

The Government of India tables its Whistleblower Bill in Parliament

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Dear all,

The *Public Interest Disclosure and Protection of Persons Making Disclosure Bill, 2010* (the Whistleblower Bill) has been tabled in the Lok Sabha yesterday (26th August 2010). The Department of Personnel and Training (DoPT), Government of India, which piloted this Bill did very little to consult with people on its contents. They refused to publicise the contents of the Bill while formulating it despite being mandated to do so under Section 4(1)(c) of the *Right to Information Act, 2005*. During a full bench hearing at the Central Information Commission in my complaint case, representatives of the DoPT acknowledged that they had not disclosed anything about this Bill in the public domain. The Commission's decision in this case is awaited. Meanwhile the text of the Bill as introduced in the Lok Sabha is not available on the DoPT's website, nor does the link to the text of the Bill on the Lok Sabha website work. The attached text of the Whistleblower Bill has been sourced from the website of PRS-India. Congrats guys, you have proven again that civil society puts information about public documents in the public domain faster than public authorities themselves. The text of the Whistleblower Bill is accessible at: <http://prsindia.org/uploads/media/Public%20Disclosure/Public%20Interest%20Disclosure%20Bill,%202010.pdf>

Given below is a quick preliminary analysis of the Whistleblower Bill.

What is good about the Whistleblower Bill?

Readers will recollect the several instances where public servants blowing the whistle on corruption and wrongdoing in government departments and public sector enterprises met with a gory fate. The names of Satyendra Dubey and Manjunath come to mind respectfully. The Government of India notified the Public Interest Disclosure and Protection of Informers Resolution (PIDPI Resolution) in the year 2004 to provide a mechanism for whistleblowers to confidentially disclose instances of wrong doing (click here to access a copy of the PIDPI Resolution: http://cvc.nic.in/004vgl26_1.PDF). This resolution was applicable to employees of the Central Government only. It did not provide any protection to potential whistleblowers working in State Governments. The current Whistleblower Bill tabled in the Lok Sabha seeks to replace the PIDPI Resolution with a statutory mechanism for whistleblowing that is uniformly applicable across the country (except Jammu and Kashmir for obvious reasons). While the PIDPI Resolution did not prescribe any consequences for revealing the identity of the whistleblower, the current Bill makes such unwarranted disclosures an offence punishable with a prison term and fine. The Central Vigilance Commission (CVC) will be the competent authority to receive information from whistleblowers in confidence at the Centre. Similar bodies will be notified by State Governments for this purpose in their own jurisdictions. In addition to public servants, any person, including NGOs may make confidential disclosures and seek protection under this law. The CVC and similar bodies in the States have been given powers to issue directions to protect whistleblowers.

What needs to be improved in the Whistleblower Bill?

1. Limited coverage of reportable actions: The list of actions which are deemed fit for disclosure in the public interest under the Whistleblower Bill are as follows:

- a) any corrupt activities recognised under the *Prevention of Corruption Act, 1988* (click here for the text of the Act: <http://www.kar.nic.in/lokayukta/preact.htm>)
- b) willful misuse of power or willful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable gain accrues to the public servant;

But what about the losses caused to the people in the context of economic crimes, harm to the environment or public health and safety? This list of circumstances under which public interest disclosures can be made under the Indian Bill is woefully inadequate when compared with international best practice standards. Only corruption and unlawful loss to the Government or unlawful gain to a public servant are recognised as reportable under this Bill. The list of improper actions covered in other whistleblower laws is much more comprehensive and not limited to pecuniary loss or gain to Government.

In the UK the following actions fall within the ambit of their whistleblower law known as the *Public Interest Disclosure Act*. (click here for the text of UK's *Public Interest Disclosure Act*: http://www.opsi.gov.uk/acts/acts1998/ukpga_19980023_en_1#1q1)

"(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged,"

In the USA the *Whistleblower Protection Act of 1989* covers the following broad areas: (click here for the text of the Act: <http://thomas.loc.gov/cgi-bin/query/C?c101:./temp/~c101tkCFRK>)

"(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences--

`(A) a violation of any law, rule, or regulation; or

`(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;"

In Ghana the *Whistleblower Act of 2006* allows for the public interest disclosure of the following actions: (click here for the text of Ghana's Whistleblower legislation: <http://www.parliament.gh/files/Whitsleblwer%20Act%20720.pdf>)

"(a) an economic crime has been committed, is about to be committed or is likely to be committed;

(b) another person has not complied with a law or is in the process of breaking a law or is likely to break a law which imposes an obligation on that person;

(c) a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) in a public institution there has been, there is or there is likely to be waste, misappropriation or mismanagement of public resources;

(e) the environment has been degraded, is being degraded or is likely to be degraded; or

(f) the health or safety of an individual or a community is endangered, has been endangered or is likely to be endangered."

