21 April 2008

Dr Lee Boon Yang
Minister for Information, Communication and the Arts

Sir,

Proposals for Internet freedom in Singapore

The government has repeatedly acknowledged that Internet technology is constantly evolving and that regulation of the Internet must keep up with the times. Moreover, as a nation, there are vast benefits we can reap from our ability to use the technology effectively and creatively, and regulation should not be a dead hand foreclosing these opportunities. Heretofore, the government has promised and exercised a light touch, but it would be better if policy is based not merely on forbearance, but framed by more clearly articulated principles, in the interest of greater transparency and coherence.

As a group of active participants in Internet expression with a concern for media regulation, we submit for your kind consideration the enclosed proposals. They include both a general review of process rules, as well as content regulation, with special regard to (a) political expression, (b) hate speech and (c) sex and violence.

Each section bears its own list of signatories, and may list one or more among us who have dissented or abstained from the recommendation arrived at for that section.

We will be making this document public the day after we have submitted it to you, as we believe that the regulation of the Internet is a matter of public interest.

We are aware that these are issues of some legal complexity and do not pretend to have arrived at perfect solutions. However, we strongly believe that some of the key principles we're advocating are important ones and hope that the government will take them on board in its ongoing review of regulations.

Yours sincerely,

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Alex Au Waipang (www.yawningbread.org)
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Roderick Chia (rodsjournal.wordpress.com)
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Justin Zhuang

Cc: Mr Cheong Yip Seng
Chairman Advisory Committee on the Impact of the Internet on Society (AIMS)

SECTION ONE

Introduction and Executive Summary

1.1 Introduction

In discussing media policy, some caricature the choices as a debate between those who understand the need for regulation and those who want a free-for-all. This is a false debate. The real issue is what kind of regulation can allow us, as individuals and as a society, to harness the benefits of free speech while minimising the harm that such speech can cause.

We believe that existing regulations are not designed to achieve this balance. Not just specific regulations, but also the government's overall regulatory approach and processes, need urgent reform. Weaknesses and inconsistencies in regulation are already being exposed by fast-changing technology. This trend will only accelerate.

International law provides one important set of benchmarks for Singapore. Although the government has always insisted on Singapore's right to chart its own course, we believe that Singapore would be the loser if we are seen to fall short of relevant international norms and best practices. None of the challenges Singapore faces is entirely unique. International law (specifically the International Covenant on Civil and Political Rights) provides useful guidance on how to balance freedom of expression with the need for certain restrictions that protect society.

In addition to referring to international norms, our review also takes into account Singapore's trajectory towards becoming a more cosmopolitan and open society in which the Internet is a key enabler.

1.2 Social purposes of regulation

Any restriction to freedom of expression must be justified by a social purpose. International law (Article 19(3) of the International Covenant on Civil and Political Rights) provides a list of legitimate aims: respect for the rights and reputations of others, and protection of national security, public order (ordre public), public health or morals. In line with international law, we do not believe that a desire to shield a government from criticism can be a legitimate function of media, particularly Internet, regulation.

Laws must also be narrowly tailored to that social purpose and be truly necessary for the stated aim, and must not be too broad, giving the authorities

powers that go far beyond their original social justification, nor designed for the government's convenience or political expediency. Any measures taken should restrict freedom of expression as little as possible, and not catch legitimate speech in the net. Since a democratic society depends on the free flow of information and ideas, it is only when it is imperative to limit that flow in the public interest that limitation justified: the benefits of any restriction must outweigh its costs.

We believe Singapore's media laws currently fail these tests and in this submission, we make the following proposals:

1.3 Executive Summary

a) All regulation of speech should be platform-neutral. Laws and regulations specific to the Internet, such as the Class Licence Scheme and the Internet Content Guidelines, should be abolished, as should the powers conferred on the Media Development Authority (MDA) to ban and penalise producers of content and owners of websites.

b) What regulation there needs to be should be based on clear, narrowly-tailored statutes and prosecution, not through administrative discretion.

c) However, only in extremis should there be prosecution, and only in instances where public safety is directly undermined. Otherwise, community moderation is the way forward, and to this end a consultative body (IC3) should be constituted.

d) Limitation and regulation of political content is unjustified in principle and unrealistic in practice. The attempt to do so impairs Singapore's maturity as a nation. The freedom to use the Internet to discuss political issues and promote political views should be guaranteed.

e) Racially and religiously offensive speech should not be proscribed by law; only incitement to injury and violence. Offensive speech should be handled through the community moderation (e.g. the consultative body) marshalling public opinion towards sensitivity and rationality.

f) The depiction of sex and violence should not be proscribed by law except when minors are involved in sexual situations, or real injury to participants or coercion took place during the making of such depiction. Matters of taste and offence to moral sensibilities should be mediated through community moderation, such as the consultative body.

