

## Newsletter

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## Containing the infectiousness of fake news - Developments in Singapore's online falsehoods laws amidst the COVID-19 outbreak

With the ongoing global outbreak of COVID-19, governments worldwide race against time to contain not only the spread of the pathogen, but also the flurry of fake news, with fears that online misinformation, if left unchecked, could be more infectious than the disease itself.

One of the weapons in the Singapore government's arsenal to contain the infectiousness of fake news, is the Protection from Online Falsehoods and Manipulation Act ("**POFMA**"), colloquially known as Singapore's "fake news law".

In particular, the past two months have seen increasing activity on the fake news front in Singapore, with various clarification statements issued by the government, and various directions issued under the POFMA. The POFMA Office (which sits within the Infocomm Media Development Authority of Singapore) has also withdrawn temporary exemptions, which had previously exempted prescribed Internet intermediaries from being issued with a "general correction direction".

Coincidentally, during this period, the Singapore High Court also delivered its first two decisions under the POFMA, just two weeks apart.

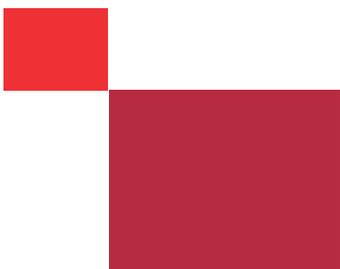
This newsletter unpacks some of these recent developments in Singapore's online falsehoods laws.

### Introduction to POFMA

The POFMA, which came into effect on 2 October 2019, empowers the Singapore government to take steps to correct and prevent the communication, in Singapore, of false statements of fact which undermine the public interest.

Amongst others, any Minister in Singapore can direct the POFMA Office to issue the following directions:

1. Correction direction
  - a. A "Part 3 Correction Direction" is issued to a person who communicated the false statement of fact ("**false material**") in Singapore, requiring that person to communicate, in the specified form and manner, a statement that the false material is false, and/or a specified statement of fact ("**correction notice**").
  - b. A "Part 4 Targeted Correction Direction" is issued to the Internet intermediary that provided the service through which the false material is communicated in Singapore, requiring it to communicate, by means of that service, a correction notice, to end-users in Singapore who access the false material.





- c. A "Part 4 General Correction Direction" is issued to an Internet intermediary or provider of mass media services, to communicate a correction notice, to all end-users in Singapore who use the service.
2. Stop Communication Direction, requiring a person to stop communicating false material (or anything that is substantially similar) in Singapore.
3. Access Blocking Order, issued where a person fails to comply with a Part 3 or Part 4 Correction Direction, and the false statement of fact is communicated on an online location which is accessible by end-users in Singapore. The Minister may then direct the Infocomm Media Development Authority to order the Internet access service provider to take reasonable steps to disable Singapore end-users' access to the online location.
4. Disabling Direction, requiring the Internet intermediary that provided the Internet intermediary service through which the false material is communicated, to disable Singapore end-users' access to the false material.

## Internet intermediaries now required to comply with general correction directions under POFMA

Until 31 January 2020, several Internet intermediaries were temporarily exempted from the requirements relating to Part 4 General Correction Directions.

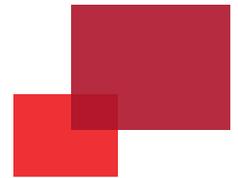
As Singapore gears up in its efforts to battle COVID-19, the Ministry of Communications and Information announced on 30 January 2020 that the temporary exemption will be lifted. As a result, Facebook, Google Search, Baidu, Twitter, and the forum HardwareZone, will be required to carry general correction directions, if the POFMA is applied to them.

Since then, the POFMA Office has issued its first general correction direction, against a post on the forum HardwareZone, claiming that a man had died from COVID-19 in Singapore.

## First "Declared Online Location" announced under POFMA

Separately, the Ministry of Communications and Information announced that with effect from 16 February 2020, the "States Times Review" Facebook page will be a Declared Online Location under the POFMA. The "States Times Review" is a socio-political website operated by a self-exiled Singaporean political dissident.

The POFMA Office is empowered to declare an online location as a "declared online location", and order an intermediary to disable access to the online



location ("**Declared Online Location**") if a website / webpage has communicated three or more different online falsehoods which are the subject of active Directions issued by the POFMA Office in the past six months.

Prior to the declaration as a Declared Online Location, the POFMA Office had issued three correction directions to the "States Times Review" Facebook page, the latest of which was in relation to statements made about the COVID-19 situation. All three Correction Directions were not complied with.

The POFMA Office has therefore also ordered Facebook to disable access for Singapore users to the "States Times Review" Facebook page, with effect from 17 February 2020.

## *Singapore Democratic Party v Attorney-General* [2020] SGHC 25

On 5 February 2020, the Honourable Justice Ang Cheng Hock, in the Singapore High Court, issued his decision in an appeal brought by the Singapore Democratic Party ("**SDP**"), to set aside three "Part 3 Correction Directions", in relation to statements made by the SDP on the employment prospects of professionals, managers, executives and technicians.

In the second half of 2019, the SDP published an article on its website, and two subsequent Facebook posts containing a hyperlink to the article.

In December 2019, the POFMA Office, on the direction of the Minister for Manpower, issued three Correction Directions to the SDP, in relation to the article and two Facebook posts. The Correction Directions directed the SDP to add correction notices at the top of the article and Facebook posts.

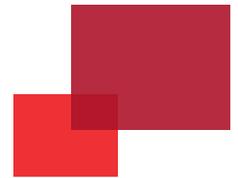
The SDP complied with all three Correction Directions, but applied to the Ministry of Manpower to cancel them. The Ministry of Manpower rejected the application.

