

**THE POLICY AND LEGAL FRAMEWORK RELATING TO THE PROPOSED COUNTER TERRORISM  
ACT OF SRI LANKA: A REVIEW OF COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS  
NORMS**

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**EXECUTIVE SUMMARY**

The Foundation for Human Rights ('FHR') and the University of Pretoria's Institute for International and Comparative Law in Africa ('ICLA') have collaborated to produce this joint paper. The authors of the joint paper are Prof Christof Heyns, Director of ICLA and former UN Special Rapporteur on extra-judicial, summary or arbitrary executions; and Toby Fisher, a London based human rights barrister. The review represents the authors' independent opinion.

Counter-terrorism legislation in Sri Lanka has been used in the past to facilitate human rights abuses including arbitrary arrest and torture of detainees. In response to widespread domestic and international calls to repeal the much-criticised Prevention of Terrorism Act, the Government of President Sirisena committed to replace it with a human rights compliant framework for combatting terrorism. On 25 April 2017, Sri Lanka's Cabinet approved the *Policy and legal framework relating to the Proposed Counter Terrorism Act of Sri Lanka* ('PLFCTA').

The PLFCTA does not provide for a human rights compliant framework for combatting terrorism.

In terms of the PLFCTA a range of powers will be conferred on the Government of Sri Lanka, including the ability to arrest; to subject suspects to lengthy pre-charge administrative detention; to seize and confiscate assets; to impose curfews and travel bans; and to proscribe organisations. All are potentially oppressive measures that interfere with fundamental rights. Accordingly, the trigger for the exercise of those powers should be tightly circumscribed.

A fundamental problem with the PLFCTA is that the offences to which the Act relates are defined in such vague and broad terms that the extraordinary powers conferred on the

executive by the Act apply to conduct that does not, on any reasonable assessment, amount to terrorism. That failure tightly to define the offence of terrorism and other offences is not in line with the international law principle of legal certainty and gives rise to a real risk of abuse.

That risk of abuse is heightened by the powers conferred by the Act that lack effective judicial or other safeguards. First, the PLFCTA permits lengthy periods of administrative detention without charge and without effective judicial oversight. Secondly, it provides for the conferral of extraordinary powers on the police, without the need to show reasonable cause and without effective judicial oversight, to search and seize, to conduct a physical examination, and to require a bank, service provider, or government institution to provide confidential personal information. Without adequate safeguards these powers interfere with fundamental rights binding on the State and are likely to amount to a breach of, *inter alia*, Articles 9 and 17 of the International Covenant on Civil and Political Rights ('ICCPR') to which Sri Lanka has been a party since 1980.

Further, although the PLFCTA includes some measures to mitigate the risk of torture, it does not go far enough.

If Sri Lanka is to replace the Prevention of Terrorism Act with a human rights compliant framework for countering terrorism, Parliament must ensure that substantial revisions are made to the PLFCTA during the drafting process. To enact a law based on the current PLFCTA would perpetuate the discriminatory, abusive application of counter-terrorism laws, which in the past have often been used to target one part of the population.

## REVIEW

### INTRODUCTION

1. During the long civil war in Sri Lanka, a range of legislative measures were used to deal with the threat of terrorism. The key instruments were: i) the Public Security Ordinance No. 25 of 1947 ('PSO'); ii) Emergency Regulations promulgated under the PSO; and iii) the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 ('PTA'). Over time, these instruments were perceived to have been operated in a discriminatory manner and were seen to facilitate human rights abuses, including arbitrary arrest and torture of detainees, by the Sri Lankan police and security services. In 2011, the almost continuous state of emergency that had been in existence in Sri Lanka since 1971 expired, bringing to an end the State's ability to exercise powers under the PSO and the Emergency Regulations, and leaving the PTA as the operative legislative instrument.
2. Since then, a range of international organisations, including the UN Human Rights Committee,<sup>1</sup> the UN Human Rights Council<sup>2</sup> and the European Union,<sup>3</sup> have encouraged the repeal of the PTA. In 2015, the Government of Sri Lanka, led by President Maithripala Sirisena, committed to repeal the PTA and to replace it with an enactment that could empower the executive to protect the country from terrorism while complying with their obligations under international law, in particular international human rights law, international refugee law and international humanitarian law.<sup>4</sup>
3. Nonetheless, progress has been slow and both domestic and international observers have continued to express serious concerns about the continued operation of counter-terrorism legislation in Sri Lanka. The UN Committee Against Torture in its concluding observations on the 5<sup>th</sup> periodic report of Sri Lanka adopted on November 30, 2016<sup>5</sup> noted with concern that the administrative detention regime

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<sup>1</sup>UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report of Sri Lanka, 27 October 2014, para 11.

<sup>2</sup>A/HRC/RES/30/1.

