The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010

RECOMMENDATIONS FOR STRENGTHENING

THE WHISTLEBLOWER PROTECTION REGIME IN INDIA

Submitted by

Mr. Venkatesh Nayak

Commonwealth Human Rights Initiative (CHRI)
B-117, First Floor, Sarvodaya Enclave,
New Delhi – 110 017
Tel: 011-43180215 / 43180200
Fax: 011-2686 4688
Email: venkatesh@humanrightsinitiative.org

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Introduction

The Government of India has found it expedient to table *The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010* (the Bill/Whistleblower Bill). The Department related Standing Committee of Parliament on Personnel, Public Grievances, Law and Justice sought views from the people of India on the contents of the Bill after placing its contents in the public domain. CHRI prepared and disseminated a comparative study analysing the Bill from the point of view of international best practice standards. This study compared the Whistleblower Bill with the *Public Interest Disclosure and Protection of Informers Bill* (LCI Bill) prepared by the Law Commission of India in 2003. CHRI demonstrated how the Whistleblower Bill fell short of matching most of the international best practice standards as well as those recommended in the Law Commission's draft Bill.

Given below is a set of recommendations that have the potential of strengthening the protection regime that the Whistleblower Bill seeks to establish. The tabular format given below identifies major aspects of the Bill that need improvement and contains recommendations based on both national and international best practice standards and the rationale behind them. Where appropriate, reference will be made to the best practice adopted in one or more countries included in the comparative study mentioned above. These recommendations are being made with the following objectives:-

- providing a safe alternative to silence for the potential whistleblower and
- ensuring that the national motto: "*Satyamēva jayate"* ("truth alone triumphs") is upheld.

Key Issues and Recommendations for Change

1. Coverage: Scope of wrongdoings is limited

a) Provision(s):

Preamble and Clause 2(d)

b) Problem area:

The description of wrongdoing that may be disclosed under the Bill is severely limited. For example human rights violations have not been included despite this being a rampant problem across the country. Other kinds of improprieties that may have adverse effect on public health, safety and environment are not included if they cannot be identified as criminal offences.

c) Rationale for improvement:

In countries that have instituted comprehensive Whistleblower protection regimes a whistleblower is protected for disclosing any violation of the law occurring in a public authority. For example see the provisions relating to similar laws operational in Canada, Romania and Uganda under Standard #2 discussed in the comparative study.

d) Recommendation:

Clause 2(d) may be amended to include violation of any law operational in the country that is or is intended to be committed by public servants.

2. Coverage: Council of Ministers has been left out

a) Provision(s):

Preamble and Clause 2(i)

b) Problem area:

The Bill does not cover wrongdoing committed or intended to be committed by members of the Council of Ministers.

c) Rationale for improvement:

With the exception of the USA, all other countries included in the comparative study have instituted comprehensive Whistleblower protection. For example see the provisions relating to similar laws operational in Canada, Ghana, New Zealand, Norway, Romania and Uganda Standard #3 discussed in the comparative study. (USA does not have Westminster style government.) The LCI Bill covered Ministers as well.

d) Recommendations:

- **Clause 2(i) may be amended to include Ministers under the ambit of the Bill.**
- **A comprehensive Lok Pal Bill be immediately enacted in order to provide for the investigation of wrongdoing by individuals occupying the position of Prime Minister, Chief Minister and Minister.**

3. Coverage: Armed Forces have been left out

a) Provision(s):

Clause 3(1)

b) Problem area:

Armed forces matters and personnel, forces maintaining law and order, intelligence and counter intelligence agencies and employees maintaining telecommunications of aforementioned organisations are exempt.

c) Rationale for improvement:

The Bill insulates crucial bodies involved in defence and law enforcement services and maintenance of related communications facilities. This exemption is a perversion of Article 33 of the Constitution along which it is closely modeled. Article 33 permits Parliament to make laws that would impose restrictions on the extent to which the fundamental rights and freedoms guaranteed under Part III of the Constitution are enjoyed by the members of such services. The limitation on the fundamental rights enjoyed by members of such services is justified on the basis of the need for proper discharge of duties and maintenance of discipline. The *Notes on Clauses* attached to the Bill does not explain the rationale behind this clause.

