IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

"ANTI- CORRUPTION"

S.C.S.D. No. 16/2023

Petitioners

1. Jayasundera Mudiyanselage Sunethra Indumathie Jayasinghe
   No. 39/3 6th Lane,
   Wickramasinghepura
   Battaramulla.

2. Kankanamge Medhavi Anuradha Siriwardhana
   59/14, School Lane, Rukmale,
   Pannipitiya.

3. Bammanne Ralalage Anuththara Jayasinghe
   No. 453, Gotabhaya Mawatha,
   Wanawasala, Kelaniya.

4. Lihiniya Kumarage Thushari Devika Dayarathne
   No. 23(5/4), Sagara Road, Colombo 04.

5. Saldeen Mohammed Sabry
   No. 604/A, Keppitiya, Galewala.

6. Kodituwakku Kankanamge Diana Malkanthi Kodutuwakku
   8B7R, National Housing Scheme,
   Raddolugama.

7. Herath Mudiyanselage Amalie Chathurika Wijesinghe
   No. 81 "Pearls" Rilaulla, Kandana.

8. Sammandapperuma Mohotti Appuhamilage Anusha Priyadarshani Kumari Sammandapperuma, No. 60, 8/2, Church Road, Pearl Residence, Colombo 15.

9. Sabaragamuwa Arachchige Bhakthi Chethana, Karunananda
No.29/D/3/1, 4th Lane Jayanthi Mawatha
Kahantota Road, Malabe.

10. Bulathgama Weda Muhandiramge Udari Monika Kumarihamy
No. 253, Stanley Thilakarathne Mawatha, Nugegoda

Counsel — Uditha Egalahewa, PC with Mr. N.K. Ashokbharan

S.C.S.D. No. 17/2023

Petitioner — Chandra Jayaratne
No.2 Greenlands Avenue, Colombo 05.

Counsel — Dilumi de Alwis

S.C.S.D. No. 18/2023

Petitioners

1. Dushmanthee Indeera Rajapakse
No. 18, Wellahena, 04th Lane, Welisara, Ragama.

2. Gayan Dhananjaya Maduwage
No.11, Mallika Mawatha, Off Templers Road, Mount Lavinia.

3. Uswatte Liyanage Gayashani Kithmini Kumari Uswatta
No. 81/45, 8th Lane Jothipala Mawatha, Malabe.

4. Henaka Ralalage, Thilanka Lakmali Kularathne
No. 31/9/H, Sapugasthanna Road, Kalagedihena.

5. Lakshmi Sherin Jansen
Walauwaththa Road, Ovitigama, Pugoda.

Counsel

Harsha Fernando with Chamith Senanayake, Yohan Coorey and Ruvendra Weerasinghe

S.C.S.D. No. 19/2023

Petitioners

1. Transparency International Sri Lanka
No. 366, Nawala Road, Nawala,

Rajagiriya.

2. Ashala Nadishani Perera
No. 31, Shalawa Road, Mirihana, Nugegoda.

Counsel

Pulasthi Hewamanne with Harini Jayawardhana, Fadhila Fairose and Githmi Wijenarayana

S.C.S.D. No. 20/2023

Petitioners

1. Urapola Gamage Janaka Chaminda
No.111/5A, Sri Somarathana Mawatha,
Bellanwila, Boralesgamuwa.

2. Kalinga Isuru Krishantha Elpitiya
No. 185/3, Rathmaldeniya Road,
Arawwala, Pannipitiya.

Counsel — Saman Liyanage with Poorni Subasinghe

S.C.S.D. No. 21/2023

Petitioners

1. Mr. N.M.P. Kaushalya K. Nawaratne
President of the Bar Association of Sri Lanka.

2. Mr. H. Isuru Balapatabendi
Secretary of the Bar Association of Sri Lanka

1st and 2nd Petitioners of No. 153, Mihindu Mawatha, Colombo 12.

Counsel — Saliya Pieris PC with Pulasthi Hewamanne, Harini Jayawardhana, Fadhila Fairose and Githmi Wijenarayana

Respondent — Hon. Attorney General
Attorney General's Dept.
Colombo 12.

Counsel for the State — ASG Nerin Pulle , PC with DSG. Dr. Avanthi Perera, SC Indumini Randeny and SC M.B.M. Sajith Bandara

Before: **Jayantha Jayasuriya, PC, CJ.**

Murdu N.B. Fernando, PC, J.

Janak De Silva., J.

The Court assembled for hearings at 10.00 a.m. on 12th May 2023, 15th May 2023, 16th May 2023 and 17th May 2023.

A Bill in its short title referred to as the "Anti-Corruption Bill" [the Bill] was published In the Government Gazette of 3rd April 2023. It was placed on the Order Paper of Parliament of 27th April 2023.

Six petitions were received challenging the constitutionality of the Bill. Upon receipt of the said petitions, the Registrar of this Court issued notice on the Hon. Attorney General as required by Article 134(1) of the Constitution. The Petitioners and the Hon. Attorney-General were heard.

The Petitioners welcomed the attempt to bring in new legislation to combat bribery and corruption.

Nevertheless, they invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution to challenge the constitutionality of the Bill broadly on four grounds. Firstly, it was contended that vesting corporate personality on the commission to be established in terms of the Bill to oversee investigations and prosecutions on bribery or corruption compromises its independence. Secondly, it was contended that the terms and conditions of service of the current employees of the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) are been changed to their detriment. Thirdly, it was contended that several clauses of the Bill are inconsistent with one or more of the provisions of the Constitution. Fourthly, it was submitted that the Bill is not effective to combat bribery and corruption unless certain specified amendments are made. In view of this submission, it is important to reaffirm the constitutional jurisdiction this Court is vested with in terms of the Constitution.

Jurisdiction of Court

This Court is exercising the jurisdiction vested on it in terms of Article 120 of the Constitution which requires it to determine whether the Bill in its entirety or any of its

provisions is inconsistent with the Constitution. When a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is required to make are specified in Article 123(2) which reads:

> *"(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –*
>
> *(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or*
>
> *(b) (b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or*
>
> *(c) (c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,*
>
> *and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent."*

Hence, even where an amendment suggested by any Petitioner may make the Bill more effective, that is not a matter Court can consider in these proceedings unless the lacuna results in the violation of a constitutional provision.

Provisions of the Bill

The Bill is divided into five Parts. Some of the Parts contains one or more Chapters.

Part I

Chapter I	-	Establishment of the Commission
Chapter II	-	Director-General and the Staff of the Commission

Chapter III	-	Finance
Chapter IV	-	Powers and the Functions of the Commission
Chapter V	-	Protection of Informers, Whistleblowers, Witnesses, and other Persons assisting the Commission
Part II	-	Declaration of Assets and Liabilities
Part III		
Chapter I	-	Offences Relating to Bribery or Corruption
Chapter II	-	Procedural Offences
Part IV	-	General
Part V	-	Transitional Provisions and Savings

Objects of the Bill

The preamble to the Bill states that it is to give effect to certain provisions of the United Nations Convention against Corruption (UNCAC) and other internationally recognized norms, standards and best practices. An Independent Commission (Commission) is to be established to detect and investigate allegations of Bribery, Corruption and offences related to the Declaration of Assets and Liabilities and associated offences. The Commission is to be empowered to direct the investigations and institute proceedings for offences of Bribery, Corruption and offences related to the Declaration of Assets and Liabilities and associated offences. The Bribery Act (Chapter 26), the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 and the Declaration of Assets and Liabilities Law No. 1 of 1975 is to be repealed.

UNCAC recognizes that corruption is a transnational phenomenon that affects all societies and economies and undermines the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law. Moreover, illicit acquisition of personal wealth is recognized to be damaging to democratic institutions,

national economies and the rule of law. UNCAC acknowledges that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively.

One of the primary objects of the Bill is to give effect to certain provisions of UNCAC. The purposes of UNCAC are to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery and promote integrity, accountability and proper management of public affairs and public property.

Bribery and corruption appear to have been in existence from time immemorial. The proof is found in ancient religious scriptures which deal with the subject.

Adhamma Sutta of *Aṅguttaranikāya* discusses how corrupt leadership has adverse consequences not only on the entire social order but also on nature and the physical environment:

> *"Monks, at a time the kings are unethical, the royal servicemen become unethical. When the royal servicemen become unethical, the Brahmin householders become unethical. When the Brahmin householders become unethical, those in the townships and provinces become unethical. When the townships and provinces become unethical, the moon and sun move unevenly. When the moon and sun move unevenly, the stars and the constellations move unevenly. When the stars and constellations move unevenly, then the night and day occur unevenly. When the night and day occur unevenly, the fortnights and months become uneven. When the fortnights and months become uneven, winds blow unevenly and in the wrong direction. When winds blow unevenly and in the wrong directions, deities become disturbed. When the deities become disturbed, the sky does not bring proper rainfall. When there is no proper rainfall, the grains ripen unevenly. When humans eat unevenly ripened grains, their life span is shortened, and they lose their beauty and power and are struck by many ailments. Monks, at a time the kings are*

ethical the opposite to the above happens. When cattle are crossing a (water way), if the leading bull goes crooked, all of them go crooked as the leading one has gone crooked. Even so, among humans, if one considered the chief behaves unethically, the rest will follow suit. If the king is unethical, the whole country rests unhappily. When cattle are crossing a (water way), if the leading bull goes straight, all of them go straight as the leading one has gone straight. Even so, among humans, if one considered the chief, indeed conducts oneself ethically all the rest follow suit. If the king is ethical, the whole country rests happily."

[cited by Prof. P. D. Premasiri, Buddhist Principles of Good Governance, pages. 64-65,Nagananda International Vesak Festival, available at <https://fbs.niibs.lk/wp-content/uploads/2021/01/premasiri-1-19012021104122.pdf> accessed 22 May 2023]

The Holy Bible strongly condemns the practice of bribery. *Thou shalt take no gift: for the gift blindeth the wise, and perverteth the words of the righteous* (Exodus 23:8). *You must not distort justice; you must not show partiality; and you must not accept bribes, for a bribe blinds the eyes of the wise and subverts the cause of those who are in the right* (Deuteronomy 16:19). *For oppression makes a wise man mad, and a bribe corrupts the heart* (Ecclesiastes 7:7). *who lends money to the poor without interest; who does not accept a bribe against the innocent. Whoever does these things will never be shaken* (Psalms 15:5). *For I know how many are your transgressions and how great are your sins- you who afflict the righteous, who take a bribe, and turn aside the needy in the gate* (Amos 5:12).

Hinduism is also unequivocal in its condemnation of bribery or corruption. *He who takes unlawful gifts goes to the Adhomukha (or head-inverted) hell.* (Vishnu Purana: A System of Hindu Mythology and Tradition, H.H. Wilson, Vol. II, page 218). *Appointed to a task, one should not touch riches. Having obtained unearned riches, one faces imprisonment or death* (The Mahabharata, Translated by Bibek Debroy, Vol. 4, page 12). *That king whose subjects are harassed by officials receiving bribes, by thieves in his kingdom, is roasted in*

hell (Padma Purana, Bhoomi Khanda, Chapter 67). *Accepting bribe is a sin and those who accept the bribe are thrown to hell* (Vaman Purana Chapter 37).

Corruption is discussed and condemned many times in the Holy Quran. *Who break the covenant of Allah after contracting it and sever that which Allah has ordered to be joined and cause corruption on earth. It is those who are the losers* (2:27). *And [recall] when Moses prayed for water for his people, so we said, "Strike with your staff the stone." And there gushed forth from it twelve springs, and every people knew its watering place. "Eat and drink from the provision of Allah, and do not commit abuse on the earth, spreading corruption* (2:205). *And when he goes away, he strives throughout the land to cause corruption therein and destroy crops and animals. And Allah does not like corruption* (2:60).

There have been instances where our legislature took a proactive role to eliminate bribery or corruption in Government. Sometime ago, six members of the legislature were dealt with for having accepted bribes. A Commission of Inquiry was appointed in September 1959, under the Commissions of Inquiry Act, to investigate and report whether, between 1st January 1943 and 11th September 1959, any Members of Parliament accepted bribes as contemplated by the terms of reference. The Commissioners reported that the allegations of bribery had been proved against six persons. Consequently, the Imposition of Civic Disabilities (Special Provisions) Act No. 14 of 1965 was passed which imposed various civic disabilities on the six persons who were found guilty by the commission. One of the disabilities which was imposed is that if any of the six persons was a Member of Parliament on the day immediately prior to 16th November 1965, his seat in that capacity is deemed to have been vacant on that date [See ***Kariapper v. Wijesinghe*** **(68 NLR 529),** ***Kariapper v. Wijesinghe*** **(70 NLR 49)**].

