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

(Whistleblower Protection Bill)

An analysis of the amendments introduced by the Government of India in 2011[1]

Background

The Government of India tabled *The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill* (the Bill/Whistleblower Bill) in the Lok Sabha in August 2010. Later the Bill was referred to the Department related Standing Committee of Parliament on Personnel, Public Grievances, Law and Justice (the Committee) for detailed deliberation. The Committee 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. CHRI submitted recommendations on 18 issues for improving the scheme of protection proposed for whistleblowers. The Committee accepted and endorsed several of our recommendations as well as those made by other organisations like the National Campaign for People's Right to Information (NCPRI) and PRS-India as well as concerned citizens. The Committee submitted its report to Parliament in June 2011. The Government of India has tabled in the Lok Sabha a slew of amendments to the Bill on 21 December, 2011. The Lok Sabha approved the amendments without even a semblance of a serious discussion on 27 December 2011.

CHRI has undertaken a preliminary analysis of the amendments proposed by the Government of India for the benefit of Parliamentarians, civil society organisations and the mass media. The preliminary analysis is given below. This is followed by a quick listing of other international best practice standards that have not been complied with by the proposed amendments.

Preliminary analysis of the amendments

A brief description of each amendment is given below followed by a juxtaposition of the original text (*italicised*) against the amendment proposed (underscored) unless the amendment introduces an altogether new provision.

Total number of amendments proposed by the Government of India: 19

Amendments #1 & 2: Change of date in the enactment formula and date mentioned in the title of the Whistleblower Bill. These amendments have been necessitated by the passage of time.

[1] Prepared by Venkatesh Nayak for Commonwealth Human Rights Initiative, New Delhi for the purpose of public discussions and debate on the whistleblower protection law.

Original provisions:
1) "Be it enacted by Parliament in the *Sixty-first* year of the Republic as follows:--"

2) "1.(1) This Act may be called Public Interest Disclosure and Protection to Persons Making the Disclosures Act*, 2010*."

Proposed amendment:
1) "Be it enacted by Parliament in the Sixty-second year of the Republic as follows:--"

2) "1.(1) This Act may be called Public Interest Disclosure and Protection to Persons Making the Disclosures Act, 2011."

Amendment #3: Special Protection Group (SPG) has been excluded from the purview of the whistleblower law.

Proposed amendment:
"1A. The provisions of this Act shall not apply to the armed forces of the Union being the Special Protection Group constituted under the Special Protection Group Act, 1988."

Analysis:
The original Bill sought to deny the members of the armed forces including the state police and agencies responsible for maintaining intelligence and communications facilities for these organisations. Several individuals and organisations had deplored this exclusion. Heeding to these submissions the Parliamentary Committee had recommended as follows:

"**5.15 … Since this Bill is ultimately aimed at tackling corruption, the Committee does not find any logical reason behind such an exemption. The Committee feels that the Bill under examination should not exclude the defence forces/ intelligence and security organisations in this matter.**

5.16. Government may, however, while doing away with such exemptions, come out with suitable and reasonable exceptions, in order to keep a balance between the operational needs of these forces and their accountability to the public. Government may, alternatively, even consider setting up a separate authority for these exempted agencies under the Bill or special laws may be enacted on the lines of the USA. The Committee directs the Government to examine this proposal in more detail so that no organisation of the Government is left out from public scrutiny and accountability in such a manner."

The Government has agreed with this recommendation and brought the armed forces within the purview of the whistleblower law. However it has excluded the SPG which provides protection for serving and former Prime Ministers and their families. This exclusion is most strange given the fact that the armed forces have been brought under the coverage of this law. This exclusion seems to have been influenced by the same thinking that sought to exclude the Prime Minister from the purview of the Lokpal Bill. However now that the Prime Minister has been included within the purview of the Lokpal Bill there is no reason

why the SPG should be denied the right to blow the whistle on any wrongdoing they come across in the course of their duties.

Recommendation: The Government must amend the Bill further to include the Special Protection Group within the purview of the Whistleblower law. A special organisation or authority may be created for investigating disclosures of wrong doing made by members of such agencies in the manner specified for the armed forces of the Union and the States, while ensuring that their operational integrity and morale are not adversely affected.

