Written Representation 84

Name: Benjamin Joshua Ong
Lecturer of Law (FDS), School of Law, Singapore Management University

Received: 28 Feb 2018

The Clerk of Parliament
Parliament House

To the *Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures* (the "**Select Committee**"):

1. I refer to the Invitation for Written Representations on the Select Committee's website.

2. My name is Benjamin Joshua Ong and my NRIC number is . I am a Lecturer of Law (FDS) at the Singapore Management University School of Law.

3. I am writing in my personal capacity and not as a representative of Singapore Management University or of its School of Law. I have only general academic interest, and no financial or other interest, in the subject matter of the Select Committee's inquiries.

4. I am now working on a paper titled 'Tackling fake news and promoting truth: a proposal from Singapore', which I believe is relevant to the Select Committee's terms of reference. Please find attached a working draft of the paper, which I humbly submit for the Select Committee's consideration.

5. In brief, the paper:

   a. adapting and modifying Tandoc, Lim and Ling's definition from their recent paper, defines 'fake news' as material with a "low degree of facticity which purports to be true" regardless of the "presence or absence of intention to deceive";

   b. identifies multiple types of harm that may be caused by false statements, and focuses on "General Harm", which "arises from the *phenomenon* of the proliferation of such false statements combined with the *mere fact of falsity*" and constitutes a "dilution of the value of each idea in the 'marketplace of ideas'";

   c. discusses what a scheme to counter "General Harm" will require, and posits that section 15 of the current Protection from Harassment Act ("**section 15**") is a good starting point;

d. identifies several problems with section 15, such as its unavailability to applicants which are corporate bodies, the difficulty in identifying the false statement, and the difficulty in identifying appropriate persons to appear as applicant(s) and respondent(s);

e. puts forth a proposal consisting of:

i. a draft 'False Statements Act', based on a modification of section 15, allowing for applications to court for an order that "no person shall publish or continue to publish the assertion complained of (however worded) in a manner suggesting that that assertion is true unless that person publishes such notification as the District Court thinks necessary to bring attention to the falsehood and the true facts";

ii. statutory duties on the part of various government bodies to promote truth; and

iii. a pre-action protocol to be followed by applicants before invoking the 'False Statements Act';

f. defends the proposal against possible arguments that it infringes on the freedom of expression; and

g. identifies potential challenges to the proposal, including its potential effectiveness as well as how compliance with court orders made under the proposed legislation may be secured.

6. Should I be called on to do so, I am willing to appear before the Select Committee to discuss or elaborate on my views or to respond to any questions.

7. In addition, I apologise in advance for the fact that parts of the paper are written in a somewhat rough style, particularly if parts of it turn out not to be perfectly clear or to be organised less than perfectly. This is because I am still in the process of editing and refining the paper; I have produced the attached working draft merely in order to raise some rough ideas for the Select Committee's consideration. Should the Select Committee choose to publish this submission and the paper, I respectfully ask that I first be contacted as I may have an updated version of the paper by then.

8. Thank you very much for kindly considering this submission.

Yours faithfully,

Benjamin Joshua Ong

enc: Draft of paper titled 'Tackling fake news and promoting truth: a proposal from Singapore'

Tackling fake news and promoting truth: a proposal from Singapore

Benjamin Joshua Ong[1]

Working draft (28 February 2018) – subject to revision. Not to be used for any purpose other than consideration by the *Select Committee on Deliberate Online Falsehoods – Causes, Consequences and Countermeasures*.

[1] Lecturer of Law (FDS), Singapore Management University School of Law, c/o 55 Armenian Street, Singapore 179943.

I am grateful to the Registry of the Supreme Court of the Republic of Singapore for granting my applications to inspect the case files relating to CA/CA 26/2016 (*Attorney-General v Ting Choon Meng*) (which included documents relating to the proceedings before the District Court in DC/OS 70020/2015 and before the High Court in HC/CJTA 1/2015); CA/CA 27/2016 (*Attorney-General v Lee Kwai Hou Howard and 4 others*) (which included documents relating to the proceedings before the District Court in DC/OS 70020/2015 and before the High Court in HC/CJTA 2/2015), and HC/CJTA 1/2016 (*Benber Dayao Yu v Jacter Singh*). Extracts from documents from these case files are referred to at certain points below.

Contents

I. Introduction; the definition of 'fake news'

1. This paper is concerned with the fight against 'fake news', a problem which has plagued societies and prompted governments to consider how to respond. It proposes legislation (with a working title of 'False Statements Act'), inspired by and based on section 15 of Singapore's Protection from Harassment Act ("**the Act**"), for legislation which might hopefully turn out to be useful in this effort. It also proposes an accompanying pre-action protocol and accompanying statutory duties on the part of various government agencies.

2. At the outset, it must be noted that the term 'fake news' is susceptible to multiple definitions.[2] Tandoc, Lim, and Ling have distinguished between various types of material which have all been said to constitute 'fake news', ranging from disguised advertising, to outright fabrications, to satire and parody.[3] For example, some scholars (typically in older articles) use the term 'fake news' to refer to content that uses the *format* of news, regardless of intention – this definition would include content that is clearly satirical rather than deliberately false or reckless as to truth.[4] Other persons have used the term to refer to allegedly inaccurate or biased information.[5] Due to potential ambiguities, some have eschewed the use of the term entirely: Singapore's Parliamentary inquiry, for instance, has made use of the phrase "deliberate online falsehoods" instead.[6]

3. Tandoc, Lim, and Ling have classified the various possible definitions of 'fake news' along two dimensions: (a) "facticity", viz. "the degree to which [it] relies on facts"; and (b)

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[2] For nuanced notes on the definition of 'fake news', see: Stephen Hutchings, 'Fake news and "post truth": some preliminary notes' (2017) 9:2 *Russian Journal of Communication* 212.

[3] Edson C Tandoc Jr, Zheng Wei Lim and Richard Ling, 'Defining "Fake News"' (2018) 6:2 *Digital Journalism* 137.

[4] E.g., Amarnath Amarasingam, ed., *The Stewart/Colbert Effect: Essays on the Real Impacts of Fake News* (McFarland 2011); Dan Berkowitz and David Asa Schwartz, 'Miley, CNN and *The Onion*' (2016) 10 *Journalism Practice* 1; Stephen Harrington, 'From the 'Little Aussie Bleeder' to *Newstopia*: (Really) Fake News in Australia' (2012) 10 *Popular Communication* 27; Sandra L Borden and Chad Tew, 'The Role of Journalist and the Performance of Journalism: Ethical Lessons From "Fake" News (Seriously)' (2007) 22 *Journal of Mass Media Ethics* 300, which uses the term to refer to television programmes that "parody the news while simultaneously presenting and criticizing it" but which "are not trying to get away with anything other than the comedy they intended" (at 306).

[5] Steven Seidenberg, 'Lies and Libel: Fake news lacks straightforward cure' (ABA Journal, July 2017) <www.abajournal.com/magazine/article/fake_news_libel_law> accessed 27 February 2018.

[6] Ministry of Communications and Information and Ministry of Law, 'Deliberate Online Falsehoods: Challenges and Implications' (Misc. 10 of 2018) (laid before Parliament on 5 January 2018).

"intention", viz. "the degree to which the creator… intends to mislead".[7] These are useful dimensions to bear in mind so as not to "limit how we can deploy the term fake news in contemporary discourse".[8]

4. Nonetheless, this article will focus on material with a low degree of facticity which purports to be true. In other words, our focus is on falsehood *per se*. At the same time, for the reasons that follow, our discussion will apply independently of the presence or absence of intention to deceive.

5. Having just clarified our definition of 'fake news', we will proceed, in part II, to explain why fake news is a problem, and the nature of the problem, before discussing in part III what will be required of a useful solution. Part IV will introduce section 15 of the Act and explain why it is *prima facie* useful. However, section 15 is not unproblematic, and has features which make it unsuitable to tackle fake news without several modifications; part V explains how and why these issues are handled by our proposal, which is presented in part VI. Part VII explains why our proposal would not infringe on the freedom of expression, while part VIII identifies some potential limitations to our proposal which have yet to be ironed out.

II. The harm done by fake news

II.A. Existing types of falsity known to the law: Specific Harm

6. At first glance, there is nothing new about 'fake news'. There are, and have always been, many types of falsity that can cause harm:

a. A false statement about the viability of an investment can cause deleterious losses to a would-be investor.

b. So, too, can a false statement about a person's character tarnish his reputation and cause him to suffer a loss of social standing.

[7] Tandoc, Lim, and Ling (n 3) 147-148.

[8] Edson C Tandoc Jr, Zheng Wei Lim and Richard Ling, 'Defining "Fake News"' (2018) 6:2 *Digital Journalism* 137, 148.

c. On a broader scale, false statistics about race relations can lead to tensions between various communities, to the detriment of society generally.[9]

7. Each of these types of false statement is clearly defined by well-established law as an actionable wrong:

a. The first causes harm to the intended audience of a statement, and gives rise to liability on the part of the speaker in the tort of deceit.

b. The second harms the person whom the statement is about, and gives that person a right to sue in defamation.

c. The third is a wrong against society generally; it is the state which takes the lead in redressing this wrong by prosecuting the speaker for sedition.

8. It is immediately apparent that each of these legal processes is directed at redressing the harm done by *each* false statement. The remedy (or, in the case of criminal offences such as sedition, the sentence) depends on the degree of such harm: for instance, a person who causes financial loss by committing the tort of deceit must pay a sum of damages commensurate with the size of that loss. Let us call this type of harm "**Specific Harm**", because the harm done arises from the specific content of the statement in question.[10]

9. Conversely, an element of luck is involved in the event that the law surrounding a particular type of Specific Harm does not necessarily grant a remedy if no tangible damage is caused: A lie about the profitability of an investment, though potentially harmful, does not cause harm in the eyes of the law of deceit if it so happens that nobody has believed it, or that those who have believed it have not acted on it (yet). Moreover, each of these laws is open to evasive tactics specific to that law: to take just one example, by concealing the source of

[9] E.g. the alleged "chilli-seed conspiracy" in Indonesia: Shawn Goh Ze Song, 'Fake news tells more than just lies' *TODAY* (Singapore, 29 March 2017) <https://www.todayonline.com/singapore/fake-news-tells-more-just-lies> accessed 27 February 2018.

