

MALAYSIA

New Section 114A of the Evidence Act



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In the digital age, the wide variety of anonymising technologies such as proxies and virtual private networks make it possible for almost anyone to publish comments to a global audience of billions and to do so anonymously. The recent controversial insertion of Section 114A into the Evidence Act 1950 by the Evidence (Amendment) (No. 2) Act 2012 which took effect on July 31st, 2012, aims to facilitate actions against online commentators by creating three factual presumptions relating to publication that could have a significant impact on legal disputes in Malaysia, particularly in the areas of defamation and sedition.

114A(1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

S.114A(1): The first presumption from this subsection is that text written under a person's Facebook profile or forum username is deemed to be published by that person. On the face of it, this is a reasonable provision to include, as in most cases this will reflect reality. The issue this presumption creates, however, is that if a person's email, Facebook or forum account is compromised and accessed by a third party, or a false account is created in someone else's name (as happened recently with Malaysian Olympic diver, Pandeleta Rinong Pamg), the innocent person bear the responsibility proving that they were not the publisher. This has critics arguing that it contravenes the fundamental presumption that a person is innocent until proven guilty.

The most controversial aspect of this section is its implication of anyone who "in any way facilitates" the publication of the offending

article. This means that Facebook, Twitter, forums or news websites which allow reader comments could all be deemed to be publishers. In fact, it is so broad that even a shopping mall or restaurant that provides WiFi could fall under the Section. There is a clear risk of increased censorship as those companies seek to insulate themselves from the sting of Section 114A(1).

S.114A(2): Subsection 2 is a source of further controversy. Under the amendment, network service is given the definition of:

"a service for carrying communications by means of guided and/or unguided electromagnetic radiation."

This includes broadband internet, WiFi, 3G and 4G communications. It means that any TM internet subscriber could be held liable for a defamatory article originating from a TM modem, or any Maxis subscriber held liable for an offensive Tweet originating from that network. Whilst it may be relatively easy for an accused person to prove their innocence, they would still incur costs and inconvenience.

S.114A(3): Means that anyone who owns a phone, laptop or PC that is used to publish an offensive article will be deemed to have published it. If a person leaves their phone or computer unattended for 10 minutes and in the interim someone uses it to publish offensive comments, the owner will be deemed to be the publisher unless they can prove otherwise, which may be impossible. A likely area of dispute with this subsection relates to 'control'. Although a person may have custody of their home computer or mobile phone, viruses and hackers can remotely take control of the device. Would Subsection (3) still apply?

Conclusion

On a civil rights level, there is concern that the new provisions will be used to suppress legitimate political or social commentary. There is a risk of innocent people being deliberately framed, or the technically un-savvy being exploited.

On a procedural level, there is a risk that the reduced evidential burden on plaintiffs and prosecutors will lead to an increase in litigation, putting increased strain on the courts. Given the fact that it is a fairly new Amendment, the question that remains is whether this highly controversial introduction will be seen to be curbing freedom of expression and instill a sense of discord and rebellion within Malaysians or whether it would be effective in regulating and ensuring responsibility in online publications.

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