



Building a nation of integrity

Urgent Position Paper

28 February 2008

Transfer of the Director General of the Commission to Investigate Allegations of Bribery or Corruption

(Please find the Executive Summary at the end of the document)

Transparency and good governance are key to progress of any country. In today's context, growth and prosperity of a nation is strongly linked to the anti corruption environment in a country. It is now globally accepted that the establishment of a strong and independent anti corruption commission is one of the strongest tools of establishing good governance and minimizing corruption. The present crisis created as a result of the removal of the Director General of the Commission to Investigate Allegations of Bribery or Corruption (hereafter the Commission) is extremely relevant to the debate on good governance and anti corruption discourse in the country and thus the Transparency International Sri Lanka (TISL) releases this position paper for public awareness and debate.

Background

The present Commission was the successor to the previous Department of Bribery established in 1954.

The Commission was established under the Act No.19 of 1994, having been **unanimously passed by Parliament** consequent to series of events leading to a change of government in 1994. The discussions of having an independent commission was mooted following the then Bribery Commissioner Mrs. Nelum Gamage being removed arbitrarily by the then President in late 1993. The then opposition in its election manifesto for the 1994 general election pledged that Mrs. Gamage would be reinstated after they came to power and that an independent anti corruption commission would be established within 6 months of assuming office, to freely investigate corruption in public sector

After assuming office, Chandrika Bandaranaike government presented two Bills (titled "Commission to Investigate Allegations of Bribery or Corruption" and "Bribery Act Amendment") which were unanimously adopted by parliament. The significant changes brought by these two statutes could be summarized as follows:

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- (a) A Special commission was established to investigate allegations of bribery or corruption, headed by three Commissioners, two of them being retired Supreme Court/Court of Appeal judges and one from investigative branch. (After the 17th Amendment to the Constitution, these Commissioners were to be appointed by the President only after an approval by the Constitutional Council.)
- (b) Investigations and prosecutions of bribery and corruption were removed from the Attorney General's Department and are vested with the Commission.
- (c) A new offence of Corruption was introduced.
- (d) Definition of public servant was broadened to include Ministers, Deputy Ministers, Members of Parliament and other political authorities,
- (e) The Director General of the Commission enjoys certain level of independence and the salary shall be a charge on the Consolidated Fund assuring certain level of independence in the position. The Director General is the administrative head of the Commission¹.

The Operation of the Commission was not without challenges from its inception. One of the first commissioners, Mr. P.M.W. Wijesooriya resigned on 14-7-1995 due to lack of skilled personnel for the commission to carry out its work and the delay in the submission of the first report of the Commission to the parliament. Government is reported to have turned down the request of the Commission for funds to send a team for investigations abroad in 1995. An apparent rift between the remaining commissioners were subsequently used by the President to send a letter dated 26-11-1997 requesting the remaining commissioners to resign, which was however turned down by the commissioners. The Kumaratunga government also withdrew the entire strength of police officers attached to the commission thus crippling the entire commission. After retirement of the then secretary Mr. S. Ganepola, the government did not replace him with a fresh appointment. Another issue always raised was the lack of clarity of the role of the Director General especially in regard to the decision making powers.

The experience since 1994 proves beyond doubt that the applicable law was not properly understood at the stage of the enactment (instead it was hurriedly passed). However an examination of the statues, annual reports of the Commission and the observations of the working of the commission would no doubt reveals the following major systemic issues which negatively impact the effective functioning of the Commission. The present Commission has in fact done a great deal to draw the attention of the authorities to address these issues in numerous ways.

- (1) The Commission does not have specific powers to initiate corruption investigations on their own without a complaint. It was suggested that this mandate be changed to permit pro active investigation by the Commission.
- (2) The Members of the Commission are chosen among the retired Judges and Investigative branches such as police. It has been suggested that these appointments should not be limited to retired judges and others, who retire at age limits over 60 years.

¹ Since its inception the scope of the Director General's functions became an unsolved issue.

This has excluded many other professionals and anti corruption fighters serving in the main anti corruption commission. In fact another suggestion is to formulate a commission comprising of a single commissioner modeled after the anti corruption commissions in Singapore and Hong Kong. The head of the Commission should be a person with high integrity who holds office for a fix term, and appointed by Constitutional Council.