In **Special Goods and Service Tax Bill [S.C.S.D. 01-09/2022] (at p. 9)** Court held:

> *"That the proposed law is to be enacted for the purpose of (a) eliminating corruption, which is undoubtedly a major obstacle towards economic development, appears to be cancerous in its growth, and spreading widely within the echelons of officialdom, and a direct onslaught on the Rule of Law...make the declared policy underpinnings of the SGST Bill extremely attractive to this Court. Those objectives are most appropriate, timely and certainly in public and national interests."*

In this context it is of vital importance that a strong legal framework is enacted with an independent body mandated to eradicate bribery and corruption and establish a just and free society.

We will now consider the impugned provisions of the Bill and their constitutionality.

Preamble

The Petitioners drew our attention to the preamble to the Bill and in particular to the words *"certain provisions"* and *"associated offences"*.

"Certain provisions"

Ms. De Alwis drew our attention to Article 156A(1)(c) of the Constitution and submitted that it is incumbent on Parliament to provide by law for the establishment of a commission to investigate allegations of bribery or corruption and that such law shall provide for measures to implement the UNCAC and any other International Convention relating to the prevention of corruption, to which Sri Lanka is a party. It was contended that in ***Singarasa v. Attorney General*** **[(2013) 1 Sri.L.R. 245]** Court held that it is a requirement that enabling legislation be enacted in Sri Lanka if any provision of any convention is to be given effect to in Sri Lanka. Our attention was drawn to the preamble to the Bill which states that it is to give effect to *certain provisions* of UNCAC. Thus, it was submitted that the Bill violates Articles 156A(1)(c), 3 and 4 of the Constitution.

However, the learned ASG countered that the focus on the preamble is misconceived in that, in terms of the principles of statutory interpretation, it is the substantive provisions of a law, and not its preamble, that one must be guided by in order to derive the implications of such law.

We agree that the focus on the preamble only in order to understand the full scope and function of the Bill is misplaced. The Bill must be read as a whole to appreciate its full legal effect.

Maxwell on the Interpretation of Statutes (12th Ed.) states (at p.73) –

> *"the preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt. It is not unusual to find that the exacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is recited, the legislative provisions extend beyond it. The preamble is often no more than a recital of some of the inconveniences and does not exclude any others for which a remedy is given by the statute. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil."*

Ms. De Alwis submitted further that upon a consideration of the Statement of Purpose in UNCAC, it is clear that one of its main purposes is the recovery of stolen assets. Moreover, according to Article 51 of UNCAC the return of assets is a fundamental principle therein. Nevertheless, it was contended that no provision has been made in the Bill to give effect to chapters IV and V of UNCAC and in particular dealing with recovery of stolen assets. Hence it was submitted that the Bill violates Articles 156A(1)(c), 3 and 4 of the Constitution.

The learned ASG countered by pointing out that both recovery of assets and mutual legal assistance are matters provided for in the Bill. He drew our attention to Clauses 114(5) and 155 of the Bill. Clause 114(5) makes provision for the forfeiture of any property acquired by the commission of an offence under the Bill or from its proceeds. Clause 155

makes the provisions of the Mutual Assistance in Criminal Matters Act No. 25 of 2002 applicable for investigations and prosecution of an offence under the Bill. However, Ms. De Alwis contended that the Mutual Assistance in Criminal Matters Act No. 25 of 2002 does not provide for a fully-fledged legal regime that is required to give effect to chapters IV and V of UNCAC.

In addressing these points, we observe that some of the provisions contained in chapters IV and V of UNCAC are already part of the domestic law through other legislation. Prevention of Money Laundering Act No. 5 of 2006 makes *inter alia* provision for investigation, prosecution and conviction for the offence of money laundering as well as for freezing and forfeiture of assets in relation to the offence of money laundering. It is also important to note that Section 3 of the Prevention of Money Laundering Act, provides that:

> *"(1) Any person, who—*
>
> *(a) engages directly or indirectly in any transaction in relation to any property which is derived or realised, directly or indirectly, from any unlawful activity or from the proceeds of any unlawful activity;*
>
> *(b) receives, possesses, conceals, disposes of, or brings into Sri Lanka, transfers out of Sri Lanka, or invests in Sri Lanka, any property which is derived or realised, directly or indirectly, from any unlawful activity or from the proceeds of any unlawful activity,*
>
> *knowing or having reason to believe that such property is derived or realised, directly or indirectly from any unlawful activity or from the proceeds of any unlawful activity, is guilty of the offence of money laundering."*

According to the said Act, *'unlawful activity'* is defined *inter alia* as *'an offence under the Bribery Act'* (emphasis added). It is pertinent to observe that Clauses 112(1) and (2) of the Bill provides for charging any person under both the Bill and the Prevention of Money Laundering Act No. 5 of 2006 and making applicable the relevant provisions under that

Act to such proceedings. Through this legislative scheme a clear nexus and a link is established between the two pieces of legislation complementing the scope and content of each other.

The Financial Transactions Reporting Act No. 6 of 2006 provides for the collection of data relating to suspicious financial transactions to facilitate the prevention, detection, investigation and prosecution of the offences of money laundering and the establishment of a Financial Intelligence Unit with wide powers. The Mutual Legal Assistance in Criminal Matters Act No. 25 of 2002 provides for rendering of assistance in criminal matters.

We further observe that Clause 115 of the Bill makes provision for non-conviction-based forfeiture of property.

Furthermore, in interpreting Article 156A(1)(c) of the Constitution, one must read in the provisions of UNCAC into the interpretative process as what is required is for the Bill to provide for measures to implement UNCAC. In this context, we note that the *Legislative guide for the implementation of the United Nations Convention against Corruption*, Second revised edition, 2012 states (at page 4) as follows:

> *"11. In establishing their priorities, national legislative drafters and other policymakers should bear in mind that the provisions of the Convention do not all have the same level of obligation. In general, provisions can be grouped into the following three categories:*
>
> *(a) Mandatory provisions, which consist of obligations to legislate (either absolutely or where specified conditions have been met);*
>
> *(b) Measures that States parties must consider applying or endeavour to adopt;*
>
> *(c) Measures that are optional.*
>
> *12. Whenever the phrase "each State Party shall adopt" is used, the reference is to mandatory provision. Otherwise, the language used in the guide is "shall consider adopting" or "shall endeavour to", which means that States*

are urged to consider adopting a certain measure and to make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the guide employs the term "may adopt"."

Clearly not all the provisions in UNCAC are meant to be implemented on a mandatory basis. Moreover, we see merit in the submission of the learned ASG that not all of the provisions of UNCAC are intended to be achieved through the legislative process alone. For instance, each State Party is required to take "*legislative and administrative measures*" under Articles 7.2 and 7.3, "*civil and administrative measures*" under Article 9.3, and "*legislative and other measures*" under *inter alia* Articles 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25. Article 14.5 which requires States Parties to endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities cannot be achieved by legislation. Article 45 encourages that States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer of prisoners.

Furthermore, the compliance with the obligations under the UNCAC are measured not by confining to an examination of the provisions in a single piece of legislation but by an assessment of the totality of the legislative and other process in a given domestic system as discussed hereinbefore.

For the foregoing reasons, we see no merit in the submission that the Bill is inconsistent with Article 156A(1)(c) of the Constitution.

"Associated offences"

Mr. Egalahewa PC and Mr. Liyanage contended that the word *"associated offences"* appears in the preamble and Clauses 2(1)(f) and 49(1)(f) of the Bill. However, it has not been defined in the Bill. It was submitted that this is vague and hence inconsistent with Article 12(1) of the Constitution.

We are inclined to uphold this contention. In **Prevention of Terrorism (Temporary Provisions) Amendment Bill [S.C.S.D. No. 13-18/2022]** Court held that (at page 22):

> *"When a provision of law is vague, it would only benefit the wrongdoer. Such a provision would not uphold the Rule of Law."*

(at page 23):

> *"This Court has stated time and again that vagueness must be avoided in the bills in order to make such provisions consistent with Article 12(1) of the Constitution."*

Accordingly, we hold that Clauses 2(1)(f) and 49(1)(f) of the Bill are inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 136 Clause 162 : insert the following immediately after line 13:-

"associated offences" mean offences referred to in section 41 of this Act other than any offence specified in this Act;"

The inconsistency will cease if the above amendment is made.

Clause 1

Clause 1(2) of the Bill empowers the Minister to specify different dates for the coming into operation of different Parts or different sections in different Parts of the Bill. However, Clause 1(3) of the Bill requires that the Bill as a whole must come into operation not later than one year from the date of coming into operation of this clause.

Ms. De Alwis and Mr. Fernando submitted that this gives the Minister the discretion to bring into force different parts and sections of the Bill at different times. Our attention was drawn to the fact that the Bill repeals the Bribery Act, the CIABOC Act No. 19 of 1994

and the Declaration of Assets and Liabilities Law No. 1 of 1975. These laws form the foundation of the present legal regime to prevent and eradicate bribery or corruption. We observe that no guidelines are there in the Bill to regulate the discretion vested on the Minister to bring the Bill into operation on different dates.

In **Special Goods and Services Tax Bill [supra]** it was held (at pages 35-36):

> *"Thus, it is seen that unspecific, wide and unregulated discretion is to be vested in the Minister. The conferment of such absolute and unfettered discretionary power distinctly lends itself to manifestly unreasonable, capricious or arbitrary decision making. It is necessary to emphasize that when unfettered and absolute power is vested in a human being or a group of persons, cannot be a guarantee of objectivity, reasonableness, absence of arbitrariness, protection of national and public interest, and the power will not be abused or used for corrupt purposes. The only assurance of objective, purposive, reasonable and transparent decision-making arises out of the vesting of well-structured power which must be exercised in accordance of well-defined, specific and objective criteria developed for the specific purpose of achieving objectives for which power has been vested. This Court needs to highlight that absolute and unfettered discretion being vested in an officer of the Executive is a recipe for (i) unreasonable and arbitrary decision-making, (ii) abuse of power, (iii) corruption, and (iv) the roadway to depredation of the Rule of Law. On all such accounts, it results in an infringement of Article l2(1) of the Constitution which guarantees equal protection of the law."*

In **Colombo Port City Economic Commission Bill [S.C.S.D. Nos. 04/2021, 05/2021 ,07-23/2021]** it was held (at page 30):

> *"Upon reading of the Bill, the Court is of the view that the regulatory structure set out in the Bill lacks clarity and provides for the exercise of arbitrary power by the Commission and thus, inconsistent with Article 12(1) of the Constitution."*

Upon a consideration of the factual circumstances of the Bill, we determine that granting power to the Minister to bring into operation parts or sections of the Bill without any guidelines on how this discretion is to be exercised is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 1 Clause 1: delete lines 6 to 10 (both inclusive) and substitute the following:-

"come into operation on such date as the Minister may by Order published in the Gazette appoint:"

The inconsistency will cease if the above amendment is made.

Clause 2

Clause 2(1) spells out the objects of the Bill which includes enhancing transparency in governance and strengthening integrity of governance and increased accountability. Clause 2(2) defines "governance" in this clause to include *participation of civil society in the administration of the Government*. Clause 162(2) defines *Government* to include the Legislature, Executive and the Judiciary.

Mr. Egalahewa PC submitted that this violates Article 43 and the independence of the judiciary.

In terms of Article 43, the direction and control of the Government of the Republic is vested with the Cabinet of Ministers which is collectively responsible and answerable to Parliament.

In **Industrial Disputes (Special Provisions) Bill [S.C.S.D. 30/2022] (at pages 9-10)** Court held that the sovereignty of the people in Article 3 must be read to include the right to an independent judiciary. The constitutional value of an independent judiciary is reaffirmed in Article 111C(1) and (2) which makes any interference with judiciary an

offence and specifies punishment for such interference to include disqualification from being an elector and from voting for a period not exceeding 7 years.

What is meant by civil society is vague. Furthermore, what is meant by their participation is vague. Our Constitution has checks and balances on the exercise of power by different organs of government. There is no such check on activities of civil society.

We determine that Clause 2(2) of the Bill is inconsistent with Articles 3, 43 and 111C of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of Article 83. This inconsistency will cease if Clause 2(2) is amended as follows:

Page 3 Clause 2 : in lines 14 and 15 delete the following words: -

"and participation of civil society in the administration of the Government."

Clause 3

It was contended by several Counsel that Clause 3 of the Bill vests corporate personality in the Commission which is inconsistent with the Constitution. Mr. Egalahewa PC submitted that the independence of the Commission is extremely important to prevent, detect, and prosecute bribery or corruption. However, making the Commission a statutory corporation is counter-productive to the perceived intention. It was submitted that the making of the Commission a statutory corporation, makes it amenable to the authority of Ministry Secretaries, COPE and COPA of the Parliament, and makes the Commission amenable to the general labour laws of the country, thereby inviting the authority of the Commissioner General of Labour. It was submitted that the disadvantages of making the Commission a statutory corporation outweighs any purported advantages, and ultimately defeats the perceived objectives that are sought to be attained.

