**Asia Internet Coalition (AIC) Submission on the Proposed Amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021**

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6 July, 2022

To,
The Ministry of Electronics and Information Technology (MEITY)
Government of India
New Delhi, India

The Asia Internet Coalition (**AIC**) is an industry association that promotes the understanding and resolution of internet policy issues in the Asia Pacific region. AIC was established in 2010 and comprises of leading internet and technology companies.

On behalf of our members, we would like to extend our appreciation to the Ministry of Electronics and Information Technology (**MEITY**) for placing the safety of digital Indians at the forefront by proposing amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (**IT Rules**) (**Proposed Amendments(s)**).

Industry groups have repeatedly pressed for SoPs at a bare minimum to include the following:

- Define/limit the scope and nature of LEAs who can make requests under the IT Rules. As an example an officer of the rank of Inspector General of Police in Special Agencies should be appointed as Nodal Officer. For agencies / special investigation units or teams which do not have an officer of the rank of IG of Police, the reporting IG or a special officer of the rank of IG to be appointed for the purpose of takedown orders. The number of such Nodal Officers may be kept to the minimum so as to limit the touch points and also monitoring of effective implementation & compliance from all intermediaries.
- Help add vital legitimacy to the far more efficient, safe and compliant dedicated legal channels of addressing content and accounts on social media platforms.
- Address and put adequate guardrails in place that define circumstances/ procedure for criminal proceedings against employees. This will go a long way in instilling confidence not just in a company but also employees who have signed up for such roles.
- Define broad terms such as decency, morality, among others that can be vague and be open to arbitrary interpretation; and carry the potential risk of misuse.

MeitY is yet to publish these SoPs or hold industry consultations on this aspect. With this background, and given that intermediaries are already facing large volumes of requests from LEAs across the country, further amendments without having due guidelines and processes in place will only add to the existing compliance burden for intermediaries.

The proposed amendments to the IT Rules would negate the Government's commitment to ease of doing business and continuity in business operations for all intermediaries that have made significant investments in the country in regard to technology, workforce and other resources.

To further the vision of MEITY and for the proper implementation of the intermediary framework in India, we write to you to express our concerns regarding the Proposed Amendments to the IT Rules. In view of the industry concerns detailed below, we urge MEITY to reconsider the Proposed Amendments.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact us directly at Secretariat@aicasia.org or +65 8739 1490. Importantly, we also look forward to offering our inputs and insights, directly through meetings and discussions.

Thank you for your time and consideration.

Sincerely,

**Jeff Paine**
**Managing Director**
**Asia Internet Coalition (AIC)**

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## Detailed Comments and Recommendations

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### Issue I: Proposed Amendments to Rule 3(1)(a) and Rule 3(1)(b) are ultra vires Section 79 of the parent statute

1. The proposed amendment to Rule 3(1)(a) requiring intermediaries to "ensure compliance" of the "…rules and regulations, privacy policy and user agreement for access or usage of its computer resource by any person…" are too ambiguous and potentially too onerous. While the Press Note has explained that this proposed amendment read with the amendments to Rule 3(1)(b) specifically requires intermediaries to enforce their policies, these amendments do not clearly define the scope of intermediaries' obligation to "ensure compliance" under Rule 3(1)(a).
   The proposed amendment to Rule 3(1)(a) appears to go beyond the obligations set out under Rule 3(1)(b). It suggests that intermediaries may bear the burden of "ensuring compliance" beyond publishing their rules and regulations, informing the user of the same and investigating/responding to complaints/flagged issues. Practically, businesses cannot be expected to implement compliance where such scope remains vague. While businesses are prepared to put in best efforts in preventing breaches of their rules and regulations (including prohibition of content dealt with in Rule 3(1)(b)), businesses are not in the position to ultimately control the actions of the user. The words "ensure compliance" may be read extremely broadly and go beyond what businesses can practically achieve.

   In respect of the proposed amendments to the grievance redressal mechanism of intermediaries under Rule 3(2), the timelines remain too short.

