

# Implications of “Online Safety” Bill

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# How the law will work

# How the Commission is activated

26. (1) A person aggrieved by the communication of a prohibited statement which is seen, heard or otherwise perceived by the users of internet based communication services (in this Act referred to as the “end users”) in Sri Lanka, by any other person, may either orally, in writing or in electronic form, make a complaint providing information pertaining to such communication to the Commission.

(2) The Commission shall designate such number of information officers from among the staff of the Commission as the Commission may deem necessary, from time to time, to receive information in relation to communication of a prohibited statement for the purpose of subsection (1).

(3)(a) Every complaint shall set out all available details of the person or persons responsible for the making or communicating the prohibited statement, including, where available, details pertaining to the Universal Resource Locator (hereinafter referred to as the “URL”) or other identifying features of the location or number from which the prohibited statement was communicated or published, and such other details as may be prescribed.

- Any user of internet-based communication can complain
  - E.g., not a reader of a newspaper, but one who read the newspaper online
- Orally, in writing or in electronic form
- With details of persons responsible for statement, including URL

# Commission actions in relation to person held responsible for content

5) Where the Commission is of the opinion that sufficient material exists that a prohibited statement has been communicated, the Commission shall carry out investigations through the officers of the Commission.

(6)(a) If the Commission is satisfied, that sufficient material exists that a prohibited statement has been communicated, it may, taking into consideration the seriousness of the matter and the likelihood of damage or prejudice caused by such prohibited statement, issue notice to the person who communicated such prohibited statement, to take measures to prevent the circulation of such prohibited statement.

(b) A person to whom a notice has been issued under paragraph (a) shall comply with such notice immediately but not later than twenty four hours from such notice.

(c) Notice referred to in paragraph (a), shall be deemed to be served, where it is served by personal service, sent by post to the last known address of the person who communicated such prohibited statement, or served by electronic means to such person, or served by such other appropriate method adopted by the Commission depending on the nature of the case.

- Forms opinion re sufficient material
- Investigates
- Issues notice to prevent circulation of prohibited statement
  - Deemed served when served by personal service/sent by post/served by electronic means/by other means
- Person to whom notice issued shall comply immediately/no later than 24 hours.

# Commission actions in relation to ISP/internet intermediary

(7) Where any person fails to comply with a notice issued under subsection (6) within twenty four hours of such notice, the Commission shall issue a notice to the internet access service provider or internet intermediary on whose online location such prohibited statement has been communicated-

(a) to disable access by the end users in Sri Lanka to such prohibited statement; or

(b) to remove such prohibited statement from such online location, as the case may be, for the period specified in such notice.

(8) The internet access service provider or internet intermediary to whom a notice has been issued under subsection (7) shall comply with such notice within twenty four hours from the issuance of such notice.

- If no action by person served notice under s. 26(6)(a), notice is served on ISP/internet intermediary to disable access by end users in LK OR remove the statement
  - Shall comply within 24 hrs

# ISP/Internet intermediary definitions

- “internet access service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received;
- “internet intermediary” means a person who provides any internet intermediary service;
- “internet intermediary service” means-
  - (a) a service that allows end users to access materials originating from third parties on or through the internet;
  - (b) a service of transmitting such materials to end users on or through the internet; or
  - (c) a service of displaying, to an end user who uses the service to make an online search, an index of search results, each of which links that end user to content hosted or stored at a location which is separate from the location of the index of search results, but excludes any act done for the purpose of, or that is incidental to, the provision of a service of giving the public access to the internet or a computing resource service;

# How enforced? S. 25. Imprisonment < 5 years; fine < LKR 1 million

- 25. Any person who fails to comply with any directive issued in respect of such person by the Commission under paragraph (c) of section 11 within twenty four hours of its receipt commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding one million rupees and in the event of a second or subsequent conviction, such term of imprisonment or fine or both such imprisonment and fine may be doubled.
- 11. The Commission shall have the following powers and functions: -
  - (c) to issue directives to persons who communicate prohibited statements under this Act, to stop the communication of any such statements;

# Section 26 and section 27 routes

## Section 26: Judiciary only at end

- The stop orders are issued based on Commission's opinions that do not require adherence to rules of natural justice, applicable to courts as well as to decision makers exercising public functions
- Section 25 offence is defined in terms of failure to comply; does not go into merits of original decision by Commission

## Section 27: Judiciary throughout, but expedited procedure

- Magistrate involved from start
  - Presumption re serving notice
  - conditional order to such person or the internet access service provider or internet intermediary on whose online location such prohibited statement has been communicated
  - If person served order does not appear within 7 days, order will be made absolute
  - Hearing to be completed within 2 weeks

# An example of imprecise drafting

Leaving room for arbitrary  
applications

# The offence of “revenge porn”

## Sri Lanka provision

- 22. (1) Any person, whether in or outside Sri Lanka who wilfully makes or communicates a statement of fact, with intention to cause harassment to another person (in this section referred to as the “target person”), by publishing any “private information” of the target person or a related person of the target person, and as a result causes the target person or any other person harassment, commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred thousand rupees and in the event of a second or subsequent conviction, such term of imprisonment or fine or both such imprisonment and fine may be doubled.

## California provision

- • “anyone who intentionally distributes an image of the intimate body part or depicting them in sexual intercourse, oral copulation, sodomy, sexual penetration, or masturbation, under circumstances in which they understand that the image shall remain private, the person distributing the image knows or should know distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.”

# CA & UK are limited to “revenge porn.” Sri Lanka wording ambiguous; may be applied for other acts



## Sri Lanka provision (contd)

- (2) For the purpose of this section-
- (a) “private information” means personal information, including any image, audio or video details, that any person may reasonably expect to remain private, but does not include any information that may be evidence of the commission of any other offence; and
- (b) “harassment” means 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.

## UK provision

- Disclosing or threatening to disclose,] private sexual photographs and films with intent to cause distress
- 1) A person commits an offence if—
  - (a) the person discloses, or threatens to disclose, a private sexual photograph or film in which another individual (“the relevant individual”) appears,
  - (b) by so doing, the person intends to cause distress to that individual, and
  - (c) the disclosure is, or would be, made without the consent of that individual.]
- (2) But it is not an offence under this section for the person to disclose or threaten to disclose,] the photograph or film to the relevant individual].

# Two possible explanations

# If minimization of harm through rapid takedown is the objective . . .

- Unrealistic to expect results from s. 26 or s. 27 routes
- Working with platforms to implement technological means of quick takedowns is the solution
- Explanation could be ignorance/lack of consultation/belief that the solution must be a law
- Imprecise drafting may be attributed to incompetence

# If minimization of harm through self-censorship is the objective . . .

- The imprecise drafting is not a bug, it's a feature
- Because no one can be sure what is allowed and what is prohibited, content generators, those who share the content, platforms, ISPs will be ultra cautious and engage in excessively strict self-censorship
  - Dissemination of potentially harmful content will decline
  - But there will also be considerable damage to healthy discourse necessary in a democratic society
  - The ambiguities in the law and the broad discretion given to the Commission will also allow arbitrary actions against persons/organizations
  - Because anyone can initiate action under s. 26 or s. 27, a high level of uncertainty will be created, as with ICCPR Act misapplications