<sup>3</sup><http://www.dailymirror.lk/article/eu-urges-govt-to-repeal-pta-95589.html>

<sup>4</sup> UN Human Rights Council Resolution A/HRC/30/L.29, co-sponsored by the government of Sri Lanka.

<sup>5</sup>UN Committee Against Torture (CAT), Concluding observations on the fifth periodic report of Sri Lanka, 30 November 2016.

established under the PTA was still in force and that PTA suspects have been held for as long as 15 years without having been indicted. It further noted that some of those who had been charged had remained in detention without a verdict for as long as 14 years. The UN CAT was also concerned over the large number of documented allegations of torture of former and current PTA detainees, who had also alleged violations of their due process rights during detention, in particular restrictions on access to lawyers.<sup>6</sup>

4. The UN CAT recommended that prompt legislative measures be taken to repeal the PTA and abolish the regime of administrative detention, which allows for the confinement of individuals outside the criminal justice system and makes them vulnerable to abuse. It also noted that in the meantime Sri Lanka should guarantee that magistrates promptly review all detention orders under the PTA, and that detainees who are designated for potential prosecution are charged and tried as soon as possible and those who are not charged or tried are immediately released.<sup>7</sup>
5. The UN CAT's concerns were echoed at the end of 2016 in the report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in his country visit report to the Human Rights Council.<sup>8</sup> The Special Rapporteur interviewed current and former suspects detained under the PTA and received well-documented accounts of extremely brutal methods of torture, including burns; beatings with sticks or wires on the soles of the feet (falanga); stress positions, including suspension for hours while handcuffed; asphyxiation using plastic bags drenched in kerosene and hanging of the person upside down; application of chili powder to the face and eyes; and sexual torture, including rape and sexual molestation, and mutilation of the genital area. In some cases, these practices occurred over a period of days or even weeks, starting upon arrest and continuing throughout the investigation.<sup>9</sup> The Special Rapporteur concluded that the use of torture and ill-treatment to obtain a confession from detainees under the PTA remained a 'routine practice'.<sup>10</sup> He maintained that the Government should immediately repeal the PTA and noted that the Act violates article 155 (2) of the Sri Lanka Constitution, which does not allow for derogation from constitutional rights,

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<sup>6</sup> *Ibid*, para 21.

<sup>7</sup> *Ibid*, para. 22.

<sup>8</sup> A/HRC/34/54/Add., 22 December 2016.

<sup>9</sup> *Ibid*, para 26.

<sup>10</sup> *Ibid*.

except for the restrictions foreseen in Article 15. He reiterated that all counter-terrorism legislation needs to be in full compliance with the country's international human rights obligations.<sup>11</sup>

6. The need for a replacement to the PTA is, therefore, clear. The Government of Sri Lanka has publicly committed to delivering that replacement and has committed to ensuring that it complies with international human rights standards, including the ICCPR to which Sri Lanka has been a State Party since 1980. Moreover, the introduction of human rights compliant legislation was a key condition of Sri Lanka's readmission to the EU's General System of Preferences Plus ('GSP +') scheme.
7. Initial drafts of the proposed framework to replace the PTA were made available online in October 2016 ('the 2016 draft') and 6 April 2016 ('the 6 April draft'). Both were the subject of extensive domestic and international criticism for their failure sufficiently to respect human rights norms.<sup>12</sup>
8. On 25 April 2017, Sri Lanka's Cabinet approved the final version of the '*Policy and Legal Framework relating to the Proposed Counter Terrorism Act of Sri Lanka*' ('PLFCTA'). The PLFCTA is not, itself, legislation but it provides a detailed framework for the expected content of the proposed replacement to the PTA. In light of the importance of this document in Sri Lanka's transition to a peaceful, pluralist and democratic society, the Foundation for Human Rights ('FHR') and the University of Pretoria's Institute for International and Comparative Law in Africa ('ICLA') collaborated to produce an independent expert review of the PLFCTA. We provide this report in pursuance of that collaboration but we emphasise that the analysis and opinions contained within it represent our own independent view.<sup>13</sup>
9. This report is not a comprehensive review of all aspects of the PLFCTA and does not engage in the detailed drafting. Instead, it represents a high level review of the extent to which the PLFCTA complies with international human rights norms and

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<sup>11</sup> *Ibid*, para 36.

<sup>12</sup> The current authors provided provisional commentary on the 6 April draft: see [https://www.fhr.org.za/files/6214/9254/5277/SRI\\_LANKAS\\_DRAFT\\_COUNTER\\_TERRORISM\\_ACT\\_-\\_PUBLICATION\\_DRAFT\\_-\\_18\\_APRIL\\_2017.pdf](https://www.fhr.org.za/files/6214/9254/5277/SRI_LANKAS_DRAFT_COUNTER_TERRORISM_ACT_-_PUBLICATION_DRAFT_-_18_APRIL_2017.pdf)

<sup>13</sup> On our request, senior Sri Lankan advocate Kishali Pinto-Jayawardena provided an expert perspective in relation to a number of the issues dealt with in this paper.

highlights key areas of concern. The absence of comment on any particular aspect of the PLFCTA should not be seen as endorsement.