Amendment #4: The definition of the term 'competent authority' has been expanded to bring a wide range of public servants including ministers, elected representatives and members of the judiciary (except judges of the Supreme Court and the High Court) within the purview of the Whistleblower law.

Original provisions:

"(b) *"Competent Authority" means in relation to-*

(i) any public servant referred to in sub-clause (A) of clause(r), the Central Vigilance Commission or any other authority as the Central Government may, by notification in the Official Gazette, specify in this behalf under this Act;

(ii) any public servant referred to in sub-clause (6) of clause (I), the State Vigilance Commissioner, if any, or any officer of a State Government or any other authority as the State Government may, by notification in the official Gazette, specify in this behalf under this Act;"

Proposed amendments:

"(b) *"Competent Authority" means-*

(i) in relation to a Member of the Union Council of Ministers, the Prime Minister:

(ii) in relation to a Member of Parliament, other than a Minister, the Chairman of the Council of States if such Member is a Member of the Council of States or the Speaker of the House of the People if such Member is Member of the House of the People, as the case may be;

(iii) in relation to a Member of the Council of Ministers in a State or Union Territory, the Chief Minister of the State or Union territory, as the case may be;

(iv) in relation to a Member of Legislative Council or Legislative Assembly of a State or Union territory, other than a Minister, the Chairman of the Legislative Council, if such Member is a Member of the Legislative Council or the Speaker of the Legislative Assembly if such Member is Member of the Legislative Assembly, as the case may be;

(v) in relation to-

(A) any judge (except a judge of the Supreme Court or of a High Court) including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions; or

(B) any person authorised by a court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;

(C) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority;

the High Court:

(vi) in relation to-

(A) any person in the service or pay of the Central Government or remunerated by the Central Government by way of fees or commission for the performance of any public duty (except Ministers, Members of Parliament and members or persons referred to in clause 9a) or clause (b) of clause (c) or clause 9d) of article 33 of the Constitution), or in the service or pay of a society of local authority, or any corporation established by or under any central Act, or any authority or a body owned or controlled or aided by the Central Government or a Government company as defined in section 617 of the Companies Act, 1956, owned or controlled by the Central Government; or

(B) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election of part of an election in relation to Parliament or a State Legislature; or

(C) any person who holds an office by virtue of which he is authorised or required to perform any public duty (except Ministers and Members of Parliament); or

(D) any person who is the president, secretary or other office-bearer of a registered cooperative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or from any corporation established by or under a Central Act, or any authority or body or a Government company as defined in section 617 of the Companies Act, 1956, owned or controlled or aided by the Central Government;

(E) any person who is a chairman, member or employee or any Central Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board; or

(f) any person who is a Vice-Chancellor or member of any governing body, professor, associate professor, assistant professor, reader, lecturer or any other teacher or employee by whatever designation called, of any University established by a Central Act or established or controlled or funded by the Central Government of any person whose services have been availed of by such University or any such other public authority in connection with holding or conducting examinations; or

(G) any person who is an office bearer or an employee of an educational, scientific, social cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any local or other public authority,

the Central Vigilance Commission or any other authority, as the Central Government may by notification in the Official Gazette, specify in this behalf under this Act;

(vii) in relation to –

(A) any person in the service or pay of the State Government or remunerated by the State Government by way of fees or commission for the performance of any public duty (except Ministers, Members of Legislative Council or Assembly of the State), or in the service or pay of a society of local authority, or any corporation established by

or under any central Act, or any authority or a body owned or controlled or aided by the State Government or a Government company as defined in section 617 of the Companies Act, 1956, owned or controlled by the State Government; or

(B) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election of part of an election in relation to municipality or Panchayats or any other local body in the State; or

(C) any person who holds an office by virtue of which he is authorised or required to perform any public duty in relation to the affairs of the State Government (except Ministers and Members of Legislative Council or Legislative Assembly of the State); or

(D) any person who is the president, secretary or other office-bearer of a registered cooperative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the State Government or from any corporation established by or under a Provincial or State Act, or any authority or body or a Government company as defined in section 617 of the Companies Act, 1956, owned or controlled or aided by the State Government;

(E) any person who is a chairman, member or employee or any State Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board; or

(f) any person who is a Vice-Chancellor or member of any governing body, professor, associate professor, assistant professor, reader, lecturer or any other teacher or employee by whatever designation called, of any University established by a Provincial or State Act or established or controlled or funded by the State Government of any person whose services have been availed of by such University or any such other public authority in connection with holding or conducting examinations; or

