



## The Proposed Amendments to the Online Safety Bill

Centre for Policy Alternatives (CPA)

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The Centre for Policy Alternatives (CPA) has previously raised concerns with the Online Safety Bill (OSB) and challenged certain clauses in the Supreme Court.<sup>1</sup> On the 18<sup>th</sup> of October, during the hearing on the constitutionality of the OSB,<sup>2</sup> the Attorney General's Department of Sri Lanka produced to the Supreme Court a series of amendments that the Government proposed to move during the Committee Stage when the Bill was to be taken up in Parliament. These "Committee Stage Amendments" would make substantial alterations to the Bill that was gazetted. Several of the amendments also deviate from "the merits and principles" of the originally gazetted OSB and thus, are in contravention of Article 78(3) of the 1978 Constitution of Sri Lanka.<sup>3</sup> Subsequently, such substantial change requires the Government of Sri Lanka to withdraw the currently proposed OSB and re-gazette the amended version. The most pertinent of those changes are summarized as follows;

### 1) Removal of "Certain Statements of Fact"

The originally gazetted OSB consistently makes reference to the vague terminology of "certain statements of fact". This has now been replaced by the term "prohibited statements" which are defined by the offences set out in Part III of the OSB. This change is exemplified in the differences between the original Preamble of the OSB and the proposed amendment:

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<sup>1</sup> 'CPA Challenges the Online Safety Bill' (12 October 2023) <https://www.cpalanka.org/cpa-challenges-the-online-safety-bill-sc-sd-89-2023/>.

<sup>2</sup> Presented by the Minister of Public Security on 3 October 2023 (Published in the Gazette on 18 September 2023) [Bill No. 207] [http://documents.gov.lk/files/bill/2023/10/391-2023\\_E.pdf](http://documents.gov.lk/files/bill/2023/10/391-2023_E.pdf).

<sup>3</sup> Article 78(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978 reads "Any amendment proposed to a Bill in Parliament shall not deviate from the merits and principles of such Bill".

Preamble of the OSB	The Proposed Amendment
“An Act to establish the Online Safety Commission; to make provisions to prohibit online communication of <i>certain statements of fact</i> in Sri Lanka...”	“An Act to establish the Online Safety Commission to provide safety from <i>prohibited statements</i> made online...”

Notably, this change is also seen in the Long Title, Clause 3, Clause 11(b) and the Part IV Heading.

## 2) Changes to the Objectives of the Bill

Problematically, Clause 3 of the original OSB set out its objectives as including protecting persons from statements that may be “threatening, alarming or distressing”. Such vague terminology could have been arbitrarily misused by the Government due to their inherent conceptual uncertainty. These words have now been removed and replaced whereby it is now an objective of the OSB to “protect persons against damage caused by the communication of prohibited statements”. While significantly changing the original objective of the OSB, this new amendment continues to adopt the broad and imprecise terminology of “damage”.

The objectives of the Bill have been used as a cover for far-reaching regulatory action initiated by the Minister. For example, the Government sought to justify the legality of the Prevention of Terrorism (De-radicalization From Holding Violent Extremist Religious Ideology) Regulations No.01 of 2021 based on the broad objectives of the Prevention of Terrorism Act.<sup>4</sup> Though the Online Safety Bill has been initiated under the guise of ‘protection’ of the public from online harms, the threat of the Government looms larger.

## 3) Entry of the Constitutional Council in Appointments and Removals of Commission Members

Previously, Clause 5 of the OSB set out that the Executive President of Sri Lanka appointed the five members of the Online Safety Commission (OSC) with the only criteria being that those members have qualifications and experience in the fields of information technology, law, governance, social services, journalism, science and technology or management. Additionally, the President held the sole authority to accept the resignation of or remove the members of the OSC. However, the proposed amendment now makes such appointment and removal of members of the OSC by the President subject to Constitutional Council approval:

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<sup>4</sup> Extraordinary Gazette No. 2218/68 dated Friday 12 March 2021.