## **OVERVIEW**

10. Alongside the responsibility of States to protect those within their jurisdiction from acts of terrorism, States have an obligation to ensure that any measure taken to combat terrorism, including the enactment of counter-terrorism legislation, complies with their obligations under international law, including human rights law, refugee law and international humanitarian law.<sup>14</sup> In UN Human Rights Council Resolution A/HRC/30/L.29 of 2015, Sri Lanka committed to ensuring that the replacement of the PTA would comply with those obligations. As confirmed in the UN Global Counter Terrorism Strategy, effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.<sup>15</sup>

11. On careful assessment, the PLFCTA is not a framework for counter terrorism legislation that complies with Sri Lanka's obligations under international human rights law. While it introduces a number of welcome protections not currently present in the PTA, including by granting a significant oversight role for the Human Rights Commission,<sup>16</sup> and providing independent access to places of detention,<sup>17</sup> the document as a whole fails to meet the necessary standards in relation to, in particular:

- a. the definitions of terrorism and other offences;
- b. judicial oversight of detention;
- c. protections against torture;
- d. police powers; and
- e. independent access to legal counsel.

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<sup>14</sup> See, for example, Security Council resolutions 1456 (2003), annex, para. 6, and 1624 (2005), para.4; General Assembly resolution 60/288, annex, para. 3; the Statement by the President of the Security Council (footnote 3), para. 12; and A/HRC/16/51/Add.4.

<sup>15</sup> General Assembly Resolution 60/288.

<sup>16</sup> See for example Part IV (xxi).

<sup>17</sup> See for example Part IV (xxxiv).

12. Below we address each of these issues in turn. First, however, it is important to consider the circumstances in which the PLFCTA was produced. We note that the PLFCTA was prepared almost entirely outside public scrutiny and without any public consultation. Substantial changes were made between the 2016 draft, the 6 April draft and the final version without any explanation. Whilst we acknowledge the input of some external parties, we are concerned that there has not been a transparent process or adequate consultation with civil society and stakeholders within Sri Lanka and, where appropriate, with other international actors. Given the historic context in which the CTA is to be made, and the dictates of the right to equal participation in political and public affairs, we consider that this is a missed opportunity that should be remedied before the CTA is drafted and approved by Parliament.<sup>18</sup>

## **KEY CONCERNS**

### ***(1) Definition of terrorism and related offences***

13. The purpose of counter terrorism legislation is to confer on the executive extraordinary powers not available under the ordinary criminal law or procedure. Those extraordinary powers might otherwise be seen as oppressive but are conferred, exceptionally, through legislation because they are considered necessary to protect the public in the specific and unique context of terrorism. They are not conferred to widen the executive's general powers of maintaining law and order and it is therefore crucial that the powers conferred through counter terrorism legislation are applicable only in relation to genuine acts of terrorism.

14. Overly broad definitions of terrorism are widely recognised as a threat to human rights. As the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has said: *"The adoption of overly broad definitions of terrorism carries the potential for deliberate misuse of the term... as well as unintended human rights abuses. Failure to restrict counter-terrorism laws and implementing measures to the countering of conduct which is truly terrorist in nature also poses the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the*

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<sup>18</sup> See Art.25 ICCPR.

*principles of necessity and proportionality that govern the permissibility of any restriction on human rights.*”<sup>19</sup>

15. The PLFCTA confers a range of powers on the Government of Sri Lanka, including the ability to arrest;<sup>20</sup> to subject suspects to lengthy pre-charge administrative detention;<sup>21</sup> take preventative steps;<sup>22</sup> to seize and confiscate assets;<sup>23</sup> to proscribe organisations;<sup>24</sup> and to impose travel bans<sup>25</sup> and curfews.<sup>26</sup> All are potentially oppressive measures that interfere with fundamental rights. Accordingly, the trigger for the exercise of those powers should be tightly circumscribed.

16. Part II, section (f) of the PLFCTA states that the extraordinary powers conferred by the Act are available where “*an offence contained in this Act is committed...*”. There are two types of offences set out in Part III of the Act: i) the offence of terrorism; and ii) other offences.

