



ශ්‍රී ලංකා මානව හිමිකම් කොමිෂන් කොමිෂන්  
இலங்கை மனித உரிமைகள் ஆணைக்குழு  
Human Rights Commission of Sri Lanka

Press Notice No: HRC/P/i/E/02/10/23

## Press Notice

The Human Rights Commission of Sri Lanka (HRCSL) sent a letter on 2 October 2023 to Hon. Tiran Alles, Minister of Public Security containing the preliminary observations and recommendations of the HRCSL on the Online Safety Bill published in the Official Gazette on 18 September 2023.

The HRCSL acknowledges that making online spaces in Sri Lanka safer for its citizens is a valuable legislative objective. However, the HRCSL is of the opinion that strengthening the institutional capacity of law enforcement authorities to interpret and apply the existing criminal law in good faith should precede any proposals to introduce new legislation with criminal offences pertaining to online activity.

The HRCSL made preliminary observations and recommendations on the Online Safety Bill with a view to ensuring the Bill's compatibility with the fundamental rights chapter of the Sri Lankan Constitution. The key recommendations of the HRCSL are as follows:

1. The Bill should avoid criminalising statements deemed merely to be 'distressing' to persons, as feelings of 'distress' can vary in degree and can be highly subjective. Remedies for such injury are best left to civil proceedings wherein damages can be sought by the injured person.
2. The proposed Online Safety Commission should be appointed through an appointment mechanism that guarantees its political independence. This Commission should not be vested with quasi-judicial powers, nor with powers to designate online locations as 'declared online locations'.
3. The provisions in the Bill that set out procedures for adverse decisions to be made against persons should be consistently revised to ensure that such persons be afforded an opportunity to be heard in keeping with the rules of natural justice.
4. The various offences in the Bill that relate to 'prohibited statements', which incite others to commit offences, already found in the Penal Code Ordinance, No. 2 of 1883, need to be either removed due to such new offences in the Bill being superfluous, or substantially revised in terms of their precision, and the rationality, reasonableness, and proportionality of the penalties imposed.
5. Clear criteria for the classification of 'inauthentic online accounts' should be included in the Bill in a manner that preserves the freedom of online users to remain anonymous, and to engage in parody or satire.
6. Experts appointed to assist police investigations should not be vested with police powers, as they may be private actors who are not publicly accountable.

7. The HRCSL welcomes the introduction of a new offence on child abuse through online means and encourages the Ministry to work closely with the relevant ministries dealing with the subjects of Justice and Child Affairs to introduce such an offence through a separate enactment.

The HRCSL welcomes the observations of relevant stakeholders and the public on the Online Safety Bill, and requests that any comments and suggestions be forwarded in Sinhala, Tamil, or English on or before 17 October 2023.

Media Spokesperson  
Human Rights Commission of Sri Lanka

02.10.2023

මගේ අංකය }  
எனது இல. }  
My No. }



දිනය }  
திகதி }  
Date. }

ඔබේ අංකය }  
உமது இல. }  
Your No. }

02.10.2023

**ශ්‍රී ලංකා මානව හිමිකම් කොමිෂන් සභාව**  
**இலங்கை மனித உரிமைகள் ஆணைக்குழு**  
**Human Rights Commission of Sri Lanka**

Hon. Tiran Alles,  
Minister of Public Security  
Ministry of Public Security  
14<sup>th</sup> Floor,  
“Suhurupaya”  
Battaramulla.

Your Excellency,

**Preliminary Observations and Recommendations on the Online Safety Bill**

We write to you with reference to the Bill titled ‘Online Safety’ published in the Official Gazette on 18 September 2023. We have reviewed the said Bill and wish to share our observations and recommendations on the Bill in terms of our mandate under section 10(c) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996. The said provision empowers the Commission to ‘advise and assist the government in formulating legislation...in furtherance of the promotion and protection of fundamental rights’.