   Subject to further procedural rules governing proceedings before the new proposed Grievance Appellate Committee under proposed amendment to Rule 3(3), intermediaries should have the right to respond in any such proceedings.

2. Please note that an intermediary under Section 79 of the Information Technology Act, 2000 (**IT Act**) is not responsible for any content communicated or transmitted on its platform by users provided, among other things, it does not modify such content and observes due diligence compliances under the IT Rules. However, the Proposed Amendments to Rule 3(1)(a) and 3(1)(b) impose obligations which may require intermediaries to change or modify user content. For

instance, to "ensure compliance" and "cause the user" to not host, transmit, share, etc. information that is prohibited under Rule 3(1)(b)(i) to (x) (**Prohibited Content**), intermediaries is expected to exercise editorial control and proactively monitor user content.

3. Additionally, such editorial control and proactive monitoring by intermediaries contradicts the "actual knowledge" requirement under Section 79(3)(b) of the IT Act. The Supreme Court in the case of Shreya Singhal v. Union of India had narrowly interpreted "actual knowledge" and stated that the intermediary must only take down content on receiving Court orders or directions from Government agencies.

**Recommendation:** Intermediaries, as conceived under Section 79 of the IT Act, only provide a technology platform or a computer resource as a service to the user. It is ultimately the user who determines the nature of content to be communicated or transmitted on the platforms / computer resources operated by the intermediaries. Given this, it may be more beneficial to impose mandates prohibiting the dissemination of certain types of content on the user itself. Furthermore, there are already existing due diligence obligations on the intermediaries with respect to users, such as the requirement to inform users periodically of any changes to the user-facing policies and consequences of non-compliance with such policies.

## Issue II: Lack of procedure or terms of reference with respect to the functioning of the Grievance Appellate Committee

1. The Proposed Amendments seek to establish a Grievance Appellate Committee (**GAC**) for hearing appeals against decisions taken by the Grievance Officer (**GO**) appointed by the intermediary. While the timelines for appealing to the GAC and time-bound disposal of such appeals have been specified, the Proposed Amendments do not specify the manner in which the GAC will operate, including whether intermediaries or the GO appointed by the intermediary will be accorded the opportunity to be heard, whether the GAC will have the power to call for information from intermediaries (including but not limited to commercially sensitive information), etc. Similarly, while the Proposed Amendments state that the intermediary must comply with the orders of the GAC, there is neither any clarity on the extent of the GAC's powers nor on the limitations in relation to such powers. Thus, the Proposed Amendments do not contain adequate restrictions to prevent the GAC from acting as a judicial or quasi-judicial body with wide-ranging authority. Therefore, it is unclear as to what will be the remit of the Grievance Appellate Committee. It seems that the body is intended to perform a function of the courts which undermines the authority of judicial review.

2. In addition to the above, no information has been provided in the Proposed Amendments on whether the decision of the GAC will be made public or not. Such transparency measures would be critical in introducing accountability to the decision-making process of the GAC.

3. In the case of Shreya Singhal v. Union of India, the Supreme Court did not strike down the rules issued under Section 69A of the IT Act pertaining to blocking orders since the Court found that such blocking can be issued through a reasoned order after complying with several procedural safeguards, including but not limited to providing concerned parties the ability to be heard. Taking this into account, to the extent that the GAC lacks procedural safeguards, it runs the risk of being struck down by the Supreme Court.

4. The draft rules provide no clarity on the quorum or composition of such an authority. The Grievance Appellate Committee cannot comprise of officers drawn solely from the executive and should necessarily comprise of officers drawn from the judiciary at least in the majority. The Grievance Appellate Committee, among other things will also look into circumstances where the user has complained to the intermediary about the non-compliance with *Rules 3(1)(b) (i) to (x)* which

includes issues such as defamation. These issues are to be solely determined by courts of law. These points demonstrate that the remit on which the Grievance Appellate Committee is going to decide is far beyond the grounds prescribed under Article 19(2) of the Constitution of India where it seems an executive authority is performing the role of the judiciary, which also negates and undermines the principle of "separation of powers" as enshrined in our Constitution. Clearly, there is a lack of information about the qualifications of the members that would be appointed by the Central Government to establish the GAC. Given the constantly evolving nature of technology in this digital age, it becomes imperative for the members to have adequate knowledge and expertise to arrive at decisions related to complex issues such as content moderation.