### *The offence of terrorism*

17. The offence of terrorism is defined as follows:

*“A person commits the offence of terrorism if that person, by any means, unlawfully or intentionally causes:*

- (i) any act of violence to any person, including his killing, attempted killing, grievous injury, or his abduction or hostage taking;*
- (ii) endangering the life of any person, other than the person committing the offence;*
- (iii) serious damage to the Sri Lanka, including public or private property, any place of public use, a State or governmental facility, a public or private transportation system, any infrastructure facility or to the environment;*
- (iv) obstruction of essential services and supplies;*
- (v) robbery, extortion or theft of or mischief to State or private property;*
- (vi) an explosion or fire;*
- (vii) a serious risk to the health and safety of the public or a section thereof;*
- (viii) obstruction or damage to or interference with any electronic or automated or computerised system or network, or the cyber environment of domains assigned to or web-sites registered with such domains assigned to Sri Lanka;*
- (ix) obstruction or damage or interference with any critical infrastructure or logistics facility associated with any essential service or supplies;*
- (x) destruction or damage to historical, religious or cultural property or heritage;*

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<sup>19</sup> A/HRC/16/51: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism - Ten areas of best practices in countering terrorism (2010).

<sup>20</sup> Part IV.

<sup>21</sup> *Ibid.*

<sup>22</sup> Parts V and VI.

<sup>23</sup> Part V (xvii).

<sup>24</sup> Part XI (a).

<sup>25</sup> Part XI (b).

<sup>26</sup> Part XI (c).



- (xi) *obstruction, damage or interference with any electronic, analog, digital or other wire-linked or wireless transmission system including signal transmissions and any other frequency based transmission systems;*

*when the purpose of such conduct, by its nature or context, is to intimidate a population, or to wrongfully or unlawfully compel the Government of Sri Lanka or any other Government or an international organization to do or to abstain from doing any act or prevent the State from functioning or to cause harm to the unity, territorial integrity or sovereignty of Sri Lanka or any other sovereign State."*

18. Unlike the definition contained in the 6 April draft of the PLFCTA, which contained a definition of terrorism that was closely aligned with the definition contained in the Draft Comprehensive Convention on International Terrorism,<sup>27</sup> the definition in the final PLFCTA does not appear to be based on any recognised or accepted international model. On any assessment, the definition used is overly broad and gives rise to a real risk that the extraordinary powers conferred by the PLFCTA will be used in circumstances that should not properly be considered as terrorism-related.

19. Take the following examples:

**Example 1:** a dock worker involved in a strike over a public sector pay dispute joins a picket line preventing supplies from entering or exiting the dock. He has i) caused the obstruction of essential supplies; ii) when the purpose of the conduct (striking and forming a picket line) is to compel the Government of Sri Lanka to do something (increase pay for dock workers).

**Example 2:** a computer hacker installs ransomware on a government computer system with the objective of extorting money. He has i) intentionally interfered with a computerized system; ii) when the purpose of

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<sup>27</sup>A/59/894. That definition reads as follows:

*"1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:*

*(a) Death or serious bodily injury to any person; or*

*(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or*

*(c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;*

*when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act"*

the conduct was to compel the Government of Sri Lanka to do something (pay him money).

**Example 3:** as an act of protest on behalf of a peaceful secessionist movement, a person defaces a statue of a former President. He has i) intentionally caused damage to cultural and historical property; ii) when the purpose of the conduct was to cause harm to the unity of Sri Lanka.

20. In each of these examples (and others could be given) the person concerned has, on the face of the PLFCTA, committed the offence of terrorism. Though all may involve criminality, none would commonly be considered to involve terrorist acts and they do not justify the use of extraordinary counter-terrorism powers. To the extent that they amount to crimes, they can be dealt with under the ordinary law.

21. In addition to that general concern, we highlight the following two specific concerns.

- a. First, although the PLFCTA purports to exclude liability where the action is taken in good faith in exercise of a fundamental right<sup>28</sup> that exclusion is of no practical effect. That is because an action is deemed not to be the lawful exercise of a fundamental right if the person has the intention, or reasonable grounds to believe, that the action *“would intimidate a population, or wrongfully or unlawfully compel the Government of Sri Lanka or any other Government or an international organization to do or to abstain from doing any act or prevent the State from functioning or to cause harm to the unity, territorial integrity or sovereignty of Sri Lanka or any other sovereign State.”*<sup>29</sup> The consequence is that the ‘fundamental right’ exclusion is no exclusion at all because it cannot apply if the purpose element of the offence is satisfied.

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<sup>28</sup> Part III (A)(b).

<sup>29</sup> We note that the provision at Part III (A)(b) refers to “paragraph (i) above”. We assume this is a typographical error and is meant to refer to “paragraph (a) above”. That error seems clear from subsequent provisions, for example Part III (B)(v) and Part III (B)(e)(iii).