It is common knowledge that where power is concentrated without adequate checks and balances the tendency to abuse such power grows with impunity. Allegations of abuse of power by armed forces when deployed on law and order or counter-terrorism duties are not uncommon. Human rights violations committed by forces charged with the maintenance of law and order such as the police are only growing in number despite the adoption of several measures to prevent such abuse of power. Given this scenario there is no rationale for exempting the armed forces from the coverage of the Bill. In countries like the Ghana, New Zealand, South Africa and Uganda such services are not excluded from the coverage of whistleblower laws. In USA special laws have been enacted to enable armed forces to make disclosures of wrongdoing in confidence to Inspectors General and members of the US Congress. For example see the statutory provisions relating to these countries under Standard #5 discussed in the comparative study.

d) Recommendation:

Clause 3(1) may be amended to bring the armed forces, forces engaged in the maintenance of law and order and bodies providing telecommunications services to such bodies within the purview of the protective regime of the Bill.

4. Coverage: Private sector has been left out

a) Provision(s):

Preamble and Clause 2

b) Problem area:

The Bill covers whistleblowers in the private sector who disclose wrongdoing in any public authority. However wrongdoing in the private sector has been left out of the ambit of the Bill.

c) Rationale for improvement:

In its 4th report entitled: *Ethics in Governance*, the Second Administrative Reforms Commission recommended that a comprehensive whistleblower protection law cover the private sector as well. The Government of India accepted this suggestion. However the Bill does not cover the private sector. The whistleblower provisions contained in *The Companies Bill, 2009* tabled in Parliament does not protect an employee of a private company from harm if he or she were to blow the whistle on internal wrongdoing. Further, the scope of the term wrongdoing is very limited. Despite the Department related Standing Committee of Parliament on Finance recommending enlargement of the scope of these provisions in its recent report the recommendation provides for whistleblowing mechanisms that are internal to a private body. There is no elaborate mechanism to protect whistleblowers nor are there serious consequences to employees who take retaliatory action against whistleblowers.

The whistleblower laws of Ghana, New Zealand, Norway, Uganda and the UK protect whistleblowers in the private sector as well. In South Africa, both the special law on whistleblowing and the *Companies Act* of 2008 facilitate private sector whistleblowing and provide protection for such actions. In the USA special laws have been passed to protect whistleblowers in the private sector. These provisions are discussed under Standard #4 of the comparative study and provide useful models to adopt in India.

d) Recommendation:

The Preamble and Clause 2 of the Bill may be amended to include the private sector within its ambit.

5. Procedures: Whistleblowing is optional for public servants

a) Provision(s):

Clause 3(1) and Chapter VII

b) Problem area:

The Bill makes it optional for a public servant to blow the whistle on wrongdoing. There is no compulsion on him or her to make a public interest disclosure about a wrongdoing that has occurred in his or her public authority.

c) Rationale for improvement:

The Bill does not provide any reasons as to why whistleblowing should be optional for public servants. Section 39 of the *Code of Criminal Procedure, 1973* requires every person to provide information to law enforcement authorities about the commission of or intention to commit the following kinds of offences:

- Offences against the State such as collecting arms, waging war and sedition;
- Offences against public tranquility such as causing unlawful assemblies and rioting;
- Bribery;
- Adulteration of food and drugs;
- Kidnapping for ransom;
- Robbery and dacoity;
- Murder and attempt to murder;
- Criminal breach of trust by public servant;
- Offences of mischief against property;
- House trespass and
- Counterfeiting currency and bank notes.

According to Section 176 of the *Indian Penal Code, 1860*, a person who does not provide information about the commission of or the intention of persons to commit the aforementioned offences, is liable for punishment with a prison term of up to six months and or fine up to Rs 1000. When the law is so strict for ordinary citizens to blow the whistle on wrongdoing in society, there is no reason why such stringent measures cannot be stipulated for public servants working in public authorities.

d) Recommendations:

