

GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

ONE HUNDRED AND SEVENTY NINTH REPORT

ON

THE PUBLIC INTEREST DISCLOSURE AND PROTECTION OF
INFORMERS

DECEMBER 2001

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December 14, 2001

Dear Shri Jaitley,

I am glad to forward here with Law Commission's 179th Report on "Public Interest Disclosure Bill".

The Law Commission had received a letter dated 24/8/1999 from Mr. N.Vittal, the Chief Vigilance Commissioner (CVC) requesting the Commission to draft a Bill encouraging to disclose corrupt practices on the part of public functionaries and protecting honest persons from such disclosures. In this connection Shri. Vittal also made reference to the speech of Prime Minister, Atal Bihari Vajpayee condemning rampant corruption and highlighting the principle of "Zero tolerance".

Corruption has become a global malaise and for its eradication, "Whistle Blowing" laws have been enacted by U.K., U.S.A. and Australia. Corrupt practices violate human rights and basic freedom and affect the development of a Nation. The Law Commission considered it necessary to recommend some measures to check this evil.

The 15th law Commission has already forwarded its 161st report on 'Central Vigilance Commission and Allied Bodies' in 1998 and 166th report on 'The Corrupt Public Servants (Forfeiture of Property) Bill' in 1999 to tackle this problem.

The Commission after an in-depth study and taking into consideration similar legislations in other countries and keeping in view the needs and circumstances of our country has prepared this report. A Bill entitled 'The Public Interest Disclosure (Protection of Informers) Bill' is enclosed with this report. (Annexure-I).

We hope the recommendations made by the Commission in this report will be implemented to achieve the larger objective of checking corruption.

With warm regards,

Yours Sincerely,

(B.P. Jeevan Reddy)

Shri. Arun Jaitley,
Hon'ble Minister for law, Justice & Co. Affairs,
New Delhi.

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**REPORT ON THE PUBLIC INTEREST DISCLOSURE AND
PROTECTION OF INFORMERS**

CHAPTER I

INTRODUCTORY

“Whistleblowers protection is a policy that all government leaders support in public but few in power tolerate in private” –

Thomas M. Devine¹

Reference

1. The Law Commission of India had received a letter dated 24th August, 1999 from Shri. N.Vittal, the Central Vigilance Commissioner (CVC), requesting the Law Commission to draft a Bill encouraging and protecting honest persons to expose corrupt practices on the part of public functionaries. In this connection, he made a reference to the speech of Prime Minister Shri.Atal Bihari Vajpayee condemning rampant corruption and highlighting the principle of ‘zero tolerance’ not only from the demand side of public servants but also from the supply side.

1.1 In the aforesaid letter, Shri.Vittal informed the Law Commission that he had banned actions on anonymous/pseudonymous complaints which had been lodged by disgruntled elements to blackmail honest officials resulting

¹ The Whistleblowers Protection Act, 1989: Foundation for the Modern Law of Employment Dissent’ by Thomas M. Devine, vol. 51, Washington College of Law, Administrative Law Review (1999), p. 533.

1. ⁷The Whistleblowers Protection Act, 1989: Foundation for the Modern Law of Employment Dissent' by Thomas M. Devine, Vol. 51, Washington College of Law, Administrative Law Review (1999), p. 533.

in their demoralization. However, honest employees could complain to the Central Vigilance Commission and their names had to be kept confidential. Shri. Vittal, in the said letter, stressed the need of a statute regarding whistle blowing (meaning thereby disclosure of a conduct adverse to the public interest) that might go a long way in strengthening the fight against corruption in the country. He found support for such a law in whistle blowing legislations already in operation in UK , US and Australia.

The Law Commission took cognizance of this communication of the Central Vigilance Commission and initiated a study on the subject.

Scope of the Report:

The Commission proposes to refer, in this Report, to the evil of corruption among public servants and maladministration and the adverse effects thereof to the country, then to the options available for eradication of corruption, the right to freedom of expression and the right to know and the limitations of the right to privacy, then to the protection afforded to whistle blowers in various countries by the judiciary and in particular by the English Courts, the European Court and by the American Courts. The Commission also proposes to survey the salient features of various laws protecting

whistle blowers in UK, Australia, New Zealand and USA. Thereafter, The Commission will refer to the proposals for a Bill on the subject in India.

While in the United States of America, the federal statute which protects whistleblowers is called the Whistleblower 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 USA enabling employees 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. Express provisions of the enactments protect the complainants from reprisals by those against whom complaints are made. A Bill on similar lines is appended to this Report.

CHAPTER II

2. Phenomenon of Corruption: Causes and effects

Corruption is a common phenomenon in several countries, only the degrees of corruption differ. It is not as if there is corruption only in developing or poorer countries. There is corruption in developed countries too. In the last five years, leading politicians in U.K., Belgium, France, Spain and Italy have been convicted of corruption and in fact, the entire European Commission resigned because of it.

(a) Supreme Court's views on Corruption:-

Corruption in our country has a historical perspective of its own. As pointed recently by the Supreme Court, State of M.P. vs. Ram Singh 2000 (5)SCC 88 “the menace of corruption was found to have enormously increased by the First and Second World War conditions. Corruption, at the initial stages, was considered to be confined to the bureaucracy, which had the opportunities to deal with a variety of State largesse in the form of contracts, licences and grants. Even after the war, the opportunities for corruption continued as large amounts of government surplus stores were required to be disposed of by public servants. As a consequence of the wars, the shortage of various goods necessitated the imposition of controls and extensive schemes of post-war reconstruction involving the disbursement of

huge sums of money which lay in the control of the public servants, giving them a wide discretion, with the result of luring them to the glittering shine of wealth and property”. The Court observed that “in order to consolidate and amend the laws relating to prevention of corruption and matters connected thereto, the Prevention of Corruption Act, 1947 was enacted which was amended from time to time. In the year 1988 a new Act on the subject, being Act 49 of 1988, was enacted with the object of dealing with the circumstances, contingencies and shortcomings which were noticed in the working and implementation of the 1947 Act.” In the same case, the Supreme Court further observed :

“Corruption is termed as a plague which is not only contagious but if not controlled, spreads like a fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti people, but aimed and targeted against them. It affects the economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence – shaking the socio-

economic-political system in an otherwise healthy, wealthy, effective and vibrant society”.

(b) **Meaning of the word ‘Corruption’:-**

There is no universal definition of what constitutes a corrupt behaviour. The definition of corruption and corrupt practices varies from country to country. The World Bank and other multilateral institutions refer to it as “the abuse of public office for private gain¹. It involves the seeking or extracting of promise or receipt of a gift or any other advantage by a public servant in consideration of the performance or omission of an act, in violation of the duties required of the office. Mark Philip, a political scientist, identified three broad definitions of corruption, viz., public office centered, public interest centered and market centered.²

- i) The public office centered corruption is defined as a behaviour that digresses from the formal public duties of an official for reasons of private benefit. J.S.Nye provides an example of a public office-centered definition:

Corruption is behaviour, which deviates from the formal duties of a public role because of private regarding (personal, close family, private clique) pecuniary status gains; or violates rules against the exercise of

¹ Published by Transparency International World Bank in Financial Times September 16, 1997.

² Mark Philip, “Defining Political Corruption” political studies, Vol.45 No.3, special issue 1997.

1. Published by Transparency International World Bank in Financial Times September 16, 1997.
2. Mark Philip, "Defining Political Corruption" political studies, Vol.45 No.3, special issue 1997.

certain types of private regarding influence. This includes such behavior as bribery (use of reward to pervert the judgment of a person of in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses).³

ii) The public office interest centered corruption focuses on behaviour which has a negative impact on the welfare of the public. Such a behaviour, in the words of Carl Friedrich, is said to exist "whenever a power holder, who is charged with doing certain things is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides for the rewards and thereby does damage to the public and its interest."⁴

iii) The market centered corruption points towards utilizing an economic methodology by individuals or groups to gain influence over the actions of the bureaucracy. Accordingly, for a civil servant who regards his office as a business, the office becomes the maximizing unit.⁵

³ J.S. Nye, Political Corruption: a Cost Benefit analysis in A.J. Heidenheimer, M. Johnston and V.le Vine(ed.), Political: A hand book, 1989 P.966 as refered in "The Asia Foundation Working Paper Series,1998 P.10

⁴ See id at page 10.

⁵ Naphaniel Leff, "Economic Development through Corruption" in Heidenheimer, *id* at 389.

3. J.S Nye, Political Corruption: A Cost Benefit analysis in A.J. Heidenheimer, M.Johnston and V. le Vine (ed.), Political: A hand book, 1989 p. 966 as referred in “ The Asia Foundation Working Paper Series, 1998, P. 10”
4. See id at page 10
5. Naphaniel Leff, “ Economic Development through Corruption” in Heidenheimer, id at 389.

These three types of definitions have been used as a basis for analyzing political corruption in Heidenheimer’s *Political Corruption* (1970). But the most functional definition adopted by various international organizations such as Transparency International and Asian Development Bank is the “misuse of public office for private profit or political gain” because, by and large, it covers all types of corruption/corrupt practices and abuses of public office. To combat corruption, the World Bank has identified specific abuses of public office for private gains, which are as follows:

“Public office is abused for private gain when an official accepts, solicits or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets or the *diversion of state revenues*.⁶”

6. World Bank, Helping countries combat corruption: the role of World Bank 1977. Italics supplied.

⁶ World Bank, Helping countries combat corruption: the role of World Bank 1997. Italics supplied

Syed Hussein Alatas has, while defining the term corruption “as the abuse of trust in the interest of private gain”, identified transactive and extortive corruption, the former being an agreement between a donor and recipient pursued by them for mutual benefit and the latter entailing some form of coercion to avoid the infliction of harm on the donor. He also identified other kinds of corruption, e.g., investive corruption involving the offer of benefit without an immediate link but in anticipation of a future gain in which favour may be required; nepotic corruption concerning favour to friends and relatives in appointment to public office; autogenic corruption taking place when a single individual earns profit from inside knowledge of a policy outcome; and supportive corruption referring to the protection or strengthening of existing corruption often through the use of intrigue or violence.⁷

The definitions, enumerations and discussions of various types/forms of corruption focus essentially on behaviour of officials in the public sector who unlawfully or improperly enrich themselves by the misuse of public power entrusted to them.

7. Syed Hussein Alatas, Corruption: Its Nature, Causes and Consequences. Aldershot; Brookfield, Vt., USA Avebury, 1990 pp 3-4.

⁷ Syed Hussein Alatas, Corruption : its Nature, Causes and Consequences. Aldershot; Brookfield, Vt., USA Avebury, 1990 pp.3-4.

(c) **Causes of corruption:-**

There are many causes of corruption at both institutional and individual levels. Experts of different specialities have highlighted various factors, e.g., decline in religious beliefs or in public morality, uncertainty in the standards of appropriate behaviour, divergence between the formal and informal rules governing behaviours in the public sector, value conflicts in the post colonial settings where the standards and practices embedded within traditional relationship differ from the institutions left behind by the departing colonial power.

Robert Klitgaard, a political scientist, has conceptualized the opportunity for corruption within an institution in the following formula–

$$\text{Corruption} = (\text{Monopoly}) + (\text{Discretion}) - \text{Accountability}$$

According to him –

“The opportunity for corruption is a function of the size of the rents under a public official’s control (M), the discretion that official has in allocating those rents (D), and the accountability that these official faces for his or her decisions.”⁸

The empirical research done by Daniel Kaufmann and Jeffrey Sachs suggests that there is a complex set of the determinants of corruption, e.g., poor institutions (including the rule of law and safeguards for the rights of property), civil liberties, governance (including the level of

⁸ Robert Klitgaard, Controlling Corruption Berkeley; University of California Prss, 1988, page 75.

professionalization of the administrative service) and economic policies as also characteristics like the size of the country which seem to play an enabling role for corruption.⁹ Along these lines, the World Bank points out both institutional and economic policy factors which generate a nourishing

8. Robert Klitgaard, *Controlling Corruption* Berkeley; University of California Press, 1988, page 75.

9. See Asia Foundation Working Paper series on Corruption prepared by Amanda L. Morgan, Consultant Asia Foundation page 50.

environment for corruption. In its report of 1997, it states that corruption thrives :

where distortions in the policy and regulatory regime provide scope for it and where institutions of restraint are weak. The problem of corruption lies at the intersection of the public and the private sectors. It is a two-way street. Private interests, domestic and external, wield their influence through illegal means to take advantage of opportunities for corruption and rent seeking, and public institutions succumb to these and other sources of corruption in the absence of credible restraint.

Thus opportunities for corrupt behaviour develop –

- (i) whenever public functionaries have large discretion in exercising the powers and little accountability for their actions taken therefor;
- (ii) whenever government policies leave some gap, then these gaps create opportunities for middlemen or the actors of corruption;

⁹ See Asia Foundation Working Paper series on Corruption prepared by Amanda L. Morgan, Consultant Asia Foundation page 50.

