

Legislative Brief

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

The Bill was introduced in the Lok Sabha on August 26, 2010 by the Ministry of Personnel, Public Grievance and Pensions. The Bill was referred to the Standing Committee on Personnel, Public Grievances, Law and Justice (Chairperson: Smt Jayanthi Natarajan), which is scheduled to submit its report by February 14, 2011.

Highlights of the Bill

- ◆ The Bill seeks to protect whistleblowers, i.e. persons making a public interest disclosure related to an act of corruption, misuse of power, or criminal offence by a public servant.
- ◆ Any public servant or any other person including a non-governmental organization may make such a disclosure to the Central or State Vigilance Commission.
- ◆ Every complaint has to include the identity of the complainant.
- ◆ The Vigilance Commission shall not disclose the identity of the complainant except to the head of the department if he deems it necessary. The Bill penalises any person who has disclosed the identity of the complainant.
- ◆ The Bill prescribes penalties for knowingly making false complaints.

Key Issues and Analysis

- ◆ The Bill aims to balance the need to protect honest officials from undue harassment with protecting persons making a public interest disclosure. It punishes any person making false complaints. However, it does not provide any penalty for victimising a complainant.
- ◆ The CVC was designated to receive public interest disclosures since 2004 through a government resolution. There have been only a few hundred complaints every year. The provisions of the Bill are similar to that of the resolution. Therefore, it is unlikely that the number of complaints will differ significantly.
- ◆ The power of the CVC is limited to making recommendations. Also it does not have any power to impose penalties. This is in contrast to the powers of the Karnataka Lokayukta and the Delhi Lokayukta.
- ◆ The Bill has a limited definition of disclosure and does not define victimisation. Other countries such as US, UK, and Canada define disclosure more widely and define victimisation.
- ◆ The Bill differs on many issues with the proposed Bill of the Law Commission and the 2nd Administrative Reform Commission's report. These include non-admission of anonymous complaints and lack of penalties for officials who victimise whistleblowers.

Recent Briefs:

[The Foreign Educational Institutions \(Regulation of Entry and Operations\) Bill, 2010](#)

October 29, 2010

[The National Accreditation Regulatory Authority for Higher Educational Institutions Bill, 2010](#)

October 29, 2010

Kaushiki Sanyal
kaushiki@prsindia.org

January 24, 2011

PART A: HIGHLIGHTS OF THE BILL¹

Context

Whistleblowing is the act of disclosing information by an employee or any stakeholder about an illegal or unethical conduct within an organisation.

The Law Commission of India² in 2001 had recommended that in order to eliminate corruption, a law to protect whistleblowers was essential. It had also drafted a Bill in its report. In 2004, in response to a petition filed after the murder of Satyendra Dubey, the Supreme Court directed that a machinery be put in place for acting on complaints from whistleblowers till a law is enacted.³ The government notified a resolution in 2004⁴ that gave the Central Vigilance Commission (CVC) the power to act on complaints from whistleblowers.

Since 2004, CVC has received 1,354 complaints from whistleblowers (see Table 2). In 2007, the report of the Second Administrative Reforms Commission⁵ also recommended that a specific law be enacted to protect whistleblowers. India is also a signatory (not ratified) to the UN Convention against Corruption since 2005, which enjoins states to facilitate reporting of corruption by public officials and provide protection against retaliation for witnesses and experts.⁶

The Bill replaces the 2004 government resolution and sets up a mechanism to receive complaints of corruption or wilful misuse of power by a public servant. It also provides safeguards against victimization of the person making the complaint.

Key Features

Public Interest Disclosure

- Any public servant or any other person including a non-governmental organization may make a public interest disclosure to a Competent Authority (defined as the Central or State Vigilance Commission).
- “Disclosure” is defined as any complaint made in writing or electronic mail against a public servant on matters related to (a) attempt to or commission of an offence under the Prevention of Corruption Act, 1988; (b) wilful misuse of power which leads to demonstrable loss to the government or gain to the public servant; or (c) attempt or commission of a criminal offence by a public servant.
- A “public servant” is any person who is an employee of the central government or the state government or any company or society owned or controlled by the central or state government. However, no public interest disclosure shall be accepted against defence, police and intelligence personnel.
- Each disclosure shall be accompanied by full particulars and supporting documents. The Vigilance Commission shall not entertain anonymous complaints.