[10] For more examples of specific types of harm and legal responses to them, see: David O Klein and Joshua R Wueller, 'Fake News: A Legal Perspective' (2017) 20:10 *Journal of Internet Law* 1; Rachel Au-Yong, 'How to fight back against the scourge of fake news' *The Straits Times* (Singapore, 4 December 2016) <http://www.straitstimes.com/singapore/how-to-fight-back> accessed 27 February 2018.

commercial speech and disguising it as speech by consumers, modern marketing practices are capable of evading laws regulating advertising communications.[11]

10. The phenomenon of 'fake news' may appear to exacerbate the risk of each of these types of Specific Harm.[12] But there is nothing to stop each of the aforementioned types of law from responding in turn. The law of defamation, for example, recognises the extent of the spread of a defamatory statement as a factor tending towards an increased award of damages.[13] So, too, could the law on sentencing for sedition, or on damages in respect of a tort of harassment.

II.B. General Harm

11. What the present paper is concerned with is the fact that each of the types of false statement identified above not only leads to *Specific* Harm, but also contributes to another type of harm, which we will call "**General Harm**". General Harm arises from the *phenomenon* of the proliferation of such false statements combined with the *fact of falsity* per se *(independent of the subject-matter of the false statements)*. It is a decrease over time of the proportion of purportedly true statements which are actually true, with the consequence that it becomes more difficult to tell whether any given statement is false or true.

12. In economic terms, the crux of General Harm is a dilution of the value of each idea in the 'marketplace of ideas', with the consequence that a participant in the marketplace who seeks truth is made to bear increased costs associated with verifying whether a purportedly true statement is actually true.[14] The magnitude of this dilution is exacerbated by the fact that modern Internet-based communication channels have greatly lowered the barriers to entry into the 'marketplace':[15] through a process of "amplification", "misinformation cycles through filters and permeates communities, which are in turn powered by the cheap, ubiquitous, and

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[11] Rebecca Tushnet, 'Attention must be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation' (2010) 58 *Buaffalo Law Review* 721 especially at 738ff.

[12] For an example relating to the phenomenon of *persecusi* in Indonesia, see Kathleen Azali, 'Fake News and Increased Persecution in Indonesia' (2017) 61 *ISEAS Perspective* <https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2017_61.pdf> accessed 27 February 2018.

[13] *Lim Eng Hock Peter v Lin Jian Wei* [2010] 4 SLR 357 (CA) [33].

[14] For a more detailed analysis of the "potential social costs" of fake news, as well as an example of an empirical methodology to study the extent of the problem, see Hunt Allcott and Matthew Gentzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31:2 *Journal of Economic Perspectives* 211.

[15] Nabiha Syed 'Real Talk About Fake News: Towards a Better Theory for Platform Governance' (2017) 127 *Yale Law Journal Forum* 337, 340.

anonymous power of the internet".[16] A second layer of distortion arises from persons who seek to convey true information having to bear the additional costs of rebutting the falsehoods, either because the content of the falsehoods is adverse to those persons' interests, or because those persons need to do so in order to (re)gain credibility.[17]

13. The example of interference with electoral processes provides a neat way to illustrate the distinction between Specific Harm and General Harm. Some instances of 'fake news' may aim to promote one candidate over another by, for example, engaging in character assassination of that candidate's opponents: this is an instance of Specific Harm in the form of defamation of the opponent, as well as General Harm in terms of causing the results of the elections to be vitiated, at least to some extent, by voters' having been misled. Other instances of 'fake news' aim, as the President of Germany's Federal Intelligence Service has put it, merely to "cause political uncertainty" and "delegitimiz[e] the democratic process… [n]o matter whom they help get ahead";[18] this is an example of General Harm without Specific Harm, because its aim is to create confusion generally by making truth harder to distinguish from falsity rather than to bring about a particular electoral result.

14. It is also possible for General Harm to take on especial significance for cultural reasons. Singapore's political culture has been said to involve a "high standard of truth and honesty in politics"[19]. In other words, political discourse is said to depend not only on the freedom of expression, but also on such expression being based on truth:

> "Rational, fair and balanced public opinion is a clear mirror that can reflect the pros and cons of policies. On the other hand, if public opinion is not rational and fair, it will become a

[16] Syed (n 15) 348.

[17] This effect is especially pronounced in the context of electoral campaigns, in which, besides the deleterious impact on democracy generally, the resources available to candidates are limited both in practical terms and by law: "Both candidates and parties are subject to legal limits on the amounts that can be spent during the course of an election. If a candidate or party is forced to spend resources rebutting a misleading attack, the campaign resources left to deal with other issues will be depleted.": Jacob Rowbottom, 'Lies, Manipulation and Elections – Controlling False Campaign Statements' (2012) 32:3 *Oxford Journal of Legal Studies* 507, 516-517.

[18] Esther King, 'Russian hackers targeting Germany: intelligence chief', *Politico* (29 November 2016) <https://www.politico.eu/article/german-intelligence-chief-russian-hackers-targeting-us-bruno-kahl-vladimir-putin/> accessed 27 February 2018.

[19] *Singapore Parliamentary Debates, Official Report* (20 April 1998) vol 68 col 1973-1974 (Prof S Jayakumar).

> distorting mirror that distorts facts, belittle the effects of policies and cause confusion between truth and falsehood."[20]

15. General Harm has practical effects that go beyond the specific effects of individual false statements. One significant potential effect is to inhibit the self-correction mechanism that can combat individual falsehoods. The standard argument against state intervention is that the freedom of expression will suffice to correct falsehoods: "even a false statement is valuable because it gives citizens the opportunity for rebuttal and correction". But this is contingent on the said citizens having the willingness and ability to "charge into the fray" to do so.[21] By contrast, as one Singaporean MP noted, the public does not have "infinite, or even adequate, time and capacity to process information". Besides, to put it bluntly, "most people cannot be bothered";[22] even if they initially can, "[r]epeated instances of deliberated online falsehoods can also have costs as it can lead to a 'cry wolf syndrome', whereby when a real emergency strikes, no one reacts because everybody is accustomed to thinking it is false news."[23]

16. A corollary effect of General Harm is that falsity not only harms the marketplace of ideas as a whole, but also skews the views of participants in the market. Once falsity becomes a feature of the marketplace of ideas, not only does truth become more elusive, the very value of truth itself is eroded, causing "society [to] los[e] its grounding in reality":[24]

> "Our evaluative capacity is called into question if the idea of a fact loses its authoritative status. If in past times the informed public was aware of ideological disagreements and of the need to argue with, and convince, dissenters and opponents of views or policies that required justification, the term 'fake news' eliminates the need to engage in any exercises in persuasion or ideological contestation. Instead, the 'other side' – whatever it may be – has pre-emptively

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[20] *Singapore Parliamentary Debates, Official Report* (16 January 2012) vol 88 p 866 (Mr Sam Tan Chin Siong).

[21] Lyrissa Barnett Lidsky, 'Where's the Harm?: Free Speech and the Regulation of Lies' (2008) 65 *Washington & Lee Law Review* 1091, 1096-1097. See also Frederick Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1981) 73-75, noting that there are "benefits to the individual of going through the mental exercise of justifying truth and rejecting falsity, an exercise that could not take place without some falsity to reject", but concluding that this "argument is premised on an optimistic view of how people react to falsity" as "unfortunately falsity is often to many people more appealing than truth, especially when accepting falsity requires less effort than identifying truth".

[22] *Singapore Parliamentary Debates, Official Report* (10 January 2018) vol 94 p 61 (Mr Seah Kian Peng).

[23] *Singapore Parliamentary Debates, Official Report* (10 January 2018) vol 94 p 44 (Ms Sun Xueling).

[24] Ralph Keyes, *The Post-Truth Era: Dishonesty and Deception in Contemporary Life* (St Martin's 2004) 285, cited in Kai Horsthemke, '"#FactsMustFall"? – education in a post-truth, post-truthful world' (2017) 12:3 *Ethics and Education* 273, 285.

> removed itself from the field of political debate by adopting an effortless pseudo-epistemology of falsehoods cloaked in truth's clothes, thus, undermining the very rationale of pronouncing something to be false."[25]

III. Shaping a solution

17. To tackle the General Harm done by fake news, we must consider the implications of this harm in more detail. Four features stand out, which any solution must take into account:

18. First, General Harm arises not only from statements' being false, but rather from their masquerading as being true, or at least risking being construed as true. An obvious lie, or something which is clearly a parody, only contributes to the general harm insofar as it risks being misconstrued as purporting to be true.

19. Second, General Harm arises from the fact of falsity *per se*, rather than from the tangible *effects* of the falsity. Even if it so happens that nobody has invested in a scheme whose profitability has been misrepresented as being higher than it is, the general public has already been harmed by the fact that there is one more false statement regarding investment opportunities in existence, and that this statement is competing with true statements for public attention. For this reason, laws such as sedition laws in Singapore,[26] Qatar, and the Gambia;[27] Germany's Network Enforcement Act;[28] and Article 154 of the Revised Penal Code of the

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[25] Michael Freeden, 'Loose talk costs… nothing' (2018) 23:1 *Journal of Political Ideologies* 1, 3.

[26] Falsehood is at most an aggravating factor to a charge of publishing materials which tend to "promote feelings of ill-will and hostility between different races or classes of the population of Singapore", contrary to the Sedition Act: *Public Prosecutor v Ai Takagi* (DC, 23 March 2016) <https://www.statecourts.gov.sg/Resources/Documents/23032016%20Oral%20GD%20-%20PP%20v%20Ai%20Takagi.pdf> accessed 27 February 2018.

[27] Amal Clooney and Philippa Webb, 'The Right to Insult in International Law' (2017) 48:2 *Columbia Human Rights Law Review* 1, 9-10, on laws in the Gambia and Qatar which refer to false statements "against the government" or contrary to "general order" respectively.

