Submission on the Data Protection Act

27th February 2018

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The Evolution Of Regulation

G4: Regulation part of broader goals e.g. development, social inclusion

G3: Regulation to encourage competition, investment, innovation and access

G2: Reduce burden and cost of regulation, more specialized/expert regulatory bodies, partnerships with industry

G1: Regulation to manage monopolies, prevent abuses, substitute for competition to drive down prices/spur innovation

THEN

Media organized, legislated and regulated by infrastructure (radio, television, telephone, print etc.), which imposed clear boundaries.

NOW

From: multiple, independent networks for each service → **To:** unbundled services across common broadband networks

CONVERGENCE

Content flows across different networks and technologies; multiple services on same or competing networks using different technology platforms (e.g. wired/wireless).

All services are data streams. Voice, video etc. are just particular streams among many.

Issue: trying to regulate 1 stream in the river – other data streams not subject to regulation.

GEOGRAPHY

Transactions take place across borders, creating problems of regulation, taxation etc.

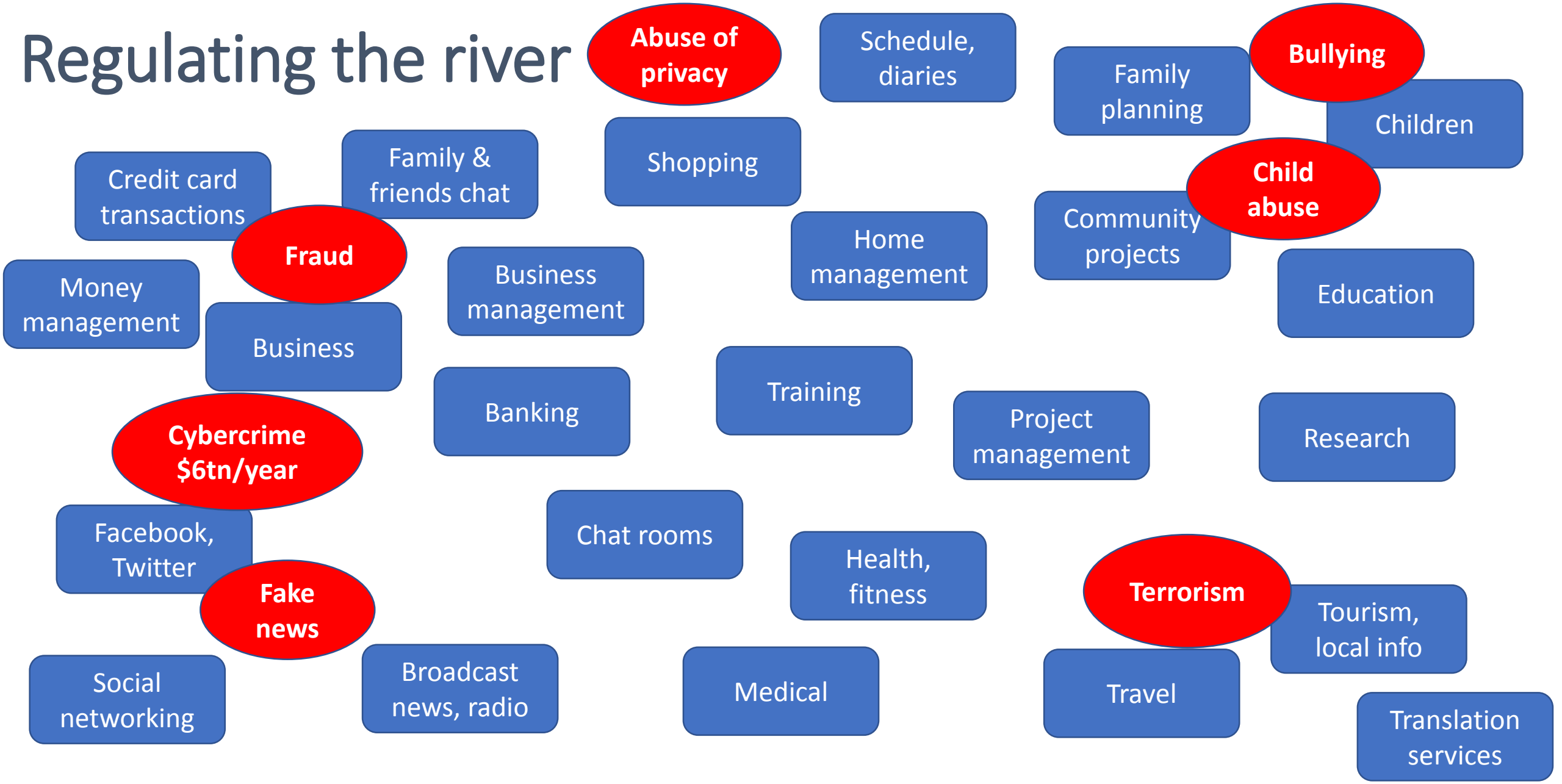
Can provide news and media services without any local presence or infrastructure – just need internet access.

