC 1 at [9].

252 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at [205]. See David Tan, “The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: (cont'd on the next page)

information, the steps taken to verify the information and the urgency of the matter.<sup>253</sup> The *Reynolds* privilege has been reformulated via the Defamation Act 2013<sup>254</sup> in the UK into a defence of “publication on matter of public interest”.<sup>255</sup> In Singapore, the Court of Appeal in *Review Publishing* rejected the *Reynolds* privilege for non-citizens but left the door open for Singapore citizens.<sup>256</sup>

75 The republication of a defamatory allegation usually gives rise to a separate defamation action.<sup>257</sup> However, for reportage of the defamatory statement, the media defendant does not have to prove the truth of the report.<sup>258</sup> Instead, it requires the neutral reporting of attributed allegations without any adoption, embellishment or subscribing to any belief in its truth,<sup>259</sup> as well as fulfilling the other factors of responsible journalism under the *Reynolds* privilege.<sup>260</sup>

(b) Application to POFMA

76 David Tan had persuasively argued that there are adequate bases for the *Reynolds* privilege to be adopted under Singapore common law in order to “build a democratic society”.<sup>261</sup> Arguably, the *Reynolds* privilege does *not* necessarily promote falsehoods, but may instead require the media publisher to behave responsibly and refrain from publishing

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Reinvigorating Freedom of Political Communication in Singapore” (2011) Sing JLS 456 at 465.

253 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at [205].

254 c 26.

255 Defamation Act 2013 (c 26) (UK) s 4.

256 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [175]–[188].

257 See Jason Bosland, “Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales” (2011) 31 OxJLS 89 at 91, citing *Stern v Piper* [1997] QB 123; *Lewis v Daily Telegraph* [1964] AC 234.

258 *Roberts v Gable* [2008] QB 502. See Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 13.104. Note that there are different views regarding the conceptual basis of the *Reynolds* privilege and whether the doctrine of reportage is a subset of the *Reynolds* privilege. See Jason Bosland, “Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales” (2011) 31 OxJLS 89 at 89–91.

259 *Roberts v Gable* [2008] QB 502 at [53]. See *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2002] EMLR 13; [2002] EMLR 215.

260 *Roberts v Gable* [2008] QB 502 at [69].

261 David Tan, “The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinforcing Freedom of Political Communication in Singapore” (2011) Sing JLS 456 at 469–470 and 475–476. Note that in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [267], the Court of Appeal affirmed that the constitutional free speech available to citizens under Art 14(1) enables them to express their views on matters of public interest.

information that is likely to be false.<sup>262</sup> A restricted application of the *Reynolds* privilege with a different emphasis accorded to the *Reynolds* factors for political public figures in Singapore would ensure responsible journalism and comment,<sup>263</sup> and would not contradict the spirit of the law behind POFMA. Moreover, the flexibility and contextual application of the *Reynolds* privilege would also allow for better adaptation of the law to changing technologies and values in the online sphere, such as in responsible tweeting and responsible Facebooking.<sup>264</sup>

77 In *TOC*, Belinda Ang J held that the “reporting defence” was untenable.<sup>265</sup> The defendant could not claim that the subject statement was “true” on the ground that it was another person who made the statement without any confirmation or knowledge of the statement’s veracity.<sup>266</sup> The rationale was to prevent “tale-bearers” from communicating online falsehoods to other users without taking a position to the truth of its content.<sup>267</sup> In contrast, the Defamation Act 2013 in the UK considers the defendant’s reasonable belief that it is in the public interest to publish the statements.<sup>268</sup> Arguably, if the “reporting defence” does *not* apply, the scope of news that can be reported will be severely limited. To promote good government and good governance in Singapore, greater leeway should be accorded to the timely publication of matters of public interest in so far as the flow of information is published in a *responsible* manner.<sup>269</sup>

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262 David Tan, “The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore” (2011) Sing JLS 456 at 477–478. See also *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359; *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804 where the scope of *Reynolds* responsible journalism is not as broad as the Court Appeal in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 made it out to be.