The list of wrongdoing and malpractices that may be reported under India's Whistleblower Bill is very brief and narrow sighted. This Bill does not take into consideration the possibility of making confidential disclosure about a range of violations of law and

wrongful actions that may occur in the public and private sector. The Whistleblower Bill must be amended to widen its scope.

2. Only one authority prescribed for receiving public interest disclosure: It appears that the framers of this Bill either did not have the benefit of international best practice standards on whistleblowing legislation or have simply chosen to ignore them. The CVC and similar bodies in the States are the only authorities competent to receive complaints of wrongdoing from whistleblowers. This is contrary to the practice in countries like the UK, USA and even some developing countries like Ghana. In the UK whistleblowers have a choice of making disclosures about wrongdoing to the Head of the Department, or to a regulatory agency prescribed by Government (like the CVC) or to any other person such as a Member of Parliament or a journalist or even a civil society organisation. Similarly in the USA the federal and State laws allow disclosures to be made to multiple authorities. Under Ghana's Whistleblower Act, confidential disclosures about wrongdoing in Government may be made to at least 18 different authorities, including the President, a Minister, the Attorney General, the Auditor General, an MP, a traditional chieftain, the head of a recognised religious body or even the head of the whistleblower's own family!

Entrusting the CVC solely with the job of receiving confidential disclosures about wrongdoing may not be the best option. Given the manner of appointment of members to bodies such as the CVC especially in the States whistleblowers may not trust the competent authorities enough to make confidential disclosures. Until such time when every CVC or like body is headed by people of impeccable integrity such as Justice Santosh Hegde (Lokayukta of Karnataka) whistleblowing is not likely to happen often. **The Whistleblower Bill must be amended to allow public interest disclosures to be made to the media or a legislator or to any other person whom the whistleblower may trust.**

3. CVC permitted to disclose the identity of whistleblowers to the Head of the Department: According to section 4(5) of the Whistleblower Bill, the CVC or similar competent authorities in the States investigating confidential disclosures are required to keep the identity of the whistleblower secret. However a proviso to this sub-section permits the CVC and similar competent authorities to reveal the identity of the whistleblower to the Head of the Department while seeking comments or explanations in the course of an inquiry. The Head of the Department is barred from disclosing the identity of the whistleblower to anybody else. **This provision alone defeats the very purpose of the law. The central philosophy of whistleblower legislation is to protect the identity of the person making the public interest disclosure so that he/she may not be targeted by the Head of the Department or any colleague or any person who has a vested interest in keeping the lid on wrongdoing shut tight. The proviso to Section 4(5) negates the very purpose of the law. This is not protection for whistleblowers. This is virtually a tailor-made death sentence for sincere and honest bureaucrats.**

4. Whistleblower Bill does not apply to the private sector: The aim of any good whistleblower legislation is to protect any person who has knowledge of wrongdoing or malpractice in any public or private body. A lot of illegal and corrupt activities occur in the name of furthering business interests in the corporate sector. The Whistleblower Bill does not extend to confidential disclosure about wrongdoing in private sector companies and firms. This is clearly in contravention of international best practices. For example in the USA at least seven federal environment-related laws on clean air, toxic substances, clean water, atomic energy, solid waste and safe drinking water, protect employees of the private/corporate sector if they report wrongdoing and illegalities (for more information click on: http://www.whistleblowers.org/index.php?option=com_content&task=view&id=37&Itemid=66).

In Ghana the Whistleblower Act promises to provide protection to any employee of any company in the private sector who reports the commission of economic offences. Given the serious problems of wrongdoing in the extractive industries in India, the pollution caused by industrial

effluents and emissions and economic offences committed by private corporations there is ample scope for whistleblowing by conscientious employees. **The Whistleblower Bill does not provide any means for such employees to make confidential disclosures. In the era of privatisation and liberalisation, the coverage of the Whistleblower Bill must be extended to the corporate sector as well.**

It may be recollected here that the Reserve Bank of India formulated a scheme for receiving protected disclosures in private sector banks and foreign banks based on Government of India's 2004 PIDPI Resolution (click here to access the details of the scheme: <http://www.rbi.org.in/Commonman/English/Scripts/Content.aspx?Id=702>). Under this scheme RBI is the nodal agency to receive confidential disclosures about wrongdoing in private sector and foreign banks. **As the Whistleblower Bill replaces the PIDPI Resolution it is not clear what will happen to the RBI's scheme for private sector and foreign banks.**

5. Armed Forces have been left out: The Whistleblower Bill does not allow members of the Indian armed forces to make public interest disclosure about wrongdoing in the armed forces. They cannot make disclosures about corruption or pecuniary gain of a colleague or about wrongdoing in the maintenance of public order committed by a member of the armed forces. This exclusion is also not in tune with international best practices. For example in the USA, the *Military Whistleblower Protection Act* of 1988 as amended from time to time allows whistleblowers in the army to make confidential disclosures about wrongdoing to members of Congress or the Inspectors General or audit officers of the Department of Defence (click here for the text of the Act: http://www.law.cornell.edu/uscode/html/uscode10/usc_sec_10_00001034----000-.html) Whistleblowers in the armed forces are entitled to similar protection against reprisals as other whistleblowers (for more information click on: [http://www.ig.navy.mil/Complaints/Complaints%20%20\(Reprisal%20Military%20Whistleblower%20Protection\).htm](http://www.ig.navy.mil/Complaints/Complaints%20%20(Reprisal%20Military%20Whistleblower%20Protection).htm)) **The Whistleblower Bill must be amended to allow members of the armed forces to make confidential disclosures about wrongdoing and malpractices in the armed forces.**