In assent:

Cherian George
Alex Au Waipang
Roderick Chia
Choo Zheng Xi
Mohan Gopalan
Scott Teng Kie Zin
See Tong Ming
Justin Zhuang
Benjamin Cheah
Ho Choon Hiong

In assent, with reservations:

Gerald Giam - but abstained from 1.3(e) and in dissent from 1.3(f)
Bernard Leong - but abstained from 1.3(e) & 1.3(f)
Ng E-Jay - but dissent to 1.3(e). Current law governing racial/religious content is acceptable to me.

In dissent:

Nil

SECTION TWO

Process Rules

We propose three principles to guide the review of regulations and the regulatory process.

2.1 Regulations should be platform-neutral

Digital convergence is making it less viable to have different rules for different platforms (such as print, broadcast, online and mobile telephony). For example, regulating the import of books and magazines or banning of films is fast becoming meaningless when the same can be downloaded online.

Media regulation should be harmonised to avoid a schizophrenic regulatory regime. In harmonising barriers to free speech, we should level down and not level up: the most liberal and transparent regulation procedures should be set as the minimum target standard.

In some respects, the existing Internet framework should be extended to other media (for example, the freedom to publish without a permit). In other respects, sound offline media practices can be adapted for online media (for example, industry and community consultation relating to films and the arts).

We call for an abolition of all laws and regulations that are platform-specific, to leave only such laws that apply to the injurious nature of the speech wherever it may occur. By this principle, content regulation specific to the Internet, such as the Internet Code of Practice and the website registration scheme, should be removed.

We recognise that in order to give form to this principle, a major review of many pieces of legislation and subsidiary legislation has to be undertaken and this may take some time. In the interim, we propose the prompt introduction of an Internet Freedom Act, the essence of which would be to provide a positive list of exemptions. This proposed Act should, first, make it clear that no legislation originally intended for other media platforms should be extended to the Internet (e.g. the Films Act, Newspaper and Printing Presses Act, Undesirable Publications Act). Second, it should dismantle the parts of the Parliamentary Elections Act that impact on Internet political speech by anyone other than political parties and candidates themselves. Third, it should make clear that the provisions of the Broadcasting Act do not apply to the Internet.

In keeping with the last, the various registration and class licence schemes, the Internet Code of Practice, and the powers of the Media Development Authority to ban and fine Internet service and content providers should be removed.

2.2 Use clear statutes and not administrative discretion

If restrictions are necessary, they should be codified in clear and transparent laws. They must be precise, such that citizens can foresee what is or is not prohibited. The principle of rule of law should strictly limit the role of arbitrary decision making, particularly at the administrative level.

In too many instances, Singapore authorities have instituted vague restrictions that leave citizens guessing, such as the use of the term "persistently political". This puts too much power in the hands of officials, who can decide as they go along how to interpret the rules, with the detailed reasoning behind those

decisions shrouded in secrecy. Such vagueness should also be opposed because of its chilling effect, discouraging citizens from uttering even legitimate speech for fear that it might be deemed illegal. This practice must stop.

By this principle, there should be no restrictions on speech except as provided by clear provisions in statutes (e.g. the way Penal Code Section 376D(1)(c) clearly defines as an offence publishing and distributing information promoting commercial sex with minors under the age of 18). There should be no devolution of power to ministers and civil servants to make additional restrictions through subsidiary legislation, nor should they be empowered to make any judgements about when an infraction has occurred. It should up to a court of law to make such findings.

The principle is: "Prosecute or nothing". The benefit of this principle is the reliance on a time-tested, publicly legitimate process, whereby the government has to make its case in open court as to why certain speech has to be prohibited, the content provider has adequate avenues to make his defence, and the court's decision is required to be set out publicly in writing and be subject to appeal.

