

English translation

2022 February 2nd

1. Mr. Mahinda Yapa Abeywardena, Speaker.
2. Mr. Mahinda Rajapaksa, Prime Minister.
3. Mr. Sajith Premadasa, Leader of the Opposition.
4. All Party Leaders of the Parliament.
5. All Parliamentarians, Sri Lanka Parliament, Sri Jayawardenepura- Kotte,
6. Chairman and High Commissioners, Human Rights Commission of Sri Lanka, RA de Mel Mawatha, Colombo.
7. Mr. Saliya Peiris, President, Presidential Council, Bar Association of Sri Lanka, Mihindu Mawatha, Colombo 12.
8. Hon. Ali Sabri, Presidential Council, Minister of Justice, Ministry of Justice, Adikarana Mawatha, Colombo 12.
9. Chairpersons and High Commissioners, Commission for the right to information, Bandaranaike Conference Hall Premises, Colombo.
10. Mr. Sanjaya Rajaratne, Attorney General, Attorney General's Department, No. 159 , Hulftsdorp, Colombo 12, Sri Lanka

Dear sir/madam,

Notice of infringement of fundamental rights by certain provisions under the proposed personal Data Protection Policy and request for necessary amendments

- Although many countries have legislation to protect the rights of their citizens by enacting laws, it is a well-known fact that they often violate the rights of citizens when they come into operation after the enactment of a law and when implementing regulations. When looking at the past 10 years alone, there are plenty of examples where government of Sri Lanka has used laws to suppress opposition parties and dissidents. In practical practice, using the Civil and Political Rights (ICCPR) Act, No. 56 of 2007 Lanka in accordance with the ICCPR treaty which is ratified to protect civil and Political Rights to suppress the rights of citizens is a good example to the above statement. Hence, our opinion is that it should be more careful when passing a law.
- As mentioned earlier, the Personal Data Protection Laws of many countries around the world are being passed to protect the personal data of citizens. Although the cessation of the use of private data for businesses and fraud was discouraged, like other

bills, there is an issue with its practice after it has been ratified. Especially, in most countries data protection laws are enforced in related to media. There is such freedom in India's draft too. The Indian journalists are fighting for even more concessions.

- Although the Personal Data Protection Bill presented by the Prime Minister is also be aimed at protecting the personal data of citizens, at first glance there are some serious issues that we observed as the Sri Lanka Young Journalists Association. Accordingly, as per the instructions of the Committee of the Sri Lanka Young Journalists Association, as an Active Members, two of us who signed below filed two petitions online and in general mode. Its number is S.C.(S.D) 10/2022.

- Although the petition was filed online on 27th January against the bill stating it violates the accepted principles of law leaving the investigation, trial and sentencing to the same institution, the Supreme Court had dismissed the petition after considering an objection filed by the Attorney General regarding time lapse.

- Although the petition was dismissed, as the Sri Lanka Young Journalists Association, our opinion is that the amendments are required to the Bill in places where the rights are violated. This bill will violate the rights of the media and it will diminish the powers of the Right to Information Act, No. 12 of 2016. We consider that it is a serious concern that an independent and non-judicial institution (Data Protection Authority) receives power to investigate complaints to impose penalties. Therefore, necessary amendments should be made before passing this bill. If not, the good intentions of bringing in the bill are also questionable. Required amendments which we intend to make in relation to this bill are outlined below in detail.

- I urge all of you to intervene to make the following amendments to this Act in order to promote the legitimacy and goodwill of the people as well as to protect the fundamental rights of citizens.

Proposed amendments

- As defined in the section 47 of the Personal Data Protection Bill presented by the Prime Minister, 'Personal data' is defined as below.

any information that can identify a data subject directly or indirectly, by reference to—

(a) an identifier such as a name, an identification number, location data or an online identifier; or

(b) one or more factors specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of that individual or natural person

- Therefore, any information that can identify a data subject directly or indirectly come under personal data. Most of the data that is used in the media on a daily basis are related to the 'personal data' in this bill.

- 'Data processing' has been defined as follows in relation to the above mentioned data.

‘any operation performed on personal data including but not limited to collection, storage, preservation, alteration, retrieval, disclosure, transmission, making available, erasure, destruction of, consultation, alignment, combination, or the carrying out of logical or arithmetical operations on personal data’

- Simply put, when a person's name is used, 'data processing' applies to everything from hearing the name, adding the name to posting the name. Every action frequently committed by the media comes under the definition of 'data processing' itself.