Procedure of Inquiry

- First, the Vigilance Commission has to verify the identity of the complainant, and then conceal his identity (unless the complainant has revealed it to any other authority). Then it shall decide whether the matter needs to be investigated based on the disclosure or after making discreet inquiries. If it decides to investigate, it shall seek an explanation from the head of the concerned organisation. The Vigilance Commission shall not reveal the identity of the complainant to the head of the organisation unless it is of the opinion that it is necessary to do so. The head of the organisation cannot reveal the identity of the complainant.
- After conducting the inquiry, if the Vigilance Commission feels that the complaint is frivolous or there is no sufficient ground to proceed, it shall close the matter. If the inquiry substantiates allegation of corruption or misuse of power, it shall recommend certain measures to the public authority (anybody falling within the jurisdiction of the Vigilance Commission). Measures include initiating proceedings against the concerned public servant, taking steps to redress the loss to the government, and recommending criminal proceedings to the appropriate authority.
- Every public authority shall create a mechanism to deal with inquiries into disclosures. The mechanism shall be supervised by the Vigilance Commission.
- The Vigilance Commission may take the assistance of the Central Bureau of Investigation or police authorities to make inquiries or to obtain information.

Exemption from Inquiry

- The Vigilance Commission shall not entertain any matter (a) if it has been decided by a Court or Tribunal, (b) if a public inquiry has been ordered, or (c) if the complaint is made five years after the action.

- The Bill exempts disclosure of proceedings of the Cabinet if it is likely to affect the sovereignty of India, security of the state, friendly relations with foreign states, public order, decency or morality. Such an exemption has to be certified by the Secretary to the central or state government.

Safeguards for Persons Making Disclosure

- A person shall not be victimised or proceeded against merely on the grounds that he has made a disclosure or assisted in an inquiry. The directions of the Vigilance Commission are binding in this regard.
- The Vigilance Commission may give directions to a concerned public servant or authority to protect a complainant or witness either on an application by the complainant or based on its own information. It may direct that the public servant who made the disclosure be restored to his previous position.
- If the Vigilance Commission decides that a complainant or a witness or a person assisting an inquiry needs protection (either based on an application filed by the complaint or a witness or on its own information), it shall issue directions to the concerned government authorities to protect such persons.
- The Vigilance Commission shall protect the identity of the complainant and related documents, unless it decides against doing so, or is required by a court to do so.

Penalties

- The Bill lays down penalties for various offences. For not furnishing reports to the Vigilance Commission, a fine of upto Rs 250 shall be imposed for each day till the report is submitted. The total penalty amount however cannot exceed Rs 50,000. For revealing the identity of complainant negligently or due to mala fide reasons, the penalty is imprisonment for upto 3 years and a fine of upto Rs 50,000. For knowingly making false or misleading disclosures with mala fide intentions, the penalty is imprisonment upto 2 years and a fine of upto Rs 30,000.
- Any person aggrieved by an order of the Vigilance Commission relating to imposition of penalty for not furnishing reports or revealing identity of complainant may file an appeal to the High Court within 60 days.

PART B: KEY ISSUES AND ANALYSIS

Protection of Both Complainant and Public Official

The Bill seeks to strike a balance between protecting persons making a public interest disclosure and preventing undue harassment of public officials.⁷

Table 1: Comparison of protection provided to complainant and public official

	Protection of complainant	Protection of public official
Identity	Vigilance Commission and the Head of the organisation have to protect the identity of the complainant. However, the Vigilance Commission can reveal the identity of the complainant to the Head if it is of the opinion that it is necessary to do so.	Every complainant has to furnish his identity (no anonymous complaint to be entertained). No complaint made after 5 years of the action shall be entertained.
Penalty	Identity revelation carries a penalty of upto 3 years and fine of upto Rs 50,000 prescribed.	A false complaint carries a penalty of imprisonment upto 2 years and fine of upto Rs 30,000.
Victimisation	The central government shall ensure that no complainant is victimised through proceedings against him merely because he made a disclosure. If a complainant is being victimised by a public servant, the Vigilance Commission may issue directions to the concerned public servant, including that the complainant be restored to his previous position.	No penalty prescribed for public official
Appeal	No appeal process specified if a complainant is penalized for false complaints.	If a public official is penalized for revealing identity or obstructing investigation of the complaint, he can appeal to the high court.