2.3 Community moderation instead of formal regulation

We believe that almost all of society's legitimate concerns about the abuse of free speech can be addressed outside the formal regulatory system. Online communities have already evolved sophisticated norms of informal self-regulation. Internet forums are almost always moderated; bloggers keep an eye over readers' comments appended to their posts. Popular sites heavy with pictorial or video content, such as YouTube, have their own rules forbidding salacious material.

With the evolution of new technology and social practices of netizens, it is neither practical nor is there need for the state to play the role of a master moderator. Legislation and state intervention, except in extremis, do not provide the best solution in dealing with the emerging complexities of the Internet.

The Internet is a social space, and social norms of leeway and consideration are constantly shifting. Although we have faith that these norms will evolve in pro-social directions, we agree that this won't happen without some concerted effort. What is needed is a process through which online communities are represented in Singapore's search for the right balance between individual freedoms and social goals.

One possible approach is to organise an Internet Content Consultative Committee (IC3) comprising one-third independent content providers, one-third persons familiar with rapidly evolving digital technologies, and one-third regular consumers of Internet content (i.e. regular surfers). The IC3 would issue recommendations whenever controversies arise regarding digital content, for example offering its view when conflicts arise between the state and content providers alleged to have behaved irresponsibly.

The IC3's deliberations should be open to public view - and digital technology can be harnessed to this goal. The objective over time is to subject more and more so-called "sensitive" areas to public reason, replacing intervention by the state (whether heavy handed or light touch) with people's own capacities for discernment and judgement. The only viable long term response to the impracticality of internet censorship is to help Singapore mature as a society, online as well as offline.

In assent:

Gerald Giam
Cherian George
Bernard Leong
Ng E-Jay
Choo Zheng Xi
Mohan Gopalan
Roderick Chia
Alex Au Waipang
Scott Teng Kie Zin
Cherian George
See Tong Ming
Justin Zhuang
Benjamin Cheah
Ho Choon Hiong

In dissent:

Nil

SECTION THREE

Regulation of Political Content on the Internet

3.1 Introduction and review of existing regulations

Legislation of political content on the Internet in its current form is flawed in principle and unrealistic in practice, and why we feel this is so is discussed in Sections 3.2 and 3.3.

Currently, the following statutes, inter alia, regulate political content on the Internet:

a) Section 5b of the Broadcasting (Class Licence) Notification, which regulates the discussion of local political issues on the Internet

b) Section 78A(1) of the Parliamentary Elections Act (Cap 218), which regulates election advertising on the Internet; and

c) Section 33 of the Films Act (Cap 107) which prohibits the making, distribution and exhibition of party political films

3.2 Discussion: Objections on Principle

The effect of these pieces of legislation is to add ambiguity to the scope of the law. Uncertainty infringes on the right of freedom of expression, as the lack of clarity over what can be expressed over the internet will, on balance, lead to more citizens choosing to withhold their comments on issues deemed political. The above-mentioned pieces of legislation stifle and discourage free expression of ideas on the Internet, thereby limiting democratic space in Singapore and limiting citizens' access to alternative sources of information. Regulation in its current form is thus synonymous with censorship and interference with the democratic process, and undermines an important principle of the rule of law: clarity.

The internet is the ultimate neutral platform for expression. It does not inherently favor either government or opposition. Rather, it favors political engagement by all sectors of society, which even the government has repeatedly recognized is essential for a sense of ownership and belonging to this country. It will harm society and all political actors to limit one of the easiest routes to political participation.

3.3 Discussion: Objections in Practice

It is impossible to enforce any regulation of political content on the Internet. Anybody with a computer and Internet access can start a blog or website of his or her own, needing no special skills or equipment, and little or no start-up capital. The Internet was designed to be inherently free and borderless, and every day, organisations and people are working on ways and means to secure that freedom by writing programs to encrypt communications and bypass firewalls. Locally, many bloggers and determined filmmakers are likely to take advantage of the borderlessness of the technology to ignore existing and future regulation of political content on the Internet, in the process bringing the law into disrepute.