- (iii) such opportunities also develop because of prevalence of administrative secrecy which encourages corruption and lobbying and insularity from democratic control.

Hence such root causes of corruption and also other causes which give rise to corruption have to be properly understood.

(d) **Effects of corruption:-**

It is an established fact that corruption or corrupt practices have detrimental or corrosive effects especially in developing countries. However, a debate on the effect of corruption on economic development went on for long. One view is that corruption may not be incompatible with development and at times may even encourage it by serving as an effective method of cutting the red tape and clearing projects for development. A bribe can be regarded as a market payment to ensure that resources are allocated to those persons who are most likely to use them efficiently.

The other view maintains that corruption detracts from development because of its undermining competitive processes, focusing on short term profits in place of sustainable and broad based development. Further, as Gunnar Myrdal pleaded, corruption creates incentives for officials to erect

additional bureaucratic obstacles with a view to increasing opportunities for more bribes.¹⁰

In the opinion of the World Bank, the arguments favouring corruption fail to account for any objective other than short term efficiency. Gunnar Myrdal also said :

“In the long run, expectations of bribery may distort the number and types of contracts placed for bidding, the method used to award contracts, and the speed or efficiency with which public officials do their work in the absence of bribes. It may also delay macroeconomic policy reform. In addition, the gains from such bribery may be inequitably distributed (accessible only to certain firms and public officials).¹¹

In the view of World Bank, the effect of bribery in the system as a whole is negative. It can delay reform by diffusing pressure and lead to detrimental evasion of good regulations. Secondly, small firms and poor segments of the society may disproportionately bear the burden of a dysfunctional system having the undesired effect of pushing business into the informal economy.

Moreover, corruption may lead to the divergence of funds from their intended targets and to the financing of unproductive public expenditure. It may result in loss of tax revenue in the form of tax evasion or improper use

10. Gunnar Myrdal, *Asian Drama: an inquiry into the Poverty of Nations*, Vol. II, New York Pantheon, 1969.

¹⁰ Gunnar Myrdal, *Asian Drama: an inquiry into the Poverty of Nations*, Vol.II, New York Pantheon, 1969.

¹¹ World Bank *Helping countries combat Corruption* 1997 p.14.

11. World bank Helping countries combat Corruption 1997, p.14.

of discretionary tax exemption. It may also affect allocation of public procurement contracts leading to inferior public infrastructure and services.

The composition of Government expenditure may also be affected by corruption in that corrupt officials may favour expenditures on goods and projects tantamount to maximizing opportunity for their personal benefits.

Thus, it is clear that corruption exacts heavy economic costs, distorts the operation of free markets and slows down economic development.

Besides economic consequences, the rampant corruption tends to undermine the legitimacy of state institutions and governments. When a public official pursues his own interest without regard to the interest attached to his public function, the balance of authority both among government entities and between the State and the civil society is effectively damaged. If the general population assumes that public officials are not bound by the restraints of their public functions, it will be less likely to obey the laws of the society. In such a situation, there is a need to combat corruption effectively because it is one of the root causes of destabilizing the rule of law.

Corruption also casts a negative influence on the efforts to deal with the incidence of poverty. It has become a mechanism by which a neo-nich class has been developed in many developing countries. It can affect morals

by the `perversion' or `destruction' of integrity in the discharge of public duties by bribery or favour or the use or existence of corrupt practices. Thus it destroys the ability of institutions and bureaucracies to deliver services that society may expect thereby posing a serious threat to the democratic institutions and the very existence of social order. Corruption in defence purchase and contracts tends to undermine the very security of the State.

Late Mehabub-ul-Haq, the famous economist spoke of two dimensions of corruption. One is the exploitative corruption where the public servant exploits the helpless poor citizen. The other is collusive corruption where the citizen corrupts the public servant by a bribe because he gets financially and beneficially, better benefits. Collusive corruption depends on black money. He pointed out four key characteristics that make corruption more damaging in South Asian countries than in any other parts of the world:

“First, corruption in South Asia occurs up-stream, not down-stream.

Corruption at the top distorts fundamental decisions about development priorities, policies and projects. In industrial countries, these core decisions are taken through transparent competition and on merit, even though petty corruption may occur down-stream.

Second, corruption money in South Asia has wings, not wheels. Most of the corrupt gains made in the region are immediately smuggled out

to safe havens abroad. Whereas there is some capital flight in other countries as well, a greater proportion goes into investment. In other words, it is more likely that corruption money in the North Asia is used to finance business than to fill foreign accounts.

Third, corruption in South Asia often leads to promotion, not prison. The big fish – unless they belong to the opposition – rarely fry. In contrast, industrialized countries often have a process of accountability where even top leaders are investigated and prosecuted. For instance, former Italian Prime Minister Bettino Craxi forced to live in exile in Tunisia to escape extradition on corruption charges in Rome. The most frustrating aspect of corruption in South Asia is that the corrupt are often too powerful to go through such an honest process of accountability.

Fourth, corruption in South Asia occurs with 515 million people in poverty, not with per capita incomes above twenty thousand dollars. While corruption in rich rapidly growing Countries may be tolerable, though responsible, in poverty stricken South Asia, it is political dynamite when the majority of the population cannot, but to massive human deprivation and even more extreme income meet their basic needs while a few make fortunes through corruption. Thus corruption

in South Asia does not lead to simply Cabinet portfolio shifts or newspaper headlines inequalities. Combating corruption in the region is not just about punishing corrupt politicians and bureaucrats but about saving human lives. There are two dimensions of corruption. One is the exploitative corruption where the public servant exploits the helpless poor citizen. The other is collusive corruption where the citizen corrupts the public servant by a bribe because he gets financially better benefits. Collusive corruption depends on black money.”

(e) **Transparency International and Corruption Perception Index**

The Transparency International is an international body founded in 1993 and publishes Global Corruption Reports annually. It also publishes a Corruption Perception Index (CPI). The Index refers to the rankings of various countries from the least corrupt to the most corrupt.

The latest report is of 2001 and it refers to serious cases of corruption in several countries in the world, including India. It also refers to steps taken in various countries to eradicate corruption and

the obstacles that legislations face in relation to challenge to their validity and also challenges to the implementation of the legislation. The Report further refers to the judgment of the Kenyan High Court of December, 2000, declaring the Kenya Anti Corruption Authority as an unconstitutional body. In South Africa, the head of the Special Investigating Unit who is mandated to probe corruption, was excluded by a Constitutional Commission from taking part in a high profile investigation. Reference is also made in the Report to the OECD Anti-Bribery Convention, 1999. The United Nations is yet to formulate a Convention against Bribery.

It is significant that the Transparency International also publishes a 'Bribe Payer's Index' (BPI). Eleven International Banks have evolved a 'Know Your Customer' principles, which are called the 'Wolfberg Principles'.

The Corruption Perception Index (CPI) was first published by the Transparency International in 1995. The Index for the year 2001 is based on several surveys conducted in various countries. It is however unfortunate that the CPI focuses only on corruption among public officials 'but not upon secret payments to

finance political campaigns, the complicity of banks in money laundering or bribery by multinationals’.

In a list of 91 countries for the year 2001, India stands set at No. 71 with a score of 2.7 out of 10. There are, no doubt, 20 other countries where corruption is higher and those countries are listed between No. 71 to No. 91. In that list come the following countries, namely, Vietnam, Zambia, Nicaragua, Equador, Pakistan, Russia, Tanzania, Bolivia, Cameroon, Kenya, Indonesia, Uganda, and Nigeria and Bangladesh comes last at No. 91. Among the least corrupt countries from are Finland, Denmark, New Zealand, Iceland, Singapore, Sweden, Canada, Netherlands, etc. (which lie between 9.9 and 8.8), UK stands at No. 13 and USA at No. 16 with 8.3 and 7.6 points respectively. Germany is at No. 20 with 7.4 points, and Japan is at No. 21 with 7.1 points.

CHAPTER III

ERADICATION OF CORRUPTION AND WHISTLE BLOWING

In this Chapter, we shall deal with methods of punishing corrupt public servants and the means available for obtaining information regarding corruption and the need for whistle blowers.

(A) **Methods employed for taking action against corrupt public servants:**

(a) **Departmental action**

One of the methods for arresting corruption is by way of initiation of departmental proceedings under the disciplinary rules. There are rules made by the Central Government as well as State Governments and Public Sector Undertakings to conduct preliminary enquiries and then if a prima facie case is made out, to frame charges and to conduct a regular enquiry observing principles of natural justice and then to pass orders of punishments including dismissal, removal, compulsory retirement and so on.

(b) **Criminal Prosecution under the Prevention of Corruption Act, 1988 read with relevant provisions of the Indian Penal Code, 1860**

Apart from departmental action, the other method is for the employer to take action against the public servant under the provisions of the Prevention of Corruption Act, 1988 read with relevant provisions of the Indian Penal Code (Act 45 of 1860). The Prevention of Corruption Act contains elaborate procedure for prosecution of corrupt public servants.

(c) **Confiscation of properties illegally acquired by corrupt means:**

The Law Commission in its 167th Report suggested enactment of a law for forfeiture of property of Corrupt Public Servants and a

Bill titled ‘The Corrupt Public Servants (Forfeiture of Property)’ is annexed with the report. The report is pending consideration by the Government from Feb. 1999. Sub-section (1) of the relevant provision states that as from the date of the commencement of the Act, it shall not be lawful for any person to whom the Act applied, to hold any illegally acquired property either by himself or through any other person on his behalf. The relevant provision of the Bill further provides as follows:

“where any person holds any illegally acquired property in contravention of the provisions of sub-section (1), such property shall be liable to be forfeited to the Central Government in accordance with the provisions of the Act”.

The provisions of the proposed Act regarding confiscation are in addition to the provision relating to conviction for a minimum period of seven years, which may extend upto fourteen years. The provisions of the proposed Act apply not only to the public servant but also to every person who is a “relative” of the public servant or an “associate” of such person or the holder of any property which was at any time previously held by the public servant, unless such holder proves that he was a transferee in good faith for adequate

consideration. The provisions also apply to any person who has deposited any amount or other moveable properties in any bank or any other concern outside the territory of India, or has acquired any properties outside the territory of India without the requisite permission of the appropriate authority. The proposed Act also contains the definition of 'relative' referring to various relations of the public servant and also a definition of 'associate' referring to various types of persons associated with the public servant.

The Bill making the above provisions has not yet become law. Once it becomes law, there is no doubt, it will substantially put an end to corruption.

(d) Benami Transactions (Prohibition) Act, 1988 and acquisition of held benami properties:-

The Act was the result of the 57th report and the 130th report of the Law Commission and precludes the person who acquired the property in the name of another person from claiming it as his own. Section 3 of the Act prohibits 'Benami transactions' while section 4 prohibits the acquirer from recovering the property from the benamidar.

Section 5 of the Act is important and permits acquisition of property held benami. It states;

“(1) All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed.

(2)For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1)”.

Unfortunately, in the last more than 13 years, rules have not been prescribed by the government for the purposes of sub-section (1) of section, 5 and the result is that it has not been possible for the government to confiscate properties acquired by the real owner in the name of his benamidars.

(e) **Public Interest Litigation; judiciary enforcing rule of law**

“Vineet Narain” cases :-

One of the methods by which inaction or delay on the part of the concerned departments or police agencies is sought to be remedied is by resorting to public interest litigation in the High Courts or in the Supreme Court. . The scope of such public interest cases has been laid down by the Supreme court of India in a series of cases, entitled Vineet Narain vs. Union

of India :- 1996 (2) Scale (SP) 42, 1996 (2) SCC 199, 1997(4) SCC. 778, 1998(1) SCC 226, 1998 (8) SCC. 661.

In these judgments, the Supreme Court has directed the Central Bureau of Investigation and the Revenue authorities to fairly and properly conduct and complete the investigation expeditiously against every person involved, irrespective of position and status. The Supreme Court observed that it is the bounden duty of the judiciary to enforce the rule of law and to see that investigation into corruption “is conducted in accordance with law and is not scuttled by anybody”. (see **1998 (1) SCC 226**)

The Court observed:-

“the holders of public offices are entrusted with certain powers to be exercised in public interest alone and, therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima-facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated.

It is the duty of the judiciary to enforce the rule of law and, therefore, to guard against erosion of the rule of law”.

Adverting to exposure of corruption by the media and public interest litigation, the court observed:-

“The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effect on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to under developed countries may be subject to the requisite steps being taken to eradicate corruption, which prevents International aid from reaching those for whom it is meant. Increasing corruption has lead to investigative journalism which is of value to a free society. The need to highlight corruption in public life through the medium of public interest litigation invoking judicial review may be frequent in India but is not unknown in other countries”.