Dissatisfied, the SDP filed an Originating Summons to set aside the three Correction Directions, arguing that the subject statement is a "true statement of fact".

Justice Ang dismissed the appeal.

In determining the issue of whether the subject statements were "true statements of fact", Justice Ang had to consider which party bears the burden of proof in the appeal, and what the standard of proof should be. The POFMA is silent on these issues, and the Parliamentary Debates similarly do not shed light on these issues.

Justice Ang held that it is the Attorney-General, on behalf of the Minister, who bears the burden of proof, for three reasons:



- First, Article 14 of the Singapore Constitution grants every citizen of Singapore the right to freedom of speech and expression. Since it is the Minister who is contending that the SDP's constitutional right to free speech should be curtailed by the Correction Directions, it is for the Minister to prove that facts warranting the curtailment of the SDP's rights exist, that is, that a false statement of fact has been made.
- Second, the appeal to the Court is by way of rehearing, so the Court is not bound by the Correction Directions issued, and can exercise its discretion completely unfettered. If the SDP bears the burden of proof, the Minister would succeed in a situation where neither party provides any evidence of truth or falsity, simply and solely because of the Minister's own earlier decision to cause the issuance of a Correction Direction. To that end, the Court would in effect be fettered by the Minister's earlier decision in issuing the Correction Direction.
- Third, there is a "*clear information asymmetry*" between the Minister and the maker of the statement that is being challenged. The Minister has the machinery of state to procure the relevant evidence of falsity, but the maker of the statement has far more limited resources. This raises the question of whether Parliament intended to place such an onerous burden on the statement-maker.

As regards the burden of proof, Justice Ang held that it is a balance of probabilities, as with all civil cases, rejecting the SDP's argument that the POFMA is a "*penal statute*".

Justice Ang then considered the three Correction Directions in question, and was satisfied that the Minister had met its burden of proof that the article and Facebook posts contained a false statement of fact.

## *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36

Exactly 2 weeks after the decision in *SDP v Attorney-General*, Justice Belinda Ang, in the Singapore High Court, issued her decision in the second appeal brought under the POFMA.

Interestingly, in relation to the issue of burden of proof, Justice Belinda Ang reached a contrary decision to Justice Ang Cheng Hock.

In that case, The Online Citizen Pte Ltd ("**TOC**") sought to set aside a "Part 3 Correction Direction" issued by the POFMA Office.

On 16 January 2020, Lawyers for Liberty ("**LFL**"), a Malaysian non-governmental organisation, published a press statement, claiming that officers from the Singapore Prison Service utilised an unlawful hanging method to execute



prisoners on death row. On the same day, TOC published an article, which directly referred to and quoted from LFL's press statement.

On 22 January 2020, the POFMA Office, on the direction of the Minister of Home Affairs, issued a Correction Direction, addressed to TOC's chief editor.

TOC applied to the Ministry of Home Affairs to cancel the Correction Direction. The Ministry of Home Affairs rejected the application. Dissatisfied, the TOC filed an Originating Summons to set aside the Correction Direction, on the basis that "*the subject statement is not a statement of fact, or is a true statement of fact*". TOC argued that it takes no position regarding the truth of the statement, as it was simply quoting from LFL's press statement.

The parties argued at length as to where the burden of proof lies in an appeal to set aside a Correction Direction. Justice Belinda Ang took a different view from Justice Ang Cheng Hong in *SDP v Attorney-General*, and held that the burden of proof is on the statement-maker to prove the truth of the statement, not on the Minister to prove its untruth. Her Honour's reasoning was as follows:

- Based on the wording of the applicable Section 17(5) of the POFMA, the provision characterises the legal elements in terms of the positive case that the statement-maker has to meet.
- Article 14 of the Constitution does not "*immunise every use of speech*". The right to free speech pertains to the communication of information, not misinformation. Therefore, a Correction Direction does not inhibit free speech, because it does not prevent the statement-maker from maintaining the original text of its published material. The statement-maker's only obligation in relation to the Correction Direction is to insert a correction notice within its published material.
- In relation to the reasoning that there is an information asymmetry between the Minister and the statement-maker, Justice Belinda Ang questioned "*the propriety of reconstructing legislative intent on the basis of a concern (i.e. information asymmetry) that Parliament did not articulate*", and was "*not prepared to imply legislative intent where none was expressed*".

Moving on to TOC's argument that the subject statement is not a "statement of fact" as it is merely a report based on hearsay, Justice Belinda Ang did not accept this argument. Under Section 17 of the POFMA, only two species of "statements" exist - "facts" and "opinions". Even if the statement-maker has no personal knowledge about a statement, a hearsay statement can still be a statement of fact.

Finally, Justice Belinda Ang found that there is no "reporting defence" under Section 17 of the POFMA. The issuance of a "Part 3 Correction Direction" does not require a fault element. A person who communicated a false statement of fact in Singapore may be issued a Correction Direction, even if the person does not know or has no reason to believe that the statement is false. Any recognition of a



"reporting defence" would frustrate the legislative purpose of prevention under the POFMA.

## Watch this space

The Singapore Government's use of its powers under the POFMA to curb falsehoods regarding the COVID-19 situation, illustrates the meaning of "public interest" under the POFMA, and confirms the applicability of the POFMA in various situations, other than to address political issues, which was often misunderstood to be its purpose.

It remains to be seen how jurisprudence in Singapore will develop, in the face of two contrasting decisions from the Singapore High Court on the issue of the burden of proof in applications to set aside Correction Directions. The SDP has been granted leave to appeal against Justice Ang Cheng Hock's decision, to Singapore's apex court, the Court of Appeal. All eyes will be on the Court of Appeal's decision to shed light on the issue.

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