The following detail specific problems with the law, highlighting the ambiguity of existing legislation, as well as its practical unenforceability.

a) Broadcasting (Class Licence) Notification Section 5b

This section lays out such a broad scope that almost any Internet Content that touches on any matter of public interest can be construed to fall afoul of it, requiring as it does that any website that provides material "for the propagation, promotion or discussion of political or religious issues relating to Singapore" register with the MDA. The mandatory registration process requires disclosure of an individuals name, employer, and salary. This is an unnecessary level of micromanagement with sinister undertones: employment details should be irrelevant to the running of a political website.

Yet, clearly, the MDA has not set about asking the hundreds of Singapore-based websites that discuss matters of political interest to register. Even so, Section 5b is not without its deleterious effects, for the arbitrariness of deciding which website will next be called upon to submit itself to registration inevitably promotes self-censorship and a wariness about discussing certain subjects. Such indirect censorship is even more damaging to Singapore's political maturity than direct censorship, promoting as it does, a culture of silence.

In any case, registration of "political websites" cannot be effectively enforced. The webmaster of such a website may choose to shut his or her site down should the MDA decide to alert him or her to the need for registration. The following day, he or she can put its content back online, on a different URL. This could continue indefinitely, at little or no cost to

the webmaster, but at great administrative cost to the MDA. Between this reality and the fact that the MDA has chosen not to pursue additional sites for registration under the Class Licence Scheme post-Sintercom, it is questionable what socially positive purpose Section 5b serves.

b) Parliamentary Elections Act Section 78A(1)(b)

Section 78 (1) (b) of the Parliamentary Elections Act allows the Minister to regulate election advertising over the internet during an election period. It applies to political parties, candidates, their agents, websites under a class license, and websites required to register with the MDA. It is the last category that we are most concerned about.

Dr Balaji Sadasivan said in Parliament in 2006 that websites that "persistently promote political views" will trigger a call for registration as a political site, followed by the application of the PEA prohibitions on elections advertising. These will prohibit the newly registered website from utilising internet tools that do not appear under a positive list.

This piece of legislation suffers from two major problems: Firstly, it is too broadly framed, with a potentially chilling effect on individual bloggers uncertain as to what constitutes "persistently political" speech. Secondly, it is ineffective in preventing the mischief it sets out to cure: political partisans can easily outflank the PEA by posting as individual, anonymous bloggers, as the law is so difficult to enforce, especially within a short election period.

Current regulations also put independent online news sites in a legal limbo. At present, licensed newspapers and their websites are exempted from the above regulations since they are rightly treated as purveyors of news, not advertising. However, no explicit exemption has been made for standalone citizen journalism websites that may be equally dedicated to informing and educating the public about the elections. Citizen journalists operating online should be able to report and comment on elections without fearing that they will be prosecuted for illegal campaigning.

Evolving technology will also blur the line between news sharing and campaigning ("election advertising") through the Internet. Consider social networking sites like Facebook; individuals, whether in Singapore or abroad, can create and join groups supporting different politicians or political parties, as is the case in the United States. Besides the difficulty of ascertaining if such groups constitute "election advertising", it is equally difficult to prosecute offenders, since Facebook is not a

Singaporean company. As mentioned above, when a statute or bylaw becomes unenforceable, it just brings law generally into disrepute.

c) Films Act, Sections 33 and 35

Banning films unnecessarily prevents a fuller understanding of Singapore's political history, and inhibits the emergence of an open and inclusive society. While not specifically directed at the Internet, the definition of "distribution" of a banned film could encompass Internet users who might want to post films with political content.

Section 33 of the Films Act ("party political films") was cited by the MDA in the ban of the film Singapore Rebel, which documents the history of civil disobedience by Dr Chee Soon Juan and covers some aspects of his life, thereby providing a little-known aspect of Singapore's history and a glimpse into the mindset and motivations of a well known opposition figure. Section 35 ("contrary to the public interest") was cited to justify the ban on another film, Zahari's 17 years, which explores independent Singapore's early history through the eyes of one political actor during those times. The suppression of such films effectively choke off critical perspectives of Singapore's political system and history.

Competing historical perspectives are essential for developing a mature body politic. Citizens should be trusted to present and assess the merits or flaws of political figures and parties.