We are mindful of the scope of the jurisdiction of this Court in examining the constitutionality of a Bill in the context of examining policy considerations based on which a proposed legislation is developed.

Our attention was drawn to the determination in **Special Goods and Services Tax Bill (supra) (at page 10)** where it was held:

> *"However, when a particular provision of a Bill which comes under scrutiny by this Court is found to contain policy which when converted into legislation would become inconsistent with the Constitution, it is then the bounded duty of this Court to point out such inconsistency. Furthermore, should it be found that there is no rational nexus between the declared objectives of the Bill and the clauses contained therein, it is necessary to declare such transgression to be unconstitutional, as such a Bill if enacted would be manifestly unreasonable and arbitrary and therefore would result in an infringement of Article 12 of the Constitution."*

Accordingly, it was contended that making the Commission a statutory corporation defeats the objectives that are expected to be achieved by the Bill, and is unreasonable and arbitrary and results in an infringement of Articles 12 and 3 of the Constitution.

In **Industrial Disputes (Special Provisions) Bill [supra](at page 9)** Court held that Article 3 of the Constitution seeks to deviate from the traditional meaning attributed to the concept of sovereignty in political theory, which focused only on the power of the State, and extend its meaning to include rights such as fundamental rights and the franchise. It is a non-exhaustive definition as the word used is *inclusive*. Hence there are other rights other than fundamental rights and the franchise that form part of the sovereignty of the people in our Constitution.

The preamble to the Constitution refers to the creation and preservation of a just and free society. There can be no just and free society where there is bribery or corruption within the executive, legislature or judiciary or for that matter the private sector. In such circumstances meritocracy is submerged by kleptocracy. The political stability and

sustainable development of the State is threatened. In ***Narendra Champaklal Trivedi v. State of Gujarat*** **[(2012) 7 SCC 80 at para 30]** it was held:

> *"It should be paramountly borne in mind that corruption at any level does not deserve either sympathy or leniency...The law does not so countenance and, rightly so, because corruption erodes the spine of a nation and in the ultimate eventuality makes the economy sterile."*

In "What is Corruption and Why should we care – Knowledge tools for Academics and Professionals" published by United Nations Office on Drugs and Crime (https://www.unodc.org/e4j/zh/anti-corruption/module-1/key-issues/effects-of corruption.html last accessed 25th May 2023) it is said that bribery and corruption negatively impact on many areas. It undermines the attainment of the UN Sustainable Development Goals and causes economic loss and inefficiency. Under conditions of corruption, the funds identified for education, health care, poverty relief, and other social welfare measures becomes a source of personal enrichment for party officials, bureaucrats and contractors. It brings about private and public sector dysfunctionality. When the justice system is invaded by corruption, people can no longer count on prosecutors and judges to do their jobs which has a debilitating impact on the rule of law. Accordingly, we hold that Sovereignty in Article 3 includes the right to a Government free of bribery or corruption.

In order to protect and advance the Sovereignty of the People, it is of fundamental importance that the Commission must be independent. Lack of such independence will fatally compromise the fight against bribery or corruption leading to disastrous economic and social consequences.

We fail to see how the independence of the Commission is compromised merely by making it a body corporate. As correctly pointed out by the learned ASG, the Human Rights Commission of Sri Lanka referred to in the Schedule to Article 41B of the Constitution is a body corporate in terms of Section 2(2) of the Human Rights Commission

of Sri Lanka Act, No. 21 of 1996. The Right to Information Commission is also a body corporate in terms of Section 11(2) of the Right to Information Act, No.12 of 2016 and is vested with the power to prosecute in terms of Section 39(4) of that Act. Similarly, the Securities and Exchange Commission which has powers of conducting inquiries and investigations, as well as initiating criminal proceedings under Section 166(1) and Section 166(8) of the Securities and Exchange Commission Act, No.19 of 2021, is a body corporate in terms of Section 4(2) of that Act. Article 156A(1)(c) does not dictate that the Commission should be established in a particular form or that it should not take the form of a body corporate.

It was pointed out that Article 52(2) of the Constitution vests, subject to the direction and control of the Minister, on the Secretary to the Ministry supervision over Government departments or other institutions in charge of his Minister. However, in our view these provisions do not give any supervisory powers to the Minister or Secretary over the powers and functions of the Commission or the exercise of such powers by the Commission.

Nevertheless, the issues raised on oversight by COPE or COPA of the Parliament raises issues of ambiguity. Such ambiguity affects the independence of the Commission which impacts on the sovereign right of the people to have a Government free of bribery or corruption. Accordingly, we determine that Clause 3(2) of the Bill is inconsistent with Articles 12 and 3 and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of Article 83. The inconsistency will cease if Clause 3 of the Bill is amended by adding the following clauses:

> *"3(4) The Commission shall exercise and perform its powers and functions without being subject to any direction or other interference proceeding from any other person except a court or tribunal entitled under law to direct or supervise the Commission in the exercise or performance of such powers or functions.*
>
> *3(5) Every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the powers or functions of the Commission as is*

referred to in paragraph (4) of this section, shall be guilty of an offence punishable by the High Court on conviction after trial without a jury with imprisonment of either description for a term which may extend to a period of one year or with fine or with both such imprisonment and fine and may, in addition, be disqualified for a period not exceeding seven years from the date of such conviction from being an elector and from voting at a Referendum or at any election of the President of the Republic or at any election of a Member of Parliament or any local authority or from holding any public office and from being employed as a public officer."

Clause 4

Clause 4(1)(a) of the Bill states that the Commission shall consist of three members appointed from among people who have expertise, reached eminence and have at least twenty years of experience in law *and* any one or more of the specified fields. It was submitted that this criterion is irrational and arbitrary. In order to be considered for appointment a person must have at least twenty years in law and any one or more of the specified fields.

We observe that the objects of the Bill require the Commission to possess a high degree of legal expertise. This will be facilitated by ensuring for at least one member of the Commission to be appointed on that basis. By requiring expertise in another area to be combined with law will exclude this expertise and defeat the objectives of the Bill.

In **Engineering Council Bill Determination [Decisions of the Supreme Court on Parliamentary Bills (2016-2017) Vol. XIII, p. 69]** and **Petroleum Resources Bill Determination [S.C.S.D. Nos. 50-52/2022]** Court recommended amendments to the composition of entities which were found to be incompatible with the objectives of the Bill.

We determine that Clause 4(1)(a) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

It was further submitted that the major responsibility of the Commission is carrying out inquiries and investigations. However, Clause 4(1)(b) of the Bill does not provide for the appointment of a person experienced in investigation of crime and law enforcement. The manner in which the relevant provision in the Bill is couched, it excludes the possibility of appointing a person with skills, competencies and expertise in investigation of crime and law enforcement, as a member of the Commission. This is not a mere draw back, but defeats the objectives of the Bill. It was contended that this is absolutely arbitrary and irrational and results in an infringement of Articles 3 and 12(1) of the Constitution.

We observe that section 2(2)(a) of the CIABOC Act No. 19 of 1994 made provision to appoint one person with wide experience relating to the investigation of crime and law enforcement as a member of that commission.

The Bill requires the Commission to be in overall supervision of its work including the investigatory aspect which cannot be abdicated. Hence it is vital to provide for the possibility of appointing a person with experience relating to the investigation of crime and law enforcement. It is our view that to completely exclude the appointment of such a person as a member of the Commission is arbitrary and irrational and defeats the objectives of the Bill. We determine that Clause 4(1)(b) of the Bill is inconsistent with Article 12(1) and can only be passed with the special majority required under paragraph (2) of Article 84.

It was further submitted that Clause 4(3) of the Bill is inconsistent with Article 41B of the Constitution which requires a Chairman of a Commission [including CIABOC vide paragraph (f) of the Schedule to Article 41B] to be appointed on the recommendation of the Constitutional Council.

In **Re the Nineteenth Amendment to the Constitution Bill [S.C.S.D. 4-19/2015]** Court held:

> *"The purpose and object of the Constitutional Council is to impose safeguards in respect of the exercising of the President's discretion, and to ensure the propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions...Seeking the views of different stakeholders can in no way be offensive to the exercise of the powers of appointment. In fact a consulting process will only enhance the quality of the appointments concerned."*

We are in agreement with the position articulated above and determine that Clause 4(3) of the Bill is inconsistent with Article 41B of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The above three inconsistencies in Clause 4 will cease if it is amended as follows:

Clause 4(1) to read as follows:

"4(1). The Commission shall consist of three members appointed by the President on the recommendation of the Constitutional Council from among the following: -

(a) a person who has expertise, reached eminence and has at least twenty years of experience in law; and

(b) two persons who have expertise, reached eminence and have at least twenty years experience in one or more of the following fields:-
(i) investigation of crime and law enforcement;
(ii)forensic auditing;
(iii) forensic accounting;
(iv) engineering;
(v) international relations and diplomatic services;
(vi) management of public affairs; or
(vii) public administration."

Page 5 Clause 4 : delete line 15 and substitute the following:-

"appointed by the President on the recommendation of the Constitutional Council to be the Chairman of the"

Clause 8

Several Counsel drew our attention to the proviso to Clause 8 of the Bill. It was submitted that it does not provide which of the other two Commissioners shall hold office for four and three years respectively when the Commission is constituted for the first time and hence is ambiguous and violative of Article 12(1) of the Constitution.

The learned ASG submitted that a Committee Stage amendment will be moved to Clause 8(3) in order to ensure that, upon vacancy arising in the office of a member of the Commission, an appointment would be made within three months thereof, in order to ensure the smooth functioning of the Commission.

Clause 15

Mr. Fernando submitted that Clause 15, read with Clauses 32 and 156, empowers the Minister to provide for the Code of Conduct of the Commission, by way of Regulations. It was his contention that vesting this power in the Minister is not conducive to the rule of law as it subjects the Commission to a political authority and it is the Commission which best knows its requirements. Hence Article 12(1) is violated.

The learned ASG submitted that a Committee Stage amendment will be moved to Clause 156(1) which contains the general regulation-making power of the Minister. Its effect would be that the Minister would have to consult the Commission, when making regulations, including regulations to introduce the Code of Conduct under Clause 15.

The proposed amendment which is referred to under Clause 156 of determination later will address the inconsistency.

Clause 17

Mr. Pieris PC submitted that Clause 17(1) of the Bill renders the Commission powerless in the appointment and removal of its Chief Executive Officer. The Commission has no control whatsoever over the actions of its Chief Executive Officer. This will result in the Commission being weakened and eventually poses a real possibility of the Commission being made dysfunctional in the event of disagreement between the Commission and the Director General. It was pointed out that the equivalent officers in all other Commissions such as the Public Service Commission, the National Police Commission, the Elections Commission and the Judicial Service Commission are appointed by the respective Commissions. It was submitted that weakening the Commission will result in an erosion of the rule of law and hence the sovereignty of the People.

We are in agreement with the view that the efficient and optimal functioning of the Commission, depend largely on the collegiality between the members of the Commission and the Director-General. It is only then that the rule of law is protected and advanced. In our view it is the duty and responsibility of the persons who are appointed to such positions holding public trust to maintain such collegiality and mutual respect and ensure smooth functioning of the Commission. However, we are unable to agree that such collegiality would not exist merely for the reason that the appointment of the Director General is made by the President on the recommendation of the Constitutional Council. Nonetheless, one of the reasons as submitted by the learned ASG to place disciplinary control of all employees of the Commission on the Commission is due to the recommendation of the UNCAC Review Cycle 2016-2018 relating to the investigators assisting the CIABOC. In this context leaving the Commission completely out from the appointment process of the Director General is irrational. In our view seeking the views of the Commission in the appointment of the Director General can in no way be offensive to the exercise of the powers of appointment. Such a consultative process will only enhance the quality of the appointments concerned. We determine that Clause 17(1) of

the Bill is inconsistent with Article 12(1) and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if it is amended as follows:

Page 10 Clause 17 : delete line 9 and substitute the following:-

"the Constitutional Council and after consulting the members of the Commission appoint a Director General"

Clause 21

It was pointed out that Clause 21 of the Bill gives the President unfettered power to remove the Director General.

In **Re Eighteenth Amendment to the Constitution [(2002) 3 Sri.L.R. 71]** Court held:-

"Articles 3 and 4 must be read together and hence no organ of government shall alienate the sovereignty of the People in the exercise of its power entrusted to it. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. That would be inconsistent with the Rule of Law."