At the outset, we wish to acknowledge that making online spaces in Sri Lanka safer for its citizens is a valuable legislative objective. However, we observe that law enforcement authorities in Sri Lanka have encountered significant challenges in interpreting and applying existing provisions of criminal law applicable to the online activity of citizens. The most significant example in this regard relates to section 3 of the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007. On the one hand, the said provision has not been adequately enforced to address online incitement to violence. On the other hand, the said provision has been misapplied to punish online content that does not constitute incitement. We

draw your attention to the Commission's general guidelines on the scope of section 3 of the ICCPR Act published in August 2019. The Commission wrote to both the Attorney-General and the Inspector General of Police pointing out that section 3 of the Act was not being applied in a 'consistent and even-handed manner'. However, we observe that this Act continues to be misapplied to online activity that does not constitute incitement. The Commission also wishes to draw your attention to the recent order of the High Court in Case No. HCEBA/1335/2023, in which the Learned High Court Judge A.K.M. Patabendige made certain key observations with respect to the scope of section 3 of the ICCPR Act and its misapplication in that case.

In view of the foregoing general concern, the Commission invites you to reconsider the timing of the proposed Bill. The strengthening of institutional capacity of law enforcement authorities to interpret and apply the existing criminal law in good faith should precede any proposals to introduce new legislation with criminal offences pertaining to online activity. Proceeding with such legislation without such institutional reform will irreversibly jeopardise the freedom of speech and expression and related fundamental rights of the people of Sri Lanka.

In any event, the following general observations and recommendations are presented for your consideration in view of revising the Bill to ensure compatibility with the fundamental rights chapter of the Sri Lankan Constitution:

1. The Bill should avoid criminalising statements deemed merely to be 'distressing' to persons, as feelings of 'distress' can vary in degree and can be highly subjective. Remedies for such injury are best left to civil proceedings wherein damages can be sought by the injured person.
2. The proposed Online Safety Commission should be appointed through an appointment mechanism that guarantees its political independence. This Commission should not be vested with quasi-judicial powers, nor with powers to designate online locations as 'declared online locations'.
3. The provisions in the Bill that set out procedures for adverse decisions to be made against persons should be consistently revised to ensure that such persons be afforded an opportunity to be heard in keeping with the rules of natural justice.
4. The various offences in the Bill that relate to 'prohibited statements', which incite others to commit offences, already found in the Penal Code Ordinance, No. 2 of 1883, need to be either removed due to such new offences in the Bill being superfluous, or substantially



revised in terms of their precision, and the rationality, reasonableness, and proportionality of the penalties imposed.

5. Clear criteria for the classification of 'inauthentic online accounts' should be included in the Bill in a manner that preserves the freedom of online users to remain anonymous, and to engage in parody or satire.
6. Experts appointed to assist police investigations should not be vested with police powers, as they may be private actors who are not publicly accountable.
7. The Commission welcomes the introduction of a new offence on child abuse through online means and encourages the Ministry to work closely with the relevant ministries dealing with the subjects of Justice and Child Affairs to introduce such an offence through a separate enactment.

Additionally, we enclose herewith our detailed observations and recommendations on the specific provisions of the draft Bill (Annex 1). Please note that the Commission has not yet had the opportunity to consult relevant stakeholders on the content of the Bill and will be forwarding further observations and recommendations once such consultations take place.

Thank you.

Sincerely,



**Justice L.T.B. Dehideniya**  
Judge of the Supreme Court (Retired)  
Chairman  
Human Rights Commission of Sri Lanka

Justice L T B Dehideniya

Chairman

Human Rights Commission of Sri Lanka

Cc: H.E. Ranil Wickremesinghe  
President of the Republic of Sri Lanka,  
Minister of Defence,  
Presidential Secretariat  
Colombo 01

## Annex 1

### **Preliminary Observations and Recommendations on the Online Safety Bill published in the Official Gazette on 18 September 2023**

Pursuant to the mandate of the Human Rights Commission of Sri Lanka under section 10(c) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996,<sup>1</sup> the Commission submits the following observations and recommendations with respect to the draft Bill. The Commission has relied on the Sri Lankan Constitution and the International Covenant on Civil and Political Rights (ICCPR) as the main frames of reference for these observations and recommendations.

#### **Clause 3**

Subclause (a) of Clause 3 includes the following objective of the Act: ‘to protect persons against damage caused by communication of false statements or threatening, alarming or distressing statements’ (emphasis added). The term ‘or’ in the clause, separating ‘false statements’ from other types of statements, means that a so-called ‘distressing statement’ does not need to be ‘false’, and can be accurate statements of a ‘distressing’ nature.

