

# **PUBLIC INTEREST DISCLOSURE AND PROTECTION TO PERSONS MAKING THE DISCLOSURE BILL, 2010**

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*The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill has been tabled in the Lok Sabha on 27<sup>th</sup> August, 2010 by Shri Prithviraj Chavan, Minister of State for Personnel, Public Grievances and Pensions. Also known as the whistle blower Bill, this Bill has been long due and now that it has been tabled, it needs to be debated vigorously as there are a lot of loose ends that need to be mended. The death of so many RTI activists and also the death of Satyendra Dubey and Manjunath Shanmugham is proof enough that very strong whistle blower protection Bill is needed in the country to encourage more and more people to come forward and report wrongdoings.*

## **I. INTRODUCTION**

There is a need of removal of corruption and maladministration in government and public sector. Everywhere around the world, whistle blowers have to be extremely unafraid of the risks they take but strong protection laws are also imperative for their safety like the UK Public Interest Disclosure Act, 1998 and the US(Federal) Whistle Blowers Protection Act, 1989. Considering how corruption has seeped into our lives and taking corruption related violence into account<sup>1</sup>, it is necessary to see how far it will be possible to implement the provisions of the proposed legislation and how far the infrastructure available will support effective implementation. It is in this regard that The Public Interest Disclosure and Protection to Persons

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<sup>1</sup> 11 RTI activists have lost their lives since January 2010-Satish Shetty (Mah), Arun Sawant (Mah), Vishram Laxman Dodiya (Guj), Shashidhar Mishra (Bihar), Sola Ranga Rao (Andhra), Vitthal Gite (Mah), Dattatraya Patil (Mah), Amit Jethwa (Guj), Vijay Pratap alias Babbu Singh (UP), Ramdas Ghadegaonkar (Mah), V Balasubramanian (TN) (List compiled by Nachiket Udupa)

Making the Disclosure Bill, 2010 has been tabled in the Lok Sabha by Union Minister of State for Personnel, Public Grievances and Pensions Shri. Prithviraj Chavan. The objective of the proposed law is to protect those who expose corruption and wrongdoing.

Whistle blowers play a very important role in providing information about corruption and mal-administration. People working in the same department best know who is corrupt but they are not bold enough to convey this information to their higher authorities as there is fear of reprisals. If adequate statutory protection is granted, there can be no doubt, that the government will be able to get more information regarding wrongdoings. Whistle blowing in good faith represents the highest ideals of public service and challenges the abuse of power. Protection of whistle blowers can however be seen as creating a number of risks, such as disruption in the work place, rending of employment relationship, possibility of blackmail and harassment, etc.<sup>2</sup>

The Bill aims to establish a mechanism to receive complaints relating to disclosures on any allegation of corruption or willful misuse of power or discretion against any public servant.<sup>3</sup> It also seeks to ensure an inquiry into such disclosures and provide adequate safeguards against the victimization of the person making such a complaint.

## II. WHISTLE BLOWING ACROSS THE WORLD

While in the US, the Federal Statute which protects whistle blowers is called the Whistle Blower's Protection Act, 1989, the English Act of 1998 and the Australian Act of 1994 are called 'Public Interest Disclosure Acts'. The New Zealand Act of 2000 is called 'Protected Disclosure Act'. These enactments provide a statutory procedure enabling public servants (in UK and in some of the States in US enabling employees

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<sup>2</sup> See Robert G. Vaughn, *State Whistle blower Statutes and the Future of Whistle blower Protection*, Administrative Law Review, Washington College of Law, Vol. 51, 1999 at 581.

<sup>3</sup> Shri Prithviraj Chavan, Minister of State for Personnel, Public Grievance and Pensions, 27(18) FRONTLINE, August 28-September 10, 2010 available at <http://www.frontlineonnet.com/fl2718/stories/20100910271801000.htm> (Last visited on August 8, 2011)

of private industries also) to make complaints in confidence to the prescribed authority regarding corruption or maladministration by other public servants in the same organization.