- **Clause 3(1) of the Bill may be amended to make it compulsory for a public servant to blow the whistle on wrongdoing of which he or she has knowledge.**
- **Chapter VII of the Bill may be amended to make it an offence for a public servant not to disclose information about wrongdoing of which he or she has knowledge. If in the course of an inquiry or investigation into the allegations of wrongdoing made by the whistleblower, it becomes apparent that one or more public servants did not blow the whistle despite having knowledge of it, prosecution must be launched against them regardless of the requirement of obtaining prior sanction from the appropriate government under Section 197 of the *Indian Evidence Act, 1872.* Upon conviction a guilty officer may be sentenced up to two years in prison and or a penalty of up to Rs. 30,000.**

6. Procedures: Single point for receiving public interest disclosures

a) Provision(s):

Clause 2(b) and 3(2)

b) Problem area:

The Bill provides for only one point for receiving disclosures of wrongdoing namely the Competent Authority in the States and at the Centre.

c) Rationale for improvement:

Whistleblower protection laws across the world provide for both internal and external mechanisms for making public interest disclosures. A whistleblower may make disclosures of wrongdoing through procedures established within the body where he or she is employed or to the head of such body. He or she may also make confidential disclosures to regulatory bodies or other designated authorities. Subject to certain conditions some laws allow for disclosures to be made to any other person including members of the respective parliaments and the media. The internal and external procedures for whistleblowing established in countries such as Canada, Ghana, New Zealand, Uganda and the United Kingdom. The purpose of providing multiple choices is to make available to the potential whistleblower safe alternatives to disclosing wrongdoing internally. These provisions are discussed under Standard #15 of the comparative study.

Restricting the potential whistleblower to only one option such as the Competent Authority like the Central Vigilance Commission may not be the best way to inspire confidence in the minds of potential whistleblowers.

d) Recommendation:

Clauses 2(b) and 3(2) of the Bill may be amended to provide multiple points where public interest disclosures may be made including members of parliament and the mass media subject to reasonable conditionalities.

7. Procedures: Undue burden on whistleblowers

a) Provision(s):

Clause 2(d), 3(3) and 3(4)

b) Problem area:

The Bill requires the whistleblower to make a disclosure specifically naming the public servant responsible for or involved in the wrongdoing. Further, the whistleblower is required to submit supporting documents and other material in support of his or her disclosure. This is too high a burden on potential whistleblowers who may not have all the data.

c) Rationale for improvement:

Most whistleblower protection laws around the world are designed to ensure that credible information about wrongdoing is received by the concerned authorities so that inquiries and investigations may be conducted. Merely filing a complaint on the basis of hearsay is discouraged. However these laws do not impose a huge burden on the whistleblower to marshal all names, facts and documents prior to making the disclosure. The purpose of the whistleblower law must be to enable disclosure of wrongdoing irrespective of the identity of the wrongdoer. It is the duty of the inquiring authority to establish the identities of wrongdoers in order to bring them to book based on the information received from the whistleblower. These best practice standards are discussed at Standards #16 and 19 in the comparative study.

d) Recommendation:

Clauses 2(d), 3(3) and 3(4) of the Bill may be amended to require the whistleblower to provide credible information of wrongdoing in good faith not based merely on hearsay. However there should not be any requirement of mentioning specific names or providing copies of documents. Mere statement of facts which can be borne out by the inquiry later should suffice for the purpose of making the public interest disclosure.

8. Procedures: Endangering the whistleblower

a) Provision(s):

Clause 4(4)

b) Problem area:

The Bill actually permits the Competent Authority to disclose the identity of the whistleblower to the Head of the department or organisation for the purpose of seeking comments or explanations on the public interest disclosure received. This virtually amounts to a death sentence being passed on the whistleblower and will encourage taking of retaliatory action by his or her colleagues or seniors.

c) Rationale for improvement:

Some countries like Canada, Ghana and Uganda require the identity of the whistleblower confidential to be kept confidential. However others such as South Africa, the UK and the USA do not place a premium on keeping the identity of the whistleblower secret. However even in these countries the name of the whistleblower cannot be disclosed without his or her express consent. Ensuring the safety of the whistleblower is as important as conducting the inquiry or investigation into wrongdoing. These provisions are discussed under Standard #13 of the comparative study. If the whistleblower has no say in the decision-making process about disclosure of his or her identity not many people will come forward and put themselves at risk by making public interest disclosure.

d) Recommendation:

Clause 4(4) of the Bill may be amended to ensure that the identity of the whistleblower is not disclosed without his or her written consent prior to such disclosure.