- b. Secondly, the phrase “*cause harm to the unity... of Sri Lanka*”, as contained in the purpose element of the offence, is unacceptably vague and fails to meet the international law principle of legality. It is unclear whether the phrase applies narrowly and only where the conduct in question is carried out in support of a violent secessionist movement; or whether the phrase has broader application and applies where the conduct in question may simply have the effect of increasing tensions between communities or where the conduct supports one community in Sri Lanka at the expense of another. For that reason, and in combination with the ‘other offences’ discussed below, it gives rise to a real risk of abuse and the continued perception that counter-terrorism legislation will be applied in a discriminatory fashion against one part of the population.

#### Other offences

22. The PLFCTA also sets out, at Part III (B)(a) – (e), other defined offences, including: ‘specified terrorist offences’; ‘aggravated criminal offences associated with terrorism’; ‘offences associated with terrorism and terrorism related offences’; and ‘abetting terrorism and terrorist organisations’ (collectively referred to as ‘other offences’).

23. In relation to these other offences, the extraordinary powers conferred by the PLFCTA apply if the offences are committed:

*“for the purpose of or having the knowledge or reasonable grounds to believe that it would have the effect of adversely affecting the unity, territorial integrity, sovereignty of Sri Lanka, or the national security or defense of Sri Lanka, or the security of the people of Sri Lanka, or would intimidate or terrorise a civilian population”.*

24. The purpose element of those offences is therefore wider than that applicable to the offence of terrorism and includes the additional purposes of: i) adversely affecting the national security or defense of Sri Lanka; and ii) adversely affecting the security of the people of Sri Lanka. There is no apparent justification for expanding the type of conduct captured by the Act in this way. Moreover, the breadth and vagueness of these additional purposes gives rise to significant human rights concern, particularly when read alongside the offences listed at Part III (B)(a) – (e).

25. For example, in relation to the ‘Specified terrorist offences’:

- a. Part III B(a)(iii) confers on the executive all the powers of the Act to deal with a person who causes any damage to State property, where the person had reasonable grounds to believe that such damage would have the effect of adversely affecting the national security or defence of Sri Lanka. Arguably, any damage caused to military installations or military equipment could fall within this definition.
- b. Part III (B)(a)(iv) confers on the executive all the powers of the Act to deal with a person in possession of a firearm, without lawful authority, where the person had reasonable grounds to believe that such possession would have the effect of adversely affecting the security of the people of Sri Lanka. Arguably any unlawful possession of a firearm adversely affects the security of the people of Sri Lanka and therefore falls within the definition.

26. Further, Part III (B)(b) sets out a wide range of ‘aggravated criminal offences associated with terrorism’ that fall within the scope of the Act if committed for defined purposes. They include human trafficking, as well as offences under the Computer Crimes Act, Payment Systems and Devices Act, Exchange Control Act, Poisons Opium and Dangerous Drugs Ordinance, and Immigrants and Emigrants Act. The effect is to confer extraordinary counter-terrorism powers on the executive in relation to conduct that falls outside the definition of terrorism contained in international norms. For example, Part III (B)(b)(i) confers on the executive all the powers of the Act to deal with a person who assists a prisoner to escape from lawful custody, where the person had reasonable grounds to believe that that might adversely affect the security of the people of Sri Lanka. Arguably any act of assisting a violent offender to escape from custody would meet the definition.

27. Part III (B)(e)(iii), dealing with ‘Abetting terrorism and terrorist organisations’, raises further concerns. It provides that it is an offence if a person:

*By words either spoken or intended to be read or understood or by signs or by visible representations or otherwise, instigates the committing of acts of violence or ethnic, religious, racial or communal disharmony, or feelings of ill will or hostility between different communities or other groups so as to affect the unity, territorial integrity or sovereignty of Sri Lanka or any other sovereign country.*

28. In essence, the provision confers on the executive all the powers of the Act to deal with a person who has committed hate speech. While hate speech in one form or another is criminal in many jurisdictions, the use of speech to instigate feelings of ill will between different communities within a country is, on no reasonable assessment, 'terrorism' except insofar as the speech directly incites terrorist acts. The PLFCTA does not limit its application in that way. Although the provision contains a restatement of the 'fundamental right' exclusion, that exclusion is – once again – of no practical effect because speech that is made with a reasonable belief that it might adversely affect the unity of the country is deemed not to be the exercise of a fundamental right.
29. The same can be said in relation to Part III (B)(e)(x) – (xii) relating to the gathering and supplying of confidential information where there are reasonable grounds to believe that such information will be used to commit an offence within the Act. The definition of 'confidential information' at Part XI (n)(b) is vague and, in essence, includes all information not already in the public domain, the dissemination of which is likely to have an adverse effect on national or public security. Accordingly, 'confidential information' can only be identified by its likely effects and there is therefore no certainty as to what information is and is not confidential. That gives rise to the real risk that the executive may use the powers contained in the Act to deal with – for example - an individual with no links to a terrorist organization who publishes, on social media, information about human rights abuses committed by state agents where that information might reasonably be thought to assist recruitment to a proscribed terrorist organization. Although the PLFCTA includes an express exemption where the information is published in the public interest by 'registered' print and electronic media, or by academic publications, there is no equivalent protection for whistleblowers or non 'registered' media.
30. Part III (B)(e)(xiii) is similarly problematic. It confers on the executive all the powers of the Act to deal with a person who distributes information *“with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes danger that one or more such offences may be committed”*. Recalling the examples of offences that arguably amount to “terrorist offences” for the purposes of the PLFCTA, as set out at paragraph 19 above, it is clear that this provision carries a risk of abuse.