Sources: Public Interest Disclosure Bill; PRS.

The protection provided to both parties raises certain issues.

Identity: The Bill does not allow anonymous complainants. But there are no clear provisions on what grounds the Vigilance Commission may reveal the identity of a complainant to the Head of an organisation. Some experts contend that allowing anonymous reporting provide protection to whistleblowers while others have expressed

Preamble, Statement of Objects and Reasons and Clauses 3(3), 3(6), 4(2), 4(4), 10, 14, 15, 16 and 19

concern about difficulty of investigation and possibility of frivolous complaints.⁸ Countries such as the U.S., U.K., Canada and Australia⁹ have some provision to investigate anonymous complaints, while Italy and Slovakia¹⁰ do not allow anonymous complaints. However, even countries which allow anonymous complaints do not provide protection against victimisation if the identity of such a whistleblower becomes known.

Victimisation: (a) The Bill does not define what constitutes victimisation. (b) There is no penalty against the public servant who may be victimising the complainant. (c) This Bill does not provide for witness protection programme to protect witnesses during investigation and trial. The Law Commission has recommended guidelines for witness identity protection.¹¹ Countries such as the US, Canada, Australia, Germany, Italy and South Africa have witness protection programmes.¹²

Penalty: The Vigilance Commission may reveal the identity of the complainant in certain circumstances (which may lead to victimisation) but the Bill does not provide for any penalty for victimising a complainant. However, a complainant may be penalised with imprisonment and a fine for making false complaints. This was recommended by the Law Commission report² and the Cabinet Note stated that the Bill aimed to protect honest officials.⁷ Such provisions may deter persons from making a disclosure to the Vigilance Commission.

Appeal: The public official may appeal to the High Court against penalty for revealing identity or obstructing investigation. However, the Bill also penalises any malafide complaint, but does not specify an appeal process.

Performance of Present Mechanism

Clauses 2(b) and 4

The CVC was designated to receive and act on complaints by whistleblowers through a 2004 Government Resolution. This Bill gives statutory status to that Resolution. However, as the data in Table 2 shows, the number of complaints has only been a few hundreds between 2005 and 2008.

There is no official study that indicates whether the number of complaints reflect the level of corruption, or whether potential whistleblowers feel threatened. Given that the provisions of this Bill are similar to that of the Resolution, there is unlikely to be a significant change in the number of persons who are willing to disclose acts of corruption.

Table 2: Number of whistleblower complaints under 2004 Resolution

Year	Complaints
2005	412
2006	338
2007	328
2008	276

Source: Annual Reports of Central Vigilance Commission

Powers of the Vigilance Commissions

Clauses 2, 4, and 9

The Central and State Vigilance Commissions shall be the nodal body to receive complaints from whistleblowers. However, their power is restricted to recommend corrective action to the public authority (including any penal action) on public officials after investigation.

Various state Lokayuktas have different powers. For example, the Karnataka Lokayukta Act states that in case a public servant is found to have committed any criminal offence, the Lokayukta may initiate prosecution without prior sanction from the concerned authority.¹³ The Delhi Lokayukta Act states that if the Lokayukta is not satisfied with the action taken by a competent authority on its report, he can make a special report to the Lt Governor and inform the complainant.¹⁴ The Andhra Pradesh Lokayukta and Upalokayukta Act provides a time-limit of one year to complete the investigation. Both the Andhra Pradesh and Himachal Pradesh Lokayukta Acts state that if an offence has been committed, a report is sent to the concerned authority who has to report within three months any action taken. If the Lokayukta is not satisfied with the action taken, he can report to the Governor and inform the complainant.¹⁵

Furthermore, an ARC report pointed out that there are few cases where CVC was able to initiate disciplinary action on government servants or impose major penalties.¹⁶ According to CVC's data, between 2004 and 2008, there were 946 cases in which the department did not comply with the CVC's recommendation on penalty.¹⁷

Definitions

Clause 2(d)

The Bill defines "disclosure" as a complaint related to corruption, any criminal offence or wilful misuse of power that leads to loss to the government or gain to the public servant. This definition is narrower than the one recommended by the Law Commission, which included mal-administration (any action which is unjust, causes undue delay or negligence, leads to waste of public funds). Countries such as Canada, US and Ghana have wider definition of disclosure (see Table 5).