(G) any person who is an office bearer or an employee of an educational, scientific, social cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the State Government or any local or other public authority,

the State Vigilance Commission, if any, or any officer of the State Government or any other authority, as the State Government may by notification in the Official Gazette, specify in this behalf under this Act;

(viii) in relation to members or persons referred to in clause (a) or clause (b) or clause (c) or clause (d) of article 33 of the Constitution, any authority or authorities as the Central Government or the State Government, as the case may be, *having jurisdiction in respect thereof,* may by notification in the Official Gazette, specify in this behalf under this Act;"

Analysis:

The amendment expands the coverage of the Bill to include the Ministers, Members of Parliament and State Legislatures, member of Central and State Public Service Commissions, armed forces specified in Article 33 of the Constitution, officers on election-related duties, academics and faculty members of universities and scientific, cultural, social and educational institutions and members of non-governmental organisations funded by the

Central or State Governments. This is very welcome. The exclusion of judges of the Supreme Court and the High Courts is also reasonable as the *Judicial Accountability and Standards Bill, 2010* deals with issues of their misbehaviour. However the amendment excludes the possibility of making a complaint of wrongdoing against the Prime Minister. This exclusion seems to have been influenced by the same thinking that sought to exclude the Prime Minister from the purview of the Lokpal Bill. However now that the Prime Minister has been included within the purview of the Lokpal Bill there is no reason why the Lokpal cannot be deemed as the competent authority for receiving and inquiring into complaints of wrongdoing against the Prime Minister. Similarly the exclusion of the Chief Minister from the purview of this Bill is also unjustifiable. As the Lokpal Bill covers the Chief Ministers under the jurisdiction of the Lokayukta there is no reason why the Lokayukta cannot be made the competent authority for receiving and inquiring into complaints of wrongdoing against the Chief Minister.

Recommendation: The Bill must be further amended to make the proposed Lokpal the competent authority to receive and investigate disclosures of wrongdoing committed by the Prime Minister. Similarly the Lokayuktas in the States must be made competent authorities for receiving and inquiring into disclosures of wrongdoing by the respective Chief Ministers.

Amendment #5: The definition of the term 'disclosure' has been expanded to include demonstrable wrongful gain that may accrue to a third party on account of wilful misuse of power and discretion by a public servant.

Original provisions:
"(ii) wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable gain accrues to the public servant;"

Proposed amendment:
"(ii) wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain which accrues to the public servant or to any third party;"

Analysis:
The amendment expands the scope of the term 'disclosure' by making it lawful for a whistleblower to make a complaint about misuse of power or discretion to cause wrongful gain to a third party. This is welcome as it is in accordance with the recommendations of the Committee. However the Government of India has ignored other recommendations of the Committee about expanding the scope of 'wrongdoing' under the Bill. The Committee agreeing with the submissions made by civil society representatives that human rights violations, wilful instances of maladministration and wrongful actions and omissions affecting public health, safety and environment be included within the definition of 'disclosure'. In its report the Committee stated as follows:

"5.11. The Committee recommends that the suggestions made/concerns raised by the stakeholders in the above mentioned paras should be seriously considered by the Ministry

and appropriately included in the Bill to the extent feasible. Eventually, the Bill should be dealing with all such wrongdoings."

The Government has ignored this broad suggestion.

Recommendation: The Bill may be further amended to include violation of any law within the definition of the term 'disclosure' as this will be in tune with international best practice standards of whistleblower legislation.

Amendment #6: The definition of the term 'public servant' has been brought in line with the definition contained in the *Prevention of Corruption Act, 1988*.

Original provisions:

(i) "*public servant" means any employee of-*

(A) the Central Government or any corporation established by or under any Central Act, any Government companies, societies or local authorities owned or controlled by the Central Government and such other categories of employees as may be notified by the central Government, from time to time, in the Official Gazette;

(B) the State Government or any corporation established by or under any State Act, Government companies, Societies or local authorities owned or controlled by the State Government and such other categories of employees as may be notified by the State Government, from time to time, in the Official Gazette.