We agree that Clause 21 gives unfettered power to the President in the removal of the Director General. We also note that absence of any consultative process to obtain views of the Commission in this regard is irrational. Accordingly, we determine that Clause 21 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will be removed if Clause 21 is amended as follows:

Page 12 Clause 21: delete lines 23 to 27 (both inclusive) and substitute the following:-

"Removal of the Director-General

21. The President may in consultation with the Commission, on any one or more grounds for disqualification set out in subsection (2) of section 19 or where the conduct of the Director-General negatively impacts on the exercise of the powers and functions of the Commission and after giving the Director General an opportunity to

be heard in person or by a duly appointed representative, remove him from office, subject to the approval of the Constitutional Council."

Clause 28

Several Counsel for Petitioners submitted that Clause 28 of the Bill infringes the provisions of the Right to Information Act No. 12 of 2016.

It was submitted that Clause 28 read with Clauses 44(2), 88, 120 and 161 of the Bill infringes the right to access information as provided for in Article 14A of the Constitution read with Articles 3 and 4.

Learned ASG submitted that the declaration required under Clause 28(1) does not apply when disclosure of information is necessary *for the purpose of giving effect to the provisions of this Act or where provision has been made under this Act to share information*. Since Clause 88(2) of the Bill provides for the appointment of an Information Officer and a Designated Officer in terms of the Right to Information Act and Clause 44 makes express reference to the applicability of the Right to Information Act, it is clear that provision has been made under the Bill to share information in terms of the Right to Information Act. Therefore, the said Information Officer and Designated Officer appointed in compliance with the Right to Information Act and exercising their statutory powers of processing requests made under that Act for access to information would fall within the exception contained in Clause 28(1) itself. Nonetheless, when they do process such requests, they may grant access to information, subject to the exceptions set out in Section 5(1) of the Right to Information Act.

It was further submitted by the learned ASG that Clause 44(2) guarantees the application of the Right to Information Act. Even though it may at first glance appear that this provision is to be construed in the context of a complainant's right to be informed of the

progress of an investigation in terms of Clause 44(1), the words used in Clause 44(2) make it very clear that same is intended to have wider application:

> *"The provisions of subsection (1) of section 5 of the Right to Information Act, No. 12 of 2016 shall apply for* ***any information provided, shared or communicated as provided for in this Act****."* (emphasis added)

Accordingly, it was contended that Clause 44(2) does not restrict reference to information provided, shared or communicated as provided for *in this Section* (which can only be a reference to a complainant's right of access to information as provided for under Clause 44(1)), but is applicable to information provided, shared or communicated as provided for *anywhere in the Act*. It was pointed out that Clause 28(3) too recognizes an important exception to the declaration of non-disclosure. For, notwithstanding that declaration, it permits sharing of information "in the public interest, for the purposes of publication in the press, media and social media with a view of enhancing the transparency and accountability of the Commission towards the public". This is in keeping with UNCAC principles in Article 13(1)(b), i.e. to ensure that the public has effective access to information, as well as Article 10 therein.

In conclusion the learned ASG submitted that the "permission" of the Commission referred to herein must be appreciated in the context of Clause 28(3). It is not an instance where the public has requested access to information, but a proactive measure of disclosure *"for the purposes of publication in the press, media and social media with a view of enhancing the transparency and accountability of the Commission towards the public"* and to be done through the Director-General. However, since the Director-General is subject to the control of the Commission, he requires its permission to disclose the relevant information and, in doing so, should also take into account the exceptions to right to information set out in Section 5(1) of the Right to Information Act. It is recalled that, as per Section 5(1)(h) of the Act, the disclosure of information should not (i) cause grave prejudice to the prevention or detection of any crime or the apprehension or

prosecution of offenders; or (ii) expose the identity of a confidential source of information in relation to law enforcement or national security, to be ascertained.

Nevertheless, the learned ASG submitted that an omnibus provision will be added by way of Committee Stage amendment to Clause 136, clarifying that the Right to Information Act, No. 12 of 2006 applies and all non-disclosure provisions such as Clause 28(1) will have to be interpreted accordingly. The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 125 Clause 136 : Add the following Sub-Clause:

> "The provisions of the Right to Information Act, No. 12 of 2016 shall apply to this Act."

We are of the view that this amendment suitably addresses the concerns raised on the application of the Right to Information Act.

Clause 29

Mr. Pieris PC submitted that the wording in Clause 29(1) as it is (i.e. *"shall be deemed to be a judicial proceeding within the meaning of the Penal Code"*, rather than *"for the purposes of"*) has the result of all investigations and incident acts of officers of the Commission being outside the Supreme Court's fundamental rights jurisdiction under Article 126 and the Court of Appeal's writ jurisdiction under Article 140. Our attention was drawn to the determination in **The Eighteenth Amendment to the Constitution [2002 (3) Sri.L.R. 71]** where Court held that an attempt to oust the jurisdiction of this Court [in this case reviewing decision of the Constitutional Council] is a violation of Article 3 of the Constitution. It was thus submitted that Clause 29(1) of the Bill is inconsistent with Articles 3, 4(d), 12(1), 126 and 140 of the Constitution.

We see no merit in this submission. It is a deeming provision limited to the Penal Code. In ***Jinawathie and Others v. Emalin Perera*** **[(1986) 2 Sri.L.R. 121 at 130]** Ranasinghe J. (as he was then) held:

> *"In statutes the expression "deemed" is commonly used for the purpose of creating a statutory function so that the meaning of a term is extended to a subject matter which it properly does not designate. Thus, where a person is "deemed to be something" it only means that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were. When a thing is deemed to be something, it does not mean that it is that which it is deemed to be, but it is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing it is nevertheless deemed to be that thing."*

Hence the use of the word *deem* is itself an acknowledgment that the investigations conducted under the Bill is not a judicial proceeding in other circumstances. Moreover, the constitutional jurisdiction of the Supreme Court and the Court of Appeal cannot be ousted by an ordinary law except to the extent specified in the proviso to Article 140 [See ***Atapattu and Others v. People's Bank and Others*** **(1997) 1 Sri.L.R. 208**].

Clause 31

Mr. Egalahewa PC submitted that the scheme envisaged in Clause 31(1) violates the provisions of Article 152 of the Constitution, and the separation of powers as provided for in our Constitution, thereby violates Articles 3 and 4 of the Constitution.

This clause provides for the submission to Parliament through the Speaker the annual budget estimates of the Commission. What is envisaged in the procedure is a review of such estimates by Parliament which will then be forwarded to the Minister assigned the subject of Finance for incorporation in the national budget subject to such modifications.

In our view, this process does not involve in the presentation of a Bill or motion as envisaged in Articles 148 and 152 of the Constitution. It is a consultative process seeking to achieve a bipartisan approach to ensuring that necessary funds are provided in the national budget for the Commission. We determine that Clause 31(1) is not inconsistent with the Constitution.

Clause 31(2) imposes a requirement on Parliament to ensure the availability of funds for inquiries and investigations on any offence conducted by the Commission which has an adverse impact on the national or public interest.

We observe that in terms of Clauses 9(b) and 26(2) of the Bill, the remuneration of the members, officers and employees are charged on the Consolidated Fund. Hence even if no provision has been made in the national budget, these expenses will have to be made available by the Treasury. This is a salutary principle which advances the independence of the Commission.

However, we observe that in so far as the expenses for inquiries and investigations are concerned, the Commission has to rely on Parliament passing relevant budgetary provisions annually. Without necessary funds for these activities, the Commission will be rendered superfluous. We further observe that there is no reference to budgetary provisions for prosecutions. There are no rational reasons for ensuring financial provisions for the remuneration of the members, officers and employees without having the same safeguard for the expenses for inquiries, investigations and prosecutions.

We determine that Clause 31(2) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if Clause 31 is amended as follows:

Page 18 Clause 31 : delete lines 19 to 27 (both inclusive) and substitute the following:-
"31(2) Subject to the provisions of the Constitution and notwithstanding the provisions of subsection (1), all expenses for

inquiries, investigations and prosecutions on any offence conducted by the Commission shall be charged on the Consolidated Fund".

Clauses 32(1) and 163(2)(h)

The Petitioners in S.C.S.D. 16/2023 and 18/2023 are employees of the CIABOC established under CIABOC Act, No. 19, of 1994 . It was submitted that the Bill repeals that Act, and in the transitional provision Clause 163(2)(h), provides that:

> *"all officers and officials of the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994 holding office prior to the date of commencement of this Act, shall, with the consent of the officer or official concerned, deemed with effect from the date of commencement of this Act to be the officers and officials of the Commission, on terms not less favourable than the terms and conditions of employment to which they were entitled under the Act, No.19 of 1994."*

It was contended that the officers of the CIABOC are public servants, who are appointed, and are under the disciplinary control of the Public Services Commission, an independent commission established by the Constitution. As public servants, they enjoy the benefits of being a public servant, including the pension rights.

The Petitioners contented that repealing the CIABOC Act, No. 19 of 1994, and establishing a statutory corporation means, the officers of the statutory corporation would not be public servants, but employees of a statutory corporation, thereby will be deprived of all the benefits they are entitled to as public servants. It was submitted that this action is arbitrary, and irrational, and clearly violates rights guaranteed under Article 12(1), and 14(1)(g) of the officers of CIABOC, including the Petitioners.

Mr. Egalahewa, PC submitted that pension rights, and other relevant benefits of being a public servant is the main incentive for many persons, including the Petitioners, to join the public service.

We observe that P.D. Kannangara in *"The History of the Ceylon Civil Service 1802-1833*, A Study of Administrative Change in Ceylon" [Tisara Prakasakayo, 1966, page 169] explains the historical reasons for granting a pension as follows:

> *"At the time of the formation of the Civil Service, the gift of the Colonial Office to what it considered inadequate salaries was a favourable retirement and pension scheme. Dundas, who originated the idea, specifically stated that considering the small scale on which it was proposed to regulate the salaries of Civil Servants, some arrangement ought to be made with a view to making a provision for their retreat. He also thought that to induce Civil Servants to look forward to a 'certain and competent independence' after a given number of years of service, was the best security against abuse. Pensions were to be proportionate to the duration and importance of the services rendered."*

Nevertheless, we agree that the State cannot abruptly and unreasonably take away the pension right of a public servant who is otherwise entitled to it. Such a course of action violates the legitimate expectation of a public servant.

We determine that Clause 163(2)(h) of the Bill is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 147 Clause 163:	delete lines 29 to 36 (both inclusive) and substitute the following: "(h) all officers and officials of the Commission to Investigate Allegations of Bribery or Corruption established under Act, No. 19 of 1994 holding office prior to the date of commencement of this Act, shall be deemed with effect from the date of commencement of this Act to be officers and officials of the Commission established under this Act, on terms not less favourable than the terms and conditions of employment to which they were entitled under the Act, No. 19 of 1994, and shall communicate, within three months of the

establishment of the Commission, whether they opt to join the service of the Commission:

provided that,

(i) every officer and official who opts to join the service of the Commission shall, for purposes of calculating pension and other retirement benefits only, be deemed to have continued in office as a public officer in the Commission to Investigate Allegations of Bribery or Corruption established under Act, No. 19 of 1994 from the date on which he was employed by that Commission until the end of his period of service in the Commission established under this Act and shall, if his period of service in the Commission when added to his previous period of service as a public officer amounts to twenty years or more be eligible, at the end of his period of service in the Commission, for the grant of pension and retirement benefits which may be applicable to such officers and officials under the provisions of any other written law including the Minutes on Pensions;

(ii) every officer and official who opts for voluntary resignation from the service of the Commission, shall be entitled to such compensation as shall be paid in terms of a Voluntary Retrenchment Scheme as shall be prescribed by the Minister and be entitled to pension and other retirement benefits which may be applicable to such officers and officials under the provisions of any written law including the Minutes on Pensions."

The inconsistency will cease if the above amendment is made.

Ms. De Alwis submitted that the officers and employees of the Commission will continue to remain as *public officers* within the meaning of Article 170 of the Constitution. Therefore, disciplinary control over them cannot be given to the Commission but must be vested in the Public Service Commission. It was contended that any attempt to do so will be contrary to Articles 55(3), 155FF and 155G of the Constitution. Accordingly, it was submitted that Clause 32 is inconsistent with Articles 55(3), 155FF and 155G of the Constitution.

This submission is misconceived. In order to be a public officer within the meaning of Article 170 of the Constitution, two requirements must be fulfilled. Firstly, it must be an office under the Republic. Secondly, the salary must be paid by the Republic. Although the Republic provides the necessary funds to the Commission, the officers and employees are paid by the Commission and more importantly, hold office under the Commission, which is a body corporate, and not the Republic.

We therefore determine that Clause 32 of the Bill is not inconsistent with Articles 55(3), 155FF and 155G of the Constitution.