### A. *Whistle Blowing In United States*

The Whistle Blower's Protection Act (WPA) of 1989 of US provides statutory protections for federal employees who engage in whistle blowing, that is, making a disclosure evidencing illegal or improper government activities in the United States. The statute in US does not apply to federal workers employed by the Postal Service or the Postal Rate Commission<sup>4</sup>, the Government Accountability Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency or any other executive entity that the President determines primarily conducts foreign intelligence or counter-intelligence activities.<sup>5</sup> Section 3 of the Act in United States clarifies that "any" disclosure regarding waste, fraud, or abuse means that the WPA applies to such disclosures "without restriction as to time, place, form, motive, context, or prior disclosure" and includes formal and informal communication. But according to Section 10<sup>6</sup> of the Whistle Blower Protection Enhancement Act of 2007, whistle blower protection is given to people working in these agencies. In the United States, whistle blowing is one of the public policy exceptions to the doctrine of employment-at-will or the employee who alleges wrongful discharge from service can bring an action against the employer to enforce public policy.<sup>7</sup>

### B. *Whistle Blowing In Britain*

Whistle blowers are protected in Britain by the Public Interest Disclosure Act of 1998<sup>8</sup>. The Act is the outcome of the Nolan Committee

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<sup>4</sup> 5 U.S.C. § 2105(e)

<sup>5</sup> The Central Imagery Office was exempted from coverage with the passage of the 1994 WPA amendments. The agency was renamed the "National Imagery and Mapping Agency" with the passage of the National Defense Authorization Act for Fiscal Year 1997. P.L. 104- 201, § 1122(b)(1).

<sup>6</sup> H.R. 985, 110th Congress

<sup>7</sup> Cummins vs. EG & G Seallol Inc. (1988) 690 F.2d. 134

<sup>8</sup> Public Interest Disclosure Act, 1998, available at <http://www.legislation.gov.uk/>

Report, 1995<sup>9</sup>, the White Paper on Freedom of Information ‘Your Right to Know’<sup>10</sup> (Cm 3818, Dec., 1997) and the Freedom of Speech in National Health Services (letter of the Minister, 1997). The British Act has provisions for protection against detriment i.e. denial of promotion and other facilities or dismissal for whistle blowing.

Under the scheme of the Act, there are three types of disclosure<sup>11</sup>, namely, (i) Internal disclosure, (ii) Regulatory disclosure and (iii) Wider disclosure. An ‘Internal disclosure’ to the employer (which may include the manager or director) will be protected if the whistle blower has an honest and reasonable suspicion that the malpractice has occurred, or is occurring or is likely to occur. Where a third party is responsible for the malpractice, the same principle applies to the disclosure made to him. It also applies, where someone in a public body which is subject to appointment by Government (e.g. National Health Service), blows the whistle to the sponsoring department. A ‘Regulatory Disclosure’ is a disclosure made to a prescribed person. A ‘Wider disclosure’ is one to the police, the media, Members of Parliament and non-prescribed regulators. These disclosures are protected, if, in addition to the test for ‘Regulatory disclosures’ they are reasonable in all the circumstances and they are not made for personal gain.

In Britain, under the Act certain types of disclosure qualify for protection (“qualifying disclosures”). These are disclosures of information which the worker reasonably believes tend to show one or more activities is either happening now, took place in the past, or is likely to happen in the future.

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ukpga/1998/23/contents (Last visited on March 27, 2011)

<sup>9</sup> Summary of the Nolan Committee’s First Report on Standards in Public Life, available at <http://www.archive.official-documents.co.uk/document/parlament/nolan/nolan.htm> (Last visited on March 27, 2011)

<sup>10</sup> Your Right to know, Government’s Proposals for a freedom of information Act, available at <http://www.nationalarchives.gov.uk/ERORrecords/HO/421/2/foi/yrtksun.htm> (Last visited on March 27, 2011)

<sup>11</sup> The Act of 1998 adds Part IV A (Protected Disclosures) in the Employment Rights Act, 1996 which contains §43A to 43L, §47B, §48 (1A), amends §49, and adds §103A, amends §105, 108, 109, 112, 117, 118, adds §127B amends §128, 191, 193, 196, 200, 205, 230 and 235.

### III. PROGRESS OF WHISTLE BLOWING LAWS IN INDIA

The whistle blower act was first drafted by the Law commission of India in the year 2001. The gruesome murder of two whistle blowers (Satyendra Dubey<sup>12</sup> in 2003 and Manjunath Shanmugham<sup>13</sup> in 2007) brought the issue of vulnerabilities of the whistle blowers to public focus.

