

**Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the right to privacy**

Ref.: OL LKA 9/2023  
(Please use this reference in your reply)

20 November 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association and Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolutions 52/9, 50/17 and 46/16.

In this connection, we would like to share several comments concerning the recently proposed **Online Safety Act** and **Broadcasting Regulatory Commission Act**. We wish to address some provisions of both aforementioned bills that we believe may not meet the requirements of international law and standards. In particular, we note potential violations of the rights to privacy, freedom of opinion and expression, and freedom of peaceful assembly and of association as protected by articles 12, 19 and 20 of the Universal Declaration of Human Rights (UDHR), and articles 17, 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Sri Lanka on 11 June 1980.<sup>1</sup>

Before commenting further on the proposed legislation, we would like to emphasise that article 19 (2) of the ICCPR guarantees the right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Under international law, restrictions to this right are permissible only if they are provided by law and are necessary and proportionate to achieve one of the legitimate aims expressly enumerated in article 19(3) of the Covenant.

The General Assembly and the Human Rights Council have concluded that permissible restrictions on the Internet are the same as those offline.<sup>2</sup>

The 2023 Joint Declaration on Media Freedom and Democracy, which the Special Rapporteur on freedom of opinion and expression published together with the regional mandates on freedom of expression, firmly stated that States should refrain from unduly interfering with the right to freedom of expression to enable media to fulfil their role and watchdog function in a democratic society.<sup>3</sup>

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<sup>1</sup> International Covenant on Civil and Political Rights Act No. 56 of 2007

<sup>2</sup> A/RES/68/167; A/HRC/RES/26/1.

<sup>3</sup> <https://www.ohchr.org/sites/default/files/documents/issues/expression/activities/2023-JD-Media-Freedom-and-Democracy.pdf>

A. *The proposed Online Safety Act*

The proposed legislation, introduced in the *Gazette Extraordinary* on 18 September 2023, seeks to combat false statements made online. The bill was presented to Parliament on 3 October 2023. The objectives of this legislation outlined at the beginning of the proposed legislation are to: “(a) protect persons against damage caused by communication of false statements or threatening, alarming or distressing statements (b) ensure protection from communication of statements in contempt of court or prejudicial to the maintenance of authority and impartiality of the judiciary (c) introduce measures to detect, prevent and safeguard against the misuses of online accounts and bots to commit offences under this Act; and to prevent the financing, promotion and other support of online locations which repeatedly communicate false statements of fact in Sri Lanka”.

On 25 October 2023, the Minister of Public Security decided to retract the proposed Bill with a view to introducing a series of amendments. On 7 November 2023, the Supreme Court announced that the Online Safety Bill was not inconsistent with the constitution and could be passed by a simple majority following committee stage amendments on certain clauses.

I. *Possible limitations to freedom of expression, peaceful assembly and association*

The proposed Online Safety Act does not define precisely what speech is prohibited. Rather, part III of the proposed Act outlines a broad range of online statements which would be prohibited by law. For example, section 12 states that: “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...” may be subject to criminal sanctions. Sections 16 and 17 provide that: “Communicating a false statement with deliberate intent to wound religious feelings”, as well as the “deliberate and malicious communication of a false statement to outrage religious feeling” may also be subject to sanctions. The proposed legislation also includes provisions on false statements relating to contempt of court (section 13), false statements “causing the offence of rioting” (section 14), cheating (sections 18 and 19), and false statements with intent to provoke a breach of peace (section 20), all of which are not defined further. Section 21 also prohibits false statements with intent to cause any officer, sailor, soldier, or airman in the navy, army or air force of Sri Lanka to mutiny, or with intent to cause fear or alarm to the public”.

The proposed Online Safety Act defines a “false statement” as “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”. It is not clear how the criterion of “known or believed by its maker to be incorrect” will be interpreted in practice. Similarly, in the absence of strict definitions, the law does not clarify how the threshold for offences such as “wounding religious emotions” (section 16) and making a false statement with the “objective of violating the peace” (section 20) will have to be understood and implemented by law enforcement officials.