Proposed amendment:

"(i) "public servant" shall have the same meaning as assigned to it in clause (c) of section 2 of the Prevention of Corruption Act, 1`988 but shall not include a judge of the Supreme Court or a judge of a High Court;"

Analysis:

This amendment is in tune with the changes made in relation to the term 'competent authority' (Amendment #4). The expanded definition of the term 'public servant' covers all public officials except judges of the Supreme Court and the High Courts. This is a welcome improvement in the provisions of the Bill.

Amendment #7: Clause 3 of the Bill has been amended to include all armed forces within its purview. Further the Competent Authorities (Central and State Vigilance Commissions) have been empowered to delegate to any other authority their powers of receiving disclosures of wrongdoing.

Original provisions:

"3. (1) Notwithstanding anything contained in the provisions of the Official Secrets Act, 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 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.

(2) Any disclosure made under this Act shall be treated as public interest disclosure for the purposes of this Act and shall be made before the Competent Authority.

Proposed amendments:

"3. (1) Notwithstanding anything contained in the provisions of the Official Secrets Act, 1923 any public servant or any other person or any other person including any non governmental organisation, may make a public interest disclosure before the Competent Authority;

(2) Any disclosure made under this Act shall be treated as public interest disclosure for the purposes of this Act, and shall be made before the Competent Authority and the complaint making the disclosure shall on behalf of the Competent Authority be received by such authority as may be specified by regulations made by the Competent Authority."

Analysis:

The inclusion of armed forces is certainly a major improvement over the original version. However the delegation of authority

Amendment #8: The Competent Authorities under the Whistleblower law will be required to conduct inquiries into the complaint of wrongdoing within a time limit that will be prescribed by the respective Government under the Rules.

Original provisions:

"(2) The Competent Authority shall, upon receipt of the complaint and concealing the identity of the complainant, or the public servant in the first instance, make discreet inquiry, *in such manner* as may be prescribed, to ascertain whether there is any basis for proceeding further to investigate the disclosure."

Proposed amendment:

"*(2)* The Competent Authority shall, upon receipt of the complaint and concealing the identity of the complainant, or the public servant in the first instance, make discreet inquiry, in such manner and within such time as may be prescribed, to ascertain whether there is any basis for proceeding further to investigate the disclosure."

Analysis:

The proposed amendment is welcome as it is aimed at stipulating a time limit for completing inquiries into disclosures of wrongdoing. However it is better to stipulate such time limits in the principal Act rather than through subordinate legislation. When the Lokpal Bill and the Grievance Redress Bill can stipulate time limits for completing inquiries and investigations there is no reason why this cannot be done in the Whistleblower law itself.

Recommendation: The Bill may be further amended to stipulate a specific time limit, say six months, for completing inquiries into a complaint of wrongdoing.

Amendments #9-11: Clause 4 of the Bill has been amended to include all complainants under the Whistleblower law for the purpose of protecting their identity. The amendment seeks to make the prior written consent of the whistleblower mandatory before his/her identity is disclosed to the Head of the Department. Where such consent is not forthcoming the whistleblower is only required to hand over all documents relating to the complaint to the Competent Authority. These amendments are positive in nature.

Original provisions:

"(4) While-seeking comments or explanations or report referred to in sub-section (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 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-section (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."

Proposed amendments:

"(4) While-seeking comments or explanations or report referred to in sub-section (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 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-section (3) on the public disclosure, become necessary to reveal the identity of the complainant or 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 with the prior written consent of the complainant or public servant 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.

Provide further that in case the complainant or the public servant does not agree to his name being revealed to the Head of the Department, in that case, the complainant or public servant, as the case may be, shall provide all documentary evidence in support of his complaint to the Competent Authority."

Amendment #12: The public authorities that receive a recommendation from the Competent Authority are required to take action within a stipulated period of time. The whistleblower has been given the right to be informed about the outcome of the inquiry launched into the complaint. If the Competent Authority decides to close a case after

inquiry the complainant will be given the right to be heard. These provisions were missing from the original version of the Bill.

Original provisions:
Inquiry into Public Interest Disclosures under Clause 4.

Proposed amendments:
"(8) The public authority to whom a recommendation is made under sub-section (7) shall take a decision on such recommendation within three months of receipt of such recommendation, or within such extended period not exceeding three months, as the Competent Authority may allow, on a request made by a public authority:
Provided that in case the public authority does not agree with the recommendation of the Competent Authority, it shall record the reasons for such disagreement.