It is observed that feelings of ‘distress’ can vary from person to person, can vary in degree, and can be highly subjective. ‘Distress’, therefore, does not make for an objective and legally certain standard to frame a criminal offence. Remedies for such injury is best left to civil proceedings wherein damages can be sought by the injured person.

**Clause 3(a) of the Bill should omit the term ‘distressing’.**

#### **Clauses 5 and 7**

Clause 5 of the Bill provides that the President shall appoint five members to the Online Safety Commission (OSC). Moreover, the President is empowered under Clause 7(2) to remove such members with cause. Therefore, the Bill does not provide adequate safeguards in terms of the political independence of the OSC. It is observed that the exercise of powers and functions, detailed below by an institution lacking independence from political interference threatens the freedom of speech and expression of the people guaranteed by Article 14(1)(a) of the Constitution.

**It is recommended that the members of the OSC be appointed through a process that guarantees their political independence. For example, such appointments may be on the recommendation of the Constitutional Council.**

#### **Clauses 11, 25, 26, and 30**

Clause 11 of the Bill sets out the powers and functions of the OSC. We observe that the OSC is vested with broad powers, including the following: to issue notices to persons who communicate false statements or directives to persons who communicate prohibited statements

---

<sup>1</sup> Section 10(c) provides that the Commission shall have the function ‘to advise and assist the government in formulating legislation...in furtherance of the promotion and protection of fundamental rights’



to stop the communication of such statements; to issue notices and recommendations to internet access service providers or internet intermediaries to disable access to a prohibited statement or to remove such prohibited statement; to specify declared online locations, and make recommendations to disable access to the information disseminated through such online locations; to register websites providing social media platforms to end users in Sri Lanka; and to issue codes of practice by way of rules for service providers and internet intermediaries who provide internet based communication services to end users in Sri Lanka.

We note that the Commission has not been assigned any specific functions to raise awareness and educate the public on online safety.

Clause 25 of the Bill provides that any person who fails to comply with any directive issued by the OSC (with respect to stopping the communication of prohibited statements) within twenty-four hours of its receipt commits an offence and is liable to face imprisonment for a term not exceeding five years or to a fine not exceeding one million rupees.

Clauses 26(6)(b) and (8) of the Bill respectively requires the person, and the internet access service provider or internet intermediary, to whom a notice has been issued by the OSC to comply with such notice within twenty-four hours from the issuance of such notice. We note that these provisions presume that in each case, the OSC would come to a reasoned conclusion that the statement in question is prohibited (by virtue of the definitions for ‘false statements’ and ‘prohibited statements’ found in Clause 56 of the Bill).

We note that the Bill does not set out any process through which affected parties can be heard during the OSC’s investigations into alleged prohibited statements under Clause 26 of the Bill. It is observed that this feature of the Bill is inconsistent with Article 12(1) of the Constitution, which the Supreme Court of Sri Lanka has interpreted to include the right to be heard. Moreover, there is no provision in the Bill under which the notices of the OSC may be appealed, and it is assumed that such decision could be challenged through a writ application in the Court of Appeal or through the fundamental rights jurisdiction of the Supreme Court.

The power of the Commission to issue codes of practice for service providers and internet intermediaries is also problematic in the context of a potentially politicised OSC. It is observed that Clause 30 of the Bill effectively converts such codes of practice into subordinate legislation, where non-compliance can result in liability to pay damages. The mode through which such damages are determined is not specified in the Bill, leading to the assumption that the OSC would also be empowered to fix the quantum of damages and act as the forum at which an application for damages is adjudicated. Clause 53 of the Bill empowers the OSC to set out its own rules with respect to codes of practice and the process through which social media platforms may be registered.

It is noted that the OSC has been vested with powers that are quasi-judicial in nature. The exercise of such quasi-judicial powers by an institution that potentially lacks independence will irreversibly jeopardise the people’s right to the freedom of speech and expression.

For example, the OSC can engage in politically motivated censorship and stifle legitimate criticism and dissent. The restriction of any statement that is allegedly harmful, or the restriction of an online location that contains a statement that is allegedly harmful, should only be imposed pursuant to an order issued by a competent court of law. Such a scheme is

Justice L.T.B. Dehideniya  
Judge of the Supreme Court (Retired)  
Chairman



separately contemplated in any event by Clause 27 of the Bill, where a Magistrate is empowered to issue appropriate orders with respect to 'prohibited statements'.