9. Procedures: Dealing with cases involving exercise of discretion

a) Provision(s):

Clause 5(4)

b) Problem area:

The Bill prohibits the Competent Authority from questioning any *bona fide* action or *bona fide* discretion (including administrative or statutory discretion) exercised in discharge of duty by the employee.

c) Rationale for improvement:

This Clause is not in tune with the intention of the Bill. One of the objectives of the Bill is to provide for inquiring into willful misuse of power and discretion alleged by the whistleblower. Until and unless inquired into how is it possible to establish that the alleged action was done in a *bona fide* or *mala fide* manner? Jurisprudence in administrative law requires that discretionary actions also be informed by some reasonable criteria. This provision makes no sense and does not aid the achievement of the objectives of the Bill.

d) Recommendation:

Clause 5(4) may be deleted.

10. Procedures: Transparency in the outcomes of cases

a) Provision(s):

Clause 4(6)

b) Problem area:

The Bill does not require the Competent Authority to inform the whistleblower of the progress made in the inquiry into wrongdoing disclosed by him or her. Similarly there is no requirement on the Competent Authority to record a detailed speaking order while closing a matter. There is no requirement to make public the outcomes of a case inquired into by the Competent Authority.

c) Rationale for improvement:

This Clause is not in tune with best practice standards. In Canada and the USA the whistleblower is informed of the progress made in his or her case and the final outcome of the inquiry launched by the competent authorities. This is a requirement of disclosure which is in public interest. The whistleblower regime in Norway also requires the outcome of an inquiry to be made public after completion. These provisions are discussed under Standard #12 of the comparative study. As the outcome of the inquiry has a direct bearing on the whistleblower's interests the Competent Authority is mandatorily required to provide reasons for closure under Section 4(1)(d) of the *Right to Information Act, 2005.* Similarly the Competent Authority is required to announce the outcomes of the case to the general public as is the requirement under Section 4(1)(c) of the *Right to Information Act.*

d) Recommendation:

Clause 4 may be amended to provide for the following:

- **The whistleblower must be kept informed about the progress of inquiry made into the allegation of wrongdoing.**
- **The Competent Authority must provide a detailed order indicating the reasons for closing a case and furnish a copy to the whistleblower immediately and free of cost.**
- **The Competent Authority must place in the public domain the details of the outcome of every inquiry launched subsequent to a public interest disclosure received.**

11. Procedures: Bureaucratic veto on disclosure of information

a) Provision(s):

Clause 7

b) Problem area:

The Bill exempts disclosure of information which may prejudicially affect the sovereignty and integrity of India, the security of the State, friendly relations with foreign countries, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Disclosure of proceedings of the Union or State Cabinet or its committee is prohibited. Such records may not even be disclosed during the inquiry into an allegation of wrongdoing made under the Bill. A certificate issued by an officer of the rank of Secretary to Government for this purpose will be binding and conclusive.

c) Rationale for improvement:

This Clause is a throwback to the 19th century and is modeled along the lines of Sections 123 and 124 of the *Indian Evidence Act, 1872*. According to these provisions a head of a government department may refuse to produce information contained in unpublished papers relating to the affairs of the State to a court of law by citing public interest. This is known as 'public interest immunity'- a claim that the Government can make in a court of law through affidavit. The Bill seems to have been drafted in complete ignorance of the jurisprudence developed around these provisions as also Section 162 of the *Indian Evidence Act*. It is settled law that such information cannot be denied to a court of law any more. In a catena of cases the Supreme Court has held that the court has residual powers to examine the document *in camera* to determine whether the 'immunity' has been properly claimed, that the information is truly related to the affairs of the State and that public interest will be harmed by disclosing it to the opposite parties. Clause 7 is in violation of this settled law. All documents relating to a case must be delivered to the competent authority or court for examination. 'Sealed cover-procedure' may be adopted for sensitive matters.

d) Recommendation:

Clause 7 may be amended to provide for the disclosure of sensitive information belonging to the specified categories in sealed cover to the Competent Authority or the Court for examination.