[28] Section 1(3) of the Act (<https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf;jsessionid=829D39DBDAC5DE294A686E374126D04E.1_cid289?__blob=publicationFile&v=2> accessed 27 February 2018) targets certain species of unlawful content set out in the German Criminal Code (<https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html> accessed 27 February 2018). Of those species, the only ones making reference to falsity appear to be "treasonous forgery" (section 100a), "defamation" (sections 186-187), "pretend[ing]" that a "breach of the public peace by threatening to commit offences" or the "commission of a felony" is "imminent" (sections 126 and 241 respectively), and "forgery of data intended to provide proof" (section 269). For a comment on the Act, see, e.g., Philip Oltermann, 'Tough new German law puts tech firms and free

Philippines[29] are insufficient to tackle fake news because they target only various species of Specific Harm.

20. It is these two points which distinguish the phenomenon of fake news from individual instances of falsity. General Harm, as we have defined it, is a harm done to the marketplace of ideas. The severity of General Harm therefore depends on the prominence of the false statement within the marketplace, and the extent to which it masquerades as being true. For example, an *obviously* false but insulting sweeping statement about the habits of persons of a particular race entails potentially great Specific Harm (namely, the inflammation of inter-racial tensions) but little to no General Harm. It is therefore adequately dealt with by the law on sedition. The phenomenon of fake news, by contrast, contributes significantly more to General Harm because it is characterised by its masquerading as being (a) true; and/or (b) from a source or type of source which one would generally associate with truth.

21. Third, the harm done by fake news does not depend on any particular intention to deceive. In particular, because fake news may be produced for a variety of reasons including a pure profit motive, the producer may be reckless to the truth rather than knowingly deceitful. To use Harry Frankfurt's colourful language, such false statements may constitute 'bullshit' rather than lies,[30] 'bullshit' being defined as follows:

> "the bullshitter… is neither on the side of the true nor on the side of the false. His eye is not on the facts at all, as the eyes of the honest man and of the liar are… He does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose."[31]

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speech in spotlight', *The Guardian* (5 Jan 2018) <https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight> accessed 27 February 2018.

[29] See <http://www.thecorpusjuris.com/legislative/acts/act-no-3815.php> accessed 27 February 2018. What is criminalised is the publication of "false news which may endanger the public order, or cause damage to the interest or credit of the State". For an overview of recent changes to the sentence for this offence, see Nestor Corrales, 'Stiffer penalties await publishers of fake news', *INQUIRER.net* (31 August 2017) <http://newsinfo.inquirer.net/927102/president-rodrigo-duterte-revised-penal-code-fake-news> accessed 27 February 2018.

[30] Nikil S Mukerji, 'A conceptual analysis of fake news', online manuscript <https://philpapers.org/rec/MUKACA> accessed 27 February 2018.

[31] Harry G Frankfurt, *On Bullshit* (Princeton University Press 2005) 56.

22. For this reason, existing laws such as Singapore's criminal offence of "transmit[ting] or caus[ing] to be transmitted a message which [one] knows to be false or fabricated"[32] are inadequate to tackle fake news to the extent that they include *mens rea* requirements that focus on punishing intent rather than removing the falsehood. As a result, such laws might cover at most the initial publication, but not subsequent republications.[33] The focus is not squarely on the General Harm done.

23. Fourth, because General Harm takes the form of a contribution to a broader phenomenon, it is very difficult to lay blame for General Harm at the feet of any *one* particular false statement. One obvious consequence of this is that the General Harm caused by any false statement is unquantifiable in monetary terms. The more important consequence is that, in addressing General Harm, there is no normative justification for treating some false statements differently from others, given that *all* the false statements contribute to General Harm. Any solution must therefore be capable of targeting *all* false statements. Therefore, it cannot be that a remedy for General Harm takes the form only of an add-on to remedies for Specific Harm. The two types of harm must be addressed separately.

24. Therein, however, lies a conundrum. On the one hand, a solution must be potentially applicable to *all* false statements that contribute to General Harm. On the other hand, such a solution must deal with false statements one by one: while it is possible to imagine a regime that targets a particular medium of communication or a particular type of communicator, such a solution, that would risk inhibiting true speech, which would be at best a waste and at worst counter-productive as it could lead to the regime losing its credibility.

IV. The starting point: section 15 of Singapore's Protection from Harassment Act

25. The proposed solution is for the law to tap on the efforts of individuals who bring instances of falsity to the court's attention, in response to which the court may make an order that has the effect of reducing or eliminating the General Harm.

26. This brings to mind a legislative development in Singapore, which is section 15 of the Protection from Harassment Act ("**the Act**"). This provision, as far as this author is aware, is a "uniquely Singaporean legal innovation… [without] any legal counterpart in other

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[32] Telecommunications Act (Cap 323, 2000 Rev Ed), s 45.

[33] *Singapore Parliamentary Debates, Official Report* (10 January 2018) vol 94 p 48 (Ms Rahayu Mahzam).

jurisdictions."[34] It allows the court, in certain circumstances, to order that identified false statements not be published except when accompanied with a notification that draws attention to the falsity. The aim of such orders is to "allow readers to assess the truth" by "judg[ing] the facts for themselves".[35]

27. The wording of section 15 is as follows:

> **15.**—
>
> (1) Where any statement of fact about any person (referred to in this section as the subject) which is false in any particular about the subject has been published by any means, the subject may apply to the District Court for an order under subsection (2) in respect of the statement complained of.
>
> (2) Subject to section 21(1), the District Court may, upon the application of the subject under subsection (1), order that no person shall publish or continue to publish the statement complained of unless that person publishes such notification as the District Court thinks necessary to bring attention to the falsehood and the true facts.
>
> (3) The District Court shall not make an order under subsection (2) unless the District Court is satisfied on the balance of probabilities that —
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> (a) the statement of fact complained of is false in any particular about the subject; and
>
> (b) it is just and equitable to do so.
>
> (4) An order under subsection (2) may be made subject to such exceptions or conditions as may be specified in the order.
>
> (5) An order under subsection (2) shall take effect in respect of the person to whom such order applies —
>
> (a) from the date when such order is served on him in such manner as may be prescribed;
>
> (b) where the District Court dispenses with the service of such order, from the date when the service on him of such order is dispensed with by the District Court; or

[34] *AG v Ting Choon Meng* [2017] 1 SLR 373 (CA) [17(a)]; see also *Ting Choon Meng v AG* [2016] 1 SLR 1248 (HC) [35].

[35] *Singapore Parliamentary Debates, Official Report* (13 March 2014, 6.00 pm) vol 91 (Mr K Shanmugam).

> (c) such later date as the District Court may specify.
>
> (6) The District Court may, on the application of the subject, the author, or any person to whom the order applies, vary, suspend or cancel the order.
>
> (7) In this section, "author" means the originator of the statement complained of.

28. A possible example of such a notification may be seen from the case of *Ting Choon Meng*, in which the Government of Singapore made an application in respect of false statements made regarding the Ministry of Defence. Although the appellate courts later held that, given the drafting of the legislation, the Ministry had no power to apply under section 15, the order originally made by the District Court is instructive:

> "Statements herein which state and/or suggest to the reader that: […] have since been declared by the Singapore Courts to be false. For the truth of the matter, please refer to [the Ministry of Defence's] statement available at this link: […]"[36]

29. It is clear why this, or something like it, might be useful in the fight against fake news. It effectively targets what has been identified above as General Harm because it is responsive to the fact of falsity *per se* and not the statement's particular subject-matter or contents or the statement-maker's motive. It empowers the court to issue orders *erga omnes* – in terms that "*no person*" shall publish the false statement without the accompanying notification – which would presumably be enforceable not only against the initial publisher of the false statement, but also against all subsequent re-publishers.

30. At the same time, lest it be thought that section 15 operates in a disproportionately draconian manner, there is the requirement that the making of such an order be "just and equitable", which allows for a degree of flexibility.

31. Moreover, because the court's inquiry is a relatively straightforward one (as opposed to the sort of inquiry required in a claim in defamation, in which complex issues such as the

[36] *AG v Lee Kwai Hou Howard* [2015] SGDC 114, [4] and [88].

defences of qualified privilege and fair comment come into play),[37] a section 15 order is "quicker and less costly".[38]

32. Finally, a great benefit of the section 15 procedure is that it requires notifications to be published *together with* the false statements. This overcomes the (obvious) problem that, if false statements are to be tackled by means of corrections, then the corrections must be published at least as widely as the falsehoods which they target (or else they will simply be drowned out).[39]

V. Problems with section 15 to be addressed by our proposal

33. Given the benefits of the section 15 procedure, our proposed legislation will take section 15 as its starting point, making modifications and additions as necessary.

34. Such modifications and additions are necessary not only because the aim of the proposed legislation is different from the aim of section 15, but also because section 15 is more generally not as straightforward as it may appear. There are a number of issues that arise, both conceptually and as illustrated by experience from Singapore.

35. As has been noted, section 15 relies on the efforts of individuals. This is sufficient to combat false statements that impinge on various individuals, such as those which constitute harassment or something similar.[40] However, when a similar mechanism is employed to target fake news, there are three broad categories of problematic case that arise:

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[37] Gary Chan Kok Yew, 'The Right to a Good (Business) Reputation and Truth: Re-examining the Declaration of Falsity' (2016) 23(2) *Torts Law Journal* 163, 180.

[38] Chan (n 37) 179 (in the context of comparing a claim for a declaration of falsity to a claim for damages in defamation).

[39] Rowbottom (n 17) 522. Such drowning out is doubly harmful: first, it fails to ensure the removal of the falsehood; second, it can lead to the correction appearing to be merely yet another alternative view – at worst, a fringe view – rather than the one that ought to be authoritative. In fact, corrections must not only be widely published; they must be published in a manner that targets the specific types of person who are likely to be misled. See Rowbottom (n 17) 23: "The willingness of the audience to believe a correction may also depend on the source. A correction in *The Guardian* may not be enough to persuade readers of *The Daily Mail* and vice versa."