The effect of Section 33 of the Films Act extends beyond just history. It also restricts the avenues for political parties, both government and opposition, to communicate directly to Singaporeans through Internet videos. Political leaders in many developed countries, including Japan, South Korea, Britain and the US, have in recent years effectively used websites like YouTube to broadcast their speeches to citizens. Even the use of political videos during elections in other countries has not led to any obvious distortion of the political process. It is therefore unfortunate that in Singapore, one of the worlds most wired countries, such an effective channel for rational political discourse is closed as a result of this law.

It is equally impossible to enforce Sections 33 and 35 of the Films Act. Despite the ban, Singapore Rebel and Zahari's 17 Years are now viewable on YouTube and Google Video. Neither of them have been taken down, nor can be. In similar fashion, future party political films could simply be aired on the Internet, without having to go through the

MDA. Once more, the very nature of the Internet makes it virtually impossible for the MDA to regulate such films.

It is instructive to note that Mr George Yeo, who was Minister for Information and the Arts when Section 33 of the Films Acts was enacted, recently admitted on Channel NewsAsia on 9 January 2007 that the government at that time "did not reckon this new media which allows you to produce the programmes quite cheaply", and felt that the government has "got to adjust that position".

3.4 Recommendations

We believe that regulation must serve a social purpose and must be enforceable to remain credible. Regulation of political content on the Internet does not serve a social purpose; if anything, it undermines free expression and encourages sub-optimal political discourse. It is also unenforceable, as demonstrated above.

In summary we recommend the following:

a) Abolish all Internet-specific legislation and bylaws, including the Class Licence Scheme

b) Repeal Section 78A of the Parliamentary Elections Act and Sections 33 and 35 of the Films Act.

c) Enshrine in the proposed Internet Freedom Act the right to discuss any matter of public interest over the Internet, even during election periods, and specifically include a provision stating that no other laws shall limit this freedom to discuss political issues and promote political views over the Internet, where "discuss" and "promote" shall also include content that is primarily sound, image and video.

In assent:

Choo Zheng Xi
Bernard Leong
Gerald Giam
Benjamin Cheah
Ng E-Jay
Roderick Chia
Ho Choon Hiong

Justin Zhuang
Alex Au Waipang
Mohan Gopalan
Scott Teng Kie Zin
Cherian George
See Tong Ming

In dissent:

Nil

SECTION FOUR

Regulation of Hate Speech on the Internet

4.1 Introduction and review of existing regulations

While protecting the racial and religious harmony of Singapore is a legitimate social goal, it must be borne in mind that any laws that attempt to achieve this by curbing speech necessarily conflict with the right to freedom of speech and expression. Freedom of speech and expression being a fundamental right, it is only when the threat to the community is grave that the right can justifiably be curtailed. Excessive curtailment of this right would not only be wrong in principle, it would also run contrary to the objective of maintaining racial and religious harmony and mutual understanding, since open discussion of these issues is crucial to achieving that goal. Whether or not a particular law that purports to protect racial and religious harmony is justifiable will therefore depend on what kind of conduct the law proscribes.

Currently, Section 4(2)(g) of the Internet Code of Practice ("whether the material glorifies, incites or endorses ethnic, racial or religious hatred, strife or intolerance") makes racial and religious hate speech a consideration in Internet regulation. In addition, other laws that are relevant are Sections 298, 298A and 505 of the Penal Code.

4.2 Discussion

Section 2.2 ("Use clear statutes and not administrative discretion") of this submission has argued that formal regulation should only be through statutes

and prosecution in the interest of platform neutrality. Section 2.1 of this submission has argued for the abolition of Internet-specific regulation. Hence, the Internet Code of Practice should be abolished.

The provisions of the Penal Code and their subparts can be divided into three categories:

a) Laws criminalising conduct that offends the racial and religious feelings of others;

b) Laws criminalising conduct that promotes hatred against a particular racial or religious group; and

c) Laws criminalising conduct that incites others to violence that is racially and religiously motivated.

Laws that fall under the third category, specifically Sections 298A(b) and 505(c) of the Penal Code, can be justified on the same basis that laws prohibiting incitement to offences generally are justified. Here, the risk to the community is at the greatest possible level, since the possibility of violence exists. Hence, purveyors of Internet content that seek to incite others to violence on racial and religious grounds should be prosecuted.