(e) **The Lok Pal Bill, 2001.**

One other law which has been envisaged over a long period for eradication of corruption is the ‘Lok Pal and Lok Ayukt Bill’. The first draft of the Bill was prepared by the

Morarji Desai Committee in 1968, the Bill was introduced in Parliament but was not passed on account of the dissolution of the then Lok Sabha. Thereafter, we have had number of draft Bills in the last 32 years namely in 1971, 1977, 1983, 1989, 1996, 1998, 2000 and the latest in the year 2001. We shall revert back to these bills in Chapter 7.

(B) Gathering information about corrupt public servants – existing procedures:

Detection of corruption is obviously linked up with the evidence that can be gathered about the conduct of the person or body indulging in corrupt activities.

Existing procedures today include **(a)** direct evidence of corruption **(b)** laying traps, **(c)** search and seizure operations and **(d)** proving that assets are owned or possessed by the public servant disproportionate to his known sources of income.

If there is direct evidence of one's corruption, there is no difficulty in arriving at a finding of corruption. In other cases where a public servant has a reputation of dishonesty, the bribe giver informs the police in advance, currency notes which are chemically treated are handed over to the public

servant by the bribe giver and almost immediately the police land at the place and recover the currency notes from the public servant. This is the trap procedure. One other method that is followed is to conduct a search and seizure operation after obtaining necessary orders from a Magistrate and seize the money, jewellery or documents showing acquisition of property illegally. There are provisions in the Income Tax Act, 1961 and other statutes for conducting such operations. Yet another method is by finding out whether the assets owned or in the possession of the public servant are grossly disproportionate to his known sources of income thereby raising a presumption that the assets must have been acquired out of corruption.

(C) Whistleblowers:

Whistleblowers can also play a very important role in providing information about corruption and mal-administration. Public servants working in the same department know better as to who is corrupt in their department but unfortunately, they are not bold enough to convey the said information to higher authorities for fear of reprisals by those against whom complaints are made. If adequate statutory protection is granted, there can be no doubt, that the government will be able to get more information regarding corruption and mal-administration. Such provisions exist in England, Australia, New Zealand and in the United States of America.

Good faith whistle blowers represent the highest ideals of public service and challenge abuses of power. They test loyalty with the highest moral principles but place the country above loyalties to persons, parties or Governments. There is a close connection between whistle blower's protection and the right of employees to disclose corruption or maladministration. Protection of whistleblowing vindicates important interests supporting the enforcement of criminal and civil laws. This aspect may be called the 'rule of law' concept implied in whistle blowing. Again, whistle blowing can be seen as supporting public interests by encouraging disclosure of certain types of information. This aspect may be called the 'public information' or 'public interest' concept implied in whistle blowing. Further, whistle blowing challenges institutional authority, prerogative and discretion. It also enables and protects employee participation in the decision making process of public institutions. This aspect may be called 'institutional' or the 'democratic reform' concept implied in whistle blowing laws. Protection of whistle blowers can however be seen as creating a number of risks, such as disruption of the work place, rending of employment relationship, possibility of blackmail and harassment, etc. (see 'State Whistleblower Statutes and the Future of Whistleblower Protection')

by Robert G. Vaughn in vol. 51, 1999, Administrative Law Review, Washington College of Law, p. 581).

In England, in the Report of the Nolan Committee on “Standards of Public Life”, the importance and the need for ‘whistle blowers’ has been dealt with in detail. In Para 112 of the Report, it is stated as follows:

“Whistle Blowing:

112. One of the conditions which can lead to an environment in which fraud and malpractice can occur according to the Metropolitan Police, is the absence of a mechanism by which concerns can be brought to light without jeopardizing the informant. The Audit Commission figures (see table 3) show that information from staff is a major contribution to the detection of fraud and corruption in the National Health Service (NHS). Concerned staff were instrumental in uncovering serious irregularities at two colleges of “Further Education”. As Public Concern at Work (PCAW), a leading charity in this field, told us in their submission, “if there is a breach of the standards appropriate to a public body, it is likely that the first people to suspect it will be the staff who work there”.

Table 3: Method of detection of proven fraud and corruption in the NHS, over three years to 1994.

(i)	<u>Information from staff:</u>	22%
(2)	Information from patients	09%
(3)	Accidental:	08%
(4)	Internal Contacts:	22%
(5)	Internal Audit	18%
(6)	External Audit	10%
(7)	Others	11%

(Source: Audit Commission, 1994)

113. However, it seems that staff concerns come to light despite rather than because of the system. We are not aware of any central guidance for executive NDPBs and whilst the NHS have issued comprehensive central guidance, the Audit Commission's 1994 Report found that none of the 17 NHS bodies they visited had a well-publicised system which informs staff whom they should contact if they suspect fraud or corruption".

Adverting to 'gagging clauses' in public employees contracts of employment, the Committee observed that there is 'public concern' about such clauses. While a loyal employee has concerns about impropriety, making public allegations in the media is unlikely to be the first recourse. However, without some way of voicing concern, and without some confidence that it will be taken seriously and dealt with if necessary, they may feel they have no other option. The Committee agreed with the sentiments expressed by Robert Sheldon MP, (Chairman of the Public

Accounts Committee) that “public money must never be allowed to have silence clauses”.

On the other hand, the Committee also made it clear that they do not wish to encourage vexatious or irresponsible complaints which undermine public confidence in institutions, without due cause. It believed that the best way to achieve the balance was to develop sound internal procedures backed by an external review.

The Audit Commission in UK interviewed the staff of the NHS and found that about one third of the NHS staff would take no action in the face of impropriety because of fears of losing their jobs if they “rock the boat”. The Nolan Committee recommended nomination of an officer or member to receive complaints and the complainant should be guaranteed ‘anonymity’. (HMSO 1995 cm 2850 I-II).

In its second Report on “Standards of Public Life” (cmd. 3270 I, 21) (May 1996) dealing with other areas including Education, the Nolan Committee stated that there must be an internal mechanism which will dissuade employees disclosing fraud or corruption to the media. It said:

“Encouraging a culture of openness within an organization will help - prevention is better than cure ... placing staff in a position where they

feel driven to approach the media to ventilate concerns is unsatisfactory both for the staff members and the organization”.

The recommendations of the Nolan Committee were accepted by the British Government (see the Government’s Response to the First Report of the Committee on “Standards in Public Life”, 1995, HMSO, 2931). Recommendation 23 of the Committee that the ‘draft Civil Service Code’ should be revised and recommendation 25 that departments and agencies should nominate one or more officials entrusted with the duty of investigating Staff concerns raised confidentially, were accepted with slight modification. Similarly, the recommendation 53 was also accepted. The New Service Code was shown in Annexure B and para 11, 12 thereof deal with reporting procedure. Annexure C contains the Draft Amendment to the Civil Service Management Code to enable employees to complain and for their protection.

The above Report and its acceptance by the Government led to the passing of the UK Public Interest Disclosure Act, 1998.

In the United States, the Whistleblowers Protection Act, 1989 states in the opening section (section 2) that Congress has found that federal employees who make disclosures serve public interest by assisting the elimination of fraud, waste, abuse and unnecessary government expenditures

and that it is necessary to protect the employees who disclose to the government illegality and corruption, and one of the purposes of the Act is to strengthen and improve protection for the rights of the federal employees, to prevent reprisals and to help eliminate wrong doing within the government by mandating that employees should not suffer adverse consequences as a result of prohibited 'personnel practices' and that it is necessary to establish that the primary role of the 'Office of Special Counsel' is to protect employees, especially whistleblowers, from prohibited 'personnel practices'. The Section further directs that the said Special Counsel acts in the interests of employee who seeks his assistance, to discipline those who commit prohibited 'personnel practices' and to protect those who are subjected to such practices.

In Australia, the Fitzgerald's Report and the Gibbs Committee Report led to the passing of the Public Interest Disclosure Protection Act, 1994, and its objects are similar.

New Zealand has also passed a statute recently called 'The Protected Disclosure Act, 2000'.

The provisions of the above said enactments will be discussed in greater detail in Chapter VI.

CHAPTER IV

Freedom of Speech, Right to Know and Right to Privacy:

Before discussing the proposals for a Bill enabling public servants to provide information about corruption or mal-administration in their department, it is necessary to refer to the Constitutional provisions relating to Freedom of Speech, Right to Know and the Right to Privacy.

Freedom of speech and expression is guaranteed by sub clause (a) of Article 19(1) of the Constitution of India. This right is, however, subject to Article 19(2) which permits law to be made for the purpose of imposing reasonable restrictions in the interests of the sovereignty and integrity of India, the security of State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

In this context, we may point out that Art. 19 (a) of the Universal Declaration of Human Rights and Art. 19 (2) of the Covenant on Civil and Political Rights and Art. 10 of the European Convention on Human Rights and Fundamental Freedoms expressly refer to the:

“freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”

and this right is, however, subject to restrictions that may be imposed by law, (a) for respecting the rights or reputations of others or (b) for the protection of national security or of public order or of public health and morals.

The First Amendment to the American Constitution also refers to the Right of Free Speech. The American Supreme Court has held in one of the most celebrated judgments in New York Times vs. Sullivan, (1964) 376 US 254 that the ‘central meaning’ of the First Amendment was the:

“profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public servants” .

The above case involved the right of the public official to seek damages for libel and the court held:

“The constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless regard of whether it was false or not”.

The word 'Public official' would include an elected representative, an appointed official and all governmental employees, even those located near the bottom of any organization provided they are government officials 'who have or appear to have substantial responsibility or control over the conduct of governmental affairs'. (Rosenblatt vs. Baer, (1966), 383 US 75). In principle, not every person in government is a 'public official'. His position must be one which could invite the public scrutiny and discussion occasioned by the particular charges in controversy. Again, in relation to what is 'official conduct' of the public servant, the law has been laid down expansively. In Garrison vs. Louisiana (1964) 379 US 64, the Supreme Court held that allegations of 'laziness, inefficiency and obstruction directed against local criminal court judges were relevant to official conduct of such judges'. Allegations could be 'anything which might touch on an official's fitness for office' and they would be relevant.

Our Supreme Court had occasion to deal with the exposure of the conduct of government through the media or otherwise. In one of the earliest cases in S. Rangarajan vs. P. Jagjivan Ram, 1989 (2) SCC 574, the Supreme Court held that criticism of government policies was not prohibited though there should be a proper balance between freedom of expression and social interests. But courts cannot simply balance the two interests as if they

are of equal weight. The court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest will be endangered. The anticipated damage should not be remote, or conjectural or farfetched. It should have proximate and have a direct nexus with the expression.

In Life Insurance Corporation vs. Manubhai D. Shah, (1992) 3 SCC 637, the Supreme Court held that there is nothing wrong in requesting the publication of the respondent's rejoinder in the Life Insurance Corporation's (LIC's) inhouse journal though the rejoinder referred to the discriminatory practices of the Corporation which were adversely affecting the interests of a large of number of policy holders. This was because; the statute required the Corporation to function in the best interests of the community. The Court observed that the 'community is, therefore, entitled to know whether or not this requirement of the statute is being satisfied in the functioning of the LIC. The LIC was bound to publish the rejoinder of the organization be it, in its inhouse journal, so that the readers who read the magazine obtained a complete picture of the corporation and not a one sided one. The LIC's refusal to publish the rejoinder was therefore violative of the right of the community to know the internal functioning of the Corporation.'

The legal foundation for exposure of corruption , misconduct or mal-administration by public servant was laid down by the Supreme Court in R. Rajagopal vs. State of Tamil Nadu, (1994) 6 SCC 632. The case involved the publication of serious misconduct of public servants by a convict who was serial-killer. The case squarely deals with the right to know and the limits of privacy of public servants. The Supreme Court referred to the judgments of the American Court in New York Times vs. Sullivan, already referred to and another judgment of the House of Lords in England reported in Derbyshire vs. Times Newspaper Ltd., 1993(2) WLR 449. The Supreme Court held that while decency and defamation were two of the grounds referred to in Clause (2) of Art. 19, still any publication against any person will not be objectionable if such publication was based on ‘public record’. In addition, in the case of ‘public official’, the right to privacy or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the public official establishes that the publication was made with reckless disregard for truth. In such a case, it would, however, be enough for the person who published the news to prove that he reacted after a reasonable verification of the facts. It is not necessary for

him to prove that what he has published is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, damages can be awarded. No doubt, in matters not relevant to his official duties, the public official enjoys the same protection in respect of his privacy as any other citizen (The judiciary and Parliament and legislatures are not subject to these principles and enjoy greater immunity). The above principle does not, however, mean that the press is not bound by the Official Secrets Act, 1923 or any similar enactment.

The above declaration of law by the Supreme Court is of fundamental importance on the subject of exposure of corrupt officials. If the law permits furnishing of information regarding corruption, past present or impending and gives protection to the informants from reprisals, unless the disclosure is proved to be malicious, such a law can play a very useful role.