Conclusion on the definition of terrorism and other offences

31. As the examples set out above show (and they are not exhaustive), the definition of terrorism and other offences in the PLFCTA is overly broad, contains vague expressions relating to the purpose element of the offence, and gives rise to the real risk that the extraordinary powers conferred by counter-terrorism legislation will be used to deal with criminal offences and other conduct that does not, on any reasonable assessment, amount to terrorism. In international law terms:

- a. The vague terminology used offends the principle of legal certainty.
- b. The risk that the extraordinary powers contained in the Act will be used for conduct that does not amount to terrorism offends the principles of necessity and proportionality.
- c. The proscription of conduct that may adversely affect the 'unity' of Sri Lanka gives rise to the real risk that counter-terrorism legislation in Sri Lanka will continue to be perceived as breaching the the principle of non-discrimination.

**(2) Pre-charge detention**

Administrative detention

32. The PLFCTA confers powers to subject suspects to administrative detention, by way of Detention Orders ('DOs'), for a period of up to 6 months without charge and/or without transfer to remand custody.<sup>30</sup> That is, on any assessment, problematic from a human rights perspective. We note that the UN CAT recommended that the Government of Sri Lanka abolish the scheme of administrative detention. The PLFCTA fails to do that. Further exacerbating the problem are the following matters:

- a. First, the PLFCTA fails to set a satisfactory threshold to be met before a DO can be made. The only tests to be met are:<sup>31</sup>
  - (i) that the Deputy Inspector General of Police is satisfied that there are reasonable grounds to believe that the suspect has committed or has been concerned in the committing of an offence contained in the Act (that is the same test to be met for arrest,<sup>32</sup> so it will be met in the vast majority of cases); and
  - (ii) the DO is made for the purpose of (a) obtaining investigative material and potential evidence relating to the committing of an offence; or (b)

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<sup>30</sup> See Part IV (xxxv).

<sup>31</sup> Part IV (xxxii).

<sup>32</sup> Part IV (x).

questioning the suspect while in detention; or (c) preserving evidence pertaining to the committing of an offence contained in the Act. There is no requirement that the suspect's detention in administrative detention, rather than in remand custody, is necessary for those purposes. In the vast majority of cases, taking the steps set out in (a), (b) and (c) will be possible if a suspect is remanded in custody, but the absence of any test of necessity gives rise to the risk that DOs will be made by default and administrative detention will be the norm, rather than exception, for those suspected of terrorist offences.<sup>33</sup>

- b. Secondly, oversight of administrative detention is muddled and inadequate:
- (i) There is no immediate judicial oversight of administrative detention. If a Detention Order is made by the time the suspect is produced before a Magistrate, the Magistrate has no power to review the necessity or lawfulness of the Detention Order and must simply order that the suspect is detained pursuant to the Detention Order.<sup>34</sup>
  - (ii) Administrative review by a Board of Review is possible within (at best) two weeks of administrative detention.<sup>35</sup> That Board is an executive body appointed by the Minister so is not independent. Moreover, there is no statutory test to be applied by the Board of Review in determining whether to maintain detention, giving rise to a real risk of arbitrary decision making. At best, the only test applicable is whether there are reasonable grounds to believe that the suspect has committed or has been concerned in the committing of an offence contained in the Act. Accordingly, the Board of Review does not appear to have any role in determining whether administrative detention, rather than remand custody, is necessary in the circumstances.
  - (iii) A review of detention by magistrates is only possible after 8 weeks.<sup>36</sup> At that stage, the suspect is not entitled to know the case against him or her and the hearing is held in camera. Moreover, the PLFCTA does not prescribe a statutory test to be applied by a magistrate in deciding

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<sup>33</sup>See also Part IV (xlv) which suggests that transfer out of remand custody and into administrative detention will be the default course of action when someone in remand custody is subsequently suspected of having been involved in terrorism offences.

<sup>34</sup> Part III (xxiv).

<sup>35</sup> Part IV (xli).

<sup>36</sup> Part IV (xxxvi).

whether to maintain a DO after 8 weeks, thereby perpetuating the risk of arbitrary decision making. It is possible that the Magistrate is entitled to consider the necessity of continued detention, in addition to the question of whether there were reasonable grounds for making the order in the first place, but that is by no means required by the PLFCTA.