263 See David Tan, “The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore” [2011] Sing JLS 456 at 477–480.

264 Hilary Young, “*Reynolds v Times Newspapers*” in *Landmark Cases in Defamation Law* (David Rolph ed) (Sydney: Hart Publishing, 2019) at pp 19–20.

265 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [54].

266 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [54]–[58].

267 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [57].

268 Defamation Act 2013 (c 26) (UK) s 4(1).

269 See David Tan, “The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore” [2011] Sing JLS 456 at 484–485.

(4) *Tort of malicious falsehood*

(a) Tort case law

78 The tort of malicious falsehood deals with false representation made maliciously to damage another's trade.<sup>270</sup> The plaintiff must prove, *inter alia*, that the defendant had published a false statement about the plaintiff's business or goods to another person.<sup>271</sup>

79 Particularly, the court considers whether a reasonable person will consider the representation as one made seriously based on "the *nature of the statement ... and the circumstances in which it is made*" [emphasis added].<sup>272</sup> In *Timothy White v Gustav Mellin*,<sup>273</sup> the defendant affixed labels to the plaintiff's "Mellin's Infants' Foods", stating that its own infant food was more nutritious and healthful than any other.<sup>274</sup> The House of Lords held that there was no slander of goods as the advertisement was of a "very common description, puffing, it may be, extremely and in an exaggerated fashion."<sup>275</sup>

80 In contrast, in *De Beers Abrasive Products Ltd v International General Electric Co of New York*,<sup>276</sup> the pamphlets distributed by the defendants, by making detailed comparisons, had suggested that the plaintiff's abrasive products were of poorer quality.<sup>277</sup> The court found that the defendants' claims must be taken seriously because the pamphlets had represented that scientific tests were properly carried out on these products.<sup>278</sup>

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270 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.032.

271 *Challenger Technologies Pte Ltd v Dennison Transoceanic Corp* [1997] 2 SLR(R) 618 at [64], citing *Kaye v Robertson* [1991] FSR 62 at 67, *per* Glidewell LJ. The other elements of malicious falsehood include: (a) the defendant made the statement maliciously; and (b) the plaintiff suffered actual damage as the direct and natural result of the publication.

272 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.036, citing *Singsung Pte Ltd v LG 26 Electronics Pte Ltd* [2015] 4 SLR 569 at [418].

273 *Timothy White v Gustav Mellin* [1895] AC 154. See Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.037.

274 *Timothy White v Gustav Mellin* [1895] AC 154 at 154.

275 *Timothy White v Gustav Mellin* [1895] AC 154 at 160, *per* Lord Herschell LC.

276 [1975] 1 WLR 972.

277 *De Beers Abrasive Products Ltd v International General Electric Co of New York* [1975] 1 WLR 972 at 974.

278 *De Beers Abrasive Products Ltd v International General Electric Co of New York* [1975] 1 WLR 972 at 981–982.



81 The multiple meanings rule is present in the tort of malicious falsehood. In *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd*<sup>279</sup> (“*Ajinomoto Sweeteners*”), the English Court of Appeal considered whether the single meaning rule under defamation law applied to malicious falsehood if different meanings could be ascertained from a statement.<sup>280</sup> The defendant supermarket chain sold health foods with labels containing the words “no hidden nasties” and “no artificial colours or flavours and no aspartame”.<sup>281</sup> The claimant raised three meanings: (a) that aspartame is harmful or unhealthy; (b) that there is a *risk* that aspartame is harmful or unhealthy; and (c) that aspartame is to be avoided.<sup>282</sup> The defendant refuted that the words meant that these foods were for customers who found aspartame objectionable.<sup>283</sup>

82 In the lower court, the single meaning rule was applied, and the claim was dismissed.<sup>284</sup> Conversely, the Court of Appeal held that the single meaning rule should not apply to malicious falsehood.<sup>285</sup> Sedley LJ referred to the single meaning rule as “anomalous, frequently otiose and, where not otiose, unjust”.<sup>286</sup> Indeed, the multiple meanings approach in malicious falsehood would be fairer and more realistic as it allows “the damaging effect of the words to be put in perspective”; thus, damage may be more “realistically gauged”.<sup>287</sup> Similarly, Rimer LJ held that the single meaning rule is a legal fiction that assumed that the reasonable man would understand a single meaning from a particular statement.<sup>288</sup> Hence, the plaintiff managed to prove malice based on the damaging meaning.<sup>289</sup>

(b) Application to POFMA

83 Ang Cheng Hock J’s approach in *SDP* resembles the tort of malicious falsehood where the plaintiff bears the burden of proof to show

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279 [2011] QB 497.