1) Amendment of section 2 of the Bill

The section 2 of the bill specifies to whom this bill is applied. Simply, this bill is applied to all persons residing in Sri Lanka.

Also this act should be applied when data processing is performed by a 'controller' or 'data processor' under an established written law in Sri Lanka as stated in the subsection 9 of section 9.

Section 47 of the bill defines the term 'controller' in that sub-section as follows.

any natural or legal person, public authority, non-governmental organization, agency or any other body or entity which alone or jointly with others determines the purposes and means of the processing of personal data.

It means, any citizen of Sri Lanka who deals with personal data (including name, village, etc.), government agencies, non-governmental organizations and other organizations fall under the definition of 'controller'.

Consequently, in accordance with section 2 of the bill, every person engaged in media are also subject to this Act. This bill applies to all of them. If the bill is passed, it could be problematic for journalists who work with data on a daily basis. There may also be issues in the use of the Right to Information Act. In the Sub-section 3 of section 9 of the bill, there are two points regarding the non-applicability of section. Under that, an amendment to the draft is requested by adding the following sections after sub section 'b' of the section 2.

‘(C) personal data used in the enjoyment of the Right to Freedom of speech and expression including freedom of the press

(D) Personal data used in the implementation of the Right to information Act No. 12 of 2016’

2) Amendment of section 3 of the Bill

The law that applies in the event of a discrepancy between this Act and other laws are mentioned in the section 3 of the bill. Following are mentioned in the sub-section 2 of the section 3.

‘(2) In the event of any inconsistency between the provisions of this Act and the provisions of such written law, the provisions of this Act shall prevail.’

Right to Information Act of Sri Lanka has been widely acclaimed nationally as well as internationally. It is considered as a good step forward in establishing democracy in Sri Lanka. In other words, any individual or organization may apply this Personal Data Protection Act. 'Data processor' is any other person who does the work instead of the controller.

The above provision of sections such as the Personal Data Protection Act may lead to a conflict with the Future Acts in the future.

The above provisions of Section 3 of the Personal Data Protection Act may create some kind of conflict with the Right to Information Act in the future. Public authorities will try to weaken the powers of the Right to Information Act using this section. In particular, the institution established under this bill falls under the definition of 'Public Authority' under the Right to Information Act and are bound to the public authorities by the orders of the Right to information Commission. If this Act operate beyond the Right to Information Act, there may be a serious situation in the future where the Right to Information Commission will be subject to the orders issued by the authorities established under this Act, which is a public authority bound by the rules of the Right to Information Commission. In order not to do so and to ensure that the Right to Information Act is as effective as before, we request that the draft should be amended by adding the following after the sub-section 2 of the section 3 of this bill.

‘However, if there is any discrepancy between the provisions of this act and the provisions of the Right to Information Act, No. 12 of 2016, the provisions of the Right to Information Act shall prevail over this Act.’

3) Amendment of section 5 of the Bill

Article 5 of this Bill refers to the processing of data in a lawful manner.

Although Schedule 1 to Schedule 4 included the legitimacy of data processing, it is not clearly stated in section 5 or Schedule 5 that data processing is legitimate for the freedom of the press and / or freedom of expression and / or the freedom of the right to information. At first glance it may seem to the reader that it is illegal to compile data on the above context. Therefore, we request that the draft be amended to include the following 2 sections under section 5 of the bill after sub section ‘d’. Accordingly, we request to amend the following mentioned in the last few words in the Sinhala version in the section 4 (the first few lines of the English version), “The processing of personal data shall be lawful if a controller is in compliance with—”

(e) to implement the right to freedom of speech expression speech and expression, including freedom of the press

(f) to implement the Right to Information Act

4) Amendment of section 17 of the Bill

Implementing the provisions of Sections 13,14, 15 and 16 of this Act in the event of a journalist being a data controller or processor may create a serious issue for the journalist to carry out his professional activities. We therefore request that the draft be amended by adding a subsection after the seventh subsection of the seventeenth section stating that these provisions are not applicable to a journalist being a data controller or processor.

‘Whatever is stated in Sections 13,14,15 and16, the provisions of Sections 13,14,15,16 shall not apply in respect of a journalist or in connection with a media activity or implementation of the Freedom of Right to Information Act.

5) Amendment of section 19 of the Bill

If the aforesaid and the following amendments are not made in this Bill, then section 19 of the bill provides that a journalist and/or any media institution and/or any other person and/or institution supporting media and/or the institution implementing the Right to Information Act shall be subject to this Act. The media and the right to information can be severely hampered as it is likely to be summoned to the authority under this Act for questioning and subject to certain orders.