6. Vexatious complainants will be imprisoned but no policy for rewarding whistleblowers: Clause 16 of the Whistleblower Bill stipulates a prison term of two years and a fine of INR 30,000 for persons who make vexatious and frivolous complaints. However there is no reward for a whistleblower who makes a very genuine complaint leading to investigation of a wrongdoing and conviction of the errant officials. The Whistleblower Act in Ghana does not penalise vexatious complaints. Similarly the UK whistleblower law is silent on vexatious and frivolous complaints. However public authorities may initiate only disciplinary action against employees making frivolous or vexatious complaints.

In Ghana the Whistleblower Act provides for the setting up of a Whistleblower Reward Fund to encourage whistleblowers. Rewards are paid to the whistleblower if the protected disclosure leads to the arrest and conviction of the guilty. If the protected disclosure leads to recovery of money then the whistleblower is entitled to get 10% of the amount as a reward.

Criminalising whistleblowing in the manner of the Indian Whistleblower Bill will only discourage potential whistleblowers from making disclosures about malpractices. **The very purpose of the Bill is defeated due to this penal provision. The Bill must be amended to remove the penal provision for vexatious complaints. This issue may be revisited based on the experience of the implementation of the law after 5 years.**

7. No clarity on the kinds of protection that a whistleblower is entitled to receive: Chapter V dealing with the nature of protection that a whistleblower can expect is very vague when compared to other whistleblower laws. It merely empowers the Central Government to ensure that no proceedings are launched against the whistleblower merely on the ground of blowing the whistle or rendering assistance to an inquiry procedure launched as a result of the

whistleblowing. The CVC and similar bodies in the State may give directions to the relevant authorities against victimisation including restoration of *status quo ante*. What these directions may be is not clarified. However these directions are made binding on the public servant who has been directed to protect the whistleblower. The CVC and similar bodies in the States may direct the police to provide protection to the victim. Even this is mentioned in parantheses - a rarity in enactments. There is no clear definition of what kinds of actions will be treated as occupational detriment suffered by the whistleblower at the hands of his/her employer. **These protections are too generalised and vague to inspire any level of confidence in the minds of potential whistleblowers.**

Similar laws in other developed and developing countries specify, with much greater clarity, the remedies and protections to which a whistleblower is entitled. For example the South African *Protected Disclosures Act of 2000* lists the following circumstances that may be recognised as occupational detriment: (click here for the complete text of the Act: http://www.nacf.org.za/guide_to_the_whistle_blowing_act/protected_disclosures_act.pdf)

1. (v) (a) *being subjected to any disciplinary action;*
- (b) *being dismissed, suspended, demoted, harassed or intimidated;*
- (c) *being transferred against his or her will;*
- (d) *being refused transfer or promotion;*
- (e) *being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;*
- (f) *being refused a reference. or being provided with an adverse reference from his or her employer;*
- (g) *being denied appointment to any employment, profession or office;*
- (h) *being threatened with any of the actions referred to paragraphs (a) to (g) above;*
- (i) *being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;*

In Ghana the Whistleblower Act provides protection against the following kinds of occupation detriment:

12. (2) *A whistleblower shall be considered as having been subjected to victimisation if because of making the disclosure,*
- (a) *the whistleblower, being an employee, is*
 - (i) *dismissed,*
 - (ii) *suspended,*
 - (iii) *declared redundant,*
 - (iv) *denied promotion,*
 - (v) *transferred against the whistleblower's will,*
 - (vi) *harassed,*
 - (vii) *intimidated,*
 - (viii) *threatened with any of the matters set out in subparagraph (i) to (vii), or*
 - (ix) *subjected to a discriminatory or other adverse measure by the employer or a fellow employee, or*
- (b) *not being an employee, the whistleblower is subjected to discrimination, intimidation or harassment by a person or an institution.*

The whistleblowing laws in the UK, USA, Ghana, South Africa and several other countries provide for compensation to a victimised whistleblower. The Indian Whistleblower Bill does not contain any provision for giving compensation to the victimised whistleblower.

Advocacy Recommendations:

Given the several major lacunae in the Whistleblower Bill introduced in the Lok Sabha, there is an urgent need to have this Bill referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for detailed deliberations and improvement. I request readers to send their analysis of the Whistleblower Bill highlighting other weaknesses. I am sure a more detailed examination will reveal more grey areas which need rectification.

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Thanks
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