- (3) The Commission does not have sufficient financial independence and hence it has to depend purely on the Treasury releasing funds on a timely basis and to the extent required, even after the Parliament approves it budget. It was suggested to have a finance committee in parliament that will decided on the budget of the independent commissions including this Commission.
- (4) The investigations are conducted only by the police officers released by the police department on a temporary basis to serve in the Commission. The Commission does not have a competent team of investigators (such as audit officers, accountants, forensic accountants, engineers, banking or IT experts). It is recommended that the commission should have sufficient finances and administrative independence to employ people from different professional backgrounds with requisite experience.

Since the inception of the first Commission, its operation was not continuous as pointed out below:²:

- First Commission consisting of Justice T.A.D. Wijesundara, Justice Siva Selliah and Mr. C. Wijesuriya was appointed on 15-12-1994 and the commission had to be reconstituted after the resignation of Justice Wijesuriya on 13-7-1995. Mr. Rudra Rajasingham was appointed to fill the vacancy. Justice Selliah expired on 9-1-1997 but the vacancy was not filled for almost three years until the five year term of the first commission expired on 14-12-1999.
- Second Commission comprising Justice Ananda Coomraswamy, Justice T.N. Abeyweera and Dr. Kingsly Wickramasuriya was appointed on 15-12-21999. Justice Abeyweera expired on 2-2-2003 and, after about one year and 5 months Justice K. Viknarajah was appointed in his place on 12-7-2004. Third commission is the present commission, comprising of Justice Ameer Ismail, Justice P. Edussuriya and Mr. Indra de Silva who were appointed on 29-3-2005 for a term ending on 28-3-2010.

Notwithstanding the systemic problems, with the appointment of the present commissioners in March 2005 the Commission became more visible in the public eye. The Commission has also established strong links with regional anti corruption bodies such as OECD-ADB anti corruption initiative and the world renowned national anti corruption commission of Hong Kong known as Independent Commission against Corruption (ICAC). The last annual report of the Commission states that there is certainly an upward trend in successful investigations and number of

² Fact Sheet issued by the Commission at the National Seminar organized by the Commission on 8th December 2007

prosecutions³. The Commission has to some extent developed necessary infrastructure and given vital exposure to some of the staff members specially those in the legal branch. Following the global experience, the Commission has also linked up with civil society organizations and other professional bodies with a view to minimizing corruption in Sri Lanka thus seeking wider support for its anti corruption efforts from various segments of the society. The Commission has also participated in many important national and international anti corruption events.

Present Crisis

In an unprecedented move, on 15-11-2007, Mr. C.A. Premashantha, the Officer in Charge of the Asset Division (a police officer) was transferred out of the Commission without any consultation with the Commission⁴. It appeared later that the Director General has objected to this move.

It is reported in media⁵ that on 18-2-2008, the Secretary to the President had summoned the Director General of the Commission and requested him to resign, which he had declined. The very next day, he was transferred to the Presidential Secretariat by a letter signed by H.E. the President himself. This has raised the attention of media whilst being raised in parliament. However, neither the President nor the government has so far disclosed to the public any reasons for the transfer.

The Chairman of the Commission has been reported to have (report in the Sunday Times⁶) stated that the Commission had not been consulted by H.E. the President prior to the removal of the Director General.

The letter of removal dated 19 February 2008 signed by the President himself states that the Director General is transferred out of the Commission in order to facilitate restructuring of administration of the Commission and that Mr. Piyasena Ranasinghe is transferred to the Presidential Secretariat with immediate effect. In a separate letter on the same date, signed by the Secretary to the President, a deputy DG, Ms. Luxmi Jayawickrama has been appointed as acting Director General until a permanent Director General is appointed.

³ For example, the total number of complaints/communications has increased from 2118 in 2005 to 3985 in 2007

⁴ Now subject matter of SC Application No. 458/2007 (pending)

⁵ Morning Leader dated 20th February 2008

⁶ Issue dated 24 February 2008

Legality of the Removal

The legal provisions contained in the Act No.19 of 1994 relating to appointment and removal of the Director General are set out below.

S. 16(1) The President may, in consultation with the members of the Commission, appoint a Director General for the Prevention of Bribery and Corruption, to assist the Commission in the discharge of the functions assigned to the Commission by this Act.

16(2) The salary of the Director General appointed under sub-section (1) shall be determined by Parliament, shall be charged on the Consolidated Fund and shall not be diminished during his period of service with the Commission.

