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8 February 2024

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இலங்கை மனித உரிமைகள் ஆணைக்குழு
Human Rights Commission of Sri Lanka

Hon. Mahinda Yapa Abeywardena
The Hon. Speaker,
Parliament of the Democratic Socialist Republic of Sri Lanka
Sri Jayawardenepura, Kotte

Hon. Speaker,

Observations on the Online Safety Act, No. 9 of 2024

We write to you with reference to the Act titled 'Online Safety' certified on 1 February 2024 and published in the Official Gazette on 2 February 2024. We have reviewed the said Act and wish to share our observations in terms of our mandate under sections 10(c) and (d) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996.

At the outset, we wish to reiterate our observations and recommendations communicated to the Hon. Minister of Public Security on 2 October 2023 with respect to the substance of the original Online Safety Bill. We highlighted that law enforcement authorities in Sri Lanka have encountered significant challenges in interpreting and applying existing criminal law applicable to online activity. We cautioned the government against proceeding with the enactment of the Bill without first engaging in meaningful institutional reform.

Nevertheless, the said Bill was placed on the Order Paper of Parliament on 3 October 2023 and was subsequently challenged by a number of Sri Lankan citizens. The Supreme Court is specifically entrusted with the authority to assess any Bill in terms of its consistency with the Constitution, including the Fundamental Rights Chapter of the Constitution. Based on such an assessment, the Court is required to prescribe the manner in which such Bill may be enacted by Parliament. Full compliance with the Court's Determination on a Bill is, therefore, crucial to guaranteeing the fundamental rights of the people of Sri Lanka.

In its Determination on the Online Safety Bill, the Supreme Court found that over thirty clauses in the Bill and certain omissions in the Bill were inconsistent with Article 12(1), and in some cases, Article 14(1)(a) of the Sri Lankan Constitution. It accordingly determined that the Bill could only be enacted by Parliament with a special majority. However, the Court added that, if all the amendments recommended by Court were introduced to the Bill during the Committee Stage of Parliament, the Bill could be enacted by Parliament with a simple majority. It was, therefore, incumbent on Parliament to introduce all necessary amendments recommended by Court if it was to enact the said Bill with a simple majority. If any such amendments were omitted, Parliament would be required to enact the Bill with a special majority.

Having carefully reviewed the Online Safety Act, the Commission observes that the following sections and omissions in the Act appear to be non-compliant with the Supreme Court's Determination on the Online Safety Bill.

1. Section 13 (Clause 13 of the Bill)

It is observed that, at pages 46 and 47 of the Supreme Court's Determination, the Court proposed substantive amendments to section 13 (i.e., clause 13 of the Bill) with regard to contempt of court in addition to the amendments proposed by the Hon. Attorney General. The Court recommended the following:

- a. Confer jurisdiction in terms of Article 105(3) of the Constitution to hear and determine such cases instead of conferring jurisdiction on the Magistrates Court;
- b. Subject to the provisions of section 49(3) of the Judicature Act, No. 37 of 1979, such conferring of jurisdiction shall be in addition to the powers conferred on the District Court, Family Court, Magistrate's Court and Primary Court by section 55 of the Judicature Act No. 37 of 1919.

The precise wording recommended by the Supreme Court does not appear to be reflected in section 13 of the Act.

2. Section 16 (Clause 17 in the Bill)

The Supreme Court observed at page 51 of its Determination that: 'While the ostensible aim of clause 17 [i.e., section 16 of the Act] is to protect religious sentiments from intentional and malicious falsehoods, *its actual scope extends beyond the remit of "online safety" as traditionally understood*' (emphasis added). It also observed that 'online safety, in its quintessential sense, is concerned with safeguarding users from immediate digital threats, such as cyberbullying, phishing, scams, or exposure to harmful content. The focus is on creating a safe environment where users can navigate and interact without fear of personal harm, privacy breaches, or digital manipulation.'

The spirit of the Court's observations appears to be that the said clause in the Bill should be deleted. However, the said clause has been retained as section 16 of the Act.

3. Section 19 (Clause 21 of the Bill)

At page 53 of its Determination, the Supreme Court observed that 'the introduction of a specific clause that criminalises the communication of false statements with intent to cause mutiny and offences against the State is *overly expansive and not strictly aligned with the intended scope of the proposed law*' (emphasis added). The Court further observes that 'by focusing on broader national security concerns and public order, the clause deviates from the principal objective of protecting Internet users and the public from online harm and providing for their safety.'

The spirit of the Court's observations once again appears to be that the said clause in the Bill should be deleted. However, the said clause has been retained as section 19 of the Act.

4. Section 20 (Clause 22 of the Bill)

At page 61 of its Determination, the Supreme Court clearly recommended the amendment of the illustration in clause 22 of the Bill.

However, the relevant section in the Act, i.e., section 20, has retained the illustration in its original form, and the Court's recommendation has not been complied with.

5. Section 27 (Clause 31 of the Bill)

At pages 59 and 60 of its Determination, the Court recommended that certain services and types of material should be exempted from liability under the Bill if they meet the following criteria:

- (a) If emails are the only user-generated content enabled by the service;
- (b) SMS and MMS services:
 - 1. if SMS messages are the only user-generated content enabled by the service;
 - 2. if MMS messages are the only user-generated content enabled by the service;
 - 3. if SMS messages and MMS messages are the only user-generated content enabled by the service;
- (c) If one-to-one live aural communications are the only user-generated content enabled by the service;
- (d) False statements, prohibited statements and other prohibited materials that are removed within six months from the date the Act comes into operation; and
- (e) Any materials that have been uploaded or interfered by third parties.

We observe that the Supreme Court required all five of the above categories to be separately exempted from liability in order for the Bill to be deemed consistent with the Constitution. However, the manner in which the Act implements the Court's recommendation appears to be erroneous.

Section 27(1) of the Act exempts categories (a), (b) and (c) above, while section 27(2) refers to categories (d) and (e). However, section 27(1) of the Act is made subject to section 27(2). Therefore, under the Act, the categories in section 27(1) are exempted only if they comply with the requirements set out in categories (d) or (e). Such a formulation is not in keeping with the Supreme Court's recommendation that all five categories be separately exempted from the scope of the Act.

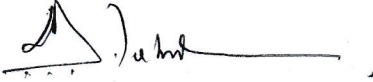
Additionally, the previous list of exempted categories in clause 31 of the original Bill (i.e., (a) an internet intermediary service; (b) a telecommunication service; (c) a service of giving public access to the internet; or (d) a computer resource service), are now exempted under section 27(1) of the Act only if they comply with section 27(2) of the Act, i.e., if the relevant material is removed within six months of the Act coming into operation, or if the material was uploaded or interfered with by third parties.

Prior to amendments being introduced during the Committee Stage of Parliament, the above-mentioned service providers would not have been required to remove material within six months of the Act coming into operation. However, section 27(2) of the Act now requires such removal in order for an internet service provider to be exempted.

We accordingly note that section 27 does not fully comply with the recommendation of the Supreme Court.

The Commission is deeply concerned about the above omissions in the Online Safety Act in terms of the Act's full compliance with the Supreme Court's Determination. Any such omission, and consequently, any remaining inconsistency with the Constitution, would have required that the Online Safety Bill be enacted only with a special majority in Parliament. Therefore, the failure to ensure full compliance with the Court's determination may give occasion to serious concerns over whether the Act, in its current form, received the requisite number of votes in Parliament.

Sincerely,



Justice L T B Dehideniya
Chairman

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

Human Rights Commission of Sri Lanka

Cc: H.E. Ranil Wickremesinghe
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