The Bill does not define victimisation. The proposed Law Commission Bill defines victimisation to include suspension, transfer, dilution of power, adverse entries in the service record, and punishments under disciplinary rules. Countries such as US, UK, Canada, South Africa and Ghana define victimisation (see Table 5).

The Law Commission and Administrative Reforms Commission

In December 2001, the 179th report of the Law Commission of India examined the issue of whistle-blowing and made certain recommendations. The scope of these recommendations were wider than that in the current Bill, as they included ministers within the purview, provided powers to the Authority to initiate criminal proceedings, and fixed a time limit. Table 3 compares the recommendations of the Commission with the provisions of the Bill.

Table 3: Comparison of the Law Commission Report and the Bill

	Law Commission of India	Bill
Scope	Disclosure can be against Minister and public servant.	Disclosure can be only against public servant.
Definitions	Defines disclosure as a complaint against abuse or misuse of power; commission of an offence under any law; or mal-administration. Defines victimisation.	Defines disclosure as a complaint against a public servant on commission of an offence under the Prevention of Corruption Act, 1988 or misuse of power leading to demonstrable loss to the government or gain to the public servant; or a criminal offence. No definition.
Disclosure of Identity	The name of person making the disclosure shall be revealed to the public servant unless the complainant requests that his identity be kept hidden or it is necessary in public interest.	The Vigilance Commission shall not reveal the identity of the complainant to the head of the organisation except if it is of the opinion that it is necessary to do so.
Powers of Competent Authority	The Competent Authority has the power to direct the appropriate authority to initiate criminal proceedings against the guilty official.	The Vigilance Commission has the power to recommend measures such as initiating proceedings and taking steps to redress the loss to the government.
Time limit	The Competent Authority has to complete the inquiry within 6 months to 2 years after receiving the complaint.	No time limit prescribed for discreet inquiry. Time limit for explanation to be given by the concerned head of department shall be prescribed.
Burden of proof	In case a complainant is victimised the burden of proof is on the employer or public servant who is accused of victimisation.	No provision.
Penalty	Penalty for false complaints is imprisonment upto 3 years and fine of upto Rs 50,000.	Penalty for false complaints is imprisonment upto 2 years and fine of upto Rs 30,000.

Sources: 179th Law Commission Report, Bill 2010, PRS.

In 2007, the 2nd Administrative Reforms Commission (ARC) made certain recommendations related to whistle-blowing, which have not been incorporated in the Bill. It included acts of whistle-blowing in the private sector and prescribed penalties for victimising complainants. The issue of the private sector is now addressed by the Companies Bill, 2009. Table 4 compares the ARC report with the Bill.

Table 4: Comparison of the ARC Report and 2010 Bill

	4 th Report of the Second ARC	Bill
Identity Protection	Whistleblowers should be protected by ensuring confidentiality and anonymity.	Makes provision to ensure confidentiality but does not allow anonymous complaints.
Private sector	Should cover corporate whistleblowers unearthing fraud or serious damage to public interest.	Not covered in this Bill. The Companies Bill, 2009 addresses this issue.
Penalty for Victimisation	Acts of harassment or victimization of or retaliation against a whistleblower should be criminal offences with substantial penalty and sentence.	No penalty for victimisation.

Sources: "Ethics in Governance," Fourth Report of the Second Administrative Reforms Commission, Bill 2010, PRS.

Laws in other countries related to whistleblowing

Different countries protect whistleblowers in different ways. Some allow multiple agencies to receive complaints, some allow anonymous complaints, and some define victimisation and provide protection against it. Table 5 gives an overview of the laws related to whistleblowing in some countries.