All these provisions appear vague and overly broad and may therefore fail to meet the requirements of article 19 (3) of the ICCPR. We recall that the right to freedom of expression applies to all kinds of information and ideas, including those that may shock, offend or disturb, and irrespective of the truth or falsehood of the content (A/HRC/47/25). As highlighted by the Human Rights Committee, the right to freedom of expression includes “political discourse, commentary on one’s own and on public affairs, discussion of human rights, journalism, cultural and artistic expression and religious discourse” (CCPR/C/GC/34 para. 11). Generally speaking, we reiterate that, as noted in a Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, issued by international and regional independent experts on freedom of expression in 2017,<sup>4</sup> “general prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression, and should be abolished”. In these conditions, the proposed law may severely limit the scope of online expression and may pose major barriers and threats to any individuals, especially journalists, human rights defenders and civil society organisations who may be critical of the government. We draw your attention to the best practices to counter disinformation in line with human rights law identified by the Special Rapporteur on freedom of opinion and expression in her report (A/HRC/47/25).

We also recall that under international law, article 20 of the ICCPR prohibits “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. The ICCPR requires a high threshold because any limitation of freedom of expression must remain an exception. Hate speech that does not reach the threshold of incitement should therefore be protected. As such, the language related to the “wounding” of religious feelings used in the Bill does not appear to meet the requirements of international human rights law.

We also note that the provisions may fail to meet the requirements of articles 21 and 22 of the ICCPR, which protect the rights to freedom of peaceful assembly and of association. Article 21 protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof (CCPR/C/GC/37, para. 6). Both the Human Rights Council and the General Assembly have called on all States to “ensure that the same rights that individuals have offline, including the rights to freedom of expression, of peaceful assembly and of association, are also fully protected online” (A/RES/73/173).

We further note that the bill seems to be directed at people living in Sri Lanka and at the diaspora, with severe adverse effects on the freedom of expression of a very wide range of individuals.

## *II. Possible limitations to the right of privacy*

Part V of the proposed Online Safety Act outlines the powers of a to-be established Online Safety Commission. The Commission may identify and declare a specific location a “declared online location” used for prohibited purposes, which may give a Magistrate the ability to order directing owner or operator to disable access by

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<sup>4</sup> <https://www.ohchr.org/Documents/Issues/Expression/JointDeclaration3March2017.doc>

the end users in Sri Lanka to such declared online location. Further, part VII of the proposed law foresees the appointment of experts to assist the police with its investigations. More specifically, private “experts” individuals, including private security company, will have law enforcement power, with apparent no accountability, which raises most serious human rights concerns, especially given the recent history of the country. Under the proposed law, these experts could have the right to enter and search premises of suspects, access “any information system, computer or computer system or any programme, data or information held in such a computer and to cause any computer to perform any function or to do any such thing”, and/or demand suspects to produce any document or data.

The interrogation of individual and the compelled production of evidence have implications for both freedom of expression online and the right to privacy. The proposed law would authorise the interception of communications based on what seem to be broadly worded grounds and may involve the implication of service intermediaries and providers. In the absence of judicial safeguards, this procedure may leave open the possibility for communications surveillance to be authorised broadly and indiscriminately. The burden of proof needed to impose penalties to “offenders” also appears to be low given the potential for surveillance to result in investigation (A/HRC/23/40 para. 50).

We would like to emphasise that article 17 of the ICCPR permits interference with the right to privacy only where it is “authorised by domestic law that is accessible and precise and that conforms to the requirements of the Covenant”, is in pursuit of “a legitimate aim” and “meet[s] the tests of necessity and proportionality”.<sup>5</sup> Under article 17(2) of the Covenant, States are required to regulate, under clearly articulated laws, the recording, processing, deletion, use and conveyance of automated personal data and to protect those affected against misuse by State organs as well as by private parties (A/HRC/17/27). Without sufficient safeguards, the proposed broad surveillance powers may fail to meet the necessity test provided for in international human rights norms. The grounds for “violating” the terms outlined in the proposed law, as discussed above, are vague and leave open the possibility of arbitrary application. The proposed law may also fail to establish sufficient guarantees against abuse and may allow the undue collection of data by state authorities and privately outsourced individuals and companies.

We stress that targeted surveillance creates incentives for self-censorship and directly undermines the ability of journalists, human rights defenders and civil society organisations to carry out their independent work, conduct investigations and build and sustain relationships with confidential sources. The former Special Rapporteur on freedom of opinion and expression noted in his report on surveillance and human rights, that the “surveillance of individuals – often journalists, activists, opposition figures, critics and others exercising their right to freedom of expression – has been shown to lead to arbitrary detention, sometimes to torture and possibly to extrajudicial killings” (A/HRC/41/35).