To give effect to the interest of the community in maintaining racial and religious harmony, enhanced penalties are also justifiable. Section 74 of the Penal Code currently provides for this. The signatories of this letter have no objection to this principle.

Where the threat is merely of promoting hatred between different racial or religious groups, the laws become less difficult to justify. This is even more so in the case of laws that criminalise offending the racial or religious feelings of others. In these situations the threat to the community is not immediate: there is usually time to manage any fallout. In such circumstances, to allow the social goal in maintaining harmony to trump over the right to freedom of speech and expression will make nonsense of that right.

Thus, rather than chill potentially-beneficial discussion of race and religion through overzealous legislation, it may be better not to resort to prosecution with regard to such speech. Instead, alternative forums - like the Internet Content Consultative Committee (IC3) proposed above - could be more representative and conciliatory. It has the flexibility to provide a nuanced stand, speaking out against bigoted and insensitive content, without guillotining freedom of speech. Through its moral force, it can retard the propagation and exacerbation of hate-filled speech, while leaving the door open to further

discussion of the issues raised by any incident. In the process, society is given an all-important chance to build up its "immune" responses against provocative words - learning in particular to challenge bad ideas with better ideas. In contrast, when government is overprotective, it forecloses society's opportunity to learn and grow.

On the other hand, the law against incitement appears inadequate in certain other respects. In many other jurisdictions, for example in the United Kingdom, other dimensions of personal identity including national origin, gender and sexual orientation are treated in ways similar to race, ethnicity and religion, should hate speech be involved. Furthermore, in the UK, the Crown Prosecution Service has advised the absence of religion enjoys the same protection as having a religion.

4.3 Recommendations

a) Abolish all Internet-specific legislation and bylaws.

b) Repeal Sections 298 and 298A of the Penal Code and replace them with new legislation that is more specific to the act of inciting others to cause injury to another class of people on the basis of race, ethnicity, national origin, religion or the absence thereof, gender and sexual orientation.

In assent:

Mohan Gopalan
Roderick Chia
Alex Au Waipang
Choo Zheng Xi
Ho Choon Hiong
Scott Teng Kie Zin
Cherian George
See Tong Ming
Justin Zhuang
Benjamin Cheah

In dissent:

Ng E-Jay

Abstained:

Gerald Giam
Bernard Leong

SECTION FIVE

Regulation of Content Relating to Sex and Violence on the Internet

5.1 Introduction and review of existing regulations

Currently, much of Part 4 ("Prohibited material") of the MDA's Internet Code of Practice deals with various kinds of sex and violence. It does however say that the listed mentions are just "factors [that] should be taken into account". Part 4(3) further suggests that they should be balanced against an assessment of "whether the material has intrinsic medical, scientific, artistic or educational value".

Other legislation that are likely to be applicable include:

a) The Undesirable Publications Act wherein "publication" is defined, inter alia, as "any sound recording... any picture or drawing... any photograph... tape, disc..." This Act also defines "obscene" as something that "tend[s] to deprave and corrupt", and makes the exhibition or distribution of obscene materials an offence. It defines as "objectionable", something that "describes or depicts... matters such as sex, horror, crime, cruelty, violence or the consumption of drugs or other intoxicating substances in such a manner that the availability of the publication is likely to be injurious to the public good."

b) Sections 292 and 293 of the Penal Code, as amended recently. Here, it is an offence if anyone "distributes, transmits by electronic means, publicly exhibits or in any manner puts into circulation" any "obscene... drawing, painting, representation or figure..."

c) Additionally, the Films Act can also be invoked. Section 21(1)(b) says that anyone who "exhibits or distributes" any film without a valid certificate from the Board of Film Censors shall be guilty of an offence.

5.2 Discussion

The regulatory framework seems rather confused and conflicting. For example, where the Internet Code of Conduct creates defences of intrinsic artistic and educational value, the other pieces of legislation do not. It is also impractical. If the argument is made that online content should be equally subject to laws as offline content, it would then mean that even a short video posted on the Internet would need a prior certificate from the Board of Film Censors as per the Films Act. This would be completely disproportionate to the scale of the activity.

Section 1 ("Introduction and Executive Summary") of this submission argues that the convergence of platforms necessitates a convergence of regulatory standards, and the borderlessness of content necessitates that these standards must be consistent with international norms. It would be ridiculous to enforce any of the above legislation on only the fraction of Internet content that has a connection with Singapore.