Recently, the Supreme Court has traced the origins of the community's 'right to know' from his right to freedom of speech and expression. The Court observed in Dinesh Trivedi vs. Union of India, 1997 (4) SCC 306 that in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. To ensure that the continued

participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the government and the basis thereof. The Court was dealing with the Vohra Committee Report and stated that though it was not advisable to make public the basis on which certain conclusions were arrived at in that Report, the conclusion reached in that Report should be examined by a new body or institution or a special committee to be appointed by the President of India on the advice of the Prime Minister and after consideration with the Speaker of the Lok Sabha.

It is therefore clear that the Supreme Court has accepted that the right to know is part of the fundamental right of freedom of speech and expression guaranteed under Art. 19 (1) (a). Of course, it will be subject to the reasonable restrictions, as may be imposed by law under article 19 (2).

It is now recognized that while a public servant may be subject to a duty of confidentiality, this duty does not extend to remaining silent regarding corruption of other public servants. Society is entitled to know and public interest is better served more if corruption or maladministration is exposed. The Whistleblower laws are based upon this principle.

In the light of the above judgment of the American and English Courts and our Supreme Court, on the question as to the scope of 'free speech', the Commission is of the view that a statute enabling complaints to be made by

public servants, or persons or NGOs against other public servants and the grant of protection to such complainants is perfectly valid and will not offend the right to privacy emanating from sub-clause (a) of clause (1) of Art. 19. The right to privacy has to be adequately balanced against the right to know. Both these rights emanate from same sub-clause in Art. 19.

CHAPTER V

JUDICIAL PROTECTION TO WHISTLE BLOWERS IN U.K, EUROPEAN UNION AND USA

Before the legislature intervened and brought in statutory protection to whistle blowers, Courts in various countries evolved several principles to protect victimization of whistle blowers. We shall refer to some of the judgments of the English Courts, the European Court and the US Courts.

English Courts:

English Courts have consistently laid down in the last more than One hundred and fifty years that there is an exception to the general principle of confidence which an employee has to maintain vis-à-vis his employer, and the exception is that where he comes to know that certain actions of his employer are detrimental to public interest, he has a duty to disclose to the public and such disclosure can neither be prevented by his employer nor is it actionable.

Abundant case law was developed in UK long before Parliament stepped in and enacted the Public Interest Disclosure Protection Act, 1998 (For necessary case law, see “Whistle Blowers and Job Security” by David Lewis in 1995 Modern Law Review, pp. 208-221). We shall refer to the principles laid down by the English courts in leading cases.

In Gartside vs. Outram (1857) 26. L.J.Ch. (N.S) 113, a former employee informed the victims of a fraud giving details of the fraud carried out by his employer. The employer's application for an injunction to prevent further disclosures was refused. Wood VC observed as follows:

“The true doctrine is, that there is no confidence as to the disclosure of inequity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part”.

Explaining the above judgment, Lord Denning stated in Fraser vs Evans 1969 (1) QB 349 that the word “iniquity” here means “just cause or excuse for breaking the confidence”.

The public importance of uninhibited criticism of Government or public servants was recognized in England, as already stated, in Derbyshire vs. Times News Paper Ltd. 1993(2) WLR 449 as an important part of the democratic process. Similar principles were laid in Hector vs. A.G. of Antigua and Bermuda 1990(2) AC 312. The English Courts substantially applied the principles laid down by the US Supreme Court in New York Times vs. Sullivan, already referred to.

In England, whistle blowers in public as well as private sectors have been protected by the Courts.

On the question as to whether there is an obligation to report the misdemeanor of fellow workers to the employer, it was held, that this was dependent upon the individual contract and the circumstances. For example, in Sybron Corporation vs. Rochem Ltd. (1983) (IRLR 253) (CA), the Court of Appeal held that by virtue of his position as a senior executive in a multinational corporation, the employee had a duty to disclose the involvement of his colleagues in a serious fraud upon the employer, even if that required him to disclose his own misdeeds (see also 'Grassing on a Fellow Employee in (1994) New Law Journal 685).

In 1968, the courts refused an injunction to a company trying to prevent its former Sales Manager revealing the existence of a price fixing cartel. The Company had put out a misleading circular, falsely blaming high prices on the new selective employment tax, when in fact the increased prices would bring in substantial additional profits” (Initials Services Ltd. vs. Putterill, (1968) 1 QB. 396). Lord Denning said:

“It seems to me that if that circular was misleading then it is at least arguable that it was in the public interest that it should be made known. I do not think that an employer can say to a servant; “I know

we are issuing misleading circulars but you are to keep quiet about it, and if you disclose it, I shall sue you for damages”. The servant may well be justified in replying; “I cannot stand such conduct. I will leave and let the public know about it, so as to protect them”

According to Lord Denning an exception had to be made to the general principle of confidentiality of an employee where there is ‘any misconduct of such a nature that it ought in the public interest to be disclosed to others’

In Lion Laboratories Ltd. vs. Evans (1985) Q.B. 526, the Laboratories tried to prevent the Daily Express from publishing confidential documents of the Laboratory which manufactures Intoximeter breathalyzer. One showed that the head of the company’s calibration department seriously doubted whether the device complied with the Home Office’s requirements. It had reached the point where he was no longer prepared to continue to certify that they were accurate. The Court of Appeal refused the injunction sought by the Laboratories, finding that the disclosure was justified in the public interest to prevent the unjust conviction of motorists, and permit the vindication of those who might have been unjustly convicted.

In the famous Spycatcher No. 2, 1987 (3) WLR 776, the government argued that no government public interest defence could apply to members of the security service, in as much as they were under a life long and

absolute duty of confidentiality and that could, in no circumstances, be breached. The Law Lords accepted that the obligation was life long but that it was not absolute. Lord Greffiths stated that the public interest defence could, exceptionally, justify disclosing information. He observed:

“theoretically, if a member of the service discovered that some iniquitous course of action was being pursued that was clearly detrimental to our national interest, and he was unable to persuade any senior members of his service or any member of the establishment, or the police, to do anything about it, then he should be relieved of his duty of confidence so that he could alert his fellow citizens to the impending danger”.

The learned law Lord also observed:

“in certain circumstances, the public interest may be better served by a limited forum of publication perhaps to the police or some other authority who can follow a suspicion that wrong doing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry”.

In Francome v. Daily Mirror, 1984 (1) WLR 892, the Court of Appeal held that the Daily Mirror could not, however, publish confidential information which suggested that a jockey had been engaging in misconduct in as much as public interest would be equally served by a disclosure to the police or to the Jockey Club.

A disclosure is more likely to be reasonable if it is about an on-going or future threat. This is based upon the general principle related to law of confidence. (Weld Blundell v. Stephens, 1919 (1) KB 520: Malone v. Metropolitan Police, 1979 (2) WLR 700. Schering Chemicals v. Falkman, 1981 (2) WLR 848.

In W v Eggedell, 1990 (2) WLR 471, the Court of Appeal held that it was lawful for a consultant psychiatrist to disclose information about an in-patient to the medical director at the patient's hospital, where the consultant genuinely believed that a decision to release the patient was based on inadequate information and posed a real risk of danger to the public. However, the court held the sale of his story to the media would not have been justified, nor would an article in an academic journal, unless it had concealed the patient's identity. Where the disclosure breached a duty of confidence owed by an employer to a third party, in determining the reasonableness of the disclosure, it will be important to assess the affect of

the breach on the right of the party and, in particular, any unjustified damage it caused him.

But more recently, in Re a Company's Application (1989) (3) WLR 265, the High Court refused to grant an injunction preventing an employee in the financial service sector from disclosing confidential information about his company to a regulatory body, notwithstanding that the disclosure might be motivated by malice. Scott J. held that it was for the regulatory authorities to find out the truth. It was observed as follows:

“It may be the case the information proposed to be given, the allegations to be made by the defendant to FIMBRA and for that matter by the defendant to the Inland Revenue, are allegations made out of malice and based upon fiction or invention. But if that is so, then I ask myself what harm will be done. FIMBRA may decide that the allegations are not worth investigating. In that case, no harm will have been done. Or FIMBRA may decide that an investigation is necessary. In that case, if the allegations turn out to be baseless, nothing will follow from the investigation. And if the harm is caused by the investigation itself, it is a harm implicit in the regulatory rule of FIMBRA”.

In addition, in UK, it was held that a reprisal against a witness who has given evidence in legal proceedings may well amount to Contempt of Court (Att. General vs. Butterworth, 1963 (1), Q.B. 696 and Chapman vs. Honing 1963. 2. Q.B. 502).

Pressure exercised by an employer on a whistle blower may be regarded as breach of an implied term that 'employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously challenge the relationship of confidence and trust between employer and employee'. (Woods vs. W.M. Car Services Ltd., 1981, IRLR 347).

Regulation 12 of the Regulations for Management of Health and Safety at Work, 1992 (UK) permitted complaints by employees regarding dangerous working conditions to the employer first. In Harris vs. Silicon Timbers Finance Ltd. (15) case 59214/93, Mathew Harris' complaint to the company about the ill effects of Lindane, a wood preservative was in question. The employee was dismissed on account of the disclosure. He was awarded 8730 Pounds as damages for unfair dismissal.

Duties of confidence reposed in an employee in the public sector, it was held, can be treated as valid only if they do not conflict with public interest. A.G. vs. Jonathan Cape Ltd. 1976(1) AC 109. It was further held

that lack of public interest in the disclosure of information was a prerequisite for any duty of confidence.

It is for the Court to decide whether such disclosure was in public interest or not. British Steel vs. Granada Television 1981 AC 1097. In that case the Court ordered the return of confidential documents that would reveal the identity of the employee who had leaked them to Granada Television. The documents revealed mismanagement and Government intervention in a publicly owned company.

From the above judgments of the English courts, it is clear that even without a statute, the English courts granted protection to disclosures by an employee in regard to the action of his employer, which were detrimental to societal interests.

European Court and Commission:

The European court and Commission have also laid down similar principles such as those laid down by the English courts. Apart from that, they are governed by Art.10 of the European Convention on Human Rights and Fundamental Freedoms which guarantees a 'right to know'.

Before the UK Human Rights Act, 1998 came into force in England, (i.e. before 2/10/2000), in a case arising from England relief was granted by European Court in Goodwin vs. United Kingdom, 1996-II Rep. Judgments

and decisions 483 (1996). One Mr. Goodwin, a journalist proposed to publish information supplied by an informant about Titre Ltd., and the company obtained injunction. The trial Judge ordered Mr. Goodwin to reveal his source so that the company can take proceedings against the informant. He refused to do so and was fined 500 Pounds for contempt. This order was even upheld by the Court of Appeal and the House of Lords. However, the European Court held that the order breached Art. 10 of the European Convention, which refers to freedom of speech and expression. It held:

“if journalists could be compelled to reveal their resources, this would make it much more difficult for them to obtain information and as, a consequence, to inform the public about matters of public interest”.

So far as public sector employees in UK are concerned, the European Court held that there must be a proper balance between freedom of expression of the employee and the corresponding rights of the employer to expect loyalty and confidence from the employee. (see Handyside vs. UK) (1981. E.H. R.R. 737). This is because the freedom is not only a personal right but is meant to serve public interest. In another case, it was held that the electorate has a right to be sufficiently informed about irregularities or mal-administration. (Ticehurst vs. British Tele Communication plc 1992.

(IRLR 219) and Faccenda Chicken vs. Fowler 1986 LCR 291. The argument is strongest when applied to a public sector employer because the jobs there involve the carrying out of government policy. (see 1997 Public Law 594 by Lucy Vickers).

At one time, in 1985, in Van Der Heijden vs. The Netherlands, (1985) D&R.42, the European Commission on Human Rights acknowledged that dismissal consequent to the exercise of the right to free speech by a whistleblower was not liable to challenge.

But in 1995, the European Court took a contrary view in Vogt v. Germany: (1996) 21. E.H.R.R. 205. The case involved the dismissal of a teacher who was a member of an extremist political party. The court held that Art. 10 of the European Convention was breached. Vogt. was a member of staff at the time of her dismissal. (It was a judgment by 10 judges against 9) The dismissal was held not valid and the employee's freedom of expression was upheld.

But restrictions contained in a professional code of conduct governing medical staff were treated as valid being a rule 'prescribed by law'. Barthold v. Germany 1985 (7) EHRR 383.

In order for a restriction to be “necessary in a democratic society”, the restriction must be proportionate to the legitimate aim pursued. (Handyside vs. UK, 1981 EHRR 737). The court allows a ‘margin of appreciation’ to States in their application of Art. 10 of the European Convention, accepting that what is proportionate can vary according to different contexts and can depend upon the type and subject matter of the speech.

The Court will more readily conclude that the restriction on freedom of speech is invalid if it amounts to a total ban of free speech and where the penalty comprises of criminal sanction. (Lingens vs. Austria (1986) 8, EHRR 407. Thorgierason vs. Iceland: (1991) 14 EHRR 843 and Jacobowski vs. Germany: (1995) 14 EHRR 64.