280 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [27]. See Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.041, citing *Slim v Daily Telegraph Ltd* [1968] 2 QB 157; [1968] 1 All ER 497 and *Charleston v News Group Newspapers* [1995] 2 AC 65.

281 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [6].

282 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [7].

283 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [7].

284 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [8].

285 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [35], *per* Sedley LJ.

286 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [31].

287 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [34].

288 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [40].

289 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [33]–[34] and [43].

that the subject statement was false. In malicious falsehood, whether the defendant disparages his rival's goods depends on whether a reasonable person would understand the defendant as making a serious claim.<sup>290</sup> For POFMA, whether a statement is a fact or an opinion is also based on a reasonable reader's perspective.<sup>291</sup> Satire or parody, which may contain some form of exaggeration, are not covered under POFMA.<sup>292</sup> Indeed, Gary Chan highlighted that regarding Internet language and expressions, when the writing style is exaggerated, among others, the statement would be less credible and more likely to be discounted by a reasonable reader under defamation law.<sup>293</sup> Ultimately, much depends on how the court perceives the reasonable interpretations of an ordinary reader.<sup>294</sup>

84 Further, the multiple meanings rule was applied in *Ajinomoto Sweeteners* for malicious falsehood. In the *obiter dicta* of *SDP*, Ang Cheng Hock J seemed inclined to adopt the "multiple meanings" rule in the POFMA context.<sup>295</sup> Arguably, the multiple meaning rule should be adopted for POFMA rather than the single meaning rule under defamation law.<sup>296</sup> In *Slim v Daily Telegraph Ltd*,<sup>297</sup> the English Court of Appeal held that the single meaning rule under defamation law would facilitate the jury system in England to quantify the loss of reputation.<sup>298</sup> Surely, the juries must agree on a single meaning because the damages awarded would depend upon the defamatory meaning.<sup>299</sup>

85 The English Court of Appeal in *Ajinomoto Sweeteners* rejected the single meaning rule over concerns about its unjust nature if adopted for

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290 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.038, citing *De Beers Abrasive Products Ltd v International General Electric Co of New York* [1975] 1 WLR 972.

291 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [29].

292 *Singapore Parliamentary Debates, Official Report* (8 May 2019) vol 94 (K Shanmugam, Minister for Home Affairs and Law): "By definition, once it talks about fact, then it excludes satire and comedy"; Aaron Chong, "Law Minister K Shanmugam Addresses Concerns over Proposed Online Falsehoods and Manipulation Law" *Channel NewsAsia* (7 May 2019).

293 Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAclJ 694 at 712.

294 Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAclJ 694 at 712.

295 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [89].

296 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [89].

297 [1968] 2 QB 157.

298 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 174; See also Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.041.

299 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 174.

malicious falsehood.<sup>300</sup> It is posited that the single meaning rule should also be rejected for POFMA *albeit* for different reasons from malicious falsehood. If the multiple meanings rule is adopted for POFMA, a single statement can give rise to two or more meanings as understood by a reasonable reader. Consequently, a CD could be issued in so far as one of the meanings is false, regardless of whether the other possible meanings are true. Certainly, the multiple meanings rule would prevent misinformation that might mislead some members of the public, but not others. Hence, this would discourage mischief through the spreading of falsehoods that are ambiguous in nature.<sup>301</sup>

(5) *Tort of negligence*

(a) Tort case law

86 An example of misleading statements can be found in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd*<sup>302</sup> (“*Ramesh s/o Krishnan*”) regarding the duty of care owned by an ex-employer regarding references checks on the employment history to prospective hirers. The reference stated that the appellant had been investigated for compliance issues, and some of the advisers under his supervision were referred to the police for investigations.<sup>303</sup>

87 The Court of Appeal clarified that an employer had to exercise reasonable care to ensure that the facts stated in the reference were true. The reference must not be misleading when read as a whole.<sup>304</sup> It would be misleading if the information provided went through an unfair selection process, or when the statements resulted in a mistaken impression that failed to present the complete picture.<sup>305</sup>

88 On the facts, the Court of Appeal held that the reference gave the misleading impression that the appellant was “involved in some serious

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300 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497 at [31], per Sedley J: “the rule itself is anomalous, frequently otiose and, where not otiose, unjust”; see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 14.041.