It is noted that the term 'prohibited statement' is defined in Clause 56 of the Bill to mean any statement prohibited by Clauses 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 or 23 of the Bill. This definition becomes problematic given the fact that the scope of some of the offences found in these Clauses are vague, or the penalties imposed are irrational, unreasonable, or disproportionate, as the case may be (see discussion below).

Additionally, the application of Clause 28, where a Magistrate is expected to inquire into and make appropriate orders against internet intermediaries with respect to 'prohibited statements', becomes problematic in light of the above definition of 'prohibited statements'. In such circumstances, the maximum penalty of ten million rupees that may be imposed on an internet intermediary, as envisaged by Clause 28(10)(a), and the penalty of one million rupees per day for a continuing offence, as envisaged by Clause 28(10)(b), is arbitrary and unreasonable, given that the impugned 'prohibited statement' may involve content that ought not to be criminalised in the first place.

**It is recommended that the powers and functions of the OSC be confined to raising awareness and educating the public on online safety, and making recommendations to a relevant court of law, and that any restriction (i.e., directives and notices to persons, internet access service providers, and internet intermediaries) on statements or online locations be imposed only pursuant to an order of a competent court of law. It is further recommended that Clause 25, 26 and 30 of the Bill be removed.**

#### **Clause 12 (read with Clause 56)**

Clause 12 of the Bill provides: 'Any person, whether in or outside Sri Lanka, who poses a threat to national security, public health or public order or promotes feelings of ill-will and hostility between different classes of people, by communicating a false statement, commits an offence...'

A 'false statement' is defined in Clause 56 of the Bill to mean 'a statement that is known or believed by its maker to be incorrect or untrue and is made especially with intent to deceive or mislead but does not include a caution, an opinion or imputation made in good faith.' Thus, the falsity of a statement is only established by virtue of the subjective knowledge or belief of the maker and the intent of the maker and can be established only by evidence in that respect.

The Commission observes that the offence set out in Clause 12 of the Bill is vague and overbroad. For instance, the notion of threatening 'national security' by 'communicating a false statement' is vague and overbroad. There is no specific definition for the concept of 'national security', and it is unclear as to how a specific false statement might threaten national security. It is possible to contemplate situations in which leaking vital intelligence or accurate sensitive information could potentially jeopardise public security. However, such acts are already prohibited under the Official Secrets Act, No. 32 of 1955.

**It is recommended that Clause 12 be substantially revised to exclude terms and phrases that are vague and overbroad, including the notion of 'threatening national security'.**



## Clause 14

Clause 14 sets out the offence of wantonly giving provocation by false statement to cause riot. It is observed that the offence set out in Clause 14(a) of the Bill substantially replicates the substance of section 150 of the Penal Code Ordinance, No. 2 of 1883. We note that the offence for provoking a riot through a false statement, as set out in this Clause, carries with it a penalty that is much higher than the existing penalty found in the Penal Code for causing a riot by 'doing anything which is illegal'. The maximum penalty under the Penal Code is imprisonment for a period of one year, whereas the maximum penalty set out in Clause 14(a) is imprisonment for a period of five years. The imposition of such a high penalty for an offence substantially similar to an existing criminal offence is arbitrary and unreasonable.

Additionally, Clause 14(b) of the Bill addresses a situation where provocation by false statement to cause riot does not result in the offence of rioting being committed. The substance of this subclause is also contained in section 150 of the Penal Code. We observe that, similar to Clause 14(a), Clause 14(b) carries a much higher penalty than the similar offence contained in the Penal Code. While section 150 of the Penal Code provides for a maximum penalty of imprisonment for a period of six months, Clause 14(b) provides for a maximum penalty of imprisonment for a period of three years.