[40] *Ting (CA)* (n 34) [24].

a. Cases in which no such individual has the ability or incentive to bring an application;

b. Cases in which such individuals have the incentive to bring an application, but are unaware that the statement has been made about them;

c. Cases involving statements that affect multiple persons, leading to a 'free-rider' problem: why should any one of those persons take the initiative to incur the time and monetary expenses of making an application, when he/she may as well wait to see if another person does so?

36. In addition, other problems arise from the drafting of section 15 and from its purpose, which is different from the purpose of our proposal.

37. We will now identify specific issues that give rise to all these problems, and discuss how they may be addressed.

V.A. Availability to applicants which are corporate bodies

38. There is no reason for the proposed legislation not to be available to applicants which are corporate bodies. Therefore, the proposed legislation must be drafted so as to avoid its scope being read down by the courts as being available only to natural persons, as the Singapore courts did in the case of section 15.

39. In Singapore, this stemmed from the question of why, if section 15 targets falsehoods *per se*, it is found in an Act called "Protection from Harassment Act". The courts concluded that section 15 is only available to applicants who are natural persons. Thus, in *Ting Choon Meng*, the High Court noted that the Act was meant to address "the problem of harassment and related anti-social behaviour";[41] concluded that section 15 only applies to "false statements that are capable of affecting their intended subject emotionally or psychologically";[42] and therefore refused to allow section 15 to be invoked by the Ministry of Defence and other corporate bodies. Similarly, the Court of Appeal (by a 2:1 majority), having regard to the place of section 15 among the other provisions of the Act (which, unlike section 15, dealt squarely with harassment and unlawful stalking), concluded that section 15 "appl[ies] only to human beings".[43]

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[41] *Ting (HC)* (n 32) [32].

[42] *Ting (HC)* (n 34) [41].

[43] *Ting (CA)* (n 34) [26].

V.B. Identifying the 'statement'

40. Section 15 does not define a "statement". It does not deal with the problem of how to individuate statements from one another. Nor does it deal with the problem of paraphrases of statements: if an order under section 15 is made in respect of a statement originally made by A and that statement is paraphrased by B, does, and should, the order apply to B's paraphrase?[44]

41. The answer ought to be yes, lest a person seek to avoid the effects of a court order relating to a false statement by simply paraphrasing it. This is why our proposed legislation uses the phrase "assertion of fact (however worded)", instead of "statement of fact". While there would be a potential difficulty in identifying whether one statement is a paraphrase of another statement, this difficulty is no greater than the difficulty the courts already face in, for example, identifying the "natural and ordinary meaning" of defamatory words however phrased.[45]

V.C. Identifying the parties

V.C.i. *Identifying the respondent*

42. Section 15(2) makes clear that the court's power is to make an order that "*no person* shall publish or continue to publish the statement complained of unless…" (emphasis added). However, there is an inconsistency between the broad terms of this order on the one hand, and other parts of section 15 and the related part of the Rules of Court, which suggest that the order is only binding on specific named persons, on the other:[46]

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[44] The answer is unclear as a matter of Singapore law. At first glance, it may appear that the applicant in *Ting Choon Meng* recognised this and had sought carefully to amend its original originating summons in order to define the "statements" in question as assertions of fact rather than exact words and phrases: Benjamin Joshua Ong, 'Restricting Publication of False Statements Using Section 15 of the Protection from Harassment Act', *Singapore Law Gazette* (May 2016) 14, 15. However, the applicant's submissions do not go so far as to suggest that the aim of the amendment had been to ensure that any order of court eventually made would be able to withstand paraphrases of the statement as originally made: Respondent's Reply Submissions in HC/CJTA 1/2015 and HC/CJTA 2/2015) (28 Aug 2015) [15] (obtained from the Supreme Court Registry).

[45] See generally Michael Jones, Anthony Dugdale, and Mark Simpson (gen eds), *Clerk and Lindsell on Torts* (22nd edn, Sweet & Maxwell 2017) [22-22].

[46] From the written submissions in *Ting Choon Meng* (obtained from the Supreme Court Registry), it does not appear that the issue of the significance of the words "No person…" in potential court orders was raised by any party. Nor does it appear from the judgments that the court considered the point.

a. O 109 r 4 of the Rules of Court states that the court may direct that the application be served on "each person to whom the… order is to apply", and that those persons may file affidavits in response.

b. Section 15(5) states that the order must be served on "the person to whom such order applies" (or the court must dispense with the requirement of service) in order for the order to take effect.[47]

43. One possible reason for this inconsistency is that section 15, as it presently exists, has at its heart a fundamental tension:

a. On the one hand, since section 15 targets falsity, an order should bite on the falsehood regardless of the person repeating it. To put it another way, it would be insufficient to tackle General Harm for orders to apply only to specific persons who are named as respondents in the application for the order, particularly if false statements are repeated (and possibly paraphrased) by others.

b. On the other hand, it appears that the law is anxious to ensure that:

i. Those who are best placed to advance arguments against making such an order will be able to do so before the court. For example, this is why the law requires that:

> "Where the author is not a person to whom the section 15(2) order is to apply, unless the Court directs otherwise, the subject must give the author notice of the hearing of the application prior to the hearing."[48]

ii. Conversely, not just anybody is entitled to advance such arguments. This is seen from section 15(6) of the Act, which provides that the court may "on the application of… any person to whom the order applies, vary, suspend or cancel the order" – clearly the legislature cannot have intended that there be floods of litigation as potentially *everybody* may apply for such a variation.[49]

44. As a result of the inconsistency, the law creates contradictory incentives. On the one hand, a publisher of an allegedly false statement who wishes to continue such publication would have the incentive to appear as a respondent so as to advance the position that the statement is

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[47] Ong (n 44) 15.

[48] Order 109 rule 4(6) of the Rules of Court (Cap 322, 2014 rev ed, R 5).

[49] Ong (n 44) 15.

in fact true. On the other hand, if (as O 109 r 4 and section 15(2) suggest, contrary to the wording of section 15(2)) orders are in effect binding only on respondents, then such a publisher would, by appearing as a respondent, risk bearing the burden of having to comply with the order (which burden probably includes the risk of facing committal for contempt of court for disobedience).[50]

45. The inconsistency should be fixed as follows. It ought to be made clear that an *order* made under section 15 is binding on *all* persons generally, whether or not they are named as respondents in the *application* for the order. In other words, the significance of being named as a respondent ought only to be that one has standing to raise arguments regarding the alleged falsity of the statement before the court during the hearing of the *application*, and not that one faces a more onerous burden of complying with the court order.

46. Who, then, ought the respondent to be?

a. The first choice of respondent ought to be the original author of the allegedly false statement; such a person will be best acquainted with the best evidence for the truth of the statement, and such a person's failure to put forth any such evidence will be the most damning evidence that the statement is false.

b. If the author cannot be found or the identity of the author is unknown, the next best respondent is any publisher of the statement who seeks to gain from publication. While such a person will not necessarily be acquainted with the grounds of the statement, such a person will at least have an interest in resisting the making of such an order.

c. On the other hand, a mere repeater of the statement, such as a hapless member of the public who unthinkingly forwards a hoax message, has neither especial knowledge of evidence for the truth of the statement nor any particular interest in appearing as a respondent.

47. Therefore, the best respondents are the author and/or publishers who stand to gain from the publication of the statement. If neither can be clearly identified, the solution is simple: the law should not unduly concern itself with identifying a respondent at all; the application should simply be heard in the absence of any respondent. Of course, this will necessitate that the court examine the application with extra care, and possibly require more clear and cogent evidence before concluding that a statement is false.

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[50] Goh Yihan and Yip Man, 'The Protection from Harassment Act 2014: Legislative Comment' (2014) 26 *Singapore Academy of Law Journal* 700, [60].

V.C.ii. *Identifying the applicant*

48. The applicant ought to be the person who is best placed and who has the greatest incentive to argue that the statement complained of is false. To allow any other person to apply might not only increase the risk of frivolous and vexatious applications being brought against the respondent, but would also reduce the likelihood that the court has the *best* possible evidence before it.

49. On the other hand, this principle must not be over-stated. The identity of the applicant is only of instrumental value in determining whether an application is to be brought before the court; it ought not to be determinative of whether or not an order is made, or what the terms of the order are.[51] This is because (unlike, say, a claim for compensation) "a s 15 order creates obligations on the respondents without corresponding rights for the applicants".[52]

50. This debate may sound similar to the debate in administrative and constitutional law over who ought to be granted *locus standi* to apply for judicial review. However, such an analogy would be of very limited usefulness. In the context of administrative and constitutional law, the concern is to promote the rule of law even in cases where there is no direct victim of allegedly unlawful action or the direct victim is unwilling or unable to apply for judicial review, while not allowing applicants such as pressure groups to divert the court's process for their own ends.[53] This concern arises particularly in the context of polycentric disputes in which the representation of some stakeholders but not others could skew the picture put before the court and risk resulting in the court making an order that is unduly favourable to the applicant at the expense of other stakeholders or of the public interest more generally. By contrast, no such concerns arise in the context of our proposal, where the court only has one straightforward issue before it, namely, whether a statement is false or not. The concern is not with the applicant's motives for applying (which could, in the context of judicial review, affect the legal/normative *arguments* advanced by the applicant), but rather the quality of *evidence* of

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[51] In Singapore, it currently is, insofar as one factor determining whether it is "just and equitable" to make an order is the "impact of the statement on the subject and the degree of adverse emotional or psychological harm suffered": *Ting (CA)* (n 34) [43(c)]. This, however, reflects a sense that, notwithstanding that section 15 in isolation appears to target falsity, the aim of the Act generally is to target various forms of harm that have an impact on individuals, and is too narrow to tackle fake news. Consider, for example, a false assertion that Barack Obama was born in Kenya. Other than the implied assertion that Barack Obama lied about his place of birth, there is really no harm done to him in the sense that there is nothing wrong with being born in Kenya. Yet such an assertion contributes to General Harm as we have defined it above.

[52] Ong (n 44) 19.