Table 5: International comparison of whistleblowing laws

	Definition of disclosure	Authority	Protection
US	Violation of laws, gross mismanagement, waste of funds and abuse of authority	Office of Special Counsel or Office of Inspector General	Allow anonymous complaints. Protect employees from victimisation in appointment, promotion, transfer, or pay.
UK	Crimes, civil offences (including negligence), miscarriages of justice, dangers to health and safety of the environment	Employer, any prescribed persons, police, media or MP	Allow anonymous complaints. Employment tribunal decides compensation if victimised by unfair dismissal or denial of promotion.
Canada	Serious wrongdoing such as violation of law, misuse of public funds, gross mismanagement.	Supervisor or Public Sector Integrity Commissioner	Allow anonymous complaints. Has protection from reprisals (disciplinary measure, demotion, termination).
South Africa	Criminal offence, failure to comply with legal obligations, miscarriage of justice, endangering health and safety of individuals, damaging environment, unfair discrimination.	Various authorities such as legal adviser, employer, Cabinet member, and any prescribed person	Right to approach court, including Labour court if subjected to occupational detriment (disciplinary action, dismissal, suspension, demotion, transfer, no reference)
Australia	Breach of Code of Conduct (be honest, comply with all laws, no improper use of inside information)	Public Service Commissioner, Merit Protection Commissioner, Agency Head	Protection against victimisation and discrimination
Ghana	Impropriety such as economic crime, non-compliance of a law, likely to break the law, miscarriage of justice, mismanagement or waste of public resources.	Various authorities such as employer, police, MP, Commission on Human Rights, President	Allow oral or written complaints. Has right to bring action to High Court for victimisation (dismissal, suspension, transfer, harassment)

Sources: **US:** Whistleblower Protection Act, 1989; **UK:** Public Interest Disclosure Act, 1998; **Canada:** Public Servants Disclosure Protection Act, 2004; **South Africa:** Protected Disclosure Act, 2000; **Australia:** Public Service Act, 1999; **Ghana:** Whistleblower Act, 2006 and PRS

Notes

1. This Brief was written on the basis of the Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010, which was introduced in the Lok Sabha on Aug 26, 2010. The Bill was referred to the Standing Committee on Personnel, Public Grievances, Law & Justice, which is scheduled to submit its report by Feb 14, 2011.
2. 179th Report of the Law Commission of India.
3. Writ Petition (Civil) 539/2003.
4. Resolution no. 89 dated April 21, 2004, Government of India.
5. "Ethics in Governance," Fourth Report of the Second Administrative Reforms Commission.
6. UN Convention Against Corruption (see <http://www.unodc.org/unodc/en/treaties/CAC/index.html>).
7. Cabinet Note on Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010, July 30, 2010.
8. "Alternative to Silence: Whistleblower Protection in 10 European Countries," Transparency International, 2009; David Banisar, "Whistleblowing: International Standards and Development," presented at the 2006 *Primera Conferencia Internacional sobre Corrupcion y la Transparencia*, Mexico; 179th Law Commission of India Report.
9. Whistleblower Protection Act (USA); Public Interest Disclosure Act, 1998 (UK); Public Servants Disclosure Protection Act (Canada); and Public Interest Disclosure Act (Australia).
10. "Alternative to Silence: Whistleblower Protection in 10 European Countries," Transparency International, 2009.
11. "Witness Identity Protection and Witness Protection Programmes," 198th Report of Law Commission of India, 2006.
12. **US:** Witness Security Program; **Canada:** Witness Protection Program Act, 1996; **Australia:** Witness Protection Act, 1994; **Germany:** Act to Harmonize the Protection of Witnesses at Risk, 2001; **Italy:** Decree Law no. 82 (2001); **South Africa:** Witness Protection Act 112 of 1998.
13. Karnataka Lokayukta Act, 2002.
14. The Delhi Lokayukta and Uplokayukta Act, 1995.
15. The Andhra Pradesh Lokayukta and Upalokayukta Act, 1983 and the Himachal Pradesh Lokayukta Act, 1983.
16. "Refurbishing of Personnel Administration: Scaling New Heights," 10th Report of the Second Administrative Reforms Commission, Nov 2008.
17. 2004 to 2008 Annual Reports of CVC.

DISCLAIMER: This document is being furnished to you for your information. You may choose to reproduce or redistribute this report for non-commercial purposes in part or in full to any other person with due acknowledgement of PRS Legislative Research ("PRS"). The opinions expressed herein are entirely those of the author(s). PRS makes every effort to use reliable and comprehensive information, but PRS does not represent that the contents of the report are accurate or complete. PRS is an independent, not-for-profit group. This document has been prepared without regard to the objectives or opinions of those who may receive it.