- (iv) At the conclusion of a period of up to six months administrative detention, a magistrate has no power to order the detainee's release and must order the detainee to be transferred to remand custody.<sup>37</sup>
- (v) There is a general right to judicial review of a DO, in accordance with the law. However, once again, there is no statutory test of necessity to be applied by the reviewing court to determine whether the DO is lawful or should continue.

33. For those reasons, and bearing in mind the very serious concerns relating to administrative detention identified by the UN CAT and the UN Special Rapporteur on Torture, it must be concluded that the provisions relating to administrative detention fail to meet international human rights standards and are likely to amount to a breach of, in particular, Article 9 ICCPR,<sup>38</sup> and may also give rise to an unacceptable risk of torture.

#### Remand custody

34. The PLFCTA permits suspects to be held for up to 12 months in remand custody prior to any charge being laid.<sup>39</sup>

35. On first being produced before a magistrate after arrest, the PLFCTA does not permit the magistrate to grant bail to a suspect if the officer-in-charge of the relevant police station makes an application for the remand of the suspect. The only power to grant bail arises if the officer in charge requests bail or has no objection to bail.<sup>40</sup> That amounts to a fundamental restriction of the protections offered by a magistrate on first production. If the magistrate has no power to grant bail against the wishes of the officer in charge, then – de facto – the PLFCTA permits the executive to detain suspects in remand for 6 months with no effective judicial oversight and no effective review of whether there is reasonable cause. Exacerbating this problem is the fact

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<sup>37</sup> Part IV (xli).

<sup>38</sup> See also Human Rights Committee General Comment 35.

<sup>39</sup> Part IV (xxx).

<sup>40</sup> Part IV (xxv).



that the High Court is expressly prohibited from granting bail to a person placed in remand custody unless 'exceptional grounds' are shown. That is, neither the magistrate nor the High Court may grant bail on the basis that there was no reasonable cause for arrest and/or no reasonable cause for continued detention on remand.

36. Part IV (xxx) provides that if criminal proceedings have not been commenced within six months of remand, the person must be released from custody unless that period is extended by a further 6 months by the High Court on an application from the Attorney General. Six months in detention prior to the laying of a charge is an unjustifiably long period and, in circumstances where there is no effective judicial oversight during that six month period, it is plainly excessive. 12 months in detention prior to the laying of a charge is even more unjustifiable, particularly where there is only a single point of judicial oversight during that period.

37. Moreover, where a criminal charge is laid within the first six months of remand detention, there is no point of effective judicial oversight at all until the criminal trial is held or for another 12 months, whichever is earlier.<sup>41</sup> That gives rise to the real possibility that a person is held in detention for a period of up to two years (six months under a Detention Order; six months in remand prior to charge; and one year between charge and production before High Court) before he or she is able to access any effective judicial remedy.

38. For those reasons, and bearing in mind the very serious concerns relating to administrative detention identified by the UN CAT and the UN Special Rapporteur on Torture, the provisions relating to remand custody also fail to meet international human rights standards. They are likely to breach, in particular, Article 9 ICCPR and may also give rise to an unacceptable risk of torture.

### ***(3) Mitigating the risk of torture***

39. As noted above, the torture of suspects detained under counter terrorism powers in Sri Lanka has been described, even in 2016, as a 'routine practice'. Consequently, the need for a replacement to the PTA to include protections that mitigate the risk of torture is clear.

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<sup>41</sup> Part IV (xxxi).

40. In response to criticisms made by the UN CAT and the UN Special Rapporteur on torture in late 2016, improvements were made to the 2016 draft of the PLFCTA in relation to mitigating the risk of torture of detainees. In that context, elements of Part IV (xiv), (xvi), (xix), (xx), (xxi), (xxii), (xxvi) – (xxviii), (xxxiii) and (xxxiv) are welcomed. In particular, the requirement for forensic medical examinations of arrested suspects and detainees, as well as the increased role for both magistrates and the Human Rights Commission in monitoring the welfare of detainees is a positive development.
41. However, other aspects of the PLFCTA continue to give rise to concern. First, Part IV (xlii) permits a police officer to take a suspect out of remand custody upon an application to a magistrate. However, there is no time limit on the period for which the suspect may be removed from custody or where he may be taken. While a conscientious magistrate may impose such conditions, that is not required by the PLFCTA. It gives rise to the risk that suspects are removed from custody for lengthy periods and held outside any supervised or regulated detention facility.
42. Secondly, whereas the 6 April draft of the PLFCTA prohibited the admissibility in evidence of confessional statements to police officers, the final version now makes such statements admissible: see Part IX. Although there is no international law principle that necessarily precludes the admissibility of confessional statements, the particular context in Sri Lanka, where torture has historically been used to procure such confessions, militates strongly against allowing confessions to police to be used as evidence in a criminal trial. The 6 April draft made confessions admissible only where made to a magistrate, thus aligning the PLFCTA with ordinary law under the Evidence Ordinance. Although the final draft includes some protections which reduce the risk of torture (including the requirement for a medical examination both before and after the confession), we consider that the 6 April approach is preferable and more effectively mitigates the risk of torture.
43. Thirdly, we note that the Human Rights Commission is expected to play a significant role in visiting places of detention and monitoring the condition of detainees. While this is potentially an important protection against the risk of torture, it relies on a properly funded Human Rights Commission with the capacity to fulfill its role. The extent to which this is the case is outside the scope of this opinion, but we highlight it as a crucial factor in ensuring compliance with international law obligations.