[53] See generally Carol Harlow, 'Public Law and Popular Justice' (2002) 65:1 *Modern Law Review* 1.

falsehood or truth. In other words, the potential difficulty arising from a sub-optimal selection of applicant is no more than a risk that an application will fail despite the statement being false.

51. Therefore, unlike section 15, our proposal does not allow only the "subject", i.e. the person whom the allegedly false statement is about, to make an application. Instead, it adopts a more flexible approach that aims to identify an appropriate applicant, recognising that this may not always be the subject of the statement. This is for the following reasons:

a. Most obviously, the "subject" requirement excludes false statements that do not relate to an identifiable person from the ambit of the legislation – this may be in keeping with the aim of the Act generally, which is to target various forms of harm that have an impact on individuals, but is not appropriate to our aim of tackling fake news.

b. The "subject" may simply be unaware of the false statement, or there may simply be too many false statements for the subject to act on them. A possible example is false statements regarding a high-profile public figure.[54]

c. Finally, as explained above, if there are multiple "subjects", no one of them would have the incentive to make an application.

52. While it will be difficult to tackle these issues completely, the proposed solution aims to incorporate a rudimentary mechanism to select the best possible applicant, on the basis that the first choice of applicant(s) are the subject(s) of the statement (if any). It does so by requiring other applicants (referred to in the proposed legislation as "strangers") to obtain leave of court before making such an application.

53. The next problem concerns statements which do not concern any person. In our view, in certain subject-matter areas (such as public health), the best course of action is for the state to step in to fill the gap and bring an action in the public interest – hence, our proposed statutory duties to promote truth on the part of government bodies. However, this should not prevent strangers from making applications, provided that there exists a mechanism to filter out frivolous and vexatious applications or applications which are doomed to fail – this mechanism is, again, the requirement for such strangers to obtain leave of court.

54. The leave stage will allow the court preliminarily to peruse the application. The respondent is only to be called upon to answer the application if the court finds that the application at least *prima facie* contains sufficient evidence that the statement is false. In other words, the threshold to be met is to be higher than in an application by a subject of an allegedly

[54] In this regard, it is worth noting that section 19(2)(e) of the Act allows for the creation of Rules of Court allowing for an application under section 15 to be made "on behalf of" the subject. However, no such Rules of Court exist.

false statement or an application by a public body pursuant to its statutory duty to promote truth.

V.C.iii. *Consolidation of actions and addition of parties*

55. Finally, it follows from the reasoning above that it may often be desirable for more than one applicant and/or respondent to be heard. The present section 15 does not appear to allow for this. The proposed legislation, by contrast, foresees the possibility that, once an application has been made, others may wish to be, and have a good reason to be, heard; and therefore allows parties to be added and applications to be consolidated.

V.D. The "just and equitable" test

56. The various difficulties with section 15 are compounded by the fact that, because section 15(3)(b) requires that an order shall not be made unless it is "just and equitable" to do so, whether or not an order is made to will depend on the manner in which a statement is published, and not merely on the fact of its falsity. For example, according to case law, factors determining whether it would be "just and equitable" to make such an order include "whether the author and/or publisher of the statement has made genuine efforts to point out that the veracity of the statement is not undisputed" and the "degree to which the false statement has been publicised".[55]

57. This is inappropriate for countering General Harm because it considers factors relevant to *each separate* instance of publication of a false statement, rather than considering the potential impact of false statements in terms of *republication* in different contexts. It may be, for instance, that one instance of publication is accompanied with "genuine efforts to point out that the veracity of the statement is not undisputed"[56] whereas a re-publication is not. It may also be that the "degree to which the false statement has been publicised" increases over time as the rate of re-publication increases.

58. Further, as the case law reveals, section 15 requires that it be "just and equitable" to make the order vis-à-vis the *particular* respondent(s) in question. This is, again, rooted in the fact that section 15 is part of anti-*harassment* legislation, such that section 15 orders focus on the particularities of perpetrator and victim. As a result, whether it is "just and equitable" to make an order has been held to consider, *inter alia*, the "degree of adverse emotional or

[55] *Ting (CA)* (n 34) [43(d)] and [43(f)].

[56] *Ting (CA)* (n 34) [43(d)] and [43(f)].

psychological harm suffered" by the subject as compared to the "ordinary instances of daily living that may be expected to be tolerated by reasonable persons".[57]

59. It is also clear that the courts have interpreted the "just and equitable" requirement in such a manner as to prevent the making of orders which would have the effect of preventing satirical speech.[58] It is proposed that instead of doing so through the vague 'just and equitable' test, a specific exception be created for speech that does not even purport to be true.[59]

60. In short, for the reasons above, our proposed legislation will do away with the discretionary 'just and equitable' requirement. Instead, the requisite flexibility is to be reflected in the court's discretion as to how to word its orders.

VI. Our proposal

VI.A. Proposed legislation

61. Taking section 15 as a starting point but with the matters above in mind, the following legislation is proposed. It is intended to be implemented together with the other two parts of our proposal outlined below, namely a pre-action protocol and statutory duties on various government agencies.

False Statements Act

Applicability of this Act

1. This Act applies to any assertion of fact, published by any means, to the extent that it:

(1) is false in any particular; and

(2) purports to be true.

Principles governing application of this Act

[57] *Ting (CA)* (n 34) [43(c)] and [43(g)]; see also *Ting (HC)* (n 34) [58]. Cf. *Benber Dayao Yu v Jacter Singh* [2017] 5 SLR 316 (HC) [42] and [53]-[54], where similar criteria were applied in a case concerning the use of "abusive and insulting words with the intent to cause harassment, alarm or distress" in circumstances where those words were also false.

[58] *Ting (CA)* (n 34) [42], [43(b)], [125(a)].

[59] If such satire should prove undesirable by reason of its being defamatory, harassing, seditious, etc., then the usual laws surrounding the various types of Specific Harm will continue to apply.

2. In respect of any application under this Act, the District Court shall have regard to:

(1) the need for applications to be disposed of expeditiously;

(2) the need to prevent the procedures set out in this section from being abused so as to harass or vex any person; and

(3) the need for orders made by the District Court to be effective in suppressing the tendency of any false assertion of fact to mislead or confuse the public by reason of its falsity.

Application in respect of statement pertaining to subject(s)

3. If the assertion is an assertion about one or more persons, whether natural persons or otherwise (known as the "subject" or "subjects" of the assertion):

(1) one or more of the subjects may apply to the District Court for an order under section 11 in respect of the assertion complained of; and

(2) subject to the requirements in section 6, any other person may apply to the District Court for an order under section 11 in respect of the statement complained of if all the subjects of the assertion have either:

(a) indicated an intention not to make such an application; or

(b) failed to make such an application despite having had a reasonable opportunity to do so.

Application by public authority pursuant to statutory duty

4. If the assertion is an assertion in respect of which any public authority has a statutory duty to promote truth, that public authority may apply to the District Court for an order under section 11 in respect of the statement complained of.

Application by stranger in respect of statement not pertaining to subject(s)

5. If the assertion is an assertion other than an assertion about one or more persons, any person may make an application for an order under section 11 in respect of the statement complained of, subject to the requirements in section 6.

Restrictions on applications by stranger

6. The following provisions shall apply to any application made under sections 3(2) or 5 of this Act:

(1) The application shall not be made until the person has first obtained the leave of the District Court.

(2) The District Court may grant leave pursuant to subsection (1) subject to any conditions or restrictions it thinks fit, which may include (but are not limited to) a condition that the applicant(s) furnish security for costs.

(3) The District Court shall not grant leave under subsection (1) unless it is satisfied that:

(a) the applicant has furnished sufficient evidence to raise a reasonable suspicion that the assertion complained of is false; and

(b) the District Court is satisfied that the application is not frivolous, vexatious, or an abuse of the process of the Court.

(4) Notwithstanding section 9 of this Act, the District Court must not require the named respondent(s) to be served with the application, to file an affidavit in reply, or to appear before the Court, until after the District Court has granted leave to the applicant(s).

Respondents to be named in application

7. An application made under this Act:

(1) shall name the author of the assertion as a respondent unless the identity of the author cannot reasonably be ascertained;

(2) may name as a respondent any person who has published or communicated the assertion; and

(3) may, if the identity of the author or of any person who has published or communicated the assertion cannot reasonably be ascertained, name no respondent.

Compliance with pre-action protocols

8. The District Court may stay or dismiss any application made under this Act if it is of the view that the applicant has unreasonably failed to comply with any relevant pre-action protocol which was in place at the time of the application.

Directions to parties

9. —

(1) Subject to sections 6(4) and 10 of this Act, the District Court may give such directions as it thinks fit requiring any person named as an applicant and/or a respondent in any application made under this Act to:

(a) be served with the copy of the application or any affidavits made by the applicant(s);

(b) appear before the District Court;

(c) make submissions to the District Court; or

(d) adduce evidence to the District Court.

(2) In determining whether to give directions under subsection (1) pertaining to any person named as an applicant and/or a respondent, the District Court must have regard to, as far as appears from the evidence before it:

(a) the ability of that person to adduce evidence which will assist the District Court in disposing of the application; and

(b) the desirability of preventing any named respondent from being put to undue inconvenience or expense.

Consolidation of actions

10. —

(1) The existence of any pending application under this Act in respect of any assertion shall not be a bar to any person making an application under this Act in respect of the same assertion.

(2) If at any time there are multiple applications under this Act pending before the District Court in respect of any assertion, the District Court may give such directions as it thinks fit as to the consolidation of some of or all such applications.

(3) Any person desiring to be named as a respondent to any pending application under this Act may apply to the Court to be added as a respondent to that application.

Order made by District Court

11. —

(1) The District Court may,

(a) upon an application under this Act, and

(b) upon being satisfied on the balance of probabilities that the assertion complained of is false in any particular,

order, in terms or subject to conditions that the District Court may specify, that no person shall publish or continue to publish the assertion complained of (however

worded) in a manner suggesting that that assertion is true unless that person publishes such notification as the District Court thinks necessary to bring attention to the falsehood and the true facts.

(2) An order under subsection (1) may be made in such terms as the District Court thinks fit, and subject to such exceptions or conditions as may be specified in the order.