Clause 5 of the OSB	The Proposed Amendment
<p>“...the Commission shall consist of five members <i>appointed by the President</i> having qualifications and experience in one or more of the fields of information technology, law, governance, social services, journalism, science and technology or management.”</p>	<p>“(1) The Commission shall consist of five members appointed by the President, <i>subject to the approval of the Constitutional Council</i>, from among the persons having qualifications and experience in one or more of the fields of information technology, law, governance, social services, journalism, science and technology or management.</p> <p>(2) Subject to the provisions of section 6, the President shall recommend the names of five persons to be appointed as members of the Commission under subsection (1), to the Constitutional Council for approval.</p> <p>(3) The President shall, within a period of fourteen days of receiving the approval of the Constitutional Council, appoint the persons approved by the Constitutional Council under subsection (2) as members of the Commission.</p> <p>(4) Where the Constitutional Council refuses to approve the name of a person referred to in subsection (2), the President shall make a fresh nomination, and the provisions of subsections (1), (2), and (3) shall apply to such nomination accordingly.</p> <p>(5) In the event of the President failing to make the necessary appointments within the period of fourteen days as specified in subsection (3), the persons approved by the Constitutional Council shall be deemed to have been appointed as the members of the Commission, with effect from the date of the expiry of such period.”.</p>

Clause 7(2) of the OSB	The Proposed Amendment
<p><i>“The President may, for reasons assigned, remove a member of the Commission from his office.”</i></p>	<p>“A member of the Commission may be removed from his office by the President, <i>subject to the approval of the Constitutional Council</i> following a hearing of the relevant member that such person</p> <p>(a) is unable to exercise, perform and discharge the powers, duties and functions of such office because of an infirmity of body or mind that has lasted for more than a period of three months;</p> <p>(b) has failed to exercise, perform and discharge the powers, duties and functions of such office for a consecutive period of more than three months without the approval of the Commission; or</p> <p>(c) is disqualified in terms of the provisions of section 6.</p>

#### 4) Changes to Voting Procedure

The gazetted OSB provides in Clause 9(5) that all decisions made by the Online Safety Commission would be decided by a majority vote of the members. The proposed amendment instead states that all decisions would be reached by a majority vote of the members of the OSC “present and voting at the meeting at which the decision is taken”. Since the quorum for a meeting of the OSC is only 3 members, technically, decisions can be made with only 2 members of the OSC supporting such a decision.

#### 5) Expansion of Powers of the Online Safety Commission

The amendment to Clause 11(i) of the OSB by Clause 11(h) would have the effect of enhancing the role of the Online Safety Commission from a regulator of ‘prohibited statements’ to an autonomous investigative agency:

Clause 11(i) of the OSB	The Proposed Amendment
<p><i>“to carry out such investigations and provide such services upon being directed by any court”.</i></p>	<p><i>“to carry out such investigations and provide such services as may be necessary to exercise and perform the powers and functions of the Commission”.</i></p>

The gazetted Bill provided for some judicial control in the investigative functions of the Commission. The proposed amendment would give the OSC its own unique investigative powers and remove the minimum judicial controls proposed in the original Bill.

Pointedly, this pattern of expanding functions is seen in Clause 26(9) of the proposed amendment to the OSB, which now adds that in case of an individual or an internet intermediary non-compliance with notices issued by the OSC, the OSC “may apply to the Magistrate's Court by way of petition and affidavit to obtain an order directing such person... to comply”.

In a similar fashion, Clause 31(3) now sets out that a person who fails to comply with the ‘code of practice’ issued by the OSC and consequently causes “wrongful loss to any other person, shall be liable to pay damages by way of compensation to the person who suffered such loss”. It would seem that the OSC is now capable of legislating for online practices.

As opposed to mitigating against the arbitrary discretion bequeathed to the Online Safety Commission by the originally gazetted OSB, the amendments only serve to further enhance those powers.