**It is recommended that any penalties imposed under Clause 14 be revisited to bring them in line with existing criminal law.**

## Clause 15

The offence set out in Clause 15 of the Bill, i.e., disturbing a religious assembly by a false statement, is substantially similar to the offence found in section 291 of the Penal Code. However, the Penal Code offence, which includes physically causing such disturbance to a religious assembly, carries with it a maximum penalty of imprisonment for a period of only one year. By contrast, Clause 15, which only deals with the utterance of false statements that may provoke others to cause the disturbance in question carries with it a maximum penalty of imprisonment for a period of three years. Imposing a higher penalty for provoking others to disturb a religious assembly (compared to the penalty for directly disturbing the religious assembly) is unreasonable and irrational.

**It is recommended that any penalty imposed under Clause 15 be revisited to bring it in line with existing criminal law.**

## Clause 16, 17 and 20

The offences found in Clauses 16 and 17 of the Bill, i.e., communicating a false statement with deliberate intent to wound religious feelings, and deliberate and malicious communication of false statement to outrage religious feelings, are substantially similar to the offences found in sections 291A and 291B of the Penal Code respectively.

These Clauses seek to compound the existing offences found in the Penal Code by imposing a higher penalty if the statement in question is false. The maximum penalty found in these Clauses, i.e., imprisonment for a period of two years and three years respectively, are higher than the equivalent penalties in the Penal Code, i.e., imprisonment for a period of one year and two years respectively.

Justice L.T.B. Dehideniya  
Judge of the Supreme Court (Retired)  
Chairman

Meanwhile, Clause 20 criminalises intentional insults by false statement with intent to provoke a breach of peace. This offence is substantially similar to the offence found in section 484 of the Penal Code. Once again, the Clause seeks to compound the existing offence in the Penal Code by imposing a higher maximum penalty (i.e., imprisonment for a period of five years) than the existing maximum penalty (i.e., imprisonment for a period of two years).

The Commission notes that it is unclear as to why the *falsity* of the impugned statement (intended to wound or outrage religious feelings or provoke the target person to breach the public peace, or to commit any other offence) is relevant to compounding the offence. The Commission observes that the existing offences found in sections 291A, 291B, and 484 of the Penal Code respectively adequately captures *all* statements, true or false, intended to wound or outrage religious feelings, or cause provocation to commit a breach of peace or other offence.

These existing offences framed during Sri Lanka's colonial era, in any event, require substantive review in terms of their compatibility with the fundamental right to the freedom of speech and expression. The Commission strongly discourages their replication in the Bill without such a substantive review.

**It is recommended that Clauses 16, 17 and 20 of the Bill be removed.**

#### **Clause 19**

Clause 19 of the Bill seeks to replicate section 399 of the Penal Code. It criminalises cheating by personation by using an online account. However, the Commission notes that the said Clause omits the element of 'cheating', which is a central feature of section 399 of the Penal Code, and instead makes it an offence to merely use an online account to pretend to be some other person. It is noted that by omitting the term 'cheating', the scope of this offence captures the use of online accounts for the purpose of parody or satire.

**It is recommended that Clause 19 be substantially revised to exclude from its scope the use of online accounts for the purpose of parody or satire.**

#### **Clause 21**

The offence found in Clause 21 of the Bill is substantially identical to the offence found in section 485 of the Penal Code, i.e., circulating a false report with intent to cause mutiny or an offence against the state. The Clause imposes a maximum penalty of imprisonment for a period of seven years, whereas the offence found in section 485 carries with it a maximum penalty of imprisonment for a period of two years. The Commission observes that the increase of the maximum penalty in this manner must be carefully justified. At present, it is unclear as to why the maximum penalty for such an offence has been increased from two years to seven years. In the absence of such justification, the Commission observes that Clause 21 of the Bill is superfluous.

**It is recommended that Clause 21 of the Bill be removed.**



## Clause 22

The Commission notes that Clause 22 contains elements that may be welcomed in light of egregious invasions of privacy online, which amount to serious acts of harassment, often of a sexual nature.

However, the scope of the offence, as it currently stands, is overbroad, given the definition of 'harassment' found in subclause 2(b) of the Bill. 'Harassment' is defined to mean an act or behaviour which has the effect of threatening, *alarming* or *distressing* a person or violating a person's dignity or creating an intimidating, degrading, hostile, humiliating or *offensive* environment or, which has all such effects' (emphasis added). It is noted that causing another person 'alarm', 'distress' or 'offence' alone ought not to attract criminal sanctions and is best dealt with through civil proceedings. This legislative thinking underscored Sri Lanka's commendable decision to remove criminal defamation from the Penal Code by enacting the Penal Code (Amendment) Act, No. 12 of 2002.