We thus have reservations that the broad surveillance, the identification and labelling of online accounts as “offenders” under this proposed law may be a violation

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<sup>5</sup> A/69/397), para. 30

of their right to privacy and freedom of expression, as outlined in articles 17 and 19 of the Covenant. Furthermore, the identity and location disclosure outlined in part V of this proposed legislation may permit authorities to identify and locate persons more easily, which may have the effect of suppressing anonymous expression, which may impact individuals, journalists, government critics or those who might fear risks of reprisals. As noted by the former Special Rapporteur on freedom of opinion and expression in a report on surveillance and freedom of expression, restrictions on anonymity facilitate State surveillance by simplifying the identification of individuals accessing or disseminating content, and facilitate the collection, compilation of large amounts of data by the state and private companies (A/HRC/23/40). The use of encryption and anonymity is essential to exercise the rights to freedom of opinion and expression in the digital age (A/HRC/29/32).

### *III. Governance mechanisms and processes*

We further wish to draw your attention to the potential conflicts with international human rights standards created by the foreseen process for implementing and enforcing the proposed Online Safety Act. The bill proposes the establishment of an Online Safety Commission, which will be composed “of five members appointed by the President [of the State]”. The appointment process will be determined by the President, which may compromise the commission members ability to be independent in their decision making. Further clause 49 provides protection for the Commission, its staff or any experts appointed under clause 37 from any lawsuits or prosecution before the court for any act or omission done in good faith, which may have most serious adverse impact on human rights accountability.

In relation to part II of the bill, outlining the “Powers and Functions of the Commission”, we refer to specifically section 11, which provides the Commission the ability:

- (a) to issue directives to persons, service providers or internet intermediaries, who have published or communicated or whose service has been used to communicate any prohibited statement, requiring them to provide to persons who have been adversely affected by any prohibited statement, an opportunity of responding to such prohibited statement;
- (b) to issue notices to persons who communicate false statements that constitute offences under this Act, to stop the communication of such statements;
- (c) to issue directives to persons who communicate prohibited statements under this Act, to stop the communication of any such statements;
- (d) to issue notices to any internet access service providers or internet intermediary to disable access to an online location which contains a prohibited statement by the end users in Sri Lanka or to remove such prohibited statement from such online location;

- (e) to refer to the appropriate court for its consideration any communications that may be in contempt of court or prejudicial to the maintenance of the authority and impartiality of the judiciary, and to provide such assistance as may be required from any court in respect of any matter so referred to such court;
- (f) to make recommendations to service providers, internet intermediaries and internet access service providers to remove prohibited statements;
- (g) to maintain an online portal containing information to enlighten the public of the falsity of any statement;
- (h) to specify declared online locations in terms of the provisions of this Act, and make recommendations to disable access to the information disseminated through such online location;
- (i) to carry out such investigations and provide such services upon being directed by any court;
- (j) to issue codes of practice by way of rules for service providers and internet intermediaries who provide internet-based communication services to the end users in Sri Lanka;
- (k) to register, in such manner as may be specified by rules made under this Act, the websites providing social media platforms to the end users in Sri Lanka;
- (l) to consult, to the extent the Commission considers appropriate, any person or group of persons who or which may be affected, or likely to be affected, in the discharge of its powers and functions;
- (m) to advise the Government, as the Commission deems appropriate, on all matters concerning online safety in Sri Lanka, within the purview of this Act;

The powers of the proposed Online Safety Commission will thus enable it to remove online content, restrict and prohibit online access, and prosecute those individuals and organisations whom the Commission deems to be offenders. Given the comments noted above, these broad powers may result in the arbitrary targeting of anyone who may express dissenting or minority opinions or may be critical of the government's actions, including journalists, human rights defenders and political opponents.

Part IV of the proposed legislation outlines the appeals process within the Commission. A person "aggrieved by the communication of a prohibited statement" can orally, in writing or through electronic form submit a complaint to the Commission. The Commission has to designate information officers who will be in charge of receiving the complaints. Where possible the complainant should also serve a copy of the complaint to the person or persons making or communicating the prohibited statement and any internet access service provider or internet intermediary (section 26).