An employee may contend that dismissal resulted in an effective ban on speech (though an ex-employee may still have a right to speak out) and the Court and Commission have further recognized that a threat of legal proceedings could also inhibit public debate: Lingens vs. Austria: 1986 8 EHRR 407.

In considering the proportionality of dismissal as a response to the exercise of freedom of speech, the following factors can be considered (Van Der Heijden vs. The Netherland (1985 D&R 42).

- (i) the nature of the applicant’s post

- (ii) the applicant's conduct in that post
 - (iii) the averments of the expression of the opinion, and
 - (iv) the nature of the options expressed.
- (i) As to (i), the nature of the post, a Judge and a teacher (who criticized provincial authorities and heads of the school) were said to have impliedly accepted restriction in their free speech (Morrisens vs. Belgium 1988 D&R 56 and B&K (1986) D&P 45 and Hasledine vs. UK 1992 DER 225).

In Vogt, (supra) the majority held that dismissal was a severe sanction as it had the effect preventing Mrs. Vogt from getting a job as a teacher elsewhere.

- (ii) As to (ii), the applicants' conduct in the post will also be relevant. The freedom to speak about workplace may be more restricted than a criticism of matters relating to funding for hospitals.
- (iii) As to (iii) , the circumstances of the speech, where the speech is on T.V., the Court may find that the restriction is appropriate. (Morrisens vs. Belgium) 1988 D&R 56. The Nolan Committee in UK has held that publicity through a private TV channel may not be objectionable in as much as in a democratic process, such publicity should not be restricted.
- (iv) In regard to (iv), the nature of the opinion expressed and the relevance of the type of speech or political debate is given greater protection by the

European Court. In Castells vs. Spain (1992) 14 EHRR 445, the Court pointed out that:

“in the democratic system, the actions or omissions of the government must be subject to the close scrutiny not only of legislature and judicial authorities, but also of the press and public opinion”.

(see also Schwabe vs. Austria (1993) 14 H&LJ 26 and Oberschlick vs. Austria (1991) 19 EHRR 389.

The European Court’s decisions thus have given greater protection to employees of public sector. (see in this connection ‘Whistle Blowing in the public Sector and the ECHR’ by Lucy Vickers (1997) Public Law, p.594).

The International Labour Organization Convention, 158 on Termination of Employment (see ILO, 68th Session 1982) is of potential value to whistle blowers. Art. 5 (c) thereof provided that the:

“filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulation or recourse to competent administrative authorities should not be regarded as a reason for dismissal.”

This Convention has not been ratified by UK but certain provisions in Employment Protection (Consolidation) Act recognize such a protection.

The USA:

The US courts also laid down the same principle that was laid down by the English courts and the European Courts but they based their decision on a principle of ‘public policy’.

In the United States, ‘whistle blowing’ is one of the public policy exceptions to the doctrine of employment-at-will. The employee who alleges wrongful discharge from service can bring an action against the employer to enforce public policy (Cummins vs. EG & G Seallol Inc. (1988) 690 F.2d. 134.

It is a feature of whistle blowing disputes in US that Government employees can comment on their employer and have free speech guaranteed under the First and Fourteenth Amendments.

Many major American companies have established formal Ombudsman systems. (see Brody, ‘Listen to your Whistle Blower’ (1986) Fortune, p.48) (See also Minding Your Business (London) by Winfield, 1990).

In the US, some cases even suggest that it would be contrary to public policy if an employee is sacked for refusing to obey breach of the professional code of ethics applicable to him. Pierce vs. Orth Pharmaceutical Corporation (1980) 84 N. J 58 = 417. A.2d 505).

The above decisions of the English Courts, the European Court and Commission and the US Courts amply protect the interest of the whistle blower on the ground of public interest and on the basis of the public policy. We shall however refer to the statutory provisions in UK, Australia, New Zealand and US separately in Chapter VI.

CHAPTER VI
STATUTORY PROTECTION TO WHISTLE BLOWERS
IN UK, AUSTRALIA, NEW ZEALAND AND USA

In this Chapter, we shall refer to the statutory provisions made in the following four countries, United Kingdom, Australia, New Zealand and the United States of America for protection of whistle blowers.

(A) United Kingdom:

(a) Rules or Codes before the the Public Interest Disclosure

Protection Act, 1998 came into force;

Initially, there were stray provisions or different rules or Codes giving protection to whistle blowers before the Public Interest Disclosure Act, 1998 came into force. We shall refer to them briefly.

The British Airways Code of Conduct tells a public servant that he must:

“be prepared to challenge if you believe that others are acting in an unethical way. Create the climate and opportunities for people to voice genuinely held concerns about behaviors or decisions that they perceived to be unprofessional or inappropriate”.

The Code further states as follows:

“do not tolerate any form of retribution against those who do speak up. Protect individual’s career and anonymity if necessary”.

But the above Code, rather contradicted itself in stating that these instructions may stand superseded by any other provisions of the Code relating to confidentiality.

So far as the Government is concerned, the Civil Service Management Code required civil servants, who believed that they were being asked to do something unlawful to report the matter to their senior officers and ‘if legal advice confirmed that the action would be likely to be held unlawful, the matter should be reported in writing to the Permanent Head of the Department’ (principle 4.1.3 of the Code).

The Code further stated that if a civil servant ‘considers that he or she is being asked to act in a manner which appears to him or her to be improper, unethical or in breach of constitutional conventions, or to involve possible misadministration, or to be otherwise inconsistent with standards of conduct prescribed in this memorandum and in the relevant civil service Codes and Guides, the matter should be reported to a senior officer and, if appropriate, to the Permanent Head of the Department’ (see Paras 11 and 12).

While the Local Government Management Board proposed similar guidelines, quite interestingly, para 72 the Purple Book prohibited officers from communicating to the public the proceedings of any Committee or the contents of any document.

The Audit Commission, in relation to the Local Authorities and the National Health Scheme stated as follows:

“any indication of fraud and the irregularities from whatever source should be followed up forthwith. In addition, the auditor should take note of any evidence..... which may indicate the possibilities of corrupt practices. Where necessary in public interest, any such evidence should be referred for further investigation by the appropriate authority”.

There are similar instructions in the Guidelines on Ethics for members of the Chartered Institute of Public Finance and Accountancy.

It was however unfortunate that nurses in the National Health Scheme were employed upon conditions which contained ‘gagging clauses’ and these clauses contradicted the 1993 Guidelines issued by the Department of Health. (see ‘Whistleblower and Job Security’ by David Lewis (1995) vol. 58, Modern Law Review, p. 208).

While the US Occupational Health Services Act, 1976 offered protection to employees who disclosed mal-administration, the UK Health Safety at Work Act, 1974 did not contain any such provision. However, in U.K. the Regulations 12 of the Management of Health and Safety at Work Regulations required employees to report to the 'employers' about safety measures at work places and the persons who so complained were protected from dismissal by Section 57 A (1) (c) and Section 22A (1) (c) of the Employment Protection (Consolidation) Act, 1978. Initially, there appeared to be no protection to trade union leaders who raised such complaints under the Trade Union and Labour Relation (Consolidation) Act, 1992. However such a protection has now been granted by an amendment of the above said Act and the amendment is contained in the UK Public Interest Disclosure Act, 1998.

The UK Sex Discrimination Act, 1975 and the UK Race Relations Act, 1976 contain provisions supporting whistle blowing. They further make it an offence to divulge information which has been disclosed by an informer if an investigation is being conducted by either the Equal Opportunity Commission or the Commission for Racial Equality. This protection somewhat got diluted by the decision of the Court of Appeal in Aziz vs. Trinity Taxis (1988), IRLR 206 holding that the employee against whom

action is taken by the employer for making the complaint, had to prove the causal link. Where, however, the employee has taken action under Section 57 of the Employment Protection (Consolidation) Act, 1978, alleging unfair dismissal, now the burden will on the employer.

(b) The UK Public Interest Disclosure Act, 1998:

The above Act is the outcome of the Nolan Committee Report, 1995, the White Paper on Freedom of Information ‘Your Right to Know’ (Cm 3818, Dec., 1997), the Modern Local Government (Cm. 4014, July, 1998) and the Freedom of Speech in National Health Services (letter of the Minister, 1997). The entire movement was spear-headed by ‘Public Concerns for Work’ consisting of Lord Borrie, Q.C., Right Honourable Lord Oliver of Aylmerton and Others. The Act took into account various disasters including the Bank of Credit and Commerce International collapse where the employee knew about mismanagement within the organization.

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

As already stated, the Act also amends the Trade Union and Labour Relations (Consolidation) Act, 1992. The provisions amended are Section 237 and the Order in Council applicable to Northern Ireland.

We shall briefly refer to the salient provisions of the 1998 Act. The Act aims at protecting whistle blowers from victimization and dismissal, where they have made complaints raising genuine concerns about a range of misconduct and malpractice (for a full summary see Halsbury's Statutes, 1999, vol. 1, p. 23 (1)).

The Act covers virtually all employees in the public, private and voluntaries sectors, and certain workers, including agencies, home workers, trainees, contractors, and all professionals in the National Health Service. The usual employment law restrictions on minimum qualifying period and age do not apply. The Act does not cover the army and the police.

The workers who blows the whistle will be protected if the disclosure is made in good faith and is about (i) a criminal act, (ii) a failure to comply with a legal obligation, (iii) a miscarriage of justice, (iv) a danger to health and safety, (v) any damage to the environment. Any attempt to cover up any of these could also be covered by the disclosure.

Under the scheme of the Act, there are three types of disclosure, 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 some one in a public body which is subject to appointment by Government (e.g. National Health Service or Quangos), blows the whistle to the sponsoring department.

A 'Regulatory Disclosure' is a disclosure made to a prescribed person. These persons to whom disclosure has to be made are likely to be regulators such as the Health and Safety Executive, the Inland Revenue and the Financial Services Authority. Such disclosures are protected where the whistle blowers pass the test for 'Internal disclosure' and where additionally, they honestly and reasonably believe that the information and allegations are substantially true.

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. The whistle blower must, however, meet other preconditions to win protection for this type of ‘Wider disclosure’. These are that (a) he reasonably believed that he would be victimized if he had raised the matter internally or with a prescribed regulator; (b) there was no prescribed regulator; and he reasonably believed that evidence was likely to be concealed or destroyed; or (c) the concern has already been raised with the employer or a prescribed regulator. These preconditions do not, however, apply if the malpractice is of an extremely serious nature.

In the case of all these three types of disclosures, if the above said conditions are met and the Employment Tribunal is satisfied that the disclosure is reasonable, the whistle blower will be protected. In deciding the reasonableness of the disclosure, the Tribunal will consider all the circumstances, including the identity of the person to whom it is made, the seriousness of the concern, whether the risk or danger remained, and whether the disclosure breached a duty of confidence which the employer owed a third party. Where the concern had been raised with the employer or the prescribed regulator, the Tribunal will consider the reasonableness of the response. Finally, if the concern had been raised with the employer, the

Tribunal will consider whether any whistle blowing procedure within the organization was or should have been used.

Full protection is given to the victim - whistleblower upon a claim made by the victim before the Employment Tribunal for compensation. Where the victimization falls short of dismissal, the Act provides that awards will be uncapped and based on losses. Where the whistle blower is an employee and has been sacked, he may, within seven days, seek 'interim relief' so that his employment continues or is deemed to continue, until the full hearing.

As to compensation for unfair dismissal or the termination of a workers contract, the position is that the Government promised to make a regulation under the Act, which will provide that the whistle blower will get compensation in a sum, which will be more than awards for normal unfair dismissal. The compensation is expected to be uncapped.

'Gagging clauses' in employment contract and several agreements are declared void under section 43J of the U.K. Employment Rights Act, 1996 in so far as they conflict with the provisions of the Act.

(c) The U K Official Secrets Act, 1989 and the U.K. Public interest

Disclosure Act, 1998:

Under Section 1 of the U.K. Public Interest Disclosure Act, 1998, as already stated, Part IV of the Employment Rights Act, 1996 has been amended and Sections 43C to 43H have been introduced into that Act. Section 43B refers to disclosure which qualified for protection called ‘qualifying disclosure’. It states that the disclosure of information which, in the reasonable belief of the worker, tends to show the following, will be protected, namely:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being, or is likely to be endangered,
- (e) that the environment has been, is being, or is likely to be damaged, or

- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being, or is likely to be deliberately concealed.

Sub-section (2) of Section 43B states that the relevant failure may occur in UK or outside UK.

Sub-section (3) states that ‘where disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it’. It is here that the Official Secrets Act, 1989 becomes relevant.

Where the disclosure of the information is itself a crime, e.g., it breaches the Official Secrets Act, 1989, the disclosure is not protected. It should be noted that raising such a concern formally within Whitehall or with the Civil Service Commissioner would not constitute a breach of a secrecy offence and so would qualify for protection in any event.