Clause 40

Mr. Fernando submitted that Article 12 of UNCAC explains how the private sector maybe engaged to prevent corruption or bribery. In addition, Article 39 of the UNCAC provides for co-operation between national authorities and the private sector. Overall object of the UNCAC is to prevent corruption in both the public and private sectors.

However, it was submitted that Clauses 36, 37, 38, 40(a), (c), (d) limits the regulatory authority of the Commission over the public sector to "monitor and coordinate" (Clause 36), "examine" (Clause 37), "advise and assist"(Clause 38), "liaising", "advising" and "monitoring" [Clause 40(a), (c) and (d)]. But, under Clause 40(g), in respect of the private sector, the Commission is given regulatory authority to prescribe codes of conduct which "*...shall be adhered to by the private sector entities*". The wording of Clause 40(g), when compared with the other said Clauses, makes the private sector be regulated as mandatory/binding, and public sector as optional/non-binding.

It was submitted that this grossly contravenes the objects and principles of the UNCAC and amounts to discrimination and therefore violates Article 12(1) of the Constitution.

Mr. Fernando further submitted that, the wording of Clause 40(g) *"...in order to develop proper conduct of business for the promotion of good commercial practices;"* makes

undue inroads to established principles of private equity, operation of markets, and autonomy of corporate governance and therefore amounts to a violation of Article 12(1) of the Constitution.

We are of the view that there is much merit in these submissions. On one hand, Clause 40(g) gives the power to the Commission to introduce codes of conduct which go beyond measures aimed at preventing bribery and corruption and encroach onto commercial practices in a broader context. There is also arbitrary classification in allowing the Commission to monitor the private sector without submitting the public sector to the same monitoring process.

Accordingly, we determine that Clause 40 of the Bill is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistencies will cease if the following amendments are made:

Page 22 Clause 40 : delete line 6 and substitute the following: -
"(g) to introduce codes of conduct for prevention and eradication of bribery and corruption which shall be adhered";

A new Clause to be added to Clause 40 to read as follows:

"to introduce codes of conduct for prevention and eradication of bribery and corruption in the public sector which shall be adhered in the public administration"

Clause 48

Mr. Pieris PC drew our attention to Clause 48(3) of the Bill which allows a maximum period of 14 days to be taken to produce an arrested person before a Magistrate with jurisdiction in the case, after he has been produced before a nearest Magistrate without jurisdiction. He submitted that the clause lacks clarity and is disproportionate and constitutionally overbroad. It was submitted that the words "subject to section 149" in this clause is nugatory because only a Magistrate with jurisdiction in the case can order bail/remand according to Clause 149.

It was further submitted that detaining a person for a time period excessive of the time taken to expeditiously take the arrested person to the nearest *competent* Magistrate is violative of Article 13(5) of the Constitution, as such detention was not authorized by a competent Magistrate and amounts to punitive detention, and not preventive detention. It was pointed out that the established position in foreign jurisdictions too is that the presumption of innocence requires that he should immediately be produced before a judge who has the power to release him on bail.

Such position is supported by the judgment of the Supreme Court of the United States in ***Stack v. Boyle* [342 U.S. 1, 4 (1951)]**:

> *"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would loose its meaning."*

Accordingly, it was submitted that Clause 48(3) lacks clarity, is constitutionally overbroad and thereby violates Article 12(1), as well as Articles 13(2) and 13(5) of the Constitution.

In our view allowing fourteen days for an arrested person to be produced before a competent Magistrate in the context of the statutory scheme of the Bill is irrational. Furthermore, it amounts to punitive detention. We accordingly determine that Clause 48(3) of the Bill is inconsistent with Articles 12(1) and 13(2) of the Constitution.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 32 Clause 48 : delete line 17 and substitute the following:-

"the case forthwith."

The inconsistency will cease if the above amendment is made.

Clause 50

Clause 50(1)(a) states that a person can be summoned to be examined *before* the Commission. It was submitted that this is vague and irrational.

In **Prevention of Terrorism (Temporary Provisions) Amendment Bill [supra]** it was held [at page 22]:

> "When a provision of law is vague, it would only benefit the wrongdoer. Such a provision would not uphold the Rule of Law.
>
> [at page 23]
>
> This Court has stated time and again that vagueness must be avoided in the bills in order to make such provisions consistent with Article 12(1) of the Constitution."

We determine that Clause 50(1)(a) is vague and inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 39 Clause 50	:	delete lines 11 and 12 and substitute the following:- "(a) summon the person to be examined with the consent of such person, to be"

The inconsistency will cease if the above amendment is made.

Clause 53

This allows the Commission to impose restraining orders such as freezing orders.

Mr. Pieris PC submitted that sections 7 and 8 of the Prevention of Money Laundering Act No. 5 of 2006 require a freezing order to be confirmed by the High Court within a period of seven days. It was submitted that a freezing order made without judicial oversight is limited merely to a period of seven days. It was contended that Clause 53 specifies the

period as three months which is overbroad and is disproportionate and a violation of an individual's right to his property, thus amounting to a violation of Article 12(1).

We do not think that the same time period must apply in all legislation on the same issue. It will depend on many factors including the objectives of the Bill and the policy goals. Nevertheless, we agree that the three months in Clause 53 has no rational connection to the objects of the Bill and therefore is arbitrary. Accordingly, we determine that Clause 53(1) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 44 Clause 53 : (1) delete line 27 and substitute the following: -
"(2) The Commission shall, within seven days during";
(2) delete lines 31 and substitute the following: -
"request an extension of the original period of seven days."

The inconsistency will cease if the above amendment is made.

Clause 55

Mr. Fernando submitted that, including "Lifestyle audit" to the scope of investigation methodology under the Bill will expand regulatory purview of the Commission and greatly contribute to overcome many practical difficulties that the officers may face when conducting investigation. It will also further enhance the *ex mero motu* authority of the Commission. It was contended that if such expansion is denied it will affect the Petitioners' equal protection of the law under Article 12(1) since there is no proper investigative methodology to ensure that the offences specified in Part III of the Bill will be successfully enforced. He submitted that including "Lifestyle audits" will be in furtherance of Article 20 of UNCAC.

We observe that Clause 55 of the Bill uses the phrase *includes* in setting out different investigation techniques. Hence, they are not exhaustive. Thus, the Commission is

empowered to use all lawful investigation techniques to achieve the objectives of the Bill. Hence, we see no inconsistency.

Clause 62

Mr. Pieris PC submitted that while acknowledging the necessity for the Commission to preserve the confidentiality of their sources, for instance the safety of informants, it is not so appropriate nor necessary to maintain secrecy regarding the *manner* of obtaining any information. Such secrecy will prevent an accused from testing whether an item of evidence was obtained in a legal manner. It was contended that therefore Clause 67 prejudices the right of the accused to a fair trial and violative of Article 12(1) and 13(3) of the Constitution.

The right to a fair trial guaranteed by Article 13(3) of the Constitution is an evolving concept. As criminal investigators become more empowered with advances in science and technology, the right of the accused to a fair trial must be molded to ensure that the basic safeguards accorded to the accused is protected. As Fernando J. held in ***Wijepala v. Attorney General*** **[(2001) 1 Sri.L.R. 46 at 49]**, Article 13(3) *"not only entitles an accused to a right to legal representation at a trial before a competent court, but also to a fair trial, and that includes anything and everything necessary for a fair trial."* The *manner* in which the evidence sought to be led against an accused was received is important in testing it against the relevant evidentiary principles. Clause 62(1) of the Bill seeks to maintain secrecy in that matter. We determine that Clause 62(1) is inconsistent with Article 13(3) and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 54 Clause 62 : delete line 19 and substitute the following: -
"compelled to reveal the source of"

The inconsistency will cease if the above amendment is made.

Clause 65

The proviso to Clause 65 allows the Commission to institute proceedings in the Magistrate Court where the offence is soliciting, accepting or offering by any person of a gratification of which the value does not exceed ten thousand rupees.

The Bill creates several types of offences in different areas including the Declaration of Assets and Liabilities, Bribery or Corruption. However, the clause limits the opportunity to file charges in the Magistrates Court in limited situations. This classification is arbitrary and does not have a rational nexus to the objects of the Bill.

We determine that Clause 65 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 58 Clause 65 : delete lines 6 to 24 (both inclusive) and substitute the following:-
"against such person in the appropriate court."

The inconsistency will cease if the above amendment is made.

Clause 67

Almost all counsel impugned the constitutionality of Clause 67 of the Bill which deals with withdrawal of indictment.

It was acknowledged that existing law provides for withdrawal of indictments. Section 194 of the Code of Criminal Procedure Act No. 15 of 1979 gives the Attorney General the power to withdraw an indictment. However, a distinction was sought to be made between this section and the impugned clause. It was contended that Section 194 of the Criminal Procedure Code as a rule of practice is generally used where there is no justification to continue proceedings, due to reasons such as insufficiency of evidence, failures in investigations, or where the witnesses falter in their evidence. It was contended that Section 194 is not relied upon in cases where there is ample evidence of liability as it would be contrary to the rule of law and an abuse of prosecutorial powers.

However, it was submitted that Clause 67 contemplates withdrawing indictments even where there is sufficient evidence of liability obliging the accused to publicly express remorse and apology, provide reparation to victims of the offence, permanently refrain from holding public office and refrain from holding an elected office for a period of seven years or pay as compensation to the State the full amount relating to the offence.

Accordingly, it was contended that Clause 67 is violative of the victims' as well as the general public's right to equal protection of the law and right to a fair trial as guaranteed by Articles 12(1) and 13(3).

The learned ASG responded that the withdrawal of an indictment can only be done with the permission of court and thus ensures judicial oversight. He submitted that not only is it similar to the power of the Attorney General under Section 194 of the Code of Criminal Procedure Act, but goes a step further providing clear criteria under Clause 67(2) for the Director-General to be guided by when he exercises discretion to withdraw an indictment.

Prosecutorial discretion to withdraw an indictment is universally accepted. In this context it is apposite to refer to ***The Attorney General v. Sivapragasam et al*, (60 NLR 468)** where Sansoni J. in referring to the prosecutorial discretion, *albeit* of the Attorney General, held as follows (at pp.470-471) –

> *"Mr. Nadesan argued that it is not open to a Crown Counsel who claims to appear and conduct a prosecution to say that he is not leading evidence. He went so far as to say that no prosecutor, not even the Attorney-General, has a discretion in the matter; and that if there is evidence available he must lead it, and if he does not lead it he ceases to appear and conduct the prosecution and the complainant or his pleader would then be entitled to prosecute and lead evidence. With respect, I entirely disagree with this proposition. The logical result of accepting it would be to place a duty on prosecuting counsel to lead evidence even when he knows that all the available evidence will fail to establish the charge against the accused. No prosecuting counsel with any regard for the Court or his own position as an officer of justice need follow such a course. The only object of leading evidence for the prosecution is to establish the ingredients of the charge, and if counsel is not satisfied in his own mind that the totality of the evidence available will achieve that result, he will be failing in his duty to the Court and to the accused if he were to insist on a fruitless recording of evidence and a senseless waste of time. It is quite wrong to suppose that a prosecuting counsel's duty is mere mechanical leading of evidence regardless of the object for which evidence is led. If he is satisfied that the evidence is insufficient to prove the charge and insists on leading evidence, how can he in conscience ask the Court to convict the accused?"*

Nevertheless, no discretion is unfettered for unfettered discretion is antithesis to the rule of law upon which our Constitution is founded. This is the acknowledged position in so far as withdrawal of indictments as well.

***Balwant Singh v. State of Bihar,* AIR 1977 SC 2265 at 2266**

> *"The statutory responsibility for deciding upon withdrawal squarely vests on the public prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. The Criminal Procedure Code is the only master of the public prosecutor and he has to guide himself with reference to Criminal Procedure Code only. So guided, the consideration which must weigh with him is whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution."*

We observe that Clause 67(2) of the Bill specifies the circumstances within which an indictment may be withdrawn. The wording in the clause is clear that there can be no other reason. The effect is taking away unfettered discretion and limiting the grounds on which an indictment can be withdrawn.

The Director General must in seeking to withdraw any indictment record reasons for such application to enable the learned High Court Judge to exercise his discretion judicially. Moreover, the wording imposes an additional condition namely that the permission of the High Court must be obtained for the withdrawal of the indictment. Here the High Court Judge must give his judicial mind to the application and decide whether to grant permission. The High Court Judge must satisfy that there are reasons within the meaning of Clause 67(2) for the withdrawal. The High Court Judge cannot abdicate his power of granting permission to the opinion of the Commission and the Director General. Nor can he disregard the sufficiency or insufficiency of evidence. The decision of the High Court Judge to grant or refuse permission is open for challenge in appropriate proceedings. To that extent, the position advanced by the Petitioners in relation to the power of withdrawal of indictment are misplaced.