(3) For the avoidance of doubt, an order under subsection (1) shall be binding on all persons, whether or not respondents in the application pursuant to which the order was made.

Variation, etc. of order

12. The District Court may vary, suspend, or cancel the order on the application of the subject, the author, or any person whom the District Court is satisfied has a sufficient interest in applying for such variation, suspension, or cancellation.

VI.B. Statutory duties to promote truth

62. There is nothing new about government institutions taking it upon themselves to debunk false rumours.[60] Singapore's government, for instance, has created a website called "Factually" in order to "clarify misperceptions about its policies or incorrect public assertions on government matters potentially harmful to Singapore's social fabric".[61] While such efforts are commendable, their success hinges on the extent to which the government institution in question possesses a legitimate claim to authority in the field in question. Some institutions' authority may derive from technical expertise, as in the case of health promotion authorities, which have no motive to do other than to report facts. Outside such cases, however, there is the risk of the government being seen as arrogating to itself a purported monopoly on truth, which can backfire by leading to a perception that the government is acting in a self-interested manner.

63. The proposed solution is to tap on the government's duty to promote the public interest by placing various government agencies under a statutory duty to promote truth and counter falsity. This is referred to in section 4 of the proposed legislation. The duty of the Health Promotion Board, for instance, will include not only the promotion of information about

[60] For an example, see Kelly Ng, 'The big read: In an era of fake news, the truth may not always be out there', *TODAY* (2 June 2017) <https://www.todayonline.com/singapore/big-read-era-fake-news-truth-may-not-always-be-out-there> accessed 27 February 2018.

[61] Rachel Au-Yong, 'How to fight back against the scourge of fake news', *The Straits Times* (4 December 2016)

health, but also the duty to dispel misinformation about (say) the effects of certain medications or foods on the human body. Such a duty may be discharged not only by providing information directly to the public, but also by making an application to court under our proposed legislation when necessary (hence solving the problem identified above of identifying an appropriate applicant).

64. The advantages of such an approach are as follows. To the extent that such government agencies have relevant expertise and derive legitimacy therefrom, such expertise will be tapped on through their marshalling evidence and presenting arguments to the courts. To the extent that they risk being seen as lacking legitimacy and/or as being mere mouthpieces for propaganda, the neutrality of the court and the rigorous evidence-based fact-finding process will fill the legitimacy gap.

65. In respect of which statements are government agencies to make an application to court? It is proposed that this be left to each agency's discretion as to how to discharge its statutory duty to promote truth. This duty does not mean that each and every allegedly false statement be the subject of an application to court. An analogy may be drawn with the police and prosecutors, who are not required respectively to investigate every single allegation or commence a prosecution in respect of every alleged offence respectively. Moreover, just as the police and prosecutors may act either on their instance or at the instance of a complainant who is a member of the public, it will be for each government agency to develop its own processes for detecting false or contentious statements as well as receiving reports from the public of the same and deciding whether or not to act on them.

VI.C. Pre-action protocol

66. In order to minimise any potential chilling effect arising from the costs of defending an application, a pre-action protocol is proposed, which will first allow the potential applicant to state his/her/its contentions and the potential respondent to respond. Like other pre-action protocols, non-compliance may lead to adverse costs consequences for the applicant.[62] Section 8 of our proposed legislation also allows for the additional power of the court to stay an application in the event that the applicant has unreasonably failed to comply with the protocol.

67. In Singapore, there are hints that the courts are to consider any pre-application steps taken by the applicant. A section 15 applicant must state in his/her application, *inter alia*, whether or not he/she has "approached" the author and/or the publisher to ask them to

[62] Order 59 rule 5(d) of the Rules of Court (Cap 322, 2014 rev ed, R 5).

"remove or correct the statement complained of", and, if not, why not.[63] However, it is unclear what the significance of such statements are or what the consequences of not first attempting to approach the author and/or publisher are.[64]

68. The steps to be attempted by an applicant before making an application, together with consequences for failure to take such steps, should be made explicit through a pre-action protocol to accompany our proposed legislation, with at least the following two requirements:

a. First, before making an application, the applicant(s) must first attempt to write to the respondents identifying the false statement, stating the grounds for believing that it is false, and requesting that it be corrected. To be sure, there may be cases in which a false statement has been widely repeated, such that a subsequent retraction or correction by the original author and/or publisher in response to the applicant's pre-action letter may not be sufficient. Even then, this requirement will be helpful in that it will give the respondent the opportunity to consent to the court's making an order, which will then be binding on all persons generally, hence saving time and costs.

b. Second, a person who is not the subject of an allegedly false statement ought in the first instance to attempt to petition the relevant government agency to bring an action on that person's behalf. The government agency will then be able to act as a preliminary filter mechanism, and, should it agree that the application ought to be made, to make the application using both its own expertise and evidence as well as any additional evidence brought to it by that person. (This is why, under our proposed legislation, such a person must, if he/she/it proceeds with the application on his/her/its own motion instead of having the relevant government agency take the lead in making the application, first obtain leave of the Court, which may be granted subject to conditions or restrictions imposed by the Court: this is to ensure, in the absence of such a filter, that the named respondent(s) is/are not unduly harassed.)

VII. In defence of our proposal: constitutional matters

VII.A. No chilling effect on speech generally

69. We will now explain why, although our proposal is a state-aided restriction on expression, it does not fall foul of constitutional guarantees of freedom of expression.

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[63] Form 243 (Exhibit "A" at [12]-[13]) of the Rules of Court (Cap 322, 2014 rev ed, R 5).

[64] It may be that these have an impact on whether it will be held to be "just and equitable" for an order to be made.

70. The starting point is that there is nothing objectionable about targeting false speech. As Lord Hobhouse said in *Reynolds v Times Newspapers Ltd* (in a passage which the Singapore courts have approved of and said to "resonat[e] with [Singapore's] local political context"[65]):

> "The liberty to communicate (and receive) information has a… place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society."[66]

71. This proposition stands to be qualified only by the practical consideration that:

> "Complete factual accuracy may not always be practically achievable nor may it always be possible definitely to establish what is true and what is not… The free discussion of opinions and the freedom to comment are inevitably liable to overlap with factual assumptions and implications. Some degree of tolerance for factual inaccuracy has to be accepted…"[67]

72. Therefore, the case against our proposal does not stem from its targeting false speech, but rather that (as stated in *New York Times Co v Sullivan*) that rules targeted at false statements may lead to "self-censorship" because not "only false speech", but also *all* speech, might be deterred "because of doubt whether it can be proved in court or fear of the expense of having to do so. [People might] tend to make only statements which 'steer far wider of the unlawful zone.'"[68]

73. This is why laws which *criminalise* false speech simply for being false are problematic. Such laws would potentially violate international human rights norms (specifically, those contained in the International Covenant on Civil and Political Rights ("**ICCPR**")).[69]

74. The corollary of this, however, is that, as Tushnet argues, the constitutionality of a statute which targets false speech depends on the extent of the consequences for the speaker, because that affects the magnitude of the effect of deterrence from speaking at all. For example,

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[65] *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 (CA) [285].

[66] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (UKHL) 238, cited in *Ting (CA)* (n 34) (CA) [112].

[67] *Reynolds* (n 66) 238.

[68] *New York Times Co v Sullivan* 376 US 254 (1964) 279.

[69] Clooney and Webb (n 27) 26-27.

Tushnet distinguishes between criminal liability and liability in damages, suggesting that the latter has less of a potential chilling effect on speech and is therefore less constitutionally problematic.[70] As Menon CJ pointed out in *Ting Choon Meng*, the risk of a chilling effect is even smaller in the case of section 15 (and, therefore, our proposed legislation):

> "s 15 does not restrict the speaker's freedom of speech, but merely constrains the publication of speech that has been proven to be false without a notification that it has been so proven and/or without a direction to where the truth may be found".[71]

75. While the criminalisation of false statements is overkill, a law that not only aims to have the falsity abated, but also done so by way of requiring that the false statement be accompanied by a correcting note rather than removed altogether, must surely, as Menon CJ noted,[72] be justified by the interests of *ordre public* (as the ICCPR allows).[73]

76. Another point to note about *New York Times Co v Sullivan* is that a great deal in it turned not on the benefit of speech *per se*, but rather on the particular case of criticism of "public officials"[74] – such speech was said to be particularly important because it was a

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[70] Mark Tushnet, '"Telling Me Lies": The Constitutionality of Regulating False Statements of Fact' (2011) Harvard Public Law Working Paper No 11-02, 9-10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930> accessed 27 February 2018.

[71] *Ting (CA)* (n 34) [111].

For a somewhat analogous argument, consider the (failed attempt at the) Truth in Broadcasting Act in the USA, which would have required any "prepackaged news story" originating from the Government not to be broadcast except when accompanied by an "announcement… that conspicuously identifies the United States Government as the source". Although this bill ultimately failed to be passed (see Weston R Sager, 'Apple Pie Propaganda? The Smith-Mundt Act Before and After the Repeal of the Domestic Dissemination Ban' (2015) 109 *Northwestern University Law Review* 511, 539-540), the arguments for its constitutionality are compelling: far from "censor[ing] or prevent[ing] any network from airing a story; it [would] simply require[e] the media to disclose the source of its government provided stories. Instead of violating the freedom of the press, the Act would preserve journalistic independence…" (Antonella Aloma Castro, 'Truth in Broadcasting Act: Can It Move the Media away from Indoctrinating and Back to Informing?' 27 *Loyola of Los Angeles Entertainment Law Review* 127, 135).

Consider also the arguments of Chan (n 37) 172-174 that, in the law of defamation, a declaration of falsity may better vindicate the right to reputation than an award of damages, and would also "go some way to alleviate the chilling effect generated by a claim for a hefty sum of monetary damages".

[72] *Ting (CA)* (n 34) [118]-[120].

[73] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 19(3)(b)

[74] *New York Times Co v Sullivan* (n 68) 283.