301 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [63] and [89].

302 [2016] 4 SLR 1124.

303 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [24].

304 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [98].

305 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [80] and [98].

misconduct”.<sup>306</sup> Although the information provided in the reference check form was factually true, several pieces of information were absent.<sup>307</sup> The respondent had withheld information that there was no evidence to substantiate the claims against the appellant.<sup>308</sup> Specifically, the police did not take any action as the allegations were not serious enough.<sup>309</sup>

(b) Application to POFMA

89 Under POFMA, the definition of “false statements” includes misleading statements: s 2(2)(b) of POFMA states that a statement is false within the meaning of POFMA if it is “false or misleading” [emphasis added]. This was affirmed in *SDP*.<sup>310</sup> Particularly, the word “amidst” was used without specifying any time frame to describe the “rising proportion of Singapore PMETs getting retrenched”.<sup>311</sup> When read contextually, the statement was misleading as there was no indication of a more recent time frame (specifically from 2015 to 2018) which contradicted the statement that local PMETs’ retrenchment rate had increased.<sup>312</sup> This approach is consistent with *Ramesh s/o Krishnan* which held that the statements in question must not convey a mistaken impression to a reasonable reader when read as a whole.<sup>313</sup>

90 Additionally, the statement-maker must not withhold salient facts from the other party. Hence, selective statements of information, although individually true, would still fall under POFMA if the selected statements collectively create a misleading representation.<sup>314</sup>

91 Furthermore, *Ramesh s/o Krishnan* stated that the information selection process must not be unfair.<sup>315</sup> For POFMA, to prove the truth or falsity of a statement, the information selected by the parties must *not*

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306 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [129].

307 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [128]–[140].

308 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [128]–[132].

309 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [130].

310 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [98].

311 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [16] and [98].

312 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [16] and [98].

313 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [98].

314 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [98].

315 *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [98].

be arbitrary.<sup>316</sup> In *SDP*, the High Court held that SDP's reference to 2010 as a starting point was arbitrary, as 2009 or even 2008 could be selected. If 2009 was selected instead of 2010, the figures would show a decrease, *not* an increase in the proportion of local PMETs being retrenched.<sup>317</sup> Therefore, it is recognised that any information selected must be rational and not arbitrary to a reasonable reader.

### C. *Guidelines for Internet intermediaries*

92 Based on the case law principles, the author proposes some guidelines and examples to help intermediaries in conducting review.

#### (1) *First limb: Is the statement a fact or an opinion?*

93 The first limb corresponds with the requirements for setting aside a CD under the first part of s 17(5)(b) of POFMA, that is, "the subject statement is not a statement of fact".<sup>318</sup> Case law had clarified that there are two categories: facts and opinions.<sup>319</sup>

94 The relevant inquiry is whether a reasonable reader would understand the statement as a fact or an opinion. Some (fictitious) examples of opinions are:<sup>320</sup>

(a) A, a doctor, states that wearing a mask prevents the spread of COVID-19, as shown by several *studies*.

(b) B states that three out of ten patients that recovered from COVID-19 in Singapore had symptoms of relapse, and sets out his *methodology* based on specific data from which he draws information. Even if the data is incomplete, the statement could still be an opinion.

(c) C, a non-government organisation worker, publishes an online article stating that the different budgets provided during the COVID-19 outbreak were insufficient to assist the needy

316 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [96]–[97].

317 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [96].

318 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 17(5)(b).

319 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [47].

320 These examples are adapted from Ministry of Law, "How the Protection from Online Falsehoods and Manipulation Act Applies" <https://www.mlaw.gov.sg/files/news/others/HowPOFMAApplies.pdf> (accessed 20 April 2020). Note that the examples are fictitious and any resemblance to actual events or locales or persons, living or dead, is entirely coincidental.

during the Circuit Breaker, based on *interviews* with government officials and social workers.