However, we observe that Clause 67(5) gives discretion to the Director General to file fresh indictment where the accused fails to comply with the conditions imposed. This is arbitrary and inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if the following amendment is made:

Page 62 Clause 67 : line 13 replace the word "may" with "shall"

Clause 71

This clause recognizes Deferred Prosecution Agreements (DPA) for the first time as part of our law. It permits the Commission to suspend and defer criminal proceedings subject to the conditions specified therein.

Mr. Pieris PC submitted that this is inconsistent with the provisions of the Constitution for the same reasons advanced on the constitutionality of Clause 67 of the Bill.

Ms. De Alwis submitted that DPA is a concept introduced in many jurisdictions such as UK, USA and Canada whereby in instances where corporates have committed offences, the conviction is deferred, taking into consideration the impact such conviction can have on the continuity of the corporate entity. She drew our attention to the explanation provided to DPA's in the official website of the Serious Frauds Office of UK which stipulates as follows:

- *A UK Deferred Prosecution Agreement (DPA) is an agreement reached between a prosecutor and an organisation which could be prosecuted, under the supervision of a judge.*
- *The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified conditions.*
- *DPAs can be used for fraud, bribery and other economic crime. They apply to organisations, never individuals.*

- *The key features of DPAs are:*
    - *They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people).*
    - *They are concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice' and that the terms are 'fair, reasonable and proportionate'.*
    - *They avoid lengthy and costly trials.*
    - *They are transparent, public events.*

However, it was contended that in terms of Clause 71(1) of the Bill, a DPA can be entered into with "any person". Moreover, Clause 71(8) imposes a qualification that DPA can be entered by the Director General with a body corporate, a partnership or in case of unincorporated associations, in the name of such unincorporated association. Nonetheless, given the fact that Clauses 106 and 108 refers to "any person", it can be seen that the provisions of DPAs can be extended to individuals as well. This point is further fortified by Clause 71(3)(d) of the Bill which stipulates that a condition can be imposed restricting such person from permanently holding public office and refrain from holding an elected office for a period of seven years.

The learned ASG submitted that the concept of DPA has been introduced into law *inter alia* for the following reasons:

- Investigations and trials for offences of economic crime becoming "forbiddingly long, expensive and complicated";
- Regulators suffering from a lack of "flexibility to secure appropriate penalties for wrongdoing, at the same time as achieving better outcomes for victims";

- Difficulties in proving that the "directing mind and will" of an organisation was at fault, thereby founding criminal liability;
- Commercial organisations having "little incentive to self-report" making the investigation of matters involving hidden, specialist or technical fields very difficult;
- Existing criminal penalties having "unintended detrimental consequences", such as a disproportionate impact on a company's share price, or collapse of a business;
- Civil proceedings allowing regulators to recover the proceeds of unlawful conduct and avoid the imposition of a criminal penalty, but not compensating victims;
- investigations and prosecutions being disproportionately expensive and time-consuming.

The learned ASG further submitted that these principles were discussed in the case of ***SFO v. Sarclad Ltd*** **[(2016) 7 WLUK 804]** in which the Serious Frauds Office of the UK entered into a DPA with the company Sarclad for the offence of conspiracy to commit bribery and failure to prevent bribery. The said case discussing the implications of DPAs noted the following:

> *"[T]here is no doubt that Sarclad's conduct was very serious both in terms of type and scale so that it is not straightforward that a proposed DPA is in principle in the interest of justice. However, it is important to send a clear message, reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile."*

The learned ASG contended that DPAs are intended to be an important component in meting out justice in the criminal justice process. The reasons set out above and the rationale provided for in the case of ***SFO v Sarclad*** shows clear justification as to why DPAs would be important in relation to offences committed by private sector entities. He submitted that the application of DPAs to sporting entities can also be justified as a permanent closure of a sporting entity or sportsperson would lead to putting a permanent end to the development of a sport or a person's talent. DPAs in relation to sporting entities will also allow persons involved in different sporting bodies to self-report offences that are being committed by individuals within such bodies. It will allow sportspersons to rehabilitate themselves and return to their sporting careers rather than having to face a permanent penalty which may imprison them for a substantial term.

We observe that DPAs are part of the criminal justice system in many jurisdictions. While its benefits are acknowledged in recent times it has evoked certain amount of criticism as well. One of the most serious and recurring criticism is that DPAs have become a substitute for individual accountability for financial crime (Corruption Watch 2016). Some authors argue that the system could potentially create a "two-tier" justice system because corporations accused of criminal conduct can settle the case pre-indictment, while an individual defendant cannot (Corruption Watch 2016; Hawley 2016). There is also growing concern that, at least in the case of the USA, DPAs fail to deter economic crime (Corruption Watch 2016).

We find that the fundamental object of a DPA is to make it available to companies. However, Clause 71(8) allows it to be applied to partnerships and unincorporated bodies contrary to the primary goals of a DPA. This is arbitrary and defeats the objects of the Bill. Accordingly, we determine Clause 71(8) is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 65 Clause 71	:	delete line 9 and substitute the following:- "into an agreement with any person referred to in subsection (8) of this section alleged to have committed"
Page 66	:	delete lines 7 to 9 (both inclusive)

We are of the view that in addition to the above amendments, the following amendment should also be made:

Page 67	:	(1) delete lines 5 to 10 (both inclusive) and substitute the following:- "(8) Where the person referred to in this section is a body corporate, an agreement under this section shall be entered into between the Director-General and such body corporate." (2) line 28 replace the word "may" with "shall"

The inconsistencies will cease if amended as above.

Clause 80

This clause identifies the persons to whom Part II of the Bill applies. It contains statutory provisions on the Declaration of Assets and Liabilities. The declaratory process is undoubtedly important to combat bribery or corruption. Hence it is important to make it applicable to all relevant persons. In this context, it is observed that Clause 108 creates certain offences relating to sporting events. Nevertheless, Clause 80 does not impose a requirement on the officials of sports bodies to make a declaration of assets and liabilities. This is irrational and defeats the objects of the Bill. Accordingly, we determine that Clause 80 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that Clause 80 will be amended as follows:

Page 77 Clause 80 : (2) delete lines 11 and 12 and substitute the following: -

"(dd) office bearers of National Association of Sports established in terms of the Sports Law No. 25 of 1973; and

"(ee) such categories of other officers as may be prescribed by regulations as high risk categories by taking into consideration the"

The inconsistency will cease if the above amendment is made.

Clause 93

This clause makes bribery of inter alia Members of Parliament and solicitation by them an offence. However, the proviso makes provision for Members of Parliament to accept certain allowance or other payment solely for the purposes of his maintenance.

This carve out is irrational and defeats the objects of the Bill. We determine that Clause 93 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 88 Clause 93 : delete lines 20 to 25 (both inclusive)

The inconsistency will cease if the above amendment is made.

Clauses 97 and 98

Mr. Fernando drew our attention to Clauses 97 and 98 of the Bill and submitted that they are too restrictive in scope and hence fail to give full effect to the provisions in UNCAC. Article 9 of the UNCAC deals with public procurement and public finances. He further submitted that bribery and corruption in public procurement causes irreparable harm and

need to be combatted effectively. A failure would defeat the objectives of the Bill. In his view Clauses 97 and 98 fail to criminalise bribery or corruption covering all stages of procurement process.

"Preventing Corruption in Public Procurement" published by the Organisation for Economic Cooperation and Development (OECD) in 2016, recognises that:

> *"Public procurement is one of the government activities most vulnerable to corruption. In addition to the volume of transactions and the financial interests at stake, corruption risks are exacerbated by the complexity of the process, the close interaction between public officials and businesses, and the multitude of stakeholders.*
>
> *Various types of corrupt acts may exploit these vulnerabilities, such as embezzlement, undue influence in the needs assessment, bribery of public officials involved in the award process, or fraud in bid evaluations, invoices or contract obligations. In many OECD countries, significant corruption risks arise from conflict of interest in decision-making, which may distort the allocation of resources through public procurement (European Commission, 2014a). Moreover, bid-rigging and cartelism may further undermine the procurement process.*
>
> *The OECD Foreign Bribery Report (2014) provides additional evidence that public procurement is vulnerable to corruption."*

According to the "Guidebook on anti-corruption in public procurement and the management of public finances - Good practices in ensuring compliance with Article 9 of the United Nations Convention against Corruption" published by the UNODC in partnership with International Anti-Corruption Academy (2013) *inter alia, "The volume and complexity of any particular procurement play an important role when it comes to corruption. Larger procurements are often most vulnerable, as bribes are frequently*

demanded and paid as a percentage of the public contract's value. Experience also shows that certain sectors are particularly vulnerable to corruption. Many corruption scandals in recent years were in the field of public works contracts, such as infrastructure projects, the defence industry, the oil and gas sector, and in the health-care sector, especially in pharmaceuticals and medical devices.

Despite its enormous negative impact and the various efforts undertaken to curb corruption in the field of government contracts, public contracts have remained highly prone to corruption during the last decade; this is true both of developing and developed countries. Even in an environment where the public and private sectors are aware of the enhanced enforcement of anti- corruption laws, corruption opportunities and challenges continue to arise through private sector contact with government officials."

We are mindful that instances of corruption or bribery in public procurement need to be effectively prevented and combatted and falls within the objective of the Bill. Even though Clauses 97 and 98 of the Bill does not cover the full gamut of public procurement process, examination of Clauses 99, 100 (a) (i), (vi), (vii), 104(1), 105 and 111 together with Clauses 97 and 98 demonstrate that such provisions cumulatively cover instances of bribery or corruption in such process despite the fact that such provisions do not make any specific reference to procurement process. It remains the responsibility of the Commission to ensure that such instances are effectively investigated and prosecuted within the framework of the Bill.

Therefore, we are unable to find any inconsistency with the Constitution on the grounds urged by Mr. Fernando.

Clause 99

The proviso to this clause allows any public official to solicit or accept any gratification which he is authorized by any written law or by the terms of his employment to receive. This carve out is vague and therefore irrational and defeats the objects of the Bill. We determine that Clause 99 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 92 Clause 99 : delete lines 1 to 5 (both inclusive) and substitute the following:-
"Provided, that section 35 of the Medical Ordinance"

The inconsistency will cease if the above amendment is made.

Clause 101

The proviso to Clause 101 allows an offer of a gratification to a public official in specified circumstances.

This carve out is vague and therefore irrational and defeats the objects of the Bill. We determine that Clause 101 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 94 Clause101 : delete lines 1 to 6 (both inclusive)

The inconsistency will cease if the above amendment is made.

Clause 112

Sub-clause (2) provides for the application of the provisions of Money Laundering Act No. 5 of 2006 to apply for proceedings of the offence of money laundering under the Bill. However, it has omitted its application to preliminary inquiries and investigations which the Commission is mandated to perform under the Bill.

This is irrational and defeats the objects of the Bill. We determine that Clause 112 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 106 Clause 112: delete lines 10 and 11 and substitute the following:-

> "Act, No. 5 of 2006 shall, mutatis mutandis, apply to the inquiries, investigations and proceedings in respect of such offence under that Act and any"

The inconsistency will cease if the above amendment is made.

Clause 119

This deals with false allegations and its consequences.

Mr. Pieris PC submitted that an anti-corruption regime that fails to effectively protect whistle-blowers, who take a great risk upon themselves and their loved ones, would fail at the very outset, "right out of the gate", as whistleblowers are arguably the most important source of information about bribery and corruption. He contended that a legal regime which discourages whistle-blowers even further is a failed law and an affront to the rule of law and the dignity of the rightful citizen. Such a regime has a weak foundation and its legitimacy and moral authority crumbles in the face of the impunities permitted by the regime itself. He contended that Clause 119 appears to be vague and constitutionally overbroad, and is disproportionate to any legitimate aim of the State, thus having a chilling effect on possible information disclosure, disregarding the oversight

that can otherwise freely be exercised by citizen participation in the fight against corruption. It was submitted that when read with the several secrecy clauses in the Bill, due to the vague and overbroad manner in which it is articulated, and the disproportionate and harsh penal sanctions imposed, such provision is unconstitutional as it impinges on the continuous right to hold the State accountable, the right to be free from corruption and treats those who make false complaints/whistleblowing, harsher than under the normal Penal Law. Accordingly, it was contended that Clause 119 is violative of Articles 3 and 12(1) of the Constitution.