If the Commission decides that “sufficient material exists that a prohibited statement has been communicated” (section 26) the Commission should carry out investigations and can issue notice on the person to take measures to prevent circulation of the said statement. The individual concerned will then have to comply with the notice within 24 hours. As noted in the previous section of this letter, if the individual does not comply with the notice within 24 hours, “the Commission can issue a notice to the internet access service provider or internet intermediary on whose online location such prohibited statement has been communicated to (a) disable access by the end users in Sri Lanka to such prohibited statement; or (b) remove the prohibited statement from such online location”. There is also provision for any person affected by the communication ‘of any prohibited statement’ to apply directly to the Magistrates Court to obtain an order to prevent the circulation of such information.

The proposed Act contains no provision for the affected person to appeal against the notice issued by the Commission.

#### *IV. Sanctions*

The envisaged penalties include heavy fines and imprisonment. Part III (section 12) of the proposed Online Safety Act states that “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 and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine in the event of a second or subsequent conviction, such term of imprisonment or fine or both... may be doubled”. Other offences, such as outlined in part III (section 21) of the proposed Act “circulating false report with intent to cause mutiny or an offence against the State...” carry prison sentences of up to seven years, or double.

Additionally, as outlined in part IV (section 34) of the proposed Act, anyone who “solicits, receives or agrees to receive any financial or other material benefit as an inducement or reward for operating a “declared online location” commits an offence shall be liable to imprisonment for a term not exceeding five years or a fine not exceeding five million rupees and in the event of a second or subsequent conviction, such term of imprisonment or fine or both... may be doubled”.

Violation of the proposed legislation thus carries the threat of punitive fines and lengthy prison sentence. We caution against the imposition of such apparent disproportionate sanctions, given their significant chilling effect on freedom of expression.<sup>6</sup>

#### *B) The proposed Broadcasting Regulatory Commission Act*

This draft legislation proposes the establishment of a “Broadcast Media Authority”, aimed at implementing licensing procedures, regulating mass media and investigating possible wrongdoings by the media organisations. The proposed legislation would require every person or entity that provides a broadcasting service to register with a newly created Broadcasting Regulatory Commission (the Commission)

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<sup>6</sup> A/HRC/38/35.

within a period of 3 months from the date of commencement of the proposed Act. No person or entity shall be permitted to operate a broadcasting service in Sri Lanka except under the authority of a license issued by the Commission.

*I. Appointment and powers of the proposed commission*

Part I (3) outlines that the Commission shall consist of:

- (i) The secretary of the Ministry of the Minister; and
- (ii) Director-General of telecommunications appointed under the Sri Lanka Telecommunications Act No. 25 of 199; and
- (iii) Three other members who shall possess a degree in law, science, business management, technology, communication, engineering, public administration or mass media from a recognised University, appointed by the President with the approval of the Constitutional Council (hereinafter referred to as the “appointed members”)

The Commission’s appointment process, if implemented in its current form, may thus give the executive the ability to punish, and/or deny licenses to media outlets that do not have a favourable view of the Government. We stress that it is essential that the oversight mechanism be an autonomous body, independent from any pressure or political ties.

Pursuant to article 6 of the proposed Act, the powers of the commission include issuing and renewing broadcasting licenses; determining the preconditions and procedures of the process; receiving complaints and conducting investigations in respect to violations of the licensing conditions; determining the recipients of broadcasting licenses; and monitoring, suspending and cancelling broadcasting licenses and determining penalties. As such, the proposed law appears to give extensive powers to the commission to order the blocking of content, in apparent absence of any meaningful judicial safeguards, which may restrict the free flow of information, in a manner incompatible with international standards on freedom of expression, as noted above.

The law also does not include any criteria for the suspension or cancellation of broadcasting licences, nor does it specify how to determine penalties. While suspension and termination are the most severe sanctions that can be imposed on a media organisation, the draft law gives the Commission complete discretion in deciding whether to suspend or terminate a media outlet for violating any of the requirements contained in it – as well as in choosing between suspension, cancellation or other possible measures. We recall that to comply with the proportionality test found in article 19(3) of the International Covenant on civil and political rights, these sanctions must be imposed only in the most exceptional circumstances involving very serious unlawful conduct where less restrictive measures would be insufficient.