Therefore, we request that the provisions of this bill be amended by including the following subsection after sub-section 5 of section 19 of the bill to ensure that they do not apply for the journalism and the right to information.

‘(6) The provisions of this section shall not apply to a journalist and/or any media institution and/or any other person and/or institution supporting media and/or the institution implementing the Right to Information Act’ and any journalist and/or any media institution and/or any other person and/or institution supporting media and/or the institution implementing the Right to Information Act’ shall not be summoned or questioned for any reason by the authority referred to in this Act.

6) Amendment of section 28 of the Bill

Part 5 of this Bill refers to the Data Protection Authority and its powers. According to section 28 of the bill, the Data Protection Authority is not a new institution and the Minister may designate a public corporation, statutory body or any other institution established by or under any written law and controlled by the government as the “Data Protection Authority of Sri Lanka” considering only a few factors. The responsibilities of this Act are also delegated to an existing institution of government and it is not an independent body.

Since there are even investigative powers under this Act, we request that an independent body be appointed to implement the provisions of this Act and that its heads be appointed after calling the nominations by the Constitutional Council.

We also request that Article 28 of the Act be amended accordingly.

7) Amendment of section 30 of the Bill

Section 30 of the bill refers to the powers delegated to the authority. Accordingly, the authority has great power and, if the Act is not amended, it also has the power to investigate if a complaint is received about a journalist processing data. Since it has a severe impact on the activities of a journalist, we request that this Act be amended by adding the following section after the section 30 of this bill.

‘The provisions of subsections ‘a’ to ‘l’ under Sections 30 of this Act shall not subject to data processing for the Journalism and/or Data processor in the enforcement of the Right to Information Act.

8) Amendment of section 33 of the Bill

Section 33 Section 30 of the Act refers to the imposition of penalties under the Act. It gives the Data Protection Authority the power to investigate as well as to prosecute. The agency itself is not a court of law and the transfer of investigative powers as well as punitive powers to the agency itself can lead to serious issues. It is also a blatant violation of the accepted principles of that law. It may also undermine a citizen's faith in justice. As mentioned earlier, Sub-section 1 of Section 33 of the Act empowers this non-judicial body to impose fines. The fines range from Rs. 10 million to Rs. 10 million per compliance. It is a serious matter to allow a non-judicial institution to impose such a large fine when even a Magistrate's Court in Sri Lanka is not enforced to impose such a large fine. In addition, as mentioned in the subsection 8 of the section 33 if an appeal is made with the Court of Appeal against a fine imposed by this institution, a deposit in cash as a security such sum of money equal to the penalty imposed by the Authority shall be deposited before the registrar of the Court of Appeal.

This is also a serious situation that cannot be taken lightly. Even if they were given a wrong decision by the Data Protection Authority, if an amount equal to the fine imposed cannot be found, this section also deprives the individual of the opportunity to appeal against the decision. We therefore request that this section be amended taking into account the following:

1. Although this authority shall have the power to investigate complaints, it shall not have the power to prosecute and impose penalties.
2. Amendments should be made so that the court is able to pronounce the verdict and the fine after the case is filed by the authority before the District Court or the Magistrate Court after trial.
3. The fine imposed by the court should be a fair fine.
4. The ability to appeal to the Court of Appeal against the fine imposed by the court should be granted and the provision that a deposit of bail should be made at the time of filing an appeal should be removed and an opportunity should be given to file an appeal.

9) Amendment of section 35 of the Bill

Section 35 of the Act refers to the Exemptions, restrictions or derogations. If the Exemptions, restrictions or derogations of this Act are determined by the authority,

it may result in serious prejudice against the right to information and the right to freedom of speech and expression. Therefore, we request that the Act be amended by adding the following section after section 35.1 of the Act.

No restrictions, weakening of the act or the power of authority shall be imposed on the exercise of the powers of the Authority in connection with the processing of data in the exercise of Freedom of speech and expression including freedom of the press and/or on the implementation of the Right to Information Act and in the processing of data.

We urge you all to include the aforesaid amendments in this bill/make the necessary efforts to do so.

Thank you

Tharindu Jayawardena. Petitioner of S.C. (S.D.) 10/2022

as per the instructions of the Committee of the Sri Lanka Young Journalists Association

M.F.M. Fazeer

Petitioner of S.C. (S.D.) 10/2022

as per the instructions of the Committee of the Sri Lanka Young Journalists Association

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