Mr. Hewamanne submitted that it is important to provide for whistle-blower protection which is an implicit right in terms of Article 12(1). He submitted that this fundamental right is supplemented by the fundamental duties in Article 28 which include *"to work conscientiously in his chosen occupation"*, to *"preserve and protect public property and to combat misuse and waste of public property"* as well as to *"protect nature and conserve its riches"* all of which would require an individual to point out corruption in both the public and private sector. It was contended that Clause 119 imposes penal sanctions and hence these provisions are unconstitutional as it discourages the continuous right to hold the State accountable, the right to be free from corruption, freedom of expression and right to equality. Thus, it was submitted that Clause 119 is inconsistent with Articles 1, 12(1) and 14(1)(a) of the Constitution.

The learned ASG responded that the repercussions of knowingly making a false allegation are irremediable. Not only would the Commission have wasted its resources, but the person against whom the allegation was made, as well as his family may have unfairly faced public criticism and other harassment. As such, frivolous complaints must be frowned upon and deterred. It was submitted that making of false allegations is an offence which should not be taken lightly and is part of existing law, including Section 21 of the CIABOC Act. He drew our attention to the decision in ***Jayasinghe v. The National***

Institute of Fisheries and Nautical Engineering and Others v. Jayasinghe **[(2004) 1 Sri.L.R. 230 at 236]** where Court held:

> *"the petitioner has included scathing remarks alleging fraud and impropriety on the part of the several named persons. Relevant facts and circumstances may be appropriately set out in a pleading on the basis of the guidelines mentioned above, but, a person seeking a Public Law remedy should not use words of slanderous and abusive nature affecting the character and social standing of persons who are named as respondents."*

No doubt whistle blowing is an important element in ensuring the sovereign right of the people to a Government free of bribery or corruption. In this context, there are several provisions in Chapter V of the Bill which protects the interests of a whistleblower, informer, witnesses and other persons assisting the Commission. Nevertheless, whistle blowing does not extend to permitting making an allegation knowing such allegation to be false. Neither does it extend to making an allegation where the maker has reason to believe that such allegation does not constitute an offence under the Bill. This is an application of the legal maxim *ignorantia juris non excusat* (Ignorance of law does not excuse). As the Buddha said, unwholesome deeds performed in ignorance does not exclude anybody from punishment (*The Dhammapada*, Danda Vagga 8th verse).

There is a balance to be drawn between the fight against bribery or corruption and ensuring that an allegation is not made against a person in those two circumstances. Such allegations have far reaching implications to the person and his family. By the time a criminal investigation or prosecution is completed and the person is found not guilty, the adverse implications of such a false allegation is virtually irreversible.

Moreover, our law recognizes the tort of malicious prosecution where a person institutes criminal proceedings maliciously without reasonable or probable clause. There the burden of proof is on a balance of probability. However, in the circumstances contemplated in Clause 119, the burden is on the prosecution to establish beyond

reasonable doubt that the accused-whistleblower made an allegation knowing such allegation to be false or having reason to believe that such allegation does not constitute an offence under the Bill. This is a very high threshold of burden of proof.

Accordingly, we are of the view that Clause 119 is not inconsistent with Articles 1, 12(1) or 14(1)(a) of the Constitution.

Clause 141

Mr. Egalahewa PC submitted that Clause 141 of the Bill, imposes a mandatory duty on the Court to give priority to proceedings with regard to offences under this Bill. It was contended that it manifestly violates judicial discretion, and a clear interference by the legislature into the realm of the judiciary, and violates the separation of powers as provided for by Article 4 of the Constitution, and thereby violates Article 3 of the Constitution.

The learned ASG drew our attention to the determination in **Colombo Port City Economic Commission Bill [S.C.S.D. Nos. 4-23/2021]** where it was held:

> *"Court after careful consideration is of the view that this clause is not inconsistent with any provision of the Constitution. However, we reiterate the observation of Court in the Judicature (Amendment) Bill S.C.S.D. Nos.7-13/2018 that clauses of this nature should have "sufficient laxity to allow the Judge to use his discretion when deciding what amounts to 'exceptional circumstances '".* (page 53)

However, this statement was made in relation to Clause 63(2) of the Colombo Port City Economic Commission Bill. The corresponding provision to Clause 141 of the Bill was Clause 63(1) of the Colombo Port City Economic Commission Bill. In that context Court held that creating a conducive environment for new investments required that disputes are resolved expeditiously.

We have earlier extensively dealt with the impact of bribery or corruption on governance. In order to eradicate these two evils from governance, it is critical that proceedings involving offences under the Bill are concluded expeditiously. Hence the classification in Clause 141 is permissible.

We are of the view that the concerns raised are addressed to satisfaction if the following amendment is made.

Page 126 Clause 141 : delete lines 21 to 24 (both inclusive) and substitute the following:-

"141. In the interest of the national economy, to foster integrity, transparency and accountability in governance and to promote integrity in the affairs of the private sector, considering the gravity and impact on the State, the proceedings in a court for offences under this Act shall be taken before any other business of the court unless in the opinion of the court special circumstances of urgency in such other business prevents it."

Clause 142

This clause provides that upon application made in that behalf by the Commission or any officer authorized by it, the whole or any part of the proceedings in any court for offences under this Bill may be held *in camera*.

Mr. Pieris PC submitted that there are no guidelines as to when *in camera* proceedings should be allowed, and this clause is far wider than Article 106 of the Constitution. Article 106(1) of the Constitution gives parties a right to a public hearing and carefully circumscribes it in circumstances laid down in Article 106(2), i.e. only where it is appropriate to do so. He submitted that the right to a public hearing is an important part of the right to a fair trial guaranteed by Article 13(3) of the Constitution which is supported by Article 14 of the International Covenant on Civil and Political Rights. Our attention was drawn to the United Nations Human Rights Committee General Comment 32 [CCPR/C/GC/32 23 August 2007] (para.28) applying the above, states that:

"All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large"

The General Comment however recognizes the need to exclude the public from hearings where circumstances call for it (para.29):

"Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children."

Accordingly, it was contended that Clause 142 is inconsistent with Article 13(3) of the Constitution read with Article 106 as it seeks to attenuate the right to a public hearing beyond what is permissible under Article 106. Finally, it was submitted that the clause is also inconsistent with Article 12(1) due to the lack of clarity and proper guidelines.

The learned ASG submitted that even Article 106(2) of the Constitution recognizes the discretion of court to hold proceedings *in camera* for the reasons specified therein and, as such, there cannot be any inconsistency with the Constitution.

We reiterate the established rule of interpretation that an Act must as far as possible be interpreted in a way consistent with the Constitution. Therefore, Clause 142 will have to be interpreted in line with Article 106 of the Constitution.

Nevertheless, the learned ASG submitted that for purposes of clarity, a Committee Stage amendment will be moved as follows:

Page 127 Clause 142 : delete line 4 and substitute the following:-

"Act may be held *in camera*, subject to Article 106 of the Constitution."

Clause 149

The clause makes it compulsory for a Magistrate to remand any person suspected or accused of being concerned with or having committed an offence under the Bill until the conclusion of the trial.

Mr. Egalahewa PC and Mr. Pieris PC both submitted that this is a draconian provision. They submitted that it makes remand the norm, and bail the exception and violates the presumption of innocence, and makes the process a punishment. The clause violates or impinges the judicial discretion, and thereby violates the judicial sovereignty.

Mr. Pieris PC submitted that the liberty of the citizen is a consideration Court has always been conscious of, as demonstrated in ***Re Athurupane*** **(51 NLR 21,23)** where it was held:

> *"There are always grave objections to the incarceration of unconvicted persons charged with bailable offences and it can only be in rare cases that reasons of such cogency arise as to outweigh these objections."*

Our attention was drawn to the decision in ***Sanjay Chandra vs CBI*** **(SC Criminal Appeal No.2178 of 2011, Decided on 23 November 2011)** where it was held:

> *"The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.*
>
> *From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test.*
>
> *In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."*

It was submitted that Clause 149(1) of the Bill violates the rights guaranteed by Article 12(1) and 13(5) of the Constitution and thereby violates Article 3 of the Constitution, and also unduly interferes with the judicial discretion, thereby violating Articles 3 and 4 of the Constitution.

The learned ASG countered that Section 3(1) of the Bail Act itself states that "[n]othing in [that] Act shall apply to any person accused or suspected of having committed, or

convicted of, an offence under, [...] any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law". This clearly shows that the legislature has retained the prerogative to deem that the Bail Act will not apply in respect of certain offences that the legislature deems fit. Following this rationale even subsequent to the promulgation of the Bail Act in 1997, the International Covenant on Civil and Political Rights Act, No. 56 of 2007 and the Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015 provide special provisions in relation to bail where a suspect or accused may only be released on bail in exceptional circumstances. This presumes that such suspect or accused shall be held in remand until the conclusion of the trial in the absence of exceptional circumstances to grant him bail.

Our attention was drawn to the determination in **Prevention of Terrorism (Temporary Provisions) (Amendment) Bill [supra]** where this Court was invited to determine the constitutionality of Clauses 10 and 11 of that bill which dealt with the court's jurisdiction to grant bail. Clause 10 of that bill amending Section 15B of the principal enactment provided jurisdiction for the High Court to release a suspect on bail provided that there are exceptional circumstances. Clause 11 of that bill amending Section 19 of the principal enactment provided Court of Appeal with the jurisdiction to grant bail pending appeal in exceptional circumstances. It was contended that Court did not make any findings of inconsistency in that instance with the Constitution.

We observe that the Bill deals with different offences in areas of bribery, corruption and the declaration of assets and liabilities. Nevertheless, this clause makes it a rule to remand a suspect or accused when produced before the Magistrate which is irrational. Accordingly, we determine that Clause 149 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that Clause 149 will be amended as follows:

Page 129 Clause 149: delete lines 27 to 32 (both inclusive) and substitute the following:-

"Bail 149. (1) All offences under this Act shall be cognizable and non-bailable and where any person suspected or accused of, being concerned in committing or having committed an offence under this Act, appears, is brought before or produces or surrenders before a Magistrate, the Magistrate shall grant bail as per the provisions of the Bail Act, No. 30 of 1997:

Provided, any person detected of having committed an offence under this Act consisting of soliciting, accepting or offering a gratification is brought before or produced or surrenders before any Magistrate with a certificate of the Director-General confirming such detection, the Magistrate shall remand such person until the conclusion of the trial:

Provided however, that the Magistrate may, in exceptional circumstances and for reasons to be recorded release such person on bail at any time prior to the conclusion of the trial.

(2) Notwithstanding the provisions of subsection (1), in any proceeding under such subsection, where the Commission informs the Magistrate that it does not intend to institute proceedings against the person in custody, such person shall be discharged forthwith."; and

Page 130 : delete lines 1 to 8 (both inclusive)

The inconsistency will cease if the above amendment is made.

Clause 156

This clause allows the Minister to make regulations as prescribed or where authorized. It was contended that this impacts on the independence of the Commission.

The learned ASG submitted that a Committee Stage amendment will be moved as follows:

Page 134 Clause 156: delete line 8 and substitute the following:-

"156. (1) The Minister may make regulations in consultation with the Commission in respect of "

We are of the view that the above concern is addressed with the amendment.

Clause 162

Mr. Pieris PC submitted that the conduct of the President of the Republic is excluded from the Bill in view of the definition of a "public official" in Clause 162. It was said that the age-old adage "Power corrupts, absolute power corrupts absolutely" holds true, and "higher" the public official, the stronger the accountability provisions against him should be, for Rule of Law to override greed and caprice which inevitably follow positions of power. It was contended that excluding the President from the reach of the anti-corruption regime envisaged by the Bill is inconsistent with the fundamental right to equal protection of the law guaranteed by Article 12(1) of the Constitution, and such exclusion can only lead to encouragement of impunity.

In ***Indiketiya Hewage Kusumdasa Mahanama, Piyadasa Dissanayake v. CIABOC and Attorney General*** **[SC TAB 1A and 1B/2020, SCM 11.01.2023]** Kodagoda, J., held:

> *"We have already mentioned before that both the Accused Appellants at the time they solicited and accepted the bribes relevant to the instant case were holding very high posts in the highest echelons of the Public Service of this country. The magnitude of the bribes they have solicited are unimaginable. The purpose for which they were solicited no doubt shows that the Accused Appellants while holding high positions of the Government had only worked for their unlawful and immoral purposes while only helping the destruction of the country's economy. We are of the view that it would be difficult for this country to revive itself as long as high officers like the Accused Appellants would hold such high offices in the Government. We therefore think that it would be important to take into account the need to deter such public officers from being inclined to embark on such unlawful endeavours."*

We are of the view that excluding the President from the application of the provisions of the Bill is arbitrary and impinges on the sovereignty of the People which includes a right to a government free of bribery or corruption. We determine that Clause 162 of the Bill is inconsistent with Articles 12(1) and 3 of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum in terms of Article 83.