95 Notably, the context and the circumstances in which the statements are published are relevant considerations.<sup>321</sup> It does not matter whether the defamatory words are framed in the form of questions or factual statements.<sup>322</sup> The use of words such as “it seems to me”, “in my judgement”, “in other words” inclines towards labelling the statements as opinions, but these inclinations are non-conclusive.<sup>323</sup> If there is a “sufficient substratum of facts” widely known to the readers, the statement in question would be an opinion rather than a factual statement.<sup>324</sup>

(2) *Second limb: Is the statement of fact false or misleading?*

96 The second limb corresponds with setting aside a CD under the second part of s 17(5)(b) of POFMA, that is, “the subject statement is a true statement of fact”.<sup>325</sup> The relevant inquiry is whether a reasonable reader would understand the meaning of the statement as *not* false or misleading when read as a whole.

(a) True statement of fact

97 The statement must be based on *true* facts. A statement which refers to a methodology or study is not necessarily true, and evidence may be adduced to prove that the statement of fact is true.<sup>326</sup> For each of the respective examples above, if:<sup>327</sup>

(i) A cites studies that do not exist, A’s statement can be a false statement of fact. However, if there are other studies which show that wearing a mask prevents the spread of COVID-19, A’s statement is nonetheless true.

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321 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [29], citing *Chen Cheng v Central Christian Church* [1998] 3 SLR(R) 236 at [34]–[35].

322 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR(R) 52 at [144].

323 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR(R) 52 at [147], citing Geoffrey Robertson & Andrew Nicol, *Robertson & Nicol on Media Law* (Sweet & Maxwell, 4th Ed, 2002) at p 120. See also Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 13.016.

324 *Jeyasegaram David v Ban Song Long David* [2005] 2 SLR(R) 712 at [53]. This test was endorsed in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [149].

325 Protection from Online Falsehoods and Manipulation Act 2019 (Act 18 of 2019) s 17(5)(b).

326 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [49].

327 Ministry of Law, “How the Protection from Online Falsehoods and Manipulation Act Applies” <https://www.mlaw.gov.sg/files/news/others/HowPOFMAApplies.pdf> (accessed 20 April 2020).



(ii) *B*'s methodology relies on data that is fabricated, and contradicts many other reliable sources like the Ministry of Health's data and peer-reviewed journals with high impact factors that indicate otherwise, *B*'s statement can be a false statement of fact.

(iii) *C* additionally relies on an interview with a social worker and states that welfare assistance had been denied to a retrenched local PMET during the COVID-19 outbreak, when assistance had not been denied, the latter statement is a false statement of fact.

(b) Misleading statements

98 If the subject statement withholds (or omits) salient facts, or conveys a mistaken representation that presents an incomplete picture in the mind of an ordinary reasonable reader, the statement is misleading.<sup>328</sup>

(a) *D* states that each "China worker" will get \$100 a day for 14 days of leave of absence, fully paid for by the Singapore government during the COVID-19 outbreak. The statement is misleading because the \$100 is paid to their *employer* via the Leave of Absence Support Programme, and this programme covers all workers, regardless of nationality.<sup>329</sup>

(b) *E* publishes a news report stating that, according to an enforcement officer, he had been verbally abused when trying to implement safe distancing measures on a crowded train. As the news report *omits* to state the police's findings that the enforcement officer had fabricated the claim, *E*'s statement can be misleading.

## VI. Recommendations

99 It would be helpful for the courts to clarify several legal issues that might influence how intermediaries could conduct their review of online contents.

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328 Ministry of Law, "How the Protection from Online Falsehoods and Manipulation Act Applies" <https://www.mlaw.gov.sg/files/news/others/HowPOFMAApplies.pdf> (accessed 20 April 2020).

329 Gov.sg, "Corrections and Clarifications Regarding Falsehoods Published by States Times Review on COVID-19 Situation" (14 February 2020) <<https://www.gov.sg/article/factually-clarifications-on-falsehoods-posted-by-str-on-covid-19-situation>> (accessed 20 April 2020).