5. As per Indian law, there must be a clear delegation of power under the parent statute to enable the executive or the rule making authority to set up such a body. The rule making power is confined to prescribe due diligence measures for/ in respect of an intermediary. The rules do not contemplate the setting up of a quasi-judicial body. Thus, setting up such a body is currently beyond the scope of the IT Rules.

**Recommendation:** We urge MEITY to allow industry to adopt a self-regulatory grievance redressal mechanism as an alternative to the GAC since it will introduce much-needed industry expertise into the process. Given the changing needs of technology and users alike, an industry-led self-regulatory mechanism will enable businesses to adopt best practices and ensure long term solutions by identifying trends and gaps. In this regard, we request MEITY for a period of at least six months to implement such a self-regulatory mechanism.

## Issue III: The GAC fails to acknowledge measures deployed by platforms

The relation between a platform and its users are determined by contractual terms as set out under the Terms and the Service Agreement. The Government, by setting up such a committee, is not only taking over the role of a judiciary but may also be seen as interfering in the affairs of private companies as the IT Rules amendments fail to acknowledge the measures deployed by platforms at their own end. It is important to remember that enforcement of community guidelines/ rules by platforms are governed by the following principles:

- Fair – Guidelines/ Rules are enforced impartially and consistently, considering the context involved.
- Informative – When actions are taken against accounts, users are informed about the reasons.
- Responsive – Mechanisms of appeals exist
- Accountable – Enforcement actions are reported in biannual transparency reports.

Permanent suspension is always reserved solely for our most severe and justified cases. Further, rules and community guidelines are not created in isolation but actually follow a rigorous policy development process that is nurtured by expert and localised feedback and inputs. **It involves in-depth research and partnership with key experts and it has even included processes open for public comment**. This is vital to ensure we are considering global perspectives around the changing nature of online speech, including how platform policies are applied and interpreted in different cultural and social contexts.

To sum up, we believe that the prospective creation of multiple, national oversight bodies – each potentially interpreting common standards through local lenses – seems likely to fragment digital policymaking while creating compliance hurdles and barriers to entry for smaller companies.

## Issue IV: Infeasible timelines with respect to grievances related to Prohibited Information may impact users

1. With respect to the grievance redressal mechanism to be implemented by intermediaries under Rule 3(2), the Proposed Amendments clarify that: As per the proposed Rule 3(2) (i), complaints, including in relation to the blocking or removal of users or users' accounts in relation to Prohibited Information, must be acknowledged within 24 hours and disposed of in 15 days. Additionally, as per the proposed provision to Rule 3(2), complaints in relation to the blocking or removal of communication links associated with Prohibited Information must be acted upon and redressed within 72 hours of reporting. Further as has been suggested earlier, terms such as decency, morality, among others that can be vague and be open to arbitrary interpretation; and carry the potential risk of misuse. Contrary to the principles laid down in the Shreya Singhal case, intermediaries are now being asked to be a judge of all kinds of content covered in Rule 3(1)(b)(i) to (x) viz., *defamatory, obscene, insulting, libellous, violation of any law for the time being in force, etc.*

2. The IT Act already provides for short timelines with respect to non-consensual circulation of nude or sexual content, and there appears to be a nexus between the short timeline and the urgency of the grievance. However, the 72-hour framework for grievance redressal sought to be introduced by the Proposed Amendments does not contain an underlying nexus with the gravity or urgency of the grievance, thereby introducing no justification for such a restrictive timeframe.