Mr. N. Vittal (then Chief Vigilance Commissioner) first initiated a whistle blower Bill in 1993. No progress took place after that so he requested the Law Commission to draft a Bill encouraging the disclosure of corrupt practices by public functionaries and protecting honest persons making such disclosures by a letter dated 24/8/1999. In this connection Mr. Vittal made reference to the speech of the then Prime Minister, Shri Atal Bihari Vajpayee condemning rampant corruption and highlighting the principle of “Zero tolerance”.<sup>14</sup> The Law commission headed by B.P. Jeevan Reddy submitted a report on the “Public Interest Disclosure Bill”, and submitted it to Arun Jaitley (the then Minister of Law, Justice and Company Affairs) on December 14, 2001.<sup>15</sup> The 15th law Commission has already forwarded its 161st report on ‘Central Vigilance Commission and Allied Bodies’ in 1998 and 166<sup>th</sup> report on ‘The Corrupt Public Servants (Forfeiture of Property) Bill’ in 1999 to tackle this problem.

In January 2003 the draft of “Public Interest Disclosure (Protection of Informers) Bill 2002” was circulated. A giant stride was made in May 2004<sup>16</sup> when the Government of India authorized the Central Vigilance Commission (CVC) as the ‘Designated Agency’ to receive written complaints for disclosure on any allegation of corruption or misuse

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<sup>12</sup> Truth Silenced- S.K. Dubey’s Murder, available at <http://www.rediff.com/news/dubey.htm> (Last visited on December 8, 2010)

<sup>13</sup> Manjunath Shanmugam Trust, available at <http://syg.com/web/mstrust/manju/scmadmin/Home.php> (Last visited on December 8, 2010)

<sup>14</sup> 179<sup>th</sup> Law Commission of India Report, Page No.2

<sup>15</sup> Ibid.

<sup>16</sup> Government of India Resolution on Public Interest Disclosure and Protection of Informer, available at <http://cvc.nic.in/PIDPI27122010.pdf> (Last visited on March 27, 2011)

of office and recommend appropriate action. Landmark legislation, Right to Information (RTI) came into force in 2005 and this can be called a significant shift in the way common people have access to information. The Public Services Bill 2006 (Draft) for the regulation of public services in the country stated that within six months of the commencement of the act, the government must put into place mechanisms to provide protection to whistle blowers.

Draft Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010 was drawn and approved by Cabinet without public consultation in August 2010. The Bill was introduced in Lok Sabha and uploaded on the DoPT website inviting comments up to September 30, 2010.

#### **IV. DISCLOSURE OF INFORMATION AND PROTECTION OF ITS SOURCE**

The RTI Act was enacted to remove the canker of corruption plaguing the countries public institutions but there has been a rise in the number of RTI whistle blowers being attacked, threatened or even killed. Section 21<sup>17</sup> of the RTI Act protects a person making disclosure in good faith but to protect the persons making disclosure in a statutory sense just one provision of the RTI Act is not enough. To protect people who give confidential information on wrongdoings a robust legislation is required. Needless to say, the disclosure of information and protection of its source go hand in hand. The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010 as it stands now is a much needed initiative but the bill in its current form needs a lot of deliberation.

#### **V. THE SHORTCOMINGS OF THE BILL**

The Bill as it stands now has a lot of shortcomings which if not corrected would make the whistle blower Act yet another redundant legislation. The definition of the word disclosure<sup>18</sup> is creating a hindrance.

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<sup>17</sup> No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act or any rule made thereunder.

<sup>18</sup> According to Clause 2(d) of the Bill, “disclosure” means a complaint relating to,-

The expression ‘willful misuse of power or discretion by a public servant’ is vague in itself as misuse of power and discretion can never be unintentional.

- a) Such misuse should have caused demonstrable loss to the government or helped the public servant to accrue demonstrable gain. In other words, if the loss or gain is not demonstrable, then it does not qualify as a disclosure and the onus to show this lies on the person making the disclosure.
- b) Disclosure is time-bound according to the Bill. Landmark cases such as Bhopal gas leak, Delhi anti-Sikh riots, Babri Masjid demolition, Godhra have all exceeded the five-year statute of limitations applied to disclosable conduct.
- c) The Bill brings complaints against any attempt to commit, or the commission of, a criminal offence by a public servant under the ambit of disclosure. But there may be acts that do not strictly satisfy the ingredients of a criminal offence, yet need to be exposed for the sake of the public interest.

