



STUDENTS' ECONOMIC FORUM

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To empower the student community...*

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 ho2099@sib.co.in



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Theme 280

WHISTLE BLOWERS' PROTECTION BILL

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Theme No: 280 : WHISTLE BLOWERS' PROTECTION BILL

A well informed customer will make the policy makers as well as organisations which produce goods and services more responsive to the customer needs. This will also result in healthy competition among organisations and improve the quality of goods and services produced.

The "SIB Students' Economic Forum" is designed to kindle interest in economic affairs in the minds of our younger generation. We highlight one theme in every monthly meeting of the "Forum". Whistleblower protection refers to laws and policies meant to protect anyone who exposes alleged wrongdoing. The wrongdoing might take the form of fraud, corruption or mismanagement. The Whistleblowers' Protection Bill also seeks to provide "adequate protection to persons reporting corruption or wilful misuse of discretion which causes demonstrable loss to the government or commission of a criminal offence by a public servant.". The Bill will also ensure punishment for false or frivolous complaints. Whistle Blowers Protection Bill was approved by the Cabinet of India as part of a drive to eliminate corruption in the country's bureaucracy and passed by the Lok Sabha on 27 December 2011. The Bill was passed by Rajya Sabha on 21 February 2014.

What is the rationale behind introducing the bill?

Corruption is a social evil which prevents proper and balanced social growth and economic development. One of the impediments felt in eliminating corruption in the Government and the public sector undertakings is lack of adequate protection to the complainants reporting the corruption or willful misuse of power or willful misuse of discretion. The Law Commission of India in 2001 has recommended that in order to eliminate corruption, a law to protect whistleblowers is essential. In 2004 the Supreme Court directed that machinery be put in place for acting on complaints from whistleblower till a law is enacted.

What does the bill feature on public interest disclosure?

Public Interest Disclosure

The Bill, under section 3, provides that any public servant or any other person including a non-governmental organization may make a public interest disclosure to a Competent Authority i.e. the Central or State Vigilance Commission. "Disclosure" has been 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) willful 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” has been defined as 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, the bill restricts the public interest disclosures accepted against defence, police and intelligence personnel. Furthermore, each disclosure shall be accompanied by full particulars and supporting documents. The Vigilance Commission is not to entertain anonymous complaints.

What is the Procedure of Inquiry described in the bill?

The Bill, under section 6 provides for the procedure of inquiry. The Vigilance Commission, at first, should ascertain the identity of the complainant and has to protect such identity unless the complainant has revealed it to any other authority. It shall then decide whether the matter needs to be investigated based on the disclosure or after making discreet inquiries. On the decision of the investigation, it should seek an explanation from the head of the concerned department, office, or as the case maybe. The Commission has to protect the identity of the complainant to the head of the organisation or department unless it becomes imminently necessary to do so. Even then, the head of the organisation cannot reveal the identity of the complainant. After conducting the inquiry, if the commission feels that there is no substantial matter or merit in the case, it shall close the case or if the inquiry substantiates allegation of corruption or misuse of power, it shall recommend certain measures to the public authority within the jurisdiction of the Commission. It can also recommend the initiation of criminal proceedings against the official or necessary corrective measure. Other than these, it can take any other action which is imminent for the purpose of the Act.

What is the Exemption Provided from Inquiry?

The bill exempts certain matter under section 11 from inquiry of the Vigilance Commission such as when it has been decided by a Court or Tribunal, if a public inquiry has been ordered, or if the complaint is made five years after the action. The Bill also 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 which has to be certified by the Secretary to the State or Central Government.

What are the Safeguards for Persons Making Disclosure?

The name of the Bill itself makes it very clear that the purpose of this act is the protection of the persons who make public interest disclosure or have assisted in such matters from possible victimization or harassment and the Central Government has to ensure such protection. The Commission has been empowered to give proper direction to the concerned authorities for the protection of complainant or witness either on an application by the complainant or based on its own information. It can also direct that the public servant who made the disclosure may be restored to his previous position. 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.

What are the Penalties laid down in the bill ?

The Bill, under section 16, lays down that for not furnishing reports to the Vigilance Commission, a fine of up to Rs 250 shall be imposed for each day till the report is submitted. The total penalty amount however cannot exceed Rs 50,000. The penalty for revealing the identity of complainant negligently or due to mala fide reasons, the penalty is imprisonment for up to 3 years and a fine of up to Rs 50,000. When a person knowingly makes false or misleading disclosures with mala fide intentions, the penalty is imprisonment up to 2 years and a fine of up to 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.