"fundamental principle of the American form of government".[75] But if such discussion is of especial value to society by virtue of its subject matter, then it follows that discussion of such subject matter which is grounded in *falsehoods* is of especial *detriment* to society. In other words, the argument that we must be especially cautious to guard against the increased risk of a harmful chilling effect when certain topics are concerned is neither here nor there, because such an increased risk is always accompanied by an increased risk of the harmful effect of discussions of those topics which are grounded in falsehoods.

VII.B. Limited impact on speakers

77. There is another reason why the potential chilling effect of the possibility of orders being made under section 15 or under our proposed legislation is greatly attenuated. This is that, as Menon CJ pointed out, such an order does not prevent *per se* the false statement from being published:

> "s 15 does not inhibit or prevent free speech at all or even materially limit it. A speaker is free to speak, notwithstanding s 15, even if what he says is objectively false and even if a court of law has found it to be false. Even then, the speaker may continue to publish that falsehood. But what s 15 does contemplate is that, in that event, the court may require him to draw attention to the falsehood… Read in that light, s 15 does not restrict the speaker's freedom of speech, but merely constrains the publication of speech that has been proven to be false without a notification that it has been so proven and/or without a direction to where the truth may be found."

78. In fact, one could go so far as to say that, far from infringing on the right to freedom of expression by *removing* statements from public discourse, our proposal would contribute to the service of the ends to which this freedom is directed by *adding* statements to public discourse.[76]

79. Can it nonetheless be said that the threat of such an order will deter expression by creating a fear of being subject to such an order? That would assume that there is some sort of cost or downside to a speaker who is required to publish the required notification. But the costs, both monetary and otherwise, risk being exaggerated.

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[75] *New York Times Co v Sullivan* (n 68) 275.

[76] On this note, one might refer to (at the risk of citing somewhat out of context) Brandeis J's famous statement in *Whitney v California* 274 US 357 (1927) 377: "If there be time to expose through discussion the falsehood and fallacies [in some speech], to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." What our proposal will do is to add this "more speech". For another perspective on how Brandeis J's statement has relevance in the context of debates surrounding 'fake news', see: Joseph Russomanno, '"Falsehood and Fallacies": Brandeis, Free Speech and Trumpism' (2017) 22:2 *Communication Law and Policy* 155.

80. As for the monetary costs involved in litigation: Our proposed pre-action protocol would prevent the speaker from incurring costs in the event that he/she/it agrees that the statement is false (e.g., when the speaker has innocently stated the falsehood and has no resistance to having his mistake corrected). For completeness, a speaker need not fear the threat of vexatious applications as a speaker who successfully resists an application would be compensated in costs.

81. As for the monetary costs of compliance with the court order: In the case of some media (such as online publications), the costs will be zero or virtually zero. As for others (such as print), it is open to the court to tailor the order in such a way as to reduce the costs: for instance, if the false statement is found in a book, the court might order the author to cause to be published an insert to accompany the book rather than requiring that all existing copies of the book be removed from circulation and the book reprinted.

82. As for other costs, such as reputational costs: Objectively speaking, there is little or no reputational damage suffered from facing a court order. As Gary Chan points out (in the context of discussing declarations of falsity as a remedy in the law of defamation), a pronouncement that a statement is false is just that. It does not *ipso facto* mean that the communication containing the false statement is useless, or that there is no interest in its having been made, or that the communication does not constitute a fair comment.[77] Nor does it even mean that the author has had deceitful intent or even been negligent. An order under our proposed legislation will be a statement about the speech, not the speaker.

83. Moreover, one would think that a speaker who in good faith wishes to state the truth would wish *voluntarily* to retract falsehoods, and publish just the truth instead of the falsehood plus the notification. As the Government submitted in *Ting Choon Meng*:

> "one would imagine that when a speaker who has innocently stated wrong facts and is informed that he has done so, he would acknowledge his innocent mistake and correct his statement. The innocently mistaken speaker would not need to bother with Section 15 as it would never come into play anyway." (emphasis in original)[78]

84. All this explains why our proposal withstands Lord Hobhouse's statement in *Reynolds* that the law ought to "tolerate [some] level of factual inaccuracy" because

> "[t] ruth is not in practice an absolute criterion. Nor are the distinctions between what is fact and innuendo and comment always capable of a delineation which leaves no room for

[77] Chan (n 37) 175-176.

[78] The Attorney-General's Reply Submissions in DC/OS 70020/2015 (10 April 2015) [11] (obtained from the Supreme Court Registry).

> disagreement or honest mistake. The free discussion of opinions and the freedom to comment are inevitably liable to overlap with factual assumptions and implications."

While this argument sounds compelling, it must be seen in the light of the context of *Reynolds*, which involved a claim in defamation. The law of defamation bears two features different from our proposal: first, the consequences of a successful defamation claim is that the defendant has to pay damages; second, it is for the plaintiff to prove truth rather than for the defendant to prove falsity. Consequently, Lord Hobhouse's reasons for tolerating some degree of falsity have no application to our proposal: there are far smaller consequences (most notably, costs orders) for the plaintiff arising from a finding of falsity; and the problem in the law of defamation of the difficulty of proving truth simply does not arise.

VII.C. Targeting of only assertions of fact, not expression of opinion

85. Another reason to doubt the 'chilling effect' argument lies in an analysis of what is 'chilled'. What the ICCPR frowns on is the criminalisation of "forms of expression that are not, of their nature, subject to verification" – in other words, expressions of *opinion*.[79] Like Singapore's section 15, our proposed legislation targets only false assertions *of fact* – in other words, assertions which are capable of being declared true or false.

86. The reason why the freedom of expression is valued is that it facilitates the development of *ideas* and *opinions*. This is evident from the classic defence of the freedom of expression and the "liberty of thought and discussion" in John Stuart Mill's *On Liberty*. His argument is based on the premise that nobody is "infallible" and seised of "authority to decide [a] question for all mankind, and exclude every other person from the means of judging".[80] This premise is clearly only applicable to questions which, by their nature, cannot be said to admit of only one right answer. In other words, what Mill advocates is the free and open discussion of *opinions*; what he argues against is the arrogation to oneself of a monopoly on power to declare an *opinion* true or false. This is why his arguments in favour of freedom of discussion are based, *inter alia*, on the idea that such discussion will weed out "beliefs not grounded on conviction".[81]

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[79] Clooney and Webb (n 27) 27, citing HRC 'General comment no. 34, Article 19, Freedoms of opinion and expression' (2011) CCPR/C/GC/34, [47].

[80] John Stuart Mill, 'Of the liberty of thought and discussion', in *On Liberty* (James R Osgood 1871) 36.

[81] Mill (n 80) 69.

87. Seen in this light, far from inhibiting the freedom of expression, our proposal will *promote* it by promoting a state of affairs in which public discourse centres around the *interpretation and application* of established facts in forming opinions and ideas, and not around getting bogged down by spurious doubts which cause already-settled *fact-finding* inquiries to be needlessly reopened.[82]

88. As the Singapore Court of Appeal has put the point:

> "while the competition of ideas in the marketplace can lead to advances in science and knowledge to the benefit of mankind (which would justify allowing the fullest scope for exercising freedom of speech), this applies largely in the sphere of statements relating to *ideas or beliefs which cannot or have yet to be proved with scientific certainty to be either true or false*… Where there exist divergent ideas or beliefs whose truth or falsity cannot or has yet to be determined with scientific certainty, it is usually the case that one of these ideas or beliefs will eventually come to be accepted by society as "true" in the sense of being the most accurate or the most rational, with the others either being discarded or falling into disfavour… From this perspective, it is possible, and indeed necessary, for "the competition of the market"… to sieve out the idea or belief which society deems to be "true" (*ie*, the most accurate or the most rational), and society derives value from this process.
>
> In contrast, it is questionable whether the marketplace of ideas rationale is applicable to false statements. Such statements are (by definition) inaccurate and society does not derive any value from their publication as 'there is no interest in being misinformed'…"[83]

89. Our proposal will only have an impact on the expression of opinions to the extent that those opinions are based on factual bases which turn out to be spurious. This is unobjectionable: if there is no right to communicate false assertions of fact, surely such a right

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[82] Consider the views of the German Constitutional Court in the *Holocaust Denial Case* [1994] 90 BVerfGE 241 (tr Raymond Youngs) <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=621> accessed 27 February 2018: "an assertion of fact known or proved to be untrue is not covered by the protection of freedom of opinion… The Federal Constitutional Court proceeds in the interest of free communication as well as of the functions of criticism and control by the media.… But this refers to factual assertions the correctness of which is still uncertain at the point in time of the statement and which cannot be cleared up within a very short period of time. It does not however take effect where the incorrectness of a statement has already been established, as is the case here."

[83] *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 (CA) [282]-[283] (emphasis in original).

cannot come into existence merely because a statement of opinion is wrapped around those assertions of fact.[84]

90. The caveat to all this, of course, is that there is no justification for restricting the communication of assertions of fact which are not *demonstrably* false. This is especially so in the case where a dispute of fact is in reality a manifestation of a dispute of opinions about the proper fact-finding methodology to be applied. But such cases need not trouble us, for our proposal only targets statements of fact which have been *proven* to be false. If there is a doubt as to the truth or falsity of a statement of fact, the court will simply dismiss the application, allowing publication without any accompanying notification.

VII.D. The right to receive accurate information

91. Finally, it is important to note that the individual liberty to speak is not the only right at stake. The existence of speech posits a listener on whom the speech is intended to have some effect. For this reason, a constitutional right to freedom of speech ought to "conside[r]… the rights of citizens to *receive* information as well as the rights of speakers to express themselves".[85] In other words:

> "Except for the value of individual self expression, the values ascribed to freedom of speech concern the ability of an audience to have access to a variety of messages. Speech, therefore, is not a terminal value, but an instrumental value because it is necessarily directed to another person."[86]

92. This must be the more so when one considers the phenomenon of the repetition of speech, in which a listener – already a participant in the process of communication – takes on a more active role as he/she becomes a speaker.

93. This being so, the freedom of expression cannot be said to be engaged in the case of demonstrably false statements because they not only contribute nothing toward, but by way of General Harm actively detract from, the 'marketplace of ideas', and in turn violate the rights of persons generally to receive accurate information – in other words, such statements strike at the very reason for the existence of the said freedom of expression.