The overbroad nature of the offence in Clause 22 is evidenced in Illustration (b) in Clause 22: 'X and Y were formerly in a relationship which has since ended. X posts a photograph of Y in the possession of X which Y could reasonably have expected to remain private. X is guilty of an offence under this section in relation to such post.' In this illustration, the private photograph in question could very well be non-intimate in nature, although Y expected that it remained private. However, the mere publishing of a regular photograph of Y may cause Y distress, as it may still amount to an invasion of privacy. Imposing criminal liability on X may be disproportionate in this instance, and Y may instead pursue civil damages for the injury caused.

**It is recommended that the scope of Clause 22 be made substantially narrower where the definition of 'harassment' is confined to the most serious forms of threat, intimidation, hostility or humiliation.**

## Clauses 32 and 33

Clause 32 of the Bill empowers the OSC to declare an online location a 'declared online location', if three or more different prohibited statements (determined by the Magistrate's Court) have been or are being communicated to the end users in Sri Lanka on such online location, and at least three of such statements had first been communicated to the end users in Sri Lanka on such online location within six months prior to the date of a declaration.

We reiterate our concerns with respect to the broad scope of the definition of 'prohibited statements', the independence of the proposed OSC and the lack of a process for affected parties to be heard before any adverse decisions are made against them. It is observed that Article 12(1) of the Constitution requires that affected parties be heard prior to such an adverse decision.

Additionally, Clause 32 does not fully appreciate the frequency with which content that may potentially be harmful in nature is posted online. The threshold of merely three such posts within a period of six months virtually ensures that a vast majority of online locations would be liable to be designated a 'declared online location' under this Clause.

It is also noted that under Clause 32(7), the failure of the owner or operator of a declared online location to inform end users that the online location has been declared may result in a



Magisterial order that the declared online location be disabled. Moreover, the failure to comply with such an order within a prescribed period can result in criminal liability for the owner or operator of a declared online location with a maximum penalty of imprisonment for a period of six years or a fine not exceeding ten million rupees.

Clause 33 of the Bill imposes a statutory obligation on service providers, digital advertising intermediaries, and internet intermediaries to take reasonable steps to ensure that they do not facilitate the communication in Sri Lanka of any paid content on any declared online location. Such reasonable steps are not defined in the Bill, and shall be determined by separate regulations, presumably issued by the relevant Minister under Clause 54 of the Bill. Moreover, failure to take such reasonable steps carries with it criminal liability with a maximum penalty of imprisonment for a period of seven years or a fine not exceeding ten million rupees.

**It is recommended that Clauses 32 and 33 of the Bill be substantially revised to remove powers of the Commission to declare online locations. Any designation of any online location ought to be made only following a hearing wherein affected parties are provided an opportunity to be heard according to the rules of natural justice, and only by an order of a competent court of law.**

**Moreover, it is recommended that any requirements to take reasonable steps with respect to any designated online location be made explicitly clear in the Bill itself, and not via subsequent regulations.**

**It is also recommended that the maximum penalties for failure to take reasonable steps be substantially revised to be reasonable and proportionate.**

#### **Clauses 34 and 35**

These Clauses set out new offences relating to deriving benefits from operating a declared online location and providing financial support to declared online locations. The concerns raised with respect to the scheme through which online locations are declared are reiterated in relation to these offences.

**It is recommended that any associated offences with respect to declared online locations be included only in the event that the designation of any online location is carried out according to the rules of natural justice and only pursuant to an order by a competent court of law.**

#### **Clause 36**

This Clause authorises the OSC to issue a notice to an internet intermediary to refrain from permitting its services from being used to communicate any prohibited statement in Sri Lanka through a specified online account or from being used by a person operating a specified online account to interact with end users.

A condition of such a notice is that the specified online account disseminates a 'prohibited statement' and is determined by the Commission to be an 'inauthentic online account or is controlled by a bot' as per subclause 2(c) of Clause 36. We reiterate our concern that a 'prohibited statement' is defined to include any statement prohibited under specific Clauses of the Bill. We reiterate that some elements of these Clauses are vague, irrational, unreasonable,

Justice L.I.B. DeSilva  
Judge of the Supreme Court (Retired)  
Chairman



and disproportionate, and that the scope of 'prohibited statements' under the Bill includes content that ought not to be criminalised in the first place.