#### 6) Alterations to Punishments for Communicating ‘Prohibited Statements’

Part III of the OSB contains various offences, many of which amount to ‘prohibited statements’, and the punishments attached to each. The proposed amendments to the OSB make wide alterations to the punishments for offences under the OSB, as follows:

<b>Clause</b>	<b>Punishment in Gazetted Bill</b>	<b>The Proposed Amendment</b>
12	“...imprisonment for a term not exceeding five years or to a fine...”	Adding “...or to a fine not exceeding five hundred thousand rupees” to the existing punishment.
14(a)	“...imprisonment of either description for a term not exceeding five years, or with fine...”	Adding “... a fine not exceeding five hundred thousand rupees or with both such...” to the existing punishment.
14(b)	“...imprisonment of either description for a term not exceeding three years, or to a fine...”	Adding “...to a fine not exceeding three hundred thousand rupees, or to both such imprisonment...” to the existing punishment.
17	“...imprisonment of either description for a term not exceeding three years, or to a fine...”	Adding “...to a fine not exceeding three hundred thousand rupees...” to the existing punishment.

18	"...to imprisonment for a term not exceeding one year or to a fine..."	Adding "...to imprisonment for a term <i>which may extend to seven years or to a fine not exceeding seven hundred thousand rupees...</i> " to the existing punishment.
19	"...to imprisonment of either description for a term not exceeding five years, or to a fine..."	Adding "...a term <i>which may extend to three years or to a fine not exceeding three hundred thousand rupees...</i> " to the existing punishment.
21	"...imprisonment of either description for a term not exceeding seven years, or to a fine..."	Adding "...to a fine <i>not exceeding seven hundred thousand rupees</i> , or to both such imprisonment..." to the existing punishment.
23	"...imprisonment for a term not exceeding twenty years or to a fine..."	Adding "...imprisonment for a term <i>not less than two years and not exceeding twenty years or to a fine not exceeding one million rupees...</i> " to the existing punishment.

These offences are similar to already existing provisions in the Penal Code, except that those in the Bill deal with actions done online (as opposed to the Penal Code). However, the punishments specified in the Bill are harsher than what is specified for the corresponding offence in the Penal Code. Additionally, Clause 16 which criminalized communicating a false statement with deliberate intent to wound religious feelings has now been deleted.

#### 7) Enhancement of Minister's Discretion

A significant amendment is proposed to Clause 37(1) of the OSB. The gazetted Bill authorised the Minister to appoint private individuals as "experts" to assist in the investigation of the commission of an offence subject to the courts deeming such appointment "necessary". However, the amendment removes this judicial safeguard and now allows the Minister to appoint the so-called "experts" without prior approval by the courts:

Clause 37(1) of the OSB	The Proposed Amendment
<p>“Where the court deems necessary, the Minister may by Order published in the Gazette appoint a person, an institution or a body of persons having the specified qualifications and experience in information technology (hereinafter referred to as “an expert”), to assist any police officer in any investigation...”</p>	<p>“The Minister may by Order published in the Gazette appoint a person, an institution or a body of persons...”</p>

#### 8) The Commission’s Ability to Institute Criminal Proceedings

Clause 42 of the OSB is to be amended to allow the OSC to directly institute criminal proceedings against any citizen. This is a significant deviation from the powers originally conceived for the Commission, in the originally gazetted Bill. It is also apparent that the amended Clause 42(1) is convoluted and incoherently framed:

Clause 42 of the OSB	The Proposed Amendment
<p>“Save as expressly provided in this Act, the provisions of the Code of Criminal Procedure Act, No. 15 of 1979, 25 shall, mutatis mutandis apply to investigations, the trial of offences and to appeals from judgements, sentences and orders pronounced at any such trial under this Act.”</p>	<p>“(1) Save as expressly provided in this Act, the provisions of the Code of Criminal Procedure Act, No. 15 of 1979, shall, mutatis mutandis apply to investigations, the trial of shall, mutatis mutandis apply to investigations, <i>institution of proceedings</i>, the trial of offences and to appeals from judgements, sentences and orders pronounced at any such trial under this Act.</p> <p>(2) Where the Commission, on consideration of material collected in the course of investigations conducted under this Act, is satisfied that any person has committed an offence under the provisions of this Act, <i>it may take steps to institute criminal proceedings</i> in terms of section 136 of the Code of Criminal Procedure Act, No. 15 of 1979.”</p>