3. Further, having a 72-hour framework to redress grievances pertaining to all 10 categories of Prohibited Content, may not be feasible. An overload of user grievances in conjunction with the restrictive timeline could lead to the intermediary missing out on or deprioritizing genuine grievances. This may ultimately impact the users who may have genuine concerns in cases of high-risk categories of Prohibited Information.

**Recommendation:** We request MEITY to retain the pre-existing timeframe with respect to all grievances given the infeasibility of implementing the Proposed Amendment and the unintended but adverse impact it may have on users.

## Issue V: No clarity on the proposed provisions pertaining to fundamental rights of citizens

1. The Proposed Amendments require that intermediaries 'respect' the rights guaranteed to Indian people by the Indian Constitution. At present, there is no clarity on what 'respecting' fundamental rights entails. By definition, fundamental rights are available against State or against instrumentality of State. Therefore, the question of an intermediary respecting rights accorded to citizens under the Constitution seems ambiguous. We believe that delegating control of governing and administering fundamental rights to intermediaries, who are private entities, could usher in a culture of self-censorship and become a dangerous inhibitor of free expression.

2. Neither does the Constitution of India place any duty on private entities to advance the fundamental rights of users nor are such fundamental rights enforceable against private entities. To the extent it is determined that a private entity is carrying out a 'public function' as per the tests established by the Courts of India, the aggrieved party's option for redress is subject to the writ jurisdictional powers of the Courts.

3. Rule 3(1)(m) imposes an obligation on intermediaries to compulsorily provide services to users, in other words, the intermediaries are being treated like public utilities which needs to be determined whether such an obligation can be imposed by way of rules.

**Recommendation:** The law on the horizontal applicability of fundamental rights is limited and still evolving in India. In this regard, we request MEITY to reconsider imposing fundamental rights obligations through the Proposed Amendments on private entities acting as intermediaries.

## Issue VI: Additional due-diligence requirements are significantly challenging safe harbour protections

Additional due diligence obligations have been included in the proposed amendments including the requirement for all intermediaries to not just inform its users of the rules and regulations but also "**cause the user** of its computer resource to not host, display, upload, modify, publish, transmit, etc.". The provision is vague and ambiguous on how an intermediary is to "cause the user."

This new requirement will cause complications since it becomes a disproportionate obligation for many intermediaries, many of which are technical providers, who are mandated by law to not select or modify the information contained in the transmission of data in any manner. Further, it puts the intermediary in a position to "pre-censor" content or decide on the nature of the content which is a decision which would go against the very definition of *intermediary* under the Information Technology Act, 2000 ("IT Act").

Section 79(2)(b)(iii) of the IT Act provides that an intermediary will enjoy safe harbour only if it does not 'select or modify the information contained in the transmission". Having to censor content thus becomes of extreme concern for intermediaries since the IT Rules provide that any non-observance of Rules shall result in the loss of its exemptions from liability as provided under Section 79 of the IT Act and Rule 7 of the IT Rules may become applicable with respect to the extant law violated. The loss of safe harbour status specifically guaranteed such protection under law will significantly impact many businesses in India by vastly increasing their liability and forcing massive operational changes.

**Recommendation:** In addition, to help business entities and stakeholders understand the obligations under the Rules it is further suggested to clearly provide clarification on what amounts to a non-observance of Rules and under what circumstances will an intermediary lose its exemptions from liability provided under Section 79 of the Law.

In addition to the above-mentioned concerns, we would like to draw your attention to the fact that a single instance of non-compliance by the intermediary can lead to loss of safe harbour protections under the IT Act. In this regard, it becomes imperative that the due diligence requirements that are to be met by intermediaries are clearly laid out. For instance, we request MEITY to consider providing clarity on the manner in which 'due diligence, privacy and transparency' expectations of users must be met over and above existing compliances already present in Indian law. Lack of clarity along with onerous compliance obligations may have an adverse impact on the ease of doing business in India, especially for smaller companies who may not have the resources to implement the extensive compliances envisaged by MEITY.