In fact the question as to whether the President is required mandatorily to consult the Commission prior to appointment was resolved previously and a convention was created since the inception of the commission, when the first Director General Ms. Nelum Gamage was appointed⁷. There are no specific provisions in the said statute on removal of the Director General. There are no specific provisions in the said statute on removal of the Director General. However the Interpretation Ordinance s.12 states as follows:

“Where in the case of any appointment authorized by any law, provisions is not made by the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, or by any other law, as to the authority by whom the appointment is to be made, such appointment may be made by the Minister or by an officer authorized in that behalf by the Minister.”

However, the appointment of the Director General is not made by a Minister but by H.E. the President and ex facie, this provision has no application to the office of the Director General.

Even assuming that H.E. the President is considered a Minister for the purpose of argument, then the same procedure must be followed i.e. any removal must be only after consultation with the Commission. In fact in all previous cases of removal of the DGs, the commissions have requested the removal of DGs and never before a DG were removed by the President unilaterally.

The question then arises as to how a corrupt Director General is removed? The Commission is however not precluded from investigating into the conduct of the Director General. The current issue is an eye opener for the policymakers to examine without delay the necessary remedial measures, having regard to well established global practices.

⁷ Mrs. Nelum Gamage was first appointed by the President without consulting the Commission but later, having regard to the provisions of law, the President subsequently consulted the commission and issued a fresh letter of appointment to Mrs. Gamage.

The Secretary to the President is reported to have said that the President does not have to give reasons to remove any one in the Commission⁸. This is perhaps as dangerous as the removal itself. Does it mean that, for bad or mala fide reasons a Director General can be removed? This is certainly not the legal position. In the leading case of Nethsinghe vs. Wickramanayaka⁹ Justice Mark Fernando has extensively dealt with the law governing the removal of public officials including the board members of corporations. The court held that the removal is reviewable by courts and no one can be removed without assigning reasons or following natural justice.

Is Transfer Mala Fide?

The absence of contemporaneous public statement from the President's office suggests that there may not be sufficient grounds to remove the Director General. Pointing the finger at H.E. the President by the public in these circumstances is unavoidable and that may not be healthy both for H.E. the President as well as for the Commission.

The transfer letter has indicated that the transfer is to facilitate re-structure of the Commission and that Ms. Luxmi Jayawickrama has been appointed to act as Director General. If the restructure of the Commission was legitimate the Commission should have played a key role in this regard. I.e. This reminds us that even in November 1997 when President Kumaratunga wanted to remove the Commissioners, she wrote a letter addressed to them stating inter alia "a complete overhaul of the Commission is a necessity in order to make a fresh start". As far as TISL is aware there is no move to restructure the Commission immediately. TISL is however not aware whether there was in fact any breakdown in the Commission due to internal administration. Secondly, Ms. Jayawickrama is the second senior officer in the grade of Deputy Director in the Commission. Ms. Mallika Liyanage is the most senior Deputy Director General. The basis of selection of Ms. Jayawickrama by the President's office is yet another mystery.

Adverse Effects of the Removal

There are serious repercussions following the removal of the Director General. They include the following:

- In terms of s.12 (1) of the Act, it is the Director General who has the sole authority to serve indictments in the same manner as it is done by the Attorney General. There are no provisions to delegate these powers to any other officer or to discharge these powers through any other officer. The present acting appointment lacks legislative authority to replace the Director General.
- The worst consequence of the whole episode is the bad precedence created with this transfer. Unless the situation is remedied immediately, there is no guarantee that the Commission would ever function with expected independence, free from executive interference in the future.

⁸ Daily Mirror 20 February 2008

⁹ SC 770/99 SC Minutes dated 13-7-2001

Globally there is a strong movement to prevent corruption in all sectors – particularly in the public sector. Though Sri Lanka can be proud of ratifying the UN Convention against Corruption (known as UNCAC), nothing much has been done to fall in line with international standards. Transparency International's Corruption Perception Index (CPI)¹⁰, ranked Sri Lanka quite low giving a score of only 3.2 out of 10. This means that Sri Lanka has lot more to do to minimize corruption in the country. Interference with the anti corruption commission is certainly a negative aspect which will add to this perception in the eyes of the investors and global community.

- Without effective anti corruption initiatives including a strong and independent anti corruption commission, socio economic or political dreams such as Mahinda Chindranaya cannot be realized. It is to the best interest of any government to restore independence of the Commission which is perceived to be interfered with in this instance.