**A. Distinguishing between facts and opinions**

100 Firstly, in defamation, the onus is placed on media publishers to distinguish clearly which statements are opinions, and which are statements of fact in opinion pieces.<sup>330</sup> Currently, it is unclear whether this principle applies to POFMA. It is proposed that for POFMA, the court should not expect a layperson to distinguish between facts and opinions with a similar level of scrutiny to that required of media publishers. Unlike media publishers, a layperson would *not* have access to legal advice.

101 For intermediaries, the reviewers should consider case law principles in reviewing online content. For example, expressions such as “in my judgment” are non-conclusive but may incline the court towards labelling the statements as opinions.<sup>331</sup> Further, for publications that are predominantly made up of opinions, or a blend of opinions and facts, intermediaries that provide platforms to these publications can retool their interface to categorise them separately from facts (for example, news reports).<sup>332</sup> This would enhance the discernment of readers in sorting through the large amount of online information.

**B. “Multiple meanings” rule**

102 Secondly, the courts could clarify the *obiter dicta* of *SDP*, where Ang Cheng Hock J seemed inclined to adopt the multiple meanings rule rather than the single meaning rule.<sup>333</sup> It is suggested that the courts adopt the multiple meanings rule, which prevents misinformation that might mislead some members of the public, but not others.<sup>334</sup>

103 For intermediaries, a single meaning could be provided for more straightforward cases. However, if the statement in question gives rise to multiple meanings, intermediaries could derive more than one meaning from a reasonable reader’s perspective. Hence, intermediaries could flag the impugned statement and clarify through explanatory notes on the meaning or multiple meanings that would give rise to false statement of fact. Indeed, the subject statement might not be false or misleading in its entirety, and some of its reasonable meanings could also give rise to

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330 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [145]–[148].

331 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [147], citing Geoffrey Robertson & Andrew Nicol, *Robertson & Nicol on Media Law* (Sweet & Maxwell, 4th Ed, 2002) at p 120.

332 Warren B Chik, “Fact or Fake News The “Role of Law” for Data Accuracy” *Singapore Law Gazette* (June 2017).

333 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [89].

334 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [62].

true statements of facts.<sup>335</sup> Hence, this allows for transparency as content providers could review the rationale behind why their content has been flagged or downranked, and subsequently take any necessary action as permitted.

### C. Contextual rule in ascertaining meaning

104 Thirdly, the courts could clarify whether the contextual rule should apply for ascertaining the meaning of the subject statement. Under s 2(2)(b) of POFMA, although a statement can be false “in part”, or “on its own”,<sup>336</sup> it is proposed that the contextual rule is not contrary to POFMA as Ang Cheng Hock J had referred to the context in *SDP*. Certainly, a reasonable reader would have considered the context and circumstances in which the statements were published, including facts that are well known to the public.<sup>337</sup> Recently, in a CD issued to Thum Ping Tjin, the Government also clarified that under s 2(2)(b), “the whole statement will not be considered false, automatically, just because ‘one bit’ of it is false” [emphasis in original].<sup>338</sup> Additionally, the various ways of communicating information via the Internet including, *inter alia*, the Internet language and expressions used, would also affect how the statement as a whole is perceived by a reasonable reader.<sup>339</sup> Therefore, the contextual rule allows for sensitivity to the various factual matrix in ambiguous online cases under POFMA.

105 Conversely, if the contextual rule does not apply, the minister could select the subject statement from the published material in a manner that disregards one or more key terms or punctuation marks; the courts do not have appellate jurisdiction over the selection.<sup>340</sup> Consequentially, the assessment of the subject statement by the courts in ascertaining meaning is restricted, which might potentially lead to absurd results that differ from a reasonable reader’s perspective.<sup>341</sup>

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335 Marcus Teo & Jonathan Hew, “Context and Meaning in the Interpretation of Statements under POFMA” *Singapore Law Gazette* (June 2020).

336 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [69].

337 See *Jeyasegaram David v Ban Song Long David* [2005] 2 SLR(R) 712.

338 Gov.sg, “Corrections and Clarifications Regarding Falsehoods and Misleading Statements by Mr Thum Ping Tjin” (13 May 2020) <<https://www.gov.sg/article/factually-corrections-on-falsehoods-about-pofma-by-thum-ping-tjin>> (accessed 15 July 2020).