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[84] For example, as the Government noted in *Ting Choon Meng*, by merely prefacing any assertion of fact with the words "I think": transcript of hearing of HC/CJTA 1/2015 (23 September 2015) 72 (obtained from the Supreme Court Registry).

[85] Syed (n 15) 342.

[86] Susan Balter-Reitz, 'In Search of Truthiness' (2006) 2 *FIU Law Review* 7, 20.

VIII. Potential challenges to be addressed

VIII.A. Effectiveness of our proposal

94. It is acknowledged that the ultimate test of any proposal like ours is its effectiveness as determined from empirical study. While it is impossible to predict the results of such studies, the literature suggests several potential issues that may arise in practice.

95. First, a recent study has demonstrated a problem referred to as the "implied truth effect": if warnings are attached to fake news items, people may get the impression that items without such a warning attached must be true.[87] This ought not to be a problem with our proposal insofar as the absence of a court-ordered notification only means that a statement has not been proven to be false, not that it is true. To the extent that members of the public may think otherwise, the solution may lie in educating the public about the effect of notifications, as well as in carefully wording the notifications.

96. Second, the effectiveness of notifications or corrections depends on readers' reading and accepting them: "false beliefs can persist even after corrections have reached a wider audience".[88] As has been explained above, our proposal, if it operates correctly, aims to minimise this problem by requiring that notifications be published *alongside* false statements.

97. The greater potential problem will lie in how to ensure that the notifications are taken seriously. The evidence surrounding the effectiveness of attaching warnings or 'corrections' to false statements is mixed,[89] and it is as yet unclear under exactly what circumstances such

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[87] Gordon Pennycook and David G Rand, 'The Implied Truth Effect: Attaching warnings to a subset of fake news stories increases perceived accuracy of stories without warnings', working paper (8 December 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035384> accessed 27 February 2018.

[88] Rowbottom (n 17) 522.

[89] See Pennycook and Rand (n 87), which includes an overview of such studies.

In one study, experiment subjects "on average became significantly less convinced by… fake news stor[ies]" when the fake news stories were accompanied with "corrections": Ethan Porter, Thomas J Wood, and David Kirby, 'Sex Trafficking, Russian Infiltration, Birth Certificates, and Pedophilia: A Survey Experiment Correcting Fake News' (2018) *Journal of Experimental Political Science* <https://www.cambridge.org/core/journals/journal-of-experimental-political-science/article/sex-trafficking-russian-infiltration-birth-certificates-and-pedophilia-a-survey-experiment-correcting-fake-news/CFEB9AFD5F0AEB64DF32D5A7641805B6> accessed 27 February 2018. (The appendix to the study (accessible by clicking on "Supplementary materials") shows the various forms which the 'corrections' took: some were journalistic articles rebutting fake news stories; others were simple evidence contradicting the fake news stories.)

'corrections' will be effective. It may be that empirical work will be required to determine the best way to phrase and present notifications so as to minimise this risk.

98. The more difficult variant of this problem concerns the perception of those who are inclined to be more suspicious of communication mandated by the state, or who subscribe to of a version of the right to freedom of expression of which *any* regulation is seen as the enemy. As Lidsky puts it, in the context of laws against Holocaust denial:

> "… an official pronouncement of Truth is highly unlikely to convert the unbelievers. The deniers have proved willing to ignore historical evidence; why should they pay more attention to evidence that emerges from a judicial or administrative proceeding? […] [P]unishment of Holocaust denial may have the unintended and paradoxical consequence of strengthening the beliefs of Holocaust deniers, rather than weakening them… they are likely to turn away from public discourse within the State to find a community of like-minded individuals who will reinforce their beliefs."[90]

99. The crux of the issue, it is submitted, lies in presenting notifications in a manner that emphasises their truth (as established through a rigorous fact-finding process) rather than to the fact of their having been put up pursuant to orders of court. The court must not be seen as seeking to arrogate to itself a monopoly on truth; rather, the legitimacy of the application process must be seen to hinge on the court's impartiality and the quality of the evidence presented to it. To some extent, this may be promoted through better communication from the courts to the public, such as through open hearings, published reasoned decisions which explain how the court has arrived at its conclusion from the evidence before it, and well-worded publications (such as summaries of decisions).

100. Of course, the notification is "*not*, strictly speaking, a declaration of falsity from the *court*"[91] insofar as it is ultimately the publisher's choice as to whether to publish the falsehood accompanied by the notification; to publish only the truth and not the falsehood; or to publish nothing at all. Nonetheless, for the reasons stated by Lidsky, it is still necessary to forestall the perception that any notification has been forced to be put up by the coercive power of the state through the courts. In this regard, careful wording of notifications may have a role to play. For

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On the other hand, another study found that, among persons with strongly held views, "corrections fail to reduce misperceptions for the most committed participants. Even worse, they actually *strengthen* misperceptions among ideological subgroups in several cases.": Brendan Nyhan and Jason Reifler, 'When Corrections Fail: The Persistence of Political Misperceptions' (2010) 32:2 *Political Behaviour* 303, 323.

[90] Lidsky (n 21) 1099-1100.

[91] Chan (n 37) 181-182.

example, it is tentatively postulated that words that purport to draw attention to the authority of the courts, such as "declared by the Singapore Courts to be false",[92] should be avoided, in favour of "have been proven to be false". The latter, unlike the former, implies that the notification has rightly been put up because it refers to the truth, and better prevents anyone from gaining the impression that it has been put up merely because the court has ordered so.

VIII.B. Securing compliance with court orders

101. How are court orders made under our proposal to be enforced? The real challenge lies not in targeting individual instances of non-compliance with orders, but rather positively preventing non-compliance in the first place. We will not attempt to present a detailed solution, but will instead highlight some points for consideration, based on ideas put forth by Warren Chik in a recent article.[93]

102. As Chik points out, there are existing legal frameworks through which restrictions on the publication of content may be imposed. He notes that there several "parties whose actions will have the strongest impact on the creation and dissemination of false information", including both "the gatekeepers of online information, including Internet intermediaries and Content Hosts such as search engines, news aggregators and social network platforms" as well as "Content Providers, specifically the authors"; makes a compelling case for "relevant Internet intermediaries [to be] clearly brought into the Internet content regulatory framework"; and proposes various changes in this regard. For example, he identifies laws which allow a regulatory agency to "demand the 'take down' or removal of websites that host content on a wide range of basis. These can be interpreted to extend to false news…"[94]

103. Such ideas may be combined with our proposal. Instead of demanding that false statements be taken down, regulators may demand that court orders to display notifications next to statements which have been found to be false.

104. Chik also identifies "(more nuanced) remedies… such as tagging/flagging, ranking and warnings attached to the source of (or news in) contention."[95] These are references to a variety of emerging technological solutions, which range from those relating to the operation of

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[92] *Lee (DC)* (n 36) [4] and [88].

[93] Warren B Chik, 'Fact or Fake News: The "Role of Law" for Data Acuracy', *Singapore Law Gazette* (June 2017) 16.

[94] Chik (n 93) 21

[95] Chik (n 93) 17-18.

individual websites and services such as Facebook[96] (such as a procedure by which fake news stories may be marked out as 'disputed' or displayed alongside 'related stories' which draw attention to the truth)[97] and Google (such as displaying the findings of reputed 'fact checkers' alongside search result),[98] to those which more ambitiously propose an "infrastructure" which would ideally become an "inherent technology component of the World Wide Web".[99]

105. Again, such tools may be combined with our proposal, in that their availability may inform the content of orders which the courts choose to make, as well as the circumstances in which it will be considered reasonable to publish a false statement. The courts will need to keep up to date with the availability of such tools, as well as their usefulness.[100]

106. Finally, does the criminal law have anything to contribute to the enforcement of orders? Despite calls by Goh Yihan and Yip Man for "more specific criminal sanctions" than the general sanctions for contempt of court,[101] it is respectfully submitted that there is no need as yet to introduce such offences. While the severity of criminalisation may appear to be commensurate with the harm done by fake news, such severity must be balanced against the need to prevent a chilling effect on communication generally. The law on contempt is already sufficiently flexible to punish *deliberate* non-compliance with court orders while exercising leniency where appropriate.

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[96] 'Facebook and the Digital Virus Called Fake News'; http://money.cnn.com/2017/12/21/technology/facebook-fake-news-related-articles/index.html

[97] Selena Larson, 'Facebook modifies the way it alerts users to fake news', *CNN* (21 December 2017) <http://money.cnn.com/2017/12/21/technology/facebook-fake-news-related-articles/index.html> accessed 27 February 2018; 'Facebook ditches fake news warning flag', *BBC* (21 December 2017) <http://www.bbc.com/news/technology-42438750> accessed 27 February 2018.

[98] Justin Kosslyn and Cong Yu, 'Fact Check now available in Google Search and News around the world', *The Keyword* (7 April 2017) <https://www.blog.google/products/search/fact-check-now-available-google-search-and-news-around-world/> accessed 27 February 2018.

[99] Georg Rehm, 'An Infrastructure for Empowering internet Users to Handle Fake News and Other Online Media Phenomena', in Georg Rehm and Thierry Declerck (eds), '*Language Technologies for the Challenges of the Digital Age* (Springer 2018) 216.

[100] In this vein, there is a developing body of literature which is of relevance to evaluating such tools because it examines the factors affecting the extent to which a user believes 'fake news'. See, for example, Russell Torres, Natalie Gerhart, and Arash Negahban, 'Combating Fake News: An Investigation of Information Verification Behaviors on Social Networking Sites', in *Truth and Lies: Deception and Cognition on the Internet* (2018) <https://scholarspace.manoa.hawaii.edu/handle/10125/50387> accessed 27 February 2018, which investigates whether users engage in "information verification behaviors".

[101] Goh and Yip (n 50) [60].

IX. Conclusion

107. It is hoped that the discussion above and our proposal, which is heavily indebted to section 15 of the Act (despite its potential shortcomings), will at least provide some food for thought as to how the battle against 'fake news' may be better fought.