(9) The Competent Authority shall, after making an inquiry inform the complainant or public servant about the action taken on the complaint and the final outcome thereof;

Provided that in a case where, after making an inquiry, the Competent Authority, decides to close the case, it shall before passing the order for closure of the case, provide an opportunity of being heard to the complainant if the complainant so desires."

Analysis:
The time limit of three months which is extendable for a further period of three months with the permission of the Competent Authority is unusually long especially in matters relating to corruption and mismanagement of public funds. Swift action is necessary in all such matters as investigation of the complaint must not be delayed. The time limit must be reduced to a shorter period of 45 days. The requirements of informing the whistleblower about the outcome of the case and giving him/her an opportunity to make a presentation against the closure are positive.

Recommendation: The Bill may be further amended to reduce the time limit for taking action on a recommendation of the Competent Authority to 30 days extendable by a maximum of 15 days with the written permission of the Competent Authority.

Amendment #13: The Competent Authority will have the power to inquire into any complaint that is not more than seven years old.

Original provision:
"(3) The Competent Authority shall not investigate, 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."

Proposed amendment:
"(3) The Competent Authority shall not investigate, any disclosure involving an allegation, if the complaint is made after the expiry of seven years from the date on which the action complained against is alleged to have taken place."

Analysis:
In the original version of the Bill the Competent Authority could not investigate complaints which related to wrongdoing occurring more than five years old from the date of making the complaint. The amendment increases this limit to seven years. This is a positive change.

Amendment #14: Clause 9 of the Bill is sought to be amended to bring it in line with Clause 4 which stipulates a time limit for the completion of inquiry into a complaint of wrong doing.

Original provision:
"9. For the purpose of making discreet inquiry or obtaining information from the organisation concerned, the Competent Authority shall be authorised to take assistance of the Delhi Special Police Establishment or the police authorities, or any other authority as may be considered necessary, to render all assistance to complete the inquiry within the *specified time* pursuant to the disclosure received by the Competent Authority."

Proposed amendment:
"9. For the purpose of making discreet inquiry or obtaining information from the organisation concerned, the Competent Authority shall be authorised to take assistance of the Delhi Special Police Establishment or the police authorities, or any other authority as may be considered necessary, to render all assistance to complete the inquiry within the prescribed time pursuant to the disclosure received by the Competent Authority."

Analysis:
This is a minor but necessary change.

Amendment #15: The burden of proving that the victimisation of the whistleblower did not occur will be on the public authority.

Original provision:
Safeguards against victimisation under Chapter V.

Proposed amendment:
"Provided that the Competent Authority shall, before giving any such direction to the public authority or public servant, give an opportunity of hearing to the complainant and the public authority or public servant, as the case may be:

Provided further that in any such hearing the burden of proof that the alleged action on the part of the public authority is not victimisation, shall lie on the public authority."

Analysis:
The original version of the Bill did not contain any clause regarding burden of proof of victimisation. As a result of this the whistleblower would have had to prove that he/she was victimised by the public authority. The Committee recommended reversal of burden of proof so that the public authority concerned is required to prove that the victimisation did not occur. This is a positive change. The amendment also requires all concerned parties to be heard before a recommendation is made by the Competent Authority on the complaint

of vicitmisation. This is also a positive change. However neither the original Bill nor the proposed amendments define what amounts to 'victimisation'. This is an international best practice requirement of whistleblower legislation. Several countries have clearly defined as to what actions or omissions amount to victimisation of the whistleblower. The Whistleblower Bill drafted by the Law Commission of India in 2003 also contained a comprehensive definition of 'victimsation'. The Committee also stated as follows on this subject:

"5.68. The Committee recommends that the term 'victimization' may be defined in the Bill."
The Government has ignored a very important principle of whistleblower legislation despite best advice available.

Recommendation: The Bill must be further amended to include a comprehensive definition of the term 'victimisation' in the context of public servants as well as other complainants who are not public servants.

Amendment #16: The Competent Authority is sought to be empowered to enforce its directions regarding providing solace to a whistleblower who has been victimised.

Original provision:
Sanctions against victimisation

Proposed amendment:
"(5) Any person who wilfully does not comply with the direction of the Competent Authority under sub-section (2) shall be liable to a penalty which may extend up to thirty thousand rupees."