Article 19 of the bill foresees the appointment of an investigation committee to investigate contraventions of the proposed legislation and violations of license or codes of ethics, monopolistic behaviour, or “any matter in which a license holder of any



broadcasting service is involve [sic] that may leads [sic] to a threat to the national security national Economy or may create any conflict among races and religions.” The broad discretion accorded for investigating media outlets raises the spectre of investigations being used to deter or penalise editorial decisions that question the government, particularly since they are coupled with the ability to compel production of any document and search media premises. In addition, the investigation committee would have the power under article 19(7) to “give an interim direction as it considers appropriate” if it considers that there is an urgent need to “protect the national security; prevent serious irreparable damage to particular person or category of persons; or protect the public interest.” This grants considerable discretion to the investigation committee to determine not only when to intervene, but how, and with which sanction.

To protect freedom of expression, international standards require States to respect the freedom of the media. Media freedom and independence is essential in order for the public to access a wide range of opinions, especially on matters of public interest. We draw your attention to the 2018 Joint Declaration on Media Independence and Diversity in the Digital Age” by the Special Rapporteur on freedom of opinion and expression, which affirms that States have an obligation to refrain from engaging in indirect forms of censorship, such as the abuse of controls over newsprint, radio frequencies or infrastructure used to disseminate media content and ensure the independence of bodies which exercise regulatory powers over the media. We also direct you to the recent report of the Special Rapporteur on freedom of opinion and expression on the issue of media freedom and the safety of journalists (A/HRC/50/29).

We believe that public bodies, which exercise powers in media regulation, including bodies that receive complaints from the public, should be independent, transparent, accountable and effectively functioning in law and in practice. They should be protected against undue interference, particularly of a political or commercial nature. We underscore that the legal status of these bodies should be clearly defined and their institutional autonomy and independence guaranteed and protected by law.

### *Conclusion*

As outlined above, the proposed legislation will give immense powers to both newly established Commissions, and could be in violation of the basic principles of freedom of expression, peaceful assembly and association and the right to privacy. In the absence of adequate safeguards, these proposed Acts may be used to suppress dissenting voices, especially those of journalists, human rights defenders and civil society organisations and those who may be critical of the Government. With general elections scheduled in 2024 and 2025, we urge your Excellency’s Government to respect media freedom, independence and pluralism, in line with the provisions of article 19 of the ICCPR.

We encourage the withdrawal, public consultation and substantial review of key aspects of both the proposed Online Safety Act and the Broadcasting Regulatory Commission Act outlined in this letter to ensure that the adopted legislation complies with your Excellency’s Government’s international human rights obligations.

To ensure that civil society has sufficient time to provide comments on the draft laws, we recommend that there should be more substantive discussion with all

stakeholders and that your Excellency's Government draws upon best practices related to media freedom so that the right to freedom of expression can be upheld (See in particular the report on media freedom in the digital age of the Special Rapporteur on freedom of opinion and expression A/HRC/50/29, and the report on disinformation and freedom of opinion and expression (A/HRC/47/25). Given the wide-ranging impact of this proposed legislation on individuals and organisations dedicated to the publication and dissemination of information in Sri Lanka, we urge your Excellency's Government to engage in wider consultations with all relevant stakeholders before bringing this proposed legislation into law.

In the light of these observations, we invite your Excellency's Government to continue our dialogue and to provide responses to the abovementioned comments. We encourage the Government to take all necessary steps to carry out a detailed review of the proposed Acts, to amend the provisions that do not meet international norms related to freedom of opinion and expression and to ensure its implementation does not result in undue restrictions of this fundamental freedom. We stand ready to provide your Excellency's Government with any technical support it may require in this context.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all matters brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis.
2. Please outline how the provisions of the proposed Online Safety Act and the Broadcasting Regulatory Commission Act are consistent with your Excellency's Government's obligations under international human rights law, and will not restrict or impede on the fundamental rights to privacy, freedom of opinion and expression, and freedom of peaceful assembly and of association as protected by articles 12, 19 and 20 of the Universal Declaration of Human Rights (UDHR), and articles 17, 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR).
3. Please indicate what measures your Excellency's Government has taken to ensure that people in Sri Lanka are able to exercise of their rights to freedom of opinion and expression, and of peaceful assembly and of association in a safe and enabling environment, both online and offline, without fear of threat or acts of intimidation and harassment of any sort.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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