#### **(4) Police powers**

44. As a general proposition, extraordinary powers conferred on the police by counter terrorism legislation should only be conferred where the ordinary law is insufficient to deal with the particular problem. Where extraordinary policing powers are required, they should be subject to tests of reasonable cause and necessity and, where appropriate, effective judicial oversight.
45. Part V and Parts VI (i), (ii) and (iii) contain a wide range of police powers that overlap substantially with powers that already exist under the ordinary law but in many cases, eliminate the need for judicial approval for the exercise of such powers. For example, these powers include the power without showing reasonable cause or the need for judicial approval:
- a. to compel a physical investigation of any person;<sup>42</sup>
  - b. to compel any person to give their fingerprints;<sup>43</sup>
  - c. to enter and search any premises or vehicle;<sup>44</sup>
  - d. to take any vehicle into custody.<sup>45</sup>
46. These are all oppressive measures which interfere with human rights. In relation to each measure, powers already exist under the ordinary law, with appropriate safeguards. There appears to be no justification for why extraordinary counter-terrorism powers are required to exercise the same powers *without* those safeguards. Consequently, their inclusion in the PLFCTA gives rise to a real risk of abuse.
47. The powers in Part VI(i), (ii), and (iii) give rise to the same risk. These provisions empower the police to require a bank, service provider, or government institution to provide personal information relating to any person. There is no requirement that any reasonable cause be shown or that any offence has been committed or suspected. If challenged, a magistrate *must* order the production of the information unless satisfied that the request for information has been made mala-fide, an exceptionally high test which will rarely be met. Accordingly, the provision is likely to amount to an unjustified interference with Article 17 ICCPR.

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<sup>42</sup> Part V (vii)(h).

<sup>43</sup> Part V (vii)(i).

<sup>44</sup> Part V (x).

<sup>45</sup> Part V (xiii).

**(5) Access to independent legal counsel**

48. Part IV (xlvii) states that a person arrested shall have the right of access to an Attorney-at-Law in the same way as provided in the Code of Criminal Procedure Act (CCP Act)/Criminal Procedure Special Provisions Act. However, a proposed amendment to the CCP Act provides that an attorney-at-law shall, if he so requests, be allowed to have access to the person in custody, *“unless such access is prejudicial to the investigation being conducted.”* The proposed amendment further states that lawyers shall be entitled to have access to the police station in which the suspect is being held to meet the officer in charge but that right too is stipulated not to be *“allowed to affect the investigations that may be conducted.”* We note that these clauses have been subjected to detailed criticism within Sri Lanka as they effectively empower the OIC with unwarranted discretion in deciding if the fundamental right of a suspect’s access to legal counsel should be afforded or not.<sup>46</sup> Consequently the PLFCTA’s referencing of the CCP Act in this regard is problematic. Having regard to the recommendations of the UN Special Rapporteur on Torture, we consider that the PLFCTA’s failure to guarantee that a suspect has an unlimited right of access to independent legal counsel amounts to an unacceptable interference with a fundamental right.

**CONCLUSION**

49. This review has not sought to produce a comprehensive assessment of all areas of concern in the PLFCTA. In particular, the review has not addressed some matters in relation to which other commentators have expressed concern, including the provisions relating to the proscription of terrorist organisations, powers to impose restrictions on individuals, and the interaction of the PLFCTA with the Right to Information Act.

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<sup>46</sup><http://hrcls.lk/english/wp-content/uploads/2017/03/IMG.pdf>;  
<http://www.sundaytimes.lk/170319/columns/yet-another-imaginative-proposal-to-privilege-the-police-233309.html>

50. Nonetheless, as can be seen above, our assessment is that the PLFCTA fails to live up to the promise made by the Sirisena Government to replace the PTA with a human rights compliant framework for countering terrorism. It is hoped that Parliament will take the opportunity to amend the proposed CTA before it is enacted. A further period of consultation with the public would provide the opportunity for a wide range of stakeholders to contribute to an improved draft.

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