Section 7 of the Official Secrets Act speaks of “authorized disclosures” and states that a disclosure can be said to be made with lawful authority if, and only if, it is made in accordance with his official duty. Sub section (4) thereof prescribes that a disclosure is to be treated as made with lawful authority if, and only if, it is made to a Crown servant for the purposes of his functions as such or in accordance with an official

authorization. Sub section (5) defines “official authorization” as one duly given or by a Crown servant.

It was stated in the House of Commons debates on July 28, 1997, that the British Government had no plans to repeal the Official Secrets Act, 1989 nor to introduce a public interest defence (H.C.Deb., vol. 299, col. 6) see 1997 Public Law, p.712.

(B) Australia: Public Interest Disclosure Act, 1994:

Initially, the need for a Whistleblowers Act was pointed out in the Fitzgerald Report (at p.134) in relation to investigation into public misfeasance in Queensland. (See Current Topics, Vol. 67 (1993) Austr. L.J. p. 249). It was observed in that Report as follows:–

“There is an urgent need.....for legislation which prohibits any person from penalizing any other person for making accurate public statements about misconduct, inefficiency, or other problems within public instrumentalities. What is required is an accessible independent body to which disclosures can be made confidentially (at least in the first instance) and in any event free from fear of reprisals. The body must be able to investigate any complaint. Its ability to investigate the disclosures made to it and to protect those who assist it, will be vital

to the long-term flow of information upon whom its success will depend.”

Later, the Gibbs Committee (on Criminal Law) also made a similar recommendation.

The Public Interest Disclosure Act, 1994 of Australia defines “employee” as including an employee within the meaning of the ‘Public Sector Management Act, 1994. The ‘proper authority’ is defined as the Chief Executive Officer or its Governing Body.

It defines ‘disclosable conduct’ and also ‘public interest disclosure’. It defines ‘unlawful reprisal’ also.

Section 4 elaborates ‘disclosable conduct’, section 9 defines ‘proper authorities’, section 10 refers to procedures to be established by government agencies, i.e., an administrative Unit, or territory instrumentality or a statutory office holder. Section 12 enables the Ombudsman under the Ombudsman Act to exercise power under that Act as if a reference in that Act to an investigation is a reference under this Act. Section 17 deals with ‘frivolous etc. disclosures’. Section 19 refers to investigation by the proper authority and section 22 to action by it.

Part IV of the Act deals with unlawful reprisals. Section 25 prohibits unlawful reprisals and penalties can be either imprisonment or in number of

penalty units. The prosecution could be defended only on the limited grounds set out in sub-section (2) of section 25. Section 29 deals with ‘liability in damage’, Sections 30, 31 with ‘injunction’.

Section 34 provides penalty of one year imprisonment or other points, for false or misleading information which is given knowingly or recklessly. This section is again in conformity with the principles laid down in New York Times vs. Sullivan (1964) 376 US 254 which has been referred to in Chapter IV. The said judgment which was followed in England in Derbyshire vs. Times Newspaper Ltd. 1993 (2) WLR 449 has also been followed by the Australian High Court in Theophanous vs. Harold and Weekly Times Ltd., 1994 (68) ALR. 713

(C) New Zealand: The Protected Disclosure Act, 2000

The Protected Disclosure Act, 2000 of New Zealand contains provisions which are similar to those in the Australian Act, 1994 with certain modifications. Sec. 6 of the Act refers to “Disclosures to which the Act applies”, sections 7 to 14 refer to the manner in which disclosures have to be made to various authorities, sec. 17 enables grievances to be submitted against reprisals, and sec. 18 refers to immunity from civil and criminal proceedings and sec. 19 to confidentiality.

Sec. 17 states that if any retaliatory action is taken by the employer or former employer such as dismissal or any action other than dismissal, the said employee may apply for redress under the provisions of the Employment Contracts Act, 1991.

Sub-section (1) of section 18 provides immunity from civil and criminal proceedings where a person has made a protected disclosure or one to the appropriate authority. Sub-section (1) of section 18 is important and reads as follows:-

“Sec. 18(1); sub-section applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath or practice”.

That means that the Act will certainly override any other law in Australia which deals with Official Secrets. This appears to be a provision better than the one in UK.

Section 19 requires the identity of the informant to be kept secret unless the informant concerned consents or unless it is required to reveal his identity for effective investigation, or to prevent a risk to public health or to public safety or for purposes of observing principles of natural justice.

Section 20 refers to “false allegations” and states that the protection under the Act and under section 66 (1) (a) of the Human Rights Act, 1993 is

not available to the person giving the information if he has made the allegation with knowledge that the information is false or has acted in bad faith. The section conforms to the principles laid down in New York Times vs. Sullivan, (1964) 376 US 254, already referred to in Chapter IV.

(D) United States of America: The Whistle Blowers Protection Act, 1989 (as amended in 1994):

Before we refer to the Federal enactment, namely the Federal Whistle Blower Protection Act, 1989 and other State statutes, we may briefly refer to the previous history in USA.

The False Claims Act, 1863 (revised in 1986) was enacted to combat fraud by suppliers to the federal government during the civil war. Under that Act, whistle blowers could receive a percentage of the money recovered or damages suffered by the government in fraud cases they exposed. There were provisions for protection of whistle blowers even in the Civil Services Reforms Act, 1978 from reprisals.

The Civil Services Reforms Act of 1978 was not able to remedy several forms of reprisals such as transfers to ‘bureaucratic Siberia’, elimination of duties, career paralysis, reprimand etc. Between 1978 and 1989, when the present Act was passed, even the federal Office of Special Counsel was not supportive of the whistle blowers effectively. Things

became better only after the 1989 Act and more so after the recent amendments of 1994 (see 'The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent' by Thomas M. Devine, vol. 51, Administrative Law Review (1999), p.531).

It appears that there are more than a hundred similar statutes in the various States in US which protect different classes of whistle blowers. In some of the States the protection is extended to employees in the private sector also. Some of these laws also deal with the 'right to disobey' illegal orders of superiors. (see "State Whistle Blowers' Statutes and the Future of Whistle Blowers Protection" by Robert G. Vaughn, in Administrative Law Review (1999), Vol.51, page 582).

Mr. M. Devine, in the article referred to, states:

'Whistleblower protection is a policy that all government leaders support in public but few in power will tolerate it in private'.

The four corner stones of the Federal Act of 1989 are: (i) giving the whistle blowers control of their own cases (rather make them depend upon the willingness of Special Counsel to litigate for them) through an Individual Right of Action, providing expanded subject matter and personal jurisdiction for hearings before the Merit Systems Protection Board (MPSB); (2) making the Office of Special Counsel, a risk free option by eliminating provisions

granting discretionary authority to the Special Counsel which powers were indeed abused earlier since 1978; (3) expanding the stage of protection by eliminating prior loopholes, broadening the shield for protected conduct and expanding the scope of illegal employer conduct and; (4) creating more realistic legal burdens of proof in order to enable whistle blowers to prevail.

The Act covers not only protection against reprisals but also against removal of duties, failure to provide training or reprimand. The employee can also seek 'interim relief' (sec. 1221). Even retired persons could file actions. The employee who succeeds can also be awarded costs. The Special Counsel can pursue corrective action for violation of the Freedom of Information Act, or for violation of civil schemes, laws, rules and regulations. He can also protect witnesses or others from harassment during the proceedings. The Board can also pass orders for contempt of its orders.

The Act makes protection mandatory whenever justified by the evidence in a disclosure. Under the Act of 1989, "if the disclosure was reasonable and significant to public policies, - then the time, manner, place, further motives, audience and anything else will be irrelevant".

The scope of the protection was expanded to protect witnesses and others assisting the inquiry. What is more novel is that it also protected those "refusing to obey an order that would require an individual to violate a

law” [sec 2302 (b) (a)] or those commanded to do an illegal act and where the refusal is followed by a reprisal. But this right is not placed in sec. 2302 (b) (8) and, therefore, does not trigger Individual Rights of Act but fell within sec. 2302 (b) (a) which requires the Special Counsel to act. Even ‘threats’ by employer became actionable.

The more important innovation was about the burden of proof. At one time, in McDonnell Douglas v. Green, (1973) 411 US 792, it was held that there were two stages in relation to burden of proof. First, the employee would have to make out a prima facie case of discrimination and then the employer could try to rebut the same. But, even if the employer’s case of absence of discrimination was accepted still the employee had to prove that the discrimination and the disclosure were inter-connected.

Even later, it was held that the burden was on the whistle blower and this was on the basis of the principle in Mt. Healthy vs. Doyle (1977) 429 US p. 274. This principle has been reversed by sec. 1214 (b) (4) (B) (i) and sec. 1221 (e) (1), both in cases of Action by the Individual or by the Special Counsel. Now the Board is bound to order corrective action if the employee “has demonstrated that a disclosure described in sec. 2302 (b) (8) was a contributing factor in the personnel action” taken against him.

Further the employer or the agency has now to prove through “clean and convincing evidence” that it “would have taken the same personnel action in the absence of such disclosure” [see sec. 1214 (b) (4) (B) (ii) and sec. 1221 (e) (2)].

Apart from ‘interim relief’, the 1989 Act provides a successful employee, i.e., one who obtains reinstatement or other success, to opt to go to another department, on transfer. There is no longer the ‘you cannot go home’ syndrome.

In addition, the new Act restored the remedies under other laws, except the constitutional tort, giving a go bye to principle laid down in Bush vs. Lucas: (1983) 462 U.S. 367. The other remedies now saved are those under Back Pay Act, Civil Rights Act, 1871, Privacy Act, 1976 and 1997 and the Tucker Act, 1994, the Veterans Preference Act, 1994 and others.

The Special Counsel cannot disclose the informants’ identity without his consent unless such exposure is felt necessary “because of an imminent danger to public health or safety or imminent violation of any common law” by the whistle blower.

In 1994, twenty new amendments were added to strengthen protection. Now, after 1994, the employer cannot resort to “any other significant change in duties, responsibilities or working conditions”. This

prohibited even reprisals by employers quoting “security reasons” for change in duties or responsibilities. This was to overcome certain reprisals based on “security clearance abuses” against whistle blowers in the Airway’s Strategic Defence Command and in the Star Wars Programme.

The 1994 Amendments enable consequential damages, medical expenses also to be paid with a view to restore the employee wholly to the status quo ante as if no retaliation had occurred.

Since 1994, the complaints (appeals) before the Board have yielded substantial results in favour of the employees.

The above provisions of the US Federal Act of 1989 are therefore of far-reaching importance and are wider than the UK Act of 1998, the Australian Act of 1994 and the New Zealand Act, 2000.

Chapter VII

The Proposed Bill and Its Basis

7.0 In the earlier Chapters, we have referred to the need for elimination of corruption and mal-administration in government and in the public sector. We have referred to the basic concepts of public policy and public interest, which are the foundation for protection of ‘whistle blowers’. We have referred to the need to strike a proper balance between the Right to Free Speech and the Right to Know. We have also referred to judicial approaches in USA, UK, European Court and by our Supreme Court in that behalf. We have also referred to the salient provisions of the UK Public Interest Disclosure Act, 1998, the Australian Public Interest Disclosure Act, 1994, the New Zealand Protected Disclosures Act, 2000 and the US (Federal) Whistle Blower’s Protection Act, 1989.

7.1 In the light of the above principles of law and provisions in other Countries, we proceed to formulate the Public Interest Disclosure (Protection of Informers) Bill, 2002 for application in our Country.

Before we proceed to the Bill, we shall briefly refer to the reports of certain earlier Committees, which have gone into corruption in India.

(A) **Earlier efforts**

7.2 (a) The Santanam Committee Report 1963

The Santhanam Committee, 1963 was a Parliamentary Committee which was requested to give a report on the methods of eradicating corruption. The Committee went into the matter extensively and suggested that there should be Vigilance Commissions both at the Centre and in the States. It referred to political corruption as more dangerous than corruption of officials. It observed:

“that there is wide spread public impression that some Ministers who held office for several years have enriched themselves illegitimately, obtained good jobs for their sons and relations through nepotism and have obtained other benefits inconsistent with any notion of purity in public life”.

The Committee counselled priority to prevention of political corruption over prevention of administrative corruption. It opined that the top had to be made clean to expect cleanliness at the lower levels. It emphasized that elected representatives, ministers and legislators have to first create a climate of integrity as an example for others to follow.

7.3 (b) The Administrative Reforms Commission Report 1967 and the Lok Pal and Lok Ayukta Bills

The Government of India set up a high level Administrative Reforms Commission on January 5, 1966 under the Chairmanship of Shri Morarji Desai. The Commission, among others, made recommendations for the creation of Ombudsman-type institutions in India. It recommended a two-tier machinery, namely, Lok Pal at the centre and Lok Ayukta at the State levels. It submitted report on October 20, 1966 appending a draft Bill for Lok Pal and Lok Ayukta.