Analysis:
The original version of the Bill did not provide the Competent Authority with any power to enforce its directions to a public authority to provide solace to the victimised whistleblower. The proposed amendment enables the Competent Authority to penalise any person who does not comply with its directions. This is a positive change.

Amendment #17: The Competent Authority is sought to be given penalty powers for not furnishing reports to it within the stipulated time or for malafidely refusing to submit a report or for giving incomplete, incorrect or misleading information or for destroying information that was the subject of the disclosure of wrongdoing. This is a positive change.

Original provision:
Offences and penalties under the law.

Proposed amendment:
"**14.** Where the Competent Authority, at the time of examining the report or explanations or report referred to in sub-section (3) of Section 4 on the complaint submitted by organisation or official concerned is of the opinion that organisation or official concerned, without any reasonable cause has not furnished the report within the specified time or *mala fidely* refused to submit the report or knowingly given incomplete, incorrect or misleading or false

report or destroyed record or information which was the subject of the disclosure or obstructed in any manner in furnishing the report, it shall impose-

a) where the organisation or official concerned, without any reasonable cause has not furnished the report within the specified time or *mala fidely* refused to submit the report, a penalty which may extend to two hundred fifty rupees each day till report is furnished, so however, the total amount of such penalty shall not exceed fifty thousand rupees;

b) where the organisation or official concerned, has knowingly given incomplete, incorrect or misleading or false report or destroyed record or information which was the subject of the disclosure or obstructed in any manner in furnishing the report, a penalty which may extend to fifty thousand rupees."

Amendment #18: The penalty order under Clause 16 of the Bill was not open to appeal in the High Court in the original version of the Bill. The proposed amendment seeks to make an order made under Clause 16 liable for appeal before the High Court. This is a positive change.

Original provision:
"19. Any person aggrieved by any order of the Competent Authority relating to imposition of penalty under *section 14 or section 15* may prefer an appeal to the High Court within a period of sixty days from the date of the order appealed against:"

Proposed amendment:
"19. Any person aggrieved by any order of the Competent Authority relating to imposition of penalty under *section 14 or section 15* or *section 16* may prefer an appeal to the High Court within a period of sixty days from the date of the order appealed against:"

Amendment #19: The original version of the Bill did not require rules to be made by the appropriate Government for stipulating the time for completing inquiries into a complaint of wrongdoing. However with the inclusion of this requirement through Amendment #8 rules will have to be made for stipulating time limits. This is a positive change.

Original provision:
"(b) *the manner* in which the discreet inquiry shall be made by the Competent Authority under sub-section (2) of section 4;"

Proposed amendment:
"(b) the manner and the time within which the discreet inquiry shall be made by the Competent Authority under sub-section (2) of section 4;"

Other best practice standards not complied with by the amendments:

a) The proposed amendments do not cover the private sector. This was a major recommendation of both the Second Administrative Reforms Commission. However the Parliamentary Standing Committee was silent on this demand put forward by civil society.

b) The proposed amendments provide only for a handful of competent authorities authority each at the Central and State level to receive complaints of wrongdoing. This is against international best practice where multiple authorities are empowered to receive and inquire into public interest disclosures. The Bill may be amended to make the Comptroller and Auditor General at the Centre and the Accountants General in the States, the National and State Human Rights Commissions (in the context of human rights violations) and regulatory bodies such as such as the National Green Tribunal and the Medical Council of India (in the context of environment and public health issues).

c) Where no authority takes credible action against a complaint received, it is international best practice to allow for disclosures to be made to the mass media. The Government has ignored this important standard in its amendments.

d) 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. This Clause is a throwback to the 19th century and is modelled 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. The amendments are silent on this issue.

e) 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. 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.

e) 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. The Committee made this recommendation. However the Government has ignored this recommendation.

f) The Committee recommended that all Rules and Regulations under the whistleblower law be made in consultation with people in the manner provided in Section 23 of *The General Clauses Act, 1897*. The Government has ignored this suggestion.

g) The Committee had recommended that a proper mechanism be provided for protecting all kinds of whistleblowers including RTI users, RTI activists and human rights defenders. The Government has ignored this suggestion and has made no new provisions for protecting RTI users and human rights defenders who are victimised.

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