12. Safeguards: Onus to protect the whistleblower and RTI applicants

a) Provision(s):

Clause 10 and Chapter V

b) Problem area:

i) The Bill states that the onus of protecting a whistleblower will be on the Central Government. There is no mention of the State Governments in this context.

ii) There is no provision for protecting whistleblowers in the non-government and citizen sector especially, citizens who unearth corruption using *The Right to Information Act, 2005.*

c) Rationale for improvement:

This clause is poorly drafted. It is obvious that in a quasi-federal setup the Central Government cannot provide protection for employees of the State Government. The Bill must authorize the State Governments to protect their whistleblowing employees.

In recent times attacks on citizens who use *The Right to Information Act, 2005* to unearth corruption and wrongdoing in government has increased manifold. They are attacked by vested interests that are in collusion with elements within the government offices. As Section 3(1) of the Bill recognises even private individuals as potential whistleblowers, RTI users can be protected from victimisation. This can be done by including a provision in the Bill that places the burden of proof on the public authority that dealt with the RTI application that it did not disclose the contents of the RTI application filed by the person attacked without lawful and proper procedure.

d) Recommendations:

- **Clause 10 of the Bill may be amended to make State Governments responsible for ensuring the safety of their whistleblowing employees.**
- **A new Clause may be inserted in Chapter V to ensure that the burden of proving that an RTI application was not disclosed to any stranger without proper authorization shall be on the public authority dealing with the RTI application.**

13. Safeguards: Victimisation of the whistleblower

a) Provision(s):

Clauses 2, 10 and Chapter V

b) Problem areas:

i) The Bill does not contain any provision about burden of proof of victimisation of or retaliatory action initiated against the whistleblower.

ii) The Bill is also silent on what actions and omissions amount to reprisals or retaliatory action against the whistleblower.

c) Rationale for improvement:

i) In order to become an effective law the Bill must recognise all kinds of action and omissions that may be considered reasonably as being retaliatory against the whistleblower. The whistleblower protection laws of Canada, Ghana, New Zealand, South Africa, Romania, the UK and the USA clearly define as to what kinds of action constitute retaliatory action. This could be in the form of transfer, demotion, denial of promotion, shifting to jobs with lesser responsibilities as compared to the qualifications of the whistleblowing employee, reduction in salary, denial or increments etc. These best practices are discussed under Standard #6 of the comparative study.

ii) The Bill must provide a safe alternative to silence for the whistleblower. One of the ways of doing this is to ensure that he or she is not required to prove that victimisation or retaliatory action occurred. A mere allegation of victimisation is enough to start the inquiry proceedings. It is international best practice to place the burden of proof on the public authority concerned that the retaliatory action did not occur or any administrative action that was taken against the whistleblowing employee would have been taken even if he or she had not made the public interest disclosure. This is the standard in countries like Ghana, Norway, New Zealand, Romania, South Africa, the UK and the USA. The relevant provisions contained in their whistleblower laws are discussed under Standard #18 of the comparative study.

d) Recommendations:

- **Clause 2 may be amended to include a definition of the kinds of action and omissions that will be treated as retaliatory action or reprisal against a whistleblower.**
- **Clause 10 of the Bill may be amended to include a provision reversing the burden of proof on the employer in every allegation of victimisation and retaliatory action.**

14. Safeguards: Disincentives for victimisers

a) Provision(s):
Chapter VI

b) Problem area:
The Bill is silent on the consequences that may entail for any person that may victimise a whistleblower or take retaliatory action against him or her.

c) Rationale for improvement:
A good whistleblower protection law must create disincentives for any person who seeks to victimise a whistleblower. This is one of the necessary safeguards for a whistleblower and goes a long way in ensuring him or her a safe alternative to silence. In Canada a detailed procedure is given in the whistleblower law for launching disciplinary action against an official who takes retaliatory action against a whistleblower. In New Zealand such retaliatory action is treated as a human rights violation. In Uganda an official who victimises a whistleblower may face a prison term of up to five years and a hefty fine. In the USA a federal employee who victimises a whistleblower may face suspension, reprimand, reduction in grade or even a monetary penalty. These best practices are discussed at Standard #17 in the comparative study.

d) Recommendation:
Chapter VI may be amended to include a penalty provision for any person who victimises or takes retaliatory action against a whistleblower. The penalty could be a maximum prison term of five years and or a fine of up to Rs. 50,000.