No doubt the MDA recognises this, at least in part. Thus the "light touch" approach, in existence in 1996. However, this approach is unwise, based as it is on first having sweeping rules and powers and then not enforcing them except in the most egregious instances. What results is a sense of arbitrariness in decisions, especially when the reasoning and process is not visible to the public. The deliberate policy of applying these rules only occasionally eventually leads to the general public even forgetting that they exist or feeling free to ignore them. The only people deterred by the continued existence of these hazy rules are those who are considering making a substantial investment, either financially or creatively, and who therefore have more to lose if the regulator turns around and starts to actively enforce the rules. The result therefore is that the very creative industries that the MDA wishes to attract are deterred by the uncertainty and the sweeping scope of these rules while individual and non-commercial Internet users continue to treat the regulator and its rules as irrelevant.

Section 2.2 ("Use clear statutes and not administrative discretion") has argued that formal regulation should only be through narrowly-tailored statutes and prosecution. We argue here that overlapping regulation such as the Internet Code of Conduct and the administrative powers given to the MDA to enforce it contradict this simpler, cleaner and more just principle. Hence, as argued in Section 2.1, the Internet Code of Conduct and similar rules specific to the Internet should be abolished.

As for the statutes themselves, viz. Sections 292 and 293 of the Penal Code, which make the depiction and distribution of obscene content criminal, we argue

that they are far too strict compared to international norms, and in practice unenforceable, especially given the fact that vast amounts of pornography can be downloaded today. Keeping an unrealistic law on the books will tend to bring the law into disrepute and encourage a culture of disregard for the law. It is therefore further recommended here that the law be revised to merely criminalise the depiction of sex involving minors and the use of the Internet in furtherance of sexual grooming of young persons - something that is consistent with international practice.

More problematic may be adult pornography depicting coercive sexual acts. While some might want this proscribed by law, it is still worthwhile asking if a rape scene in the cinema today might be passed under the R21 rating. And the answer is yes. The only difference between pornography and general-release films is that the latter tend to be less explicit and gratuitous in its depiction than the former. However, this ultimately is a matter of degree and it will always be a subjective call as to where the line is. Moreover, the line shifts over time. It is hence better not to write this into legislation, but to leave this question of the depiction of coercive sexual acts to community moderation.

If in the making of the video, an actual coercive act took place rather than being simulated, then the law should go after the perpetrators of that act itself. The making of the video can be considered by the court to be an aggravating factor. The further distribution of the video may justifiably be proscribed as an invasion of privacy.

Likewise on the question of Internet content that depicts violence: The depiction itself should not be criminal, anymore than the depiction of it in cinema today is. Even murder and genocide (for example, in the film Hotel Rwanda) are allowed to be depicted. However, if in the making of such content, coercion took place or actual injury was caused, then naturally the law should intervene in the real-world event.

Section 2.3 has discussed the useful role of an Internet Content Consultative Committee (IC3) as an example of the form community moderation can take. It proposed that IC3 should not have any mandatory powers, but by being broadly representative and expert, it would over time acquire moral force. This is the appropriate forum for discussion about digital content involving sex and violence, and its consensus pronouncements are likely, in due course, to play the role of "signpostng". It can also encourage appropriate labelling and fencing by site owners. Unlike laws or written regulations applied by bureaucrats whose deliberations are veiled by the Official Secrets Act, community moderation is an approach that is flexible, scalable and sensitive to changing public opinion.

5.3 Recommendations

a) Abolish all Internet-specific legislation and bylaws

b) Repeal Sections 292 and 293 of the Penal Code

c) Write into the proposed Internet Freedom Act the exemption of digital content from any existing laws pertaining to obscenity and violence except that involving persons under 16 years of age.

d) Let the IC3 evolve ways to deal with explicit depictions of sex and violence through community moderation.

In assent:

Alex Au Waipang
Ng E-Jay
Choo Zheng Xi
Mohan Gopalan
Scott Teng Kie Zin
See Tong Ming
Benjamin Cheah
Ho Choon Hiong
Roderick Chia

In dissent:

Gerald Giam

Abstained:

Bernard Leong
Cherian George
Justin Zhuang

END