339 Gary Chan Kok Yew, “Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities” (2015) 27 SAclJ 694 at 708–709.

340 Marcus Teo & Jonathan Hew, “Context and Meaning in the Interpretation of Statements under POFMA” *Singapore Law Gazette* (June 2020).

341 Marcus Teo & Jonathan Hew, “Context and Meaning in the Interpretation of Statements under POFMA” *Singapore Law Gazette* (June 2020). Note that the selection of the subject statement may only be challenged through judicial review.

106 For intermediaries, if the contextual rule is irrelevant, intermediaries could isolate a single sentence, the headlines or a picture and label the entire publication as false or misleading.<sup>342</sup> If the contextual rule is relevant, the content providers could challenge the intermediaries' decisions by directing them to other statements, or the broader sentiment which the publication evokes to a reasonable reader. For multiple postings, it is suggested that the intermediaries (and/or the court) could consider several factors to determine whether the posts should be viewed as a single publication including, *inter alia*, whether a reasonable reader is expected to read the thread chronologically; how interested in or impacted by the original post the reader is; and whether the terms in the publication invite the reader to access the other links provided.<sup>343</sup>

#### D. Hyperlinks

107 Fourthly, the court in *SDP* held that hyperlinks of the false statement(s) on the social media platform, such as through Facebook posts, suffice to constitute republication that attracts liability under POFMA.<sup>344</sup> The court took a broad reading of the word “communicate” as stated in s 3(1) of POFMA, that is, making the information “available to one or more end-users in Singapore on or through the internet”.<sup>345</sup>

108 It is suggested that the court could consider various factors based on the different factual matrix. For hyperlinks under defamation law,<sup>346</sup> Deschamp J's two-step approach in *Crookes v Newton* seems more rational: it requires not only the plaintiff to prove the existence of a “deliberate act”, but also that third parties had received and understood the defamatory material.<sup>347</sup> Besides direct evidence, inferences could be drawn including, *inter alia*, the accessibility of the links based on their numbers and locations; the number of hits on the site containing the hyperlinked material; and evidence concerning the behaviour of Internet users.<sup>348</sup>

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342 *Cf* *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 and *Spicer v Commissioner of Police of the Metropolis* [2019] EWHC 1439 (QB), discussed at para 52 above.

343 Gary Chan Kok Yew, “Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities” (2015) 27 SAclJ 694 at 721.

344 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [56].

345 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [52].

346 Note that in general, the publication of defamatory statements via the Internet requires the plaintiff to prove that the defamatory material was downloaded and accessed in Singapore. See *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860; Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 12.084.

347 *Crookes v Newton* [2011] 3 SCR 269 at [62]; See Gary Chan Kok Yew, “Defamation via Hyperlinks: More Than Meets the Eye” (2012) 128 LQR 346 at 350.

348 *Crookes v Newton* [2011] 3 SCR 269 at [110].

109 Arguably, there would be no “communication” under POFMA if the impugned material that contained the false statements was not “readily available” to readers, or there were no direct evidence and/or inferences of a third party receiving the hyperlinked content. Notably, Deschamp J’s approach could be further refined under POFMA, such as incorporating the “endorsement” requirement that was (possibly) applied in *SDP*.<sup>349</sup>

110 For intermediaries, reviewers should be mindful that besides the publication which contains the false statements of fact, any hyperlinks to the impugned publication should also be flagged. The intermediaries should first check whether the hyperlinks are valid, such as whether the hyperlinks referred users to a different address from the impugned content.