The term 'inauthentic online account' is defined in Clause 56 to mean 'an online account that is controlled by a person other than the person represented (whether by its user, unique identifier or other information) as its holder, and the representation is made for the purpose of misleading the end users in Sri Lanka of any internet intermediary service as to the holder's identity.'

It is imperative that the notion of 'inauthenticity' is not conflated with that of 'anonymity' nor includes parody or satire. Anonymity is an accepted form of communication and interaction in online spaces, and parody and satire are legitimate forms of expression.

**It is recommended that Clause 36 be revised to set out clear criteria for the classification of inauthentic online accounts in a manner that preserves the freedom of online users to remain anonymous and engage in parody or satire. Moreover, such classification should be revisited alongside a revision of how 'prohibited statements' are defined in the Bill.**

### **Clauses 37 and 38**

Clause 37 sets out the process through which the relevant Minister may appoint experts to assist the police in investigations of offences under the Bill. Clause 37(5) authorises such an expert, with the authority granted by a police officer not below the rank of sub-inspector, to: require any person to produce any document, information, device or other thing as is necessary for the purpose of such investigation; require any person to disclose any traffic data; orally examine any person; and do such other things as may be reasonably required, for the purposes of this Bill.

It is noted that Clause 37(4) requires that a warrant be issued with respect to an expert entering premises along with a police officer or accessing any information system, computer, computer system, or programme during the course of an investigation. However, Clause 37(5) does not require such judicial oversight when the expert is authorised to direct others to produce documents, information, or devices, to examine persons, or to 'do such other things' required for the purpose of an investigation.

Moreover, according to Clause 38, an expert appointed under Clause 37 can, under the authority of a police officer, require any person to make any disclosure or to assist in an investigation in respect of an offence under the Bill. Such person is required to comply with such requirement.

We note that the scheme set out in Clauses 37 and 38 effectively enables the police to subcontract its investigative functions and delegate its powers to a private actor who is not publicly accountable and is only bound by the Order issued by the relevant Minister under Clause 37(1).

**It is recommended that Clauses 37 and 38 be substantially revised to ensure that the role of any expert appointed to assist in police investigations be confined to an advisory capacity, and that such expert (who may be a private actor) not be vested with police powers.**

## Clause 48

This Clause sets out the vicarious liability of directors, partners and controlling members in the event that a body of persons, as the case may be, is found to have committed an offence. We note that imposing such vicarious liability is problematic in the context of vague and overbroad offences, and offences that contain arbitrary or unreasonable elements as discussed above.

**It is recommended that Clause 48 of the Bill be removed.**

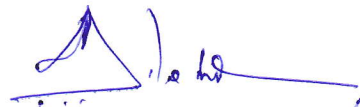
## General Observations and Recommendations

It is generally observed that the offences set out in Clauses 12, 14, 15, 16, 17, 20 and 21 of the Bill seek to criminalise the causing of certain types of harm through false statements. These offences essentially deal with inciting others to cause harm through false statements online.

It is observed that, in a prevailing context where certain similar offences, such as the offence of incitement found in section 3 of the ICCPR Act, No. 56 of 2007, are routinely misapplied, the offences found in these Clauses are at risk of being regularly misapplied. It is evident that the capacity of law enforcement authorities in Sri Lanka to interpret and enforce speech-related offences, such as offences concerning incitement, in a consistent and even-handed manner needs to be strengthened.

It is also noted that the Bill does not deal with certain threats to online safety, such as malware, phishing attacks, and denial-of-service attacks. These types of threats require appropriate legal remedies.

**It is generally recommended that the government refrain from introducing new criminal offences concerning incitement prior to engaging in meaningful institutional reform. Such reform should aim to strengthen the capacity of law enforcement authorities to interpret and apply existing criminal law pertaining to incitement consistently, objectively, and in good faith.**



Justice L.T.B. Dehideniya  
Judge of the Supreme Court (Retired)  
Chairman  
Human Rights Commission of Sri Lanka