The Government of India introduced the Lok Pal and Lok Ayukta Bill 1968 in the Lok Sabha on May 10, 1968. The Bill was referred to a joint Committee of two Houses of Parliament, which submitted its report on March 26, 1969. The Lok Sabha passed the Bill on August 20, 1969 but while it was pending in the Rajya Sabha, the Lok Sabha was dissolved and the Bill consequently lapsed. The same was the fate of the Lok Pal Bill, 1971, Lok Pal Bill, 1977, Lok Pal Bill, 1983, Lok Pal Bill, 1989, Lok Pal Bill, 1996, the Lok Pal Bill, 1998. In the States, as of now, about 14 States have Lok Ayuktas and Up Lok Ayuktas, under State laws. The State of Haryana has however repealed the Act, which was in force.

The 1998 Lok Pal Bill provides for a Chairperson/Members consisting of the Chief Justice of India and two other Judges of the Supreme Court next to the Chief Justice in seniority, to be appointed by the President on the

recommendations of a Committee consisting of the Vice-President of India as its Chairman, the Prime Minister, the Speaker of Lok Sabha, the Minister of Home Affairs, Leader of the House to which the Prime Minister does not belong, the Leader of the Opposition in the Lok Sabha and Rajya Sabha as Members.

The Lok Pal will enquire in complaints, which are made alleging that a ‘public functionary’ has committed an offence under the Prevention of Corruption Act, 1988 and the expression ‘Public functionary’ covers the Prime Minister, Ministers and Ministers of State, Deputy Minister and Members of Parliament. This is partially in line with the recommendations of the Morarji Desai Committee.

7.4 (c) Vohra Committee Report:

The Vohra Committee reports have been referred to extensively by the Supreme Court in the Vineet Narain cases, as stated earlier.(see Chapter II)

7.5 (B) **The Proposed Bill**

We shall now try to formulate provisions of the proposed Bill.

7.6 (1) **title and extent; (proposed sec.1)**

The name of the proposed Act will be “Public Interest Disclosure (Protection of Informers) Act, 2002. It applies also to public servants outside India.

This provision has also to be read with sub-section (3) of section 6 which states that the provisions of the Act shall apply even to disclosable conduct committed before the commencement of this Act.

7.7 (2) Definitions: (proposed sec.2)

(a) “action” [proposed sec 2(a)]

Initially, it is necessary to define the word ‘action’. This is with reference to the ‘action’ in regard to which a complaint can be made. The Lok Pal and Lok Ayukta Acts uniformly defined the word ‘action’. In the Lok Pal and Lok Ayukta Bill of 1969 and similar enactments in the States, ‘action’ was defined as

“action taken by way of decision, recommendation or finding or in any manner and includes failure to act and all the expressions connecting action shall be construed accordingly.”

On the same analogy, it is proposed to define ‘action’ in the proposed Bill as follows:

“action” means action taken by way of decision, recommendation or finding or any other proceeding and includes failure to act and all other expressions connoting action or act shall be construed accordingly.”

7.8 (b) ‘Competent Authority’: [proposed sec 2 (b)]

It becomes necessary to define the word ‘Competent Authority’ to whom the complaint can be made. In the Lok Pal and Lok Ayukta Bill of 1969 and other enactments in the States, the said word has been defined, as “in relation to public servant who is a Minister, the Prime Minister and in relation to others, such authority as may be prescribed”

It was decided to omit Prime Minister from the purview of the Act in view of the proposed Lok Pal Bill, 2001. On that analogy and having regard to the constitution of the Central Vigilance Commission under the Ordinance of 1999 which lapsed and which is being continued under the Resolution dated 4.4.1999 of the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), it is proposed that the Competent Authority in the case of Minister will be ‘any Authority notified by the President in this behalf’ and in the case of any other public servant, the “Central Vigilance Commissioner” as stated above.

‘Competent Authority’ is therefore proposed be defined as follows:

“Section 2(b): ‘Competent Authority’ in relation to

(i) a Minister, means any Authority notified by the President in this behalf;

(ii) any other public servant, means the Central Vigilance Commission constituted under the Central Vigilance Commission's Ordinance, 1999 which ceased to operate and continued under the Government of India in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training Resolution No. 371/20/99-AVD dated the 4th April, 1999”.

7.9 (c) ‘disclosure’ [proposed sec. 2 (c)]

In as much as the basis of the inquiry under the proposed Act is the ‘disclosure’, it is necessary to define the word ‘disclosure’.

The Australian Act of 1994 defines ‘public interest disclosure’ while sec. 43A of the U.K. Employment Rights Act, 1996 (section 43A was introduced by U.K. Public Interest Disclosure Act, 1998) defines ‘protected disclosure’ in sec. 43A.

We propose a simple definition of ‘disclosure’ in the proposed sec. 2(c) as follows:

“Section 2(c): ‘disclosure’ means a disclosure of information that the person making the disclosure reasonably believes that it tends to show disclosable conduct’.

7.10 (d) ‘disclosable conduct’ [proposed sec. 2(d)]

The Australian Public Interest Act, 1994 defines ‘disclosable conduct’ while section 43B of the U.K. Employment Rights Act, 1996 (as amended by the U.K. Public Interest Disclosure Act, 1998) defines ‘qualifying disclosure’ (i.e. disclosure which is disclosable and which qualifies for protection). On those lines, we propose to define ‘disclosable conduct’ to include disclosure regarding past actions, present actions and proposed actions. The definition of ‘disclosable conduct’ of a public servant in regard to which the disclosures can be made, is proposed as follows:

“Section 2(d): ‘disclosable conduct’ means such conduct as a public servant may engage in or has engaged in or is engaging, or proposes to engage in, which amounts to –

- (i) abuse or misuse of power or discretion vested in him; or
- (ii) an attempt to commit or the commission of an offence under the Prevention of Corruption Act, 1988, the Indian Penal Code, 1860 or any other law for the time being in force; or
- (iii) mal-administration.”

7.11 (e) ‘Mal-administration’[proposed sec. 2 (e)]

This word occurs in clause (iii) of proposed sec. 2 (d) and has, therefore, to be defined.

There is a definition of ‘mal administration’ in the Lok Pal and Lok Ayuktas Bill 1969 in sec. 2(g). This definition also refers to past and present acts or acts proposed. We propose to adopt the a definition of ‘mal administration’ as found in section 2 (8) of the above Bill as follows:

“Section 2(e): ‘mal-administration’ includes any action taken or purporting to have been taken or being taken or proposed to be taken in the exercise of administrative or statutory power or discretion,-

- (i) where such action is unreasonable, unjust, oppressive or improperly discriminatory;
- (ii) where there has been negligence or undue delay in taking such action;
- (iii) where there has been reckless, excessive or unauthorized use of power in taking such action;
- (iv) where such action amounts to breach of trust;
- (v) where such action involves the conduct of a public servant which would result in wastage of public funds or causes loss or prejudice to the State or is prejudicial to public funds or causes loss or prejudice to the State or is prejudicial to public interest in any manner; or

- (vi) where such action is outside the authority conferred by law or amounts to violations of systems or procedure.”

7.12 (f) ‘Minister’: (proposed sec. 2(f)).

‘Minister’ is proposed to be defined as a Member of the Council of the Ministers for the Union and includes the Minister of State and Deputy Minister but does not include the Prime Minister.

The Prime Minister is proposed to be excluded in as much as separate provisions appears to have been made in the proposed The Lok Pal Bill, 2001 so far as the Prime Minister is concerned.

7.13 (g) ‘Prescribed’: (proposed sec. 2(g))

A formal definition of the word ‘prescribed’ is proposed as meaning rules to be made under this Act.

7.14 (h) ‘public servant’ [proposed section 2(h)]

The definition refers to every Minister at the Central level, (as proposed to be defined in the sec. 2(f)) (i.e. excluding the Prime Minister) Central Government servants, public servants in local authorities in Union Territories and Central Public Sector undertakings servants, Cooperative

societies or societies financed by the Central Government. The definition of ‘public servant’ in Clause 2 (k) of the Lok Pal and Lok Ayuktas Bill, 1969 is exhaustive and we propose to adopt the said definition of ‘public servant’ as follows:

- “(i) every Minister
- (ii) every officer who is appointed to a public service or post in connection with the affairs of the Union,
- (iii) every person in the service of,-
 - (A) any local authority in any Union Territory (which is notified by the Central Government in this behalf in the Official Gazette),
 - (B) any Corporation (not being a local authority) established by or under a Central Act and owned or controlled by the Central Government,
 - (C) any Government company within the meaning of section 617 of the Companies Act, 1956, in which not less than fifty-one per cent of the paid up share capital is held by the Central Government, or any company which is a subsidiary of a company in which not less

than fifty-one per cent of the paid up share capital is held by the Central Government,

(D) any cooperative society receiving any financial aid from the Central Government; or

(E) any society registered under the Societies Registration Act, 1860, which is subject to the control of the Central Government and which is notified by that Government in this behalf in the Official Gazette.”

7.15 (i) Victimisation: (proposed sec. 2(i))

The Act is intended to grant ‘protection’ to the persons who make disclosures. Protection against victimization is provided under the proposed section 10. Under sub-section (3) of the proposed section 10, the Competent Authority is being empowered to issue appropriate directions upon complaints made under sub-section (2) of that section by all persons (other than Ministers) who are victimized. Under sub-section (4) of section 10 as proposed, the competent authority is being empowered to restore the public servant making the disclosure to the status quo ante. In that context, it is necessary to have a definition of ‘victimization’.

While defining the said word, we have kept in mind the various provisions in the US Whistle Blowers Act of 1989, to which we have

referred in extenso in chapter VI. Under the US Law apart from dismissal from service, even withdrawal or dilution of powers and functions, reprimand or censure could be the subject matter of victimization. We are also aware that the victimization may be by the person against whom the disclosure is made or may be by another person or public authority, at the instance of the person against whom disclosure is made. In the light of the above, it is proposed to define 'victimization' as follows, in the proposed sec.2(i);

“victimization” with all its grammatical variations, in relation to public servant other than a Minister, shall include-

(A) suspension pending inquiry, transfer, dilution or withdrawal of duties, powers and responsibilities, recording adverse entries in the service records, issue of memos, verbal abuse, all classes of major or minor punishment specified in the disciplinary rules, orders or regulations applicable to such public servant and such other type of harassment;

(B) any of the acts referred to in sub-clause (A) whether committed by the person against whom a disclosure is made or by any other person or public authority at his instance.

7.16 Public Interest Disclosure: [Proposed sec. 3]

This section is proposed to deal with requirements of a ‘Public Interest Disclosure’ which can be protected. Sub section (1) speaks of disclosure and sub section (2) contains a non-obstante clause overriding the provisions of the ‘Official Secrets Act, 1923’. This is a clear improvement over the U.K. Public Interest Disclosure Act of 1998 where the protection, as already indicated, is very restricted. As stated earlier, the New Zealand Protected Disclosures Act, 2000 also contains a provision overriding other Acts. (see Chapter VI).

Sub section (2) refers to the persons who can make the disclosure. They are:

- (i) Public Servants (except those referred to in clauses (a) to (d) of Art. 33 of the Constitution),or
- (ii) Any person, or
- (iii) Non-Governmental organizations.

The disclosure must, under sub section (3), be in good faith, based on a solemn affirmation that the person making the disclosure reasonably believes that the information disclosed and any allegation contained therein is substantially true. The disclosure is to be made to the ‘Competent

Authority', supported by details and documents. The Authority can call for further information or particulars.

The person who makes complaint must disclose his identity. In other words, anonymous complaints or those sent under false names, will not be entertained.

7.17 Procedure on receipt of Public Interest Disclosure: [proposed section 4]

The proposed section provides for a preliminary inquiry unless the disclosure is frivolous or vexatious or is misconceived or lacking in substance or is trivial or has already been dealt with adequately (sub section (1)).

In case the issue has been determined by a Court or tribunal authorized to determine it, there will be no further inquiry (proposed sub section (2)).

Under proposed sub section (3), if the Authority is of opinion that the disclosure should be inquired into, it shall proceed under sec. 5.

7.18 Procedure of Inquiry : [proposed sec. 5]

The proposed 5 section requires that the disclosure with relevant documents be sent to the public servant concerned against whom complaint

is made and to his superior in the official hierarchy, giving reasonable opportunity. [proposed sub section (1)].

Proposed sub section (2) requires the inquiry ‘not to be open to public’ and that the ‘names of the persons making the disclosure and of the public servant named in the disclosure’ shall not be disclosed to the public.

Proposed sub section (3) directs that the name of the person making the disclosure shall be disclosed to the public servant provided that, if the person making the disclosure requests that his identity should not be disclosed to the public servant named in the disclosure, and if the Competent authority is satisfied that such a request may be acceded to in public interest or the safety of such person, it shall make the necessary direction in that behalf after recording its reasons.

Sub-section (4) of the proposed section 5 requires that the competent authority shall be bound by the principle of natural justice and also by the other provisions of the Act and it shall have the power to regulate its own procedure including the fixing of places and times of its inquiry.