15. Safeguards: Provision of interim relief to the whistleblower

a) Provision(s):
Chapter V

b) Problem area:
The Bill is silent on providing interim relief except ordering *status quo ante*.

c) Rationale for improvement:
Merely ordering *status quo ante* is not enough to alleviate the suffering caused to the whistleblower due to retaliatory action. The Bill must clearly specify the kinds of interim relief that a whistleblower may claim if the Competent Authority finds that the allegation of victimisation is required to be investigated. The LCI Bill did contain provisions for making interim orders to alleviate the suffering of the victimised whistleblower, However this provision is missing from the current Bill. The laws of New Zealand, the UK and the USA contain provisions for giving interim relief to the victimised whistleblower. These provisions are discussed at Standard #14 of the comparative study.

d) Recommendations:
Chapter V of the Bill may be amended to enable the Competent Authority to grant interim relief to the victimised whistleblower.

16. Safeguards: Whistleblower's right of appeal

a) Provision(s):

Chapter VII

b) Problem area:

The Bill does not provide the whistleblower any right of appeal against the order of the Competent Authority except when a penalty is imposed for making *mala fide* disclosure.

c) Rationale for improvement:

The Bill must provide the whistleblower with the right of appeal if he or she is aggrieved by any order of the Competent Authority. As the right of appeal is not a common law right it must be created specifically in the statute.

d) Recommendations:

Chapter VII of the Bill may be amended in order to provide for a right of appeal for the whistleblower if he or she is aggrieved by any order of the Competent Authority. Such right of appeal may lie in the High Court of appropriate jurisdiction.

17. Safeguards: Protect those who volunteer information

a) Provision(s):

Chapter VII

b) Problem area:

The Bill does not provide express protection to any person who may voluntarily come forward to provide additional or related information about a wrongdoing that is being inquired into, subsequent to a disclosure made by the whistleblower under this law. Such persons are also likely to be victimised by vested interests in the public authority.

c) Rationale for improvement:

The Bill must automatically provide similar degrees of protection as is available to the original whistleblower to any person who may volunteer information related to a wrongdoing that is being investigated under this law. However such protection may not be automatically available to a person who provides information upon being compelled under the inquiry process.

d) Recommendations:

Chapter VII of the Bill may be amended in order to provide for adequate protection to any person who may provide information that is additional or related to the wrongdoing that is disclosed by any whistleblower.

18. Safeguards: Public consultation on Rule-making

a) Provision(s):

Chapter VII Clauses 24, 25 and 26

b) Problem area:

The Bill does not require the Central and State Governments to make Rules after prior publication and public consultation. Similarly the Competent Authority is not required to make Regulations through the process of prior publication and consultation.

c) Rationale for improvement:

The process of making laws and subordinate legislation in India is not sufficiently participatory and consultative. Even though the *General Clauses Act, 1897* contains a procedure for making rules and regulations after prior publication this requirement is not included in Bills. As a result Section 23 of this Act remains a dead letter, rarely used. According to Section 4(1)(c) of the *Right to Information Act, 2005* governments and public authorities are required to announce all facts while formulating important decisions or announcing policies to inform the people. The Central Information Commission has on two separate occasions directed the Government of India and the Government of the National Capital Territory of Delhi to adopt consultative processes prior to tabling Bills and rules and regulations in Parliament and the State Legislature. It is only fitting that an important piece of legislation, such as the Whistleblower Bill, contain a requirement that participatory procedures be adopted for making rules and regulations. Prior publication of draft rules and regulations ensures that people have an opportunity to give inputs to the process of making subordinate legislation. This ensures that the provisions in the principal Act are not diluted in the process of making subordinate legislation.

d) Recommendations:

- **Clauses 24, and 25 of the Bill may be amended to require the Central and State Governments to make rules for carrying out the provisions of the Bill as per the procedure of prior publication described in Section 23 of the *General Clauses Act, 1897*.**
- **Clause 26 of the Bill may be amended to require the Competent Authority to make regulations for carrying out the provisions of the Bill as per the procedure of prior publication described in Section 23 of the *General Clauses Act, 1897*.**

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