The current Bill does not cover complaints against officials of private corporations or multinational companies. The Bill seeks to protect only complainants against officials of Central and State governments or public sector companies. There could be inclusion of private bodies<sup>19</sup> clause in the lines of the RTI Act which provides for similar line of inclusion.

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- (i) *an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988;*
  - (ii) *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;*
  - (iii) *an attempt to commit or commission of a criminal offence by a public servant, made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosure.*

<sup>19</sup> Clause 2(h) of the RTI Act “public authority” means any authority or body or institution of self- government established or constituted—

(a) by or under the Constitution;

This would mean that for the performance of public functions, even private corporations and individuals will be within the ambit of the bill. The private sector (including NGOs) is rapidly expanding both in terms of economic resources but also by becoming the primary/co-provider of citizen services and recent scandals such as Satyam, IPL makes it evermore necessary that the private entities should be brought under the purview of this Bill.

The Bill is silent about the process of appointment of the competent authority to whom complaints have to be sent. Considering that the competent authority under the Public Interest Disclosure and Protection of Informer's Resolution (PIDPI)<sup>20</sup>, the Central Vigilance Commissioner (CVC), has not sufficiently inspired potential whistleblowers, the Bill's move to restrict the choice of the competent authority to only the CVC and the State Vigilance Commissioners is a serious limitation. Moreover, CVC does not have its own investigation capability and must outsource investigation to the police, etc, which are not statutorily independent as it is evident from the current state of things.

There is no time limit in which the investigation needs to be completed. Hence, there could be a potential to use delay as a tactics.

The proviso to Sub-clause 4 of Clause 4<sup>21</sup> of the Bill says that if the competent authority is of the opinion that it seems necessary on the course of seeking comments and explanation to disclose the identity of

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*(b) by any other law made by Parliament;*

*(c) by any other law made by State Legislature;*

*(d) by notification issued or order made by the appropriate Government, and includes any—*

*(i) body owned, controlled or substantially financed;*

*(ii) non-Government organisation substantially financed,*

*directly or indirectly by funds provided by the appropriate Government;*

<sup>20</sup> Important Features of the 'Whistle Blower's Resolution, April 21, 2004, available at <http://cvc.nic.in/whistle.pdf> (Last visited on April 4, 2011)

<sup>21</sup> While-seeking comments or explanations or report referred to in sub-clause (3), the Competent Authority shall not reveal the identity of the complainant or the public servant and direct the Head of the Department of the organisation concerned or office concerned not to reveal the identity of the complainant or



the discloser, they may do so. This vitiates the whole point of protection of the whistle blower as his immediate supervisor would come to know that he has made a disclosure and it may affect his prospects in the office and in some cases, even his life.

The Bill bars on the members of the armed forces from disclosing wrongdoing in the armed forces. Clause 3(1)<sup>22</sup> of the Bill excludes not only members of the armed forces but personnel of several other agencies.

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public servant:

*Provided that if the Competent Authority is of the opinion that it has, for the purpose of seeking comments or explanation or report from them under sub-clause (3) on the public disclosure, become necessary to reveal the identity of the public servant to the Head of the Department of the organisation or authority, board or corporation concerned or office concerned, the Competent Authority may reveal the identity of the complainant or public servant to such Head of the Department of the organisation or authority, board or corporation concerned or office concerned for the said purpose.*

- <sup>22</sup> *Clause 3.(1) Notwithstanding anything contained in the provisions of the Official Secrets Act of 1923, any public servant [other than those referred to in clauses (a) to (d) of article 33 of the Constitution] or any other person including any non-governmental organisation, may make a public interest disclosure before the' competent Authority: Provided that any public servant, being a person or member referred to in clause (a ) or 10 clause (b) or clause (c) or clause (d) of article 33 of the Constitution, may make a public disclosure if such disclosure does not, directly or indirectly, relate to,—*
- (a) the members of the Armed Force or any matter relating to Armed Forces; or*
  - (b) the members of the Forces charged with the maintenance of public order; or*
  - (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence or any matter relating to such bureau or other organisation;*
  - (d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c) or any matter relating to such telecommunication system, bureau or organisation.*