The learned ASG submitted that a Committee Stage amendment will be moved as follows:

Page 141 Clause 162 : delete line 19 and substitute the following: -
"public official" include the President, the Prime Minister, a"

The inconsistency will cease if the above amendment is made.

The Determination of the Court

The determination of the Court as to the constitutionality of the Bill titled "Anti-Corruption Bill" is as follows:

1. Clauses 2(1)(f) and 49(1)(f) are inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The learned ASG submitted that the following amendment will be moved at the Committee Stage:

   Page 136 Clause 162 : insert the following immediately after line 13:-
   "associated offences" mean offences referred to in section 41 of this Act other than any offence specified in this Act;"

   The inconsistency will cease if the above amendment is made.

2. Clause 1 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 1 Clause 1: delete lines 6 to 10 (both inclusive) and substitute the following:- "come into operation on such date as the Minister may by Order published in the Gazette appoint:"

The inconsistency will cease if the above amendment is made.

3. Clause 2(2) of the Bill is inconsistent with Articles 3, 43 and 111C of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of Article 83. This inconsistency will cease if Clause 2(2) is amended as follows:

Page 3 Clause 2 : in lines 14 and 15 delete the following words: - "and participation of civil society in the administration of the Government."

4. Clause 3(2) of the Bill is inconsistent with Articles 12 and 3 and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of Article 83. The inconsistency will cease if Clause 3 of the Bill is amended by adding the following clauses:

"3(4) The Commission shall exercise and perform its powers and functions without being subject to any direction or other interference proceeding from any other person except a court or tribunal entitled under law to direct or supervise the Commission in the exercise or performance of such powers or functions.

3(5) Every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the powers or functions of the Commission as is referred to in paragraph (4) of this section, shall be guilty of an offence punishable by the High Court on conviction after trial without a jury with imprisonment of either description for a term which may extend to a period of one year or with fine or with both such imprisonment and fine and may, in addition, be disqualified for a period not exceeding seven years from the date of such conviction from being an elector and from voting at a Referendum or at any election of the President of the Republic or at any election of a Member of Parliament or any local

authority or from holding any public office and from being employed as a public officer."

5. Clause 4(1)(a) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   Clause 4(1)(b) of the Bill is inconsistent with Article 12(1) and can only be passed with the special majority required under paragraph (2) of Article 84.

   Clause 4(3) of the Bill is inconsistent Article 41B of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

   The above three inconsistencies in Clause 4 will cease if it is amended as follows:

   Clause 4(1) to read as follows:

   "4(1) The Commission shall consist of three members appointed by the President on the recommendation of the Constitutional Council from among the following: -

   (a) a person who has expertise, reached eminence and has at least twenty years of experience in law; and

   (b) two persons who have expertise, reached eminence and have at least twenty years experience in one or more of the following fields:-
   (i) investigation of crime and law enforcement;
   (ii)forensic auditing;
   (iii) forensic accounting;
   (iv) engineering;
   (v) international relations and diplomatic services;
   (vi) management of public affairs; or
   (vii) public administration."

   Page 5 Clause 4 : delete line 15 and substitute the following:-
   "appointed by the President on the recommendation of the Constitutional Council to be the Chairman of the";

6. Clause 17(1) of the Bill is inconsistent with Article 12(1) and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if it is amended as follows:

Page 10 Clause 17 : delete line 9 and substitute the following:-
"the Constitutional Council and after consulting the members of the Commission appoint a Director General"

7. Clause 21 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will be removed if Clause 21 is amended as follows:

Page 12 Clause 21: delete lines 23 to 27 (both inclusive) and substitute the following:-

"Removal of the Director-General

21. The President may in consultation with the Commission, on any one or more grounds for disqualification set out in subsection (2) of section 19 or where the conduct of the Director-General negatively impacts on the exercise of the powers and functions of the Commission and after giving the Director General an opportunity to be heard in person or by a duly appointed representative, remove him from office, subject to the approval of the Constitutional Council."

8. Clause 31(2) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84. The inconsistency will cease if Clause 31 is amended as follows:

Page 18 Clause 31 : delete lines 19 to 27 (both inclusive) and substitute the following:-
"31(2) Subject to the provisions of the Constitution and notwithstanding the provisions of subsection (1), all expenses for inquiries, investigations and prosecutions on any offence conducted by the Commission shall be charged on the Consolidated Fund".

9. Clause 163(2)(h) of the Bill is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 147 Clause 163: (1) delete lines 29 to 36 (both inclusive) and substitute the following:

"(h) all officers and officials of the Commission to Investigate Allegations of Bribery or Corruption established under Act, No. 19 of 1994 holding office prior to the date of commencement of this Act, shall be deemed with effect from the date of commencement of this Act to be officers and officials of the Commission established under this Act, on terms not less favourable than the terms and conditions of employment to which they were entitled under the Act, No. 19 of 1994, and shall communicate, within three months of the establishment of the Commission, whether they opt to join the service of the Commission:

Provided that,

(i) every officer and official who opts to join the service of the Commission shall, for purposes of calculating pension and other retirement benefits only, be deemed to have continued in office as a public officer in the Commission to Investigate Allegations of Bribery or Corruption established under Act, No. 19 of 1994 from the date on which he was employed by that Commission until the end of his period of service in the Commission established under this Act and shall, if his period of service in the Commission when added to his previous period of service as a public officer amounts to twenty years or more be eligible, at the end of his period of service in the Commission, for the grant of pension and retirement benefits which may be applicable to such officers and officials under the provisions of any other written law including the Minutes on Pensions;

(ii) every officer and official who opts for voluntary resignation from the service of the Commission,

shall be entitled to such compensation as shall be paid in terms of a Voluntary Retrenchment Scheme as shall be prescribed by the Minister and be entitled to pension and other retirement benefits which may be applicable to such officers and officials under the provisions of any written law including the Minutes on Pensions."

The inconsistency will cease if the above amendment is made.

10. Clause 40 of the Bill is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistencies will cease if the following amendments are made:

Page 22 Clause 40 : delete line 6 and substitute the following: -
"(g) to introduce codes of conduct for prevention and eradication of bribery and corruption which shall be adhered";

A new sub-clause to be added to Clause 40 to read as follows:

"to introduce codes of conduct for prevention and eradication of bribery and corruption in the public sector which shall be adhered in the public administration";

11. Clause 48(3) of the Bill is inconsistent with Articles 12(1) and 13(2) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 32 Clause 48 : delete line 17 and substitute the following:-
"the case forthwith."

The inconsistency will cease if the above amendment is made.

12. Clause 50(1)(a) is vague and inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 39 Clause 50 : delete lines 11 and 12 and substitute the following:-
"(a) summon the person to be examined with the consent of such person, to be"

The inconsistency will cease if the above amendment is made.

13. Clause 53(1) of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 44 Clause 53 : (1) delete line 27 and substitute the following: -
"(2) The Commission shall, within seven days during";
(2) delete lines 31 and substitute the following: -
"request an extension of the original period of seven days.";

The inconsistency will cease if the above amendment is made.

14. Clause 62(1) is inconsistent with Article 13(3) and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 54 Clause 62 : delete line 19 and substitute the following: -
"compelled to reveal the source of";

The inconsistency will cease if the above amendment is made.

15. Clause 65 of the Bill is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 58 Clause 65	delete lines 6 to 24 (both inclusive) and substitute the following:- "against such person in the appropriate court."

The inconsistency will cease if the above amendment is made.

16. Clause 67(5) is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The inconsistency will cease if the following amendment is made:

Page 62 Clause 67:	line 13 replace the word "may" with "shall"

17. Clause 71(6) and (8) is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 65 Clause 71	:	(1) delete line 9 and substitute the following:- "into an agreement with any person referred to in subsection (8) of this section alleged to have committed";
Page 66	:	(2) delete lines 7 to 9 (both inclusive)

We are of the view that in addition to the above amendments, the following amendment should also be made:

Page 67	:	(1) delete lines 5 to 10 (both inclusive) and substitute the following:- "(8) Where the person referred to in this section is a body corporate, an agreement under this section shall be entered into between the Director-General and such body corporate." (2) line 28 replace the word "may" with "shall"

The inconsistencies will cease if the above amendments are made.

18. Clause 80 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 77 Clause 80 : delete lines 11 and 12 and substitute the following:
"(dd) office bearers of National Association of Sports established in terms of the Sports Law No. 25 of 1973; and
"(ee) such categories of other officers as may be prescribed by regulations as high risk categories by taking into consideration the";

The inconsistency will cease if the above amendment is made.

19. Clause 93 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 88 Clause 93 : delete lines 20 to 25 (both inclusive)

The inconsistency will cease if the above amendment is made.

20. Clause 99 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 92 Clause 99 : delete lines 1 to 5 (both inclusive) and substitute the following:-
"Provided, that section 35 of the Medical Ordinance";

The inconsistency will cease if the above amendment is made.

21. Clause 101 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 94 Clause101 : delete lines 1 to 6 (both inclusive);

The inconsistency will cease if the above amendment is made.

22. Clause 112 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 106 Clause 112 : delete lines 10 and 11 and substitute the following:-
"Act, No. 5 of 2006 shall, *mutatis mutandis*, apply to the inquiries, investigations and proceedings in respect of such offence under that Act and any";

The inconsistency will cease if the above amendment is made.

23. Clause 149 is inconsistent with Article 12(1) of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84.

The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 129 Clause 149: (1) delete lines 27 to 32 (both inclusive) and substitute the following:-

"Bail 149. (1) All offences under this Act shall be cognizable and non-bailable and where any person suspected or accused of, being concerned in committing or having committed an offence under this Act, appears, is brought before or produces or surrenders before a Magistrate, the Magistrate shall grant bail as per the provisions of the Bail Act, No. 30 of 1997:

Provided, any person detected of having committed an offence under this Act consisting of soliciting, accepting or offering a gratification is brought before or produced or surrenders before any

Magistrate with a certificate of the Director-General confirming such detection, the Magistrate shall remand such person until the conclusion of the trial:
Provided however, that the Magistrate may, in exceptional circumstances and for reasons to be recorded release such person on bail at any time prior to the conclusion of the trial.
(2) Notwithstanding the provisions of subsection (1), in any proceeding under such subsection, where the Commission informs the Magistrate that it does not intend to institute proceedings against the person in custody, such person shall be discharged forthwith."; and

Page 130 : (2) delete lines 1 to 8 (both inclusive)

The inconsistency will cease if the above amendment is made.

24. Clause 162 of the Bill is inconsistent with Articles 12(1) and 3 of the Constitution and can only be passed with the special majority required under paragraph (2) of Article 84 and approved by the People at a Referendum in terms of Article 83.
The learned ASG submitted that the following amendment will be moved at the Committee Stage:

Page 141 Clause 162 :(6) delete lines 19 and substitute the following: -"public official" include the President, the Prime Minister, a";

The inconsistency will cease if the above amendment is made.

In addition to the above amendments, the learned ASG informed that the following amendments will be made to address several concerns raised by the Petitioners:

1. Clause 8(3) to be amended to ensure that, upon vacancy arising in the office of a member of the Commission, an appointment would be made within three months thereof, in order ensure the smooth functioning of the Commission.

2. Page 125 Clause 136 : Add the following Sub-Clause:

"The provisions of the Right to Information Act, No. 12 of 2016 shall apply to this Act."

3. Page 126 Clause 141 : delete lines 21 to 24 (both inclusive) and substitute the following:-

"141. In the interest of the national economy, to foster integrity, transparency and accountability in governance and to promote integrity in the affairs of the private sector, considering the gravity and impact on the State, the proceedings in a court for offences under this Act shall be taken before any other business of the court unless in the opinion of the court special circumstances of urgency in such other business prevents it."

4. Page 127 Clause 142 : delete line 4 and substitute the following:-
"Act may be held *in camera*, subject to Article 106 of the Constitution."

5. Page 134 Clause 156 : delete line 8 and substitute the following:-
"156. (1) The Minister may make regulations in consultation with the Commission in respect of "

We wish to place on record our deep appreciation of the assistance given by the learned President's Counsel and other Counsel who appeared for the Petitioners, and the learned Additional Solicitor General who represented the Hon. Attorney-General, in these proceedings.

In conclusion, we wish to record that our attention was drawn to several textual discrepancies between the Sinhala, Tamil and English texts of the Bill. This causes a lot of concern to Court in its deliberations. We note that it also affects the legislators who are

deprived of a correct understanding of the Bill unless such discrepancies are corrected. The State undertook to correct all these discrepancies at the appropriate stage of the legislative process.

Jayantha Jayasuriya, PC
Chief Justice

Murdu N.B. Fernando, PC
Judge of the Supreme Court

Janak De Silva
Judge of the Supreme Court