### ***E. Multi-pronged approach***

111 Realistically, there is a constraint on the time and resources that intermediaries can spend in reviewing every complaint made. As such, a multi-pronged approach as proposed by the Select Committee should be further explored.<sup>350</sup> Warren Chik has proposed that intermediaries and the authorities could engage multiple stakeholders, including civil society groups such as associations of academics, media outlets, and librarians, in regulating online falsehoods.<sup>351</sup> Firstly, these civil society groups can assist in fact-checking and identifying sources of misinformation. Secondly, these groups can provide credible sources of truthful information for the correction of online falsehoods to users, particularly where highly disputed facts are involved. Thirdly, these groups can assist intermediaries such as Google News to categorise facts and opinions separately.<sup>352</sup>

112 Additionally, intermediaries could also feature a “reply” mechanism to alternative sources or fact-checked content.<sup>353</sup> This would

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349 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [55]–[56]. Ang Cheng Hock J’s approach appears similar to the approach of McLachlin CJ and Fish J in *Crookes v Newton* [2011] 3 SCR 269 (at [48] and [50]), who added that a hyperlink would amount to publication if the text indicated “adoption or endorsement of the content of the hyperlinked text” [emphasis in original; other emphasis omitted].

350 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 164.

351 Warren B Chik, “Fact or Fake News: The ‘Role of Law’ for Data Accuracy” *Singapore Law Gazette* (June 2017).

352 Warren B Chik, “Fact or Fake News: The ‘Role of Law’ for Data Accuracy” *Singapore Law Gazette* (June 2017).

353 Warren B Chik, “Fact or Fake News: The ‘Role of Law’ for Data Accuracy” *Singapore Law Gazette* (June 2017).

align with the legislative purpose for CDs under POFMA, that is, to allow readers to compare both sources of information and arrive at their own conclusion.<sup>354</sup> Currently, Google is working to provide a second “fact-check” labelled article alongside the main headlines.<sup>355</sup> Facebook is also testing a button that provides access to alternative news sources.<sup>356</sup> Therefore, these mechanisms could supplement the CDs issued and encourage better discernment among readers.

113 In summary, intermediaries should adopt proactive roles in regulating online falsehoods under POFMA. Ideally, guidelines from case law principles could assist intermediaries in making better informed decisions that are sensitive to the various factual matrices on the Internet. Additionally, more stakeholders, including civil groups, could be involved in the multi-pronged approach in regulating online falsehoods.

## VII. Conclusion

114 Online falsehoods can be rapidly disseminated through Internet intermediaries which harm the social fabric of society. Although Internet intermediaries have adopted various self-regulatory measures, these measures might be inadequate without legislation in place. Hence, POFMA was enacted as part of a multi-pronged approach to counter online falsehoods.<sup>357</sup>

115 This article argues that intermediaries should take more proactive rather than passive roles under the framework of POFMA in regulating online falsehoods. Hence, there is the possibility of intermediaries working together with the Government. Certainly, there is a danger of “a hybrid form of private-public censorship”, especially when some definitions on what constitutes online falsehoods under POFMA are unclear.

116 To avoid over-regulation, intermediaries should be cognisant of the recent cases under POFMA, as well as the case law under tort (that is, defamation, malicious falsehood and negligence). For instance, in order

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354 *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [36].

355 Google, “Written Representation 138” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at pp B1235–B1236.

356 Facebook, “Written Representation 104” in *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p B1004.

357 *Report of the Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (Parl 15 of 2018, 19 September 2018) at p 164.



to distinguish between facts and opinions under POFMA, the objective standard based on a reasonable reader's perspective is derived from the defence of fair comment under defamation law.<sup>358</sup> Some other examples of case law principles that are applicable to POFMA include, *inter alia*, the objective standard in ascertaining meaning under defamation,<sup>359</sup> and what constitutes misleading statements in determining the duty of care owed by ex-employees under negligence.<sup>360</sup> Some guidelines from these case law principles are formulated for intermediaries above. With these guidelines, it is hoped that intermediaries will judiciously exercise their discretion to flag, downrank, or even remove online falsehoods.

117 Lastly, it would be useful for the court to clarify whether certain case law principles including, *inter alia*, the multiple meanings rule and the contextual rule in ascertaining meaning are applicable in the POFMA context. Moreover, a multi-pronged approach as recommended by the Select Committee should be further explored. Intermediaries should work with the authorities and other stakeholders, including civil groups, in their reviewing and fact-checking processes. Ultimately, the participation by all segments of society is crucial in this long and difficult battle against online falsehoods.

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358 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [29].

359 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [70].

360 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25 at [98]. See *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR1124.