Members of the forces charged with the maintenance of public order, persons employed in any bureau or other organization established by the state for purposes of intelligence or counter-intelligence or any matter relating to such bureau or other organization, and persons employed in, or in connection with, the telecommunication systems set up for the purposes of any force, bureau or organization are also barred from making public interest disclosures under the Bill. Thus, if a whistle blower in any of these organizations wants to expose a fake encounter or any other form of maladministration practices, he or she cannot do so under the Bill which restricts the Bill's outreach. But this whole policy of secrecy is a little outdated in our knowledge intensive society and India being a democracy it is more so important that there should be absolute freedom of speech and media publishing. Already, Wikileaks is creating waves and it is evident that publishing improves transparency and transparency creates a better society for all people. Better scrutiny in all areas would lead to reduced corruption in government institutions and organizations. Therefore, laws restricting the flow of information are contrary to the principles of justice, liberty and democracy.

The Bill criminalizes whistle-blowing rather than seeking to reward it. Clause 16<sup>23</sup> of the Bill stipulates a prison term, which may extend up to two years, and a fine, which may extend up to Rs.30, 000 for persons who make vexatious and frivolous complaints. But the Bill does not seek to reward a whistle-blower who makes a genuine complaint leading to investigation and conviction.

Chapter V of the Bill which deals with the protection of the whistle blowers merely empowers the Central government to ensure that no proceedings are launched against the whistle-blower merely on the grounds of making a disclosure or rendering assistance to an inquiry as a result of whistle-blowing. The clause on protection<sup>24</sup> are too general to inspire confidence among potential whistle blowers.

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<sup>23</sup> *Clause 16-Any person who makes any disclosure mala fide and knowingly that it was incorrect or false or misleading shall be punishable with imprisonment for a term which may extend up to two years and also to fine which may extend up to thirty thousand rupees.*

<sup>24</sup> *Clause 10. ( 1 ) The Central Government shall ensure that no person or a*

Protection for the whistle blower will kick-in only after he or she makes a complaint. RTI activists who often come under threat just by virtue of filing an RTI application will not be covered unless they file a complaint. For a rural activist working for instance to expose corruption in NREGA, the state vigilance commissioner may not be easily accessible.

No deterrent punitive action (e.g., immediate termination, loss of pension and mandatory imprisonment) is specified against those found guilty of victimization and this will discourage the whistle blower from coming out with the truth as there could be physical harm and intimidation not just to the whistle blower himself but also to his immediate family members.

The possible ways of making more and more people interested in whistle blowing is perhaps by incentivizing whistle blowing. There should be a complete bar against any kind of prosecution against the complainant and rather than all disciplinary action being taken against the guilty internally, there should be a central mechanism for the same. Moreover, there should be an adequate and credible mechanism to protect the whistle blowers from physical reprisal.

## VI. CONCLUSION

The Bill in its current form lacks teeth and therefore needs to be vigorously debated in the public and thoroughly revised so that it doesn't become yet another cosmetic exercise. In light of all this, it is intriguing

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*public servant who has made a disclosure under this Act is victimised by initiation of any proceedings or otherwise merely on the ground that such person or a public servant had made a disclosure or rendered assistance in inquiry under this Act.*

*(2) If any person is being victimised or likely to be victimised on the ground that he had filed a complaint or made disclosure or rendered assistance in inquiry under this Act, he may file an application before the Competent Authority seeking redress in the matter, and such authority shall take such action, as deemed fit and may give suitable directions to the concerned public servant or the public authority, as the case may be, to protect such person from being victimised or avoid his victimisation.*

why the Department of Personnel and Training (DoPT) under the Ministry of Personnel, Public Grievances and Pensions which uploaded the Bill on its website and invited comments from the public, to be sent latest by September 30, 2010 did not circulate a draft Bill and invite comments from members of civil society to improve it before it was introduced in Parliament. Perhaps, as once a Bill is introduced in Parliament; the government is not bound to reveal, under the pretext of protecting parliamentary privilege, what suggestions or comments it received from the public or whether any suggestions were taken into consideration. The government in this way can keep a significant stage of law-making away from the public gaze, even while keeping up the pretence of involving the public.

As the Bill stands now, it is very necessary that it is scrutinized by the public so that the public is able to exercise the provisions seeking protection when it becomes an act and hopefully the revised Bill will encourage a new surge of whistle blowing in India.