What are the Flaws, recommendations and conclusion in the bill ?

The introduction of this bill is a welcome step towards the fight against corruption and protection of those who provide for the public interest disclosure but the first step is itself suffering from various deficiencies and flaws. The Bill provides that the Competent Authority shall not investigate, (i) any disclosure which is made after the expiry of twelve months from the date on which the action complained against becomes known to the complainant; and (ii) any disclosure involving an allegation, if the complaint is made after the expiry of five years from the date on which the action complained against is alleged to have taken place. This provision is not just unnecessary but it will be used by the bureaucracy to deter the investigation on the basis of technical ground, i.e. whether or not the complainant had come to know of the disclosure within a period of twelve months or not and whether the date of commission of offence was within a period of five years or not, rather than the merits of the case.

On the contrary, it is required that the cases of corruption be investigated on the sole ground of merit and it should not make any difference whether the complainant had come to know of the disclosure within a period of twelve months or not. A case of corruption does not become pardonable after five years. It is high time that the government takes a serious note of the noble fight against corruption. Furthermore, it is a matter of grave concern that an exception has been created in favor of the armed forces and intelligence agencies and that too without cogent reasons. It is important to note here that the Right to Information Act, 2005 does not create an exception in favor of armed forces and even the intelligence agencies have not been fully exempted from its purview and such organizations are fully disclosable in relation to human rights violation and corruption. This bill aims at tackling corruption and thus, there seems no reasonable excuse for such outright exemptions. However, certain matters such as those in relation of national security and others may be exempted for obvious reasons. Also, this bill exempts the Private Sector but considering the recent cases like the Satyam fraud case, the Indian Premiere League scandal, etc. it seems only just and reasonable that the same be brought within the purview of this legislation along with the various NGOs.

Corruption in various levels of the government and judiciary is growing and it is of utmost necessity that the responsible persons be brought within the ambit of this bill.

The Bill provides for receiving complaints even through electronic method which is quite necessary in modern times. However, the use of electronic methods may not be so safe for the whistleblower and thus it is important that stringent rules and regulations be framed in this regard such that the identity of the whistleblower is kept secret at any cost. Another suggestion would be that an anonymous complaint should not be rejected on the sole ground of anonymity in a case where the facts mentioned in the case and various supporting documents provide for a prima facie case. Another observation is that the main intention of the complainant while making a disclosure is the protection of public interest and undue burden should not be put on the person for providing substantial proof to support his/her case. It would be unreasonable to expect an ordinary citizen who is at the receiving end of the minimal resources and the sufferer of corruption to provide sufficient proof to substantiate his/her complaint. It is suggested that the Competent Authority should take reasonable steps so that when a prima facie case is made out, he should be able to follow up the complaint to its own logical conclusion.

A particular time limit should be provided within which the Competent Authority has to complete the investigation. And it could also be provided that if the time period is to be extended, it cannot go beyond a certain point. This bill does not provide any rule in case of non-adherence to the recommendation of the Competent Authority.

In absence of such provision, the implementation of the recommendation cannot be ensured. If such a provision is missing, then one excuse or other defeating the very objective of this legislation will definitely delay the implementation. Thus, it becomes necessary that a proper mechanism be ensured so that direction of the Competent Authority is not avoided to protect the wrong doers. Also, this bill empowers the Competent Authority to recommend initiation of criminal proceedings under relevant provisions and considering the fact there is no limitation period under our criminal system, the statutory time limit of five years be dissolved. Further, limiting cases older than five years does not sound well even on the ground the relevant records may not be available. It is of general practice that records are properly kept for much longer period than of five years. Another important aspect is that the Bill does not define victimization thus leaving a gray area which could definitely be exploited for the benefit of those in power.

Another important recommendation is that the word 'recommendation' of the Competent Authority be replaced by 'directions' such as to provide greater emphasis. Furthermore, the establishment of proper and special courts for this specific law will be a great supplement to this enactment. It is true that corruption cannot be totally driven out of any society but it is also true that proper laws and effective implementation of such laws will definitely reduce the ever rising levels of corruption.

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.

Your comments and feedback on this publication may be sent to Staff Training College, The South Indian Bank Ltd., Thrissur 680 001 or by E.mail: ho2099@sib.co.in

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