Issue: beyond current regulatory reach (for small nations). Need international accords?

Major New Challenges

- New monopolies: few companies now control social data; hard to challenge incumbents.
- Concerns: anti-trust, consumer choice & privacy - even for free services and products.
- Fake news & echo chambers, societal manipulation via social media. Evidence of political manipulation via social media in >30 countries.
- Traditional 'trusted' media losing market share to unregulated social media (social medial is news source for 62% of US adults, primary news source for ~18%.)
- Terrorist recruitment – mostly in unregulated space. E.g. 54,000 websites with information on IED's etc. posted online by IS August 2016 to May 2017; 2/3rd of information shared within two hours after posting.
- Gangs using social media as a new front in their war.
- Cyber-bullying, revenge porn, extortion.

Regulating the river



The direction of travel

- Support Jamaica's transition to digital society. Facilitate positive change, mitigate harms.
- Good media services available to all citizens. A media and technology-literate society.
- Need to ensure national and citizen security; prevent legitimate privacy being compromised; detect and act against abuses - fraud, extortion, grooming, bullying, terrorist recruitment etc.
- Demand for seamless access to diverse content across platforms.
- So regulation must be streamlined, effective but low-cost, content-focused, technology-agnostic.

The Digital Economy and Society: main points so far.

- Digital economy requires disclosure, collection, storage & monetization of personal data. People must be free to disclose, but also protected. Otherwise will undermine development of digital markets.
- Need to encourage transition, but prevent abuses. Also need to encourage digital literacy.
- So content regulation and data protection operate in same context, have similar goals.
- Regulatory approach: lean, transparent, efficient and effective. Need mix of educational and advisory interventions, legal and economic tools, sanctions and positive incentives.

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Governance

- All decisions of Information Commissioner should be documented, explained, justified.
- Should be provision for public to complain about Information Commissioner.
- Commissioner *Ad Hoc* could be quicker and more efficient than an appeal tribunal.

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Need scale of responses

- Criminal sanctions should be reserved for most egregious breaches.
- Should also be power to impose administrative fines for lesser breaches.
- [See for example Article 83 of the EU General Data Protection Regulation]
- Fines should be partially ring-fenced, used to support digital literacy programs.

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Extra-territoriality

- Businesses no longer limited by geography or physical presence.
- Collection, use, sharing and mining of data between different entities across multiple jurisdictions is now common; e.g. in BPO industry personal information is routinely transferred across borders.
- **Problem:** Under section 3(1)(b), Act applies to foreign entities only if they use equipment in Jamaica to process information. Gives no protection against firms that collect personal data but have no physical presence in Jamaica.
- If firm has no presence in Jamaica but does similar business (e.g. online sales) as firm established in Jamaica, local firm is at disadvantage if DP Act does not apply to both companies.
- Does DP Act apply to e.g. a data broker who purchases data to sell on to firms in other countries?

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Extra-territoriality: possible solutions

If **Act** does not have extra-territorial effect, could include restrictions on transfer of personal data to other countries. Examples:

1. Japan's **Act on Protection of Personal Information** (Japan): places restrictions on the transfer of personal data to foreign countries. The Act applies to foreign organizations which are not located in Japan but provide goods or services to residents.

2. Australia's **Privacy Act 1988:** non-Australian organizations are bound by the provisions if they have an 'Australian link', which includes carrying on business in Australia.

3. In 2017 the Federal Court of Canada made an extra-territorial order against a foreign national operating outside Canada for violating a Canadian citizen's rights under Canada's privacy law.

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Anonymized Data

- Section 23 of the Data Protection Act states that consent must be given for the processing of personal data except in specified circumstances, e.g. when necessary for administration of justice.
- Personal data defined as data relating to a living individual who can be identified from the data.
- Various options, e.g. Japan removed requirement for prior consent to transfer anonymized data, provided specific rules were followed; these included disclosure of the type of items anonymized and the method by which the anonymized data was provided; and anonymized information has to be handled separately from data with personal identifiers.

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Doing more with less

- GOJ /IMF commitment to public sector transformation: includes reduction in number of public bodies.
- Consider integrating proposed Office of the Information Commissioner with existing Broadcasting Commission.
- This would avoid expanding public service by establishing additional agency.

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Thank you !

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