TISL's Position

In the absence of a specific procedure to remove the Director General, the policymakers must consider the global good practices in similar situations with the sole objective of preserving the credibility and integrity of the anti corruption commission and rather than individuals holding positions. TISL believes and suggests that if the present structure to continue, both appointment and removal of the Director General and other key officials should be done by the H.E. President upon the recommendation of the Constitutional Council in consultation with the Commission. The provisions must be designed to prevent firstly the possible manipulations by corrupt elements to rid a good and effective Director General and secondly to make sure that no person with any allegations hold this position. Until such provisions are incorporated in the law, the appointing authorities should respect fundamental principles of good governance in such appointments hence to create a healthy practice.

TISL firmly believes that present course of action followed by the President's office does not build confidence either on H.E. the President, his government or on the Commission itself. It has already created irreversible bad precedence. Thus the onus is on H.E the President to restore the status quo.

¹⁰ Corruption Perception Index 2007 – Sri Lanka ranks 94th with a score of 3.2 out of 10 points. This is the most known corruption index based virtually on perception of grand corruption by country specialists, investors and corporate sector.

Sri Lanka is a party to the United Nations Convention against Corruption under which Sri Lanka is required to strengthen the independence of the anti corruption commission. Sri Lanka has also ratified the regional anti corruption initiative called OECD-ADB Anti Corruption Initiative, which was ratified by almost all the countries in the Asian region. The act of removal of the Director General may be perceived by the public as interference by H.E. the President on the independence of the Commission and therefore there is a heavy burden on H.E. the President to dispel such interpretations.

If H.E. the President or any other person has in his/her possession material to substantiate allegations against any official of the Commission, those material should immediately be submitted to the Commission by H.E. the President or any outsider deciding on the issue following the rules of natural justice. Thus, following good global practices, a transparent and accountable internal complaint and inquiry mechanism should be introduced to the Commission. In such instances, some countries have introduced strong internal disciplinary mechanisms.

At present the absence of a review on operational aspects of the Commission is a major lacuna. Had there been a transparent review mechanism of the operational aspects within the Commission both to review its operations and efficiency, there would not have been any room for false allegations by political authorities or any other source. Thus TISL believes that it is time that the Commission considers a suitable review mechanism, similar to that is accepted by the Independent Commission against Corruption in Hong Kong.

TISL concludes that many of the issues raised here sufficiently stress the need to reconsider the structure and the mandate of the Commission while ensuring the financial support to generate independence of its operations without being dependent on any of the branches of the Executive. **However, there is no alternate to the political will or to the need of officers with integrity to function the Commission effectively.**

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Executive Summary (28-Feb-2008)

In today's context, growth and prosperity of a nation is strongly linked to the anti corruption discourse in a country. It is now globally accepted that the establishment of a strong and independent anti corruption commission is one of the strongest tools of establishing good governance and minimizing corruption. The present crisis created as a result of the removal of the Director General of the Commission to Investigate Allegations of Bribery or Corruption (Commission) is extremely relevant to the debate on good governance and anti corruption activities in the country and thus the TISL releases this position paper for public awareness and debate.

- (a) There is no specific provision for the removal of the Director General of the Bribery Commission but the practice was always to consult the commission prior to a removal. The policymakers must consider the global good practices with the sole objective of preserving the credibility and integrity of the anti corruption commission and not the individuals holding positions. The provisions must be designed to prevent firstly possible manipulations by the corrupt elements to rid a good and effective Director General and secondly to make sure that no person with questionable integrity holds this position.
- (b) The present course of action followed by the President's office does not build confidence either on H.E. the President, his government or on the Commission itself. It has already created irreversible bad precedence. Thus the onus is on H.E. the President to restore the status quo. Being a party to the United Nations Convention against Corruption and the OECD-EDB anti Corruption Action Plan in the Asian Region, Sri Lanka is required to strengthen the independence of the anti corruption commission. The act of removal of the Director General in the present circumstances appears to be against those international commitments.
- (c) If allegations against any official of the Commission to substantiate the relevant material and information should immediately be submitted to the Commission without H.E. the President or any outsider deciding on the issue unilaterally and arbitrarily. A transparent and accountable internal complaint and inquiry mechanism should be introduced to the Commission following global good practices.
- (d) The absence of a review on operational aspects of the Commission is a major lacuna. The Commission should consider a suitable review mechanism for them, similar to the one that is accepted by the Independent Commission against Corruption in Hong Kong.

TISL concludes that many of the issues raised here sufficiently stress the need to reconsider the structure and the mandate of the Commission while ensuring the financial support to generate independence of its operations without being dependent on any of the branches of the Executive. **However, there is no alternate to the political will or to the need of officers with integrity to function the Commission effectively.**