Sub-section (5) of proposed section 5 provides that if after conducting the inquiry, the competent authority is of the opinion that (a) the facts and allegations contained in the disclosure are frivolous or vexatious or are not made in good faith or (b) there are no sufficient grounds for proceedings

with the inquiry, it shall close the inquiry and inform the concerned persons, the reasons for its opinion.

Sub-section (6) of the proposed 5 provided that, if after conducting such inquiry, the competent authority is of the opinion that disclosable conduct is established against a public servant, (a) it shall, if such public servant is other than a Minister, record the appropriate finding and send its findings along with the relevant records, to the Authority competent to take disciplinary action against the public servant; and (b) it shall, if such public servant is a Minister, record the appropriate the findings and send its findings along with the relevant records, to the Prime Minister.

Sub-section (7) of the proposed section 5 states that upon receipt of the findings as stated in clauses (a) or (b) of sub-section (6), the authority referred therein shall take appropriate action immediately against the person named in the findings.

Sub-section (8) of the proposed section 5 states, if the inquiry held by the Competent Authority discloses conduct, which constitutes an offence punishable under any law, the Competent Authority shall direct the appropriate authority, or agency to initiate criminal proceedings against such public servant including the Minister in accordance with law. It is also proposed to be provided in the same sub-section that where the Competent

Authority directs as above, there is no need to obtain any sanction or prior approval for such prosecution under any law for the time being in force.

Sub-section (9) of the proposed section 5 states that the conduct of an inquiry under the Act in respect of any action shall not affect, such action or any power or duty of any public servant to take further action with respect to any matter subject to the inquiry in accordance with any law for the time being in force.

7.19 Matters excluded from the purview of the Competent Authority – (proposed section 6)

Certain matters are proposed to be excluded from the purview of the competent authority such as where an inquiry has been ordered under the Public Servants Inquiry Act, 1850 or under the Commission of Inquiry Act (proposed sub section (1)).

Under proposed sub section (2), any disclosure

- (a) which is made after expiry of 12 months from the date on which the action complained against becomes known to the complainant or
- (b) where 5 years have expired between date of ‘action’ complained against and date of

disclosure, shall not be entertained unless sufficient cause is made out for the delay in the case of disclosure falling under Clause (a).

Sub-section (3) of the proposed section 6 provides that subject to the provision of sub-section (2) referred to above, the provisions of the Act shall apply to all disclosable conduct committed before the commencement of this Act.

Sub-section (4) of the proposed section 6 states that nothing in the Act shall be construed as empowering the competent authority to question, in any inquiry under the Act, any administrative or statutory action taken in exercise of a discretion except where it is satisfied that the discretion is so exercised because of the ‘disclosable conduct’.

7.20 Powers of Competent Authority: (proposed section 7)

The proposed section 7 deals with powers of the competent authority during the inquiry.

Proposed sub section (4) of section 7 precludes any ‘privilege’ to be claimed in regard to any evidence that may be produced except as provided in proposed sub section (5), where the disclosure might prejudice the security or defence or international relations of India or the ongoing investigation of crime; or might involve the disclosure of proceedings of the

Cabinet of the Union Government or any of its Committees. This is to be certified as stated in proposed sub section (5) and if so certified, the certificate shall be binding and conclusive.

Proposed sub section (6) provides that no person shall be compelled, for the purposes of inquiry, to give evidence or produce any document whenever he could not be compelled to give or produce in proceedings before a Court.

7.21 Report on Disclosure – (proposed section 8)

Sub-section (1) of the proposed section 8, states that the Competent Authority shall prepare annually a consolidated annual report of the performance of its activities in such form as may be prescribed and forward it to the President.

Sub-section (2) of the proposed section 8 states that on the receipt of the annual report under sub-section (1), the President shall cause a copy thereof together with the explanatory memorandum to be laid before each House of Parliament.

7.22 Periods of limitation – (proposed section 9)

Sub-Section (1) of the proposed section 9 states that the Competent Authority shall hold every such inquiry as expeditiously as possible and in

any case complete the inquiry within a period of six months from the date of the receipt of the complaint.

It is proposed to add a provision to sub-section (1) stating to the Competent authority is of the opinion that the inquiry cannot be completed before the said period, it may reasons for be recorded in writing, extend the said period and in no case, the said period shall be extended beyond a period of two years from the date of the receipt of the complaint.

It is possible that in some cases, the inquiry not completed within a period of two years as stated in sub-section (1). But, that does not mean that the public servant is to be deemed as exonerated. We are, therefore, proposing by way of sub-section (2) that nothing contained in sub-section (1) shall operate as a bar against initiation or continuance of any action or proceedings under any other law for the time being in force against the public servant named in the complaint.

7.23 Safeguards against victimization – (proposed section 10)

Sub-section (1) of proposed section 10 required the Central Government to ensure that no person who has made a disclosure under section 3 (2) of the Act is ‘victimized’ by initiation of any proceedings or

otherwise made on the ground that such person had made a disclosure under this Act.

This Sub-section and other sub-sections of section 10 have to read along with the definition of victimization in section 2 (i) which refers to 'victimization' in the case of all government servant other than a Minister.

Sub-section (2) of proposed section 10 states that if any 'person' other than a Minister is aggrieved by any action on the ground that he is being victimized due to the fact that he had filed a complaint.

Under sub-Section 3, he may file an application before the Competent Authority seeking redress in the matter. It will be noticed that the word 'person' will obviously include a public servant (other than a Minister) or any person who is not a public servant and may also include a Non-Governmental Organization.

Sub-section (3) of proposed section 10 states that an application under sub-section (2) of section 10, the Competent Authority may, after making such inquiry as it deems fit, give appropriate directions as it may consider necessary, to the concerned public servant or public authority against whom the allegations of victimization have been proved.

We are also view that there should be a proviso to above sub-section (3) stating that where the Competent Authority is of the opinion that the

allegation of victimization is not true or is not maintainable for the reason that the action alleges to cause hardship is not relatable to the complaint is to subject matter, it may dismiss the application.

This provision has to be read along with section 14, which relates to burden of proof.

Sub-section (4) of the proposed section 10 states that notwithstanding anything contained in any other law for the time being in force, the power to give directions under sub-section (3), in relation to a public servant, shall include the power to direct the restoration of the public servant making the disclosure, to the status quo ante.

We have proposed that this power to restore the public servant to the status quo ante should be vested in the Competent Authority and that where public servants have to be restored back into service or the other acts of victimization have to be nullified, it will be desirable to enable the Competent Authority to issue directions to the concerned disciplinary authorities referred to in other Acts, Rules, Codes, or Regulations applicable to the public servant. It will not be a necessary for the public servant, to invoke the jurisdiction the Central Administrative Tribunal or any other appropriate body for relief and that is why we have introduced a non-obstante clause at the opening of the section.

Sub-section (5) of the proposed section 10 enables the Competent Authority to issue directions to prevent the conduct or victimization continuing or occurring in the future. There are similar provisions in other countries.

Sub-section (6) of the proposed section 10 states that every direction given by the Competent Authority shall be binding upon the public servant or the public authority against whom the allegation of victimization has been proved.

7.24 Transfer of public servant for avoiding victimization:

It is possible that during the continuance of the inquiry against the public servant against whom the disclosure is made, the person who has made the disclosure may be harassed by way of transfer. It may also happen that in spite of a bona fide belief in the truth of the allegations contained in the disclosure, the allegations are not proved in the inquiry conducted by the Competent Authority and in such a case, the public servant who had made the complaint may be harassed within his department. It is also possible that the allegations made by public servant are proved in the inquiry conducted by the Competent Authority and thereafter the person who made the disclosure may suffer unnecessary harassment in his department.

In Australia and in United States of America, the relevant statutes (referred to in Chapter VI) give a choice to the public servant who made the complaint to seek a transfer to other department, subject of course to his qualification, experience and the availability of an equivalent post. We propose a similar safeguard.

7.25 Protection of witnesses and other persons: (Proposed section 12):

There are provisions in the US Whistleblowers Act, 1989 to protect witnesses and other assisting the inquiry so that the persons against whom complaints are made do not try to scuttle the inquiry or interfere with the witnesses and other persons assisting the inquiry. It is, therefore, necessary to protect the witness and other persons assisting the inquiry. With a view to ensure this protection, we make a provision in section 12 to the effect that the Competent Authority shall pass such orders granting adequate protection to the witnesses and other persons assisting the inquiry as may be necessary in the circumstance of the case.

7.26 Power to issue interim order: (Proposed section 13):

We find that in Australia and in United States of America, the statutes of 1994 and 1989 respectively, contain provisions permitting interim orders

to be passed by the Competent Authority to prevent victimization of the public servant making the disclosure.

In our view, such a provision is necessary so that before or during the continuance of the inquiry by the Competent Authority, there are no reprisals or victimization of the person making the complaint. Unless such a power is vested in the Competent Authority, it is possible that the person against whom the complaint is made may try to victimize the person making the complaint for the purpose of scuttling the inquiry.

7.27 Burden of proof in certain cases: (Proposed section 14):

In the United States of America, in the federal statute of 1989, there is a specific provision, as stated in Chapter VI, that the burden of proving that the action or proceeding which is the subject of victimization, would have been taken even if no such disclosure was made by the applicant (applicant in the application under section 10) shall be upon the public servant or the public authority against whom the allegations of victimization are made. In fact, before such a provision was made in USA, the burden of proof to prove the nexus between the act of victimization and the disclosure was placed on the employee and such a procedure did not yield any results in rendering justice to the person who made the disclosure. That was why the law was modified by shifting the burden of proof to the employer.

We have also stated in Chapter VI that even in UK, where the employee has taken action under section 57 of the Employment Protection (Consolidation) Act, 1978, alleging unfair dismissal, the burden of proof is on the employer.

On the same lines as in the USA and in UK, we recommend that in the proposed section 15, the burden of proof shall be on the public servant or public authority against whom the allegations of victimization are made before the Competent Authority, to establish that the same action would have been taken or the same proceedings would have been issued against the public servant making the disclosure, even if he had made no such disclosure.

7.28 Protection of action in good faith: (Proposed section 15):

It is proposed to protect all actions taken in good faith by the Competent Authority. It is, therefore, proposed to have a section stating that no suit, prosecution or other legal proceedings shall lie against the Competent Authority or against any officer, employee, agency, or person acting on its behalf, in respect of anything which is in good faith done or intended to be done under the Act.

7.29 Punishment for False or Frivolous Disclosures : (proposed section 16):

We have seen in Chapter IV that while dealing with the Right to Freedom of Expression as contained in Article 19 (1) (a) of our Constitution, and the similar right contained in the US Constitution and in Art. 10 of the European Convention, it has now been held that allegations against public servant are not actionable merely because they are wrong or have been found to be not proved. It is necessary to further establish that the allegations were made by the person with knowledge that they were false or were made, recklessly or maliciously. In India, our Supreme Court has also laid down the same rule in Rajagopal's case referred to in Chapter IV. We have also referred to several other cases in Chapter V which have protected disclosures with a view to protect public interest or interest of public policy. Therefore, any provision which proposes to punish the person making the disclosure, must necessarily take notice of the above provisions of law as laid down by the Supreme Court of India.

In fact, in Australia and New Zealand, the relevant statutes which permit punishment of the person making the disclosure, take note of the above principle of law in the section which deals with punishment of the person making the disclosure. It may also be noticed, in the context, that

clause (c) of the section 2 in the present Bill defines ‘disclosure’ as a disclosure of information that the person making the disclosure reasonably believes, that it tends to show disclosable conduct. We have also provided in sub-section (3) of section 3 that every disclosure shall be made in good faith and the person making shall solemnly affirm that he reasonably believe that the information disclosed and any allegation contained therein, is substantially true.

Therefore, it will not be constitutionally or even otherwise permissible to punish a person merely because, in the inquiry conducted by the Competent Authority, the facts and allegations mentioned in the disclosure could not be proved.

We have, therefore, taken note of the above principle in drafting the section dealing with punishment of the person making the disclosure. The Section as proposed reads as follows:

“Section 16: any person who makes any disclosure which falls to his knowledge or reckless or malicious shall be punishable with imprisonment for a term which may extend upto 3 years and also to fine which may extend upto fifty thousand rupees”.

7.30 Rule making power: (proposed sec. 17):

Sub-section (1) of the proposed section 17 states that the President may, by notification in the Official Gazette, make rules for the purpose of carrying out the provisions of the Act.

Sub-section (2) of the proposed section 17 states that every rule made under the Act shall be laid, as soon as may be after it is made, before each House of Parliament. The provisions are similar to like provisions in various other Acts indicating the procedure for laying rules before Parliament.

We recommend accordingly

(Justice B.P. Jeevan Reddy)

Chairman

(Justice M.Jagannadha Rao)

Vice Chairman

(Dr.N.M. Ghatate)

Member

(Mr.T.K.Viswanathan)

Member-Secretary

Date 14.12.2001

