

Regulatory Hotline

July 31, 2018

PARLIAMENT TIGHTENS THE NOOSE ON CORRUPTION!

- No pardon for bribe-givers - if found guilty, liable for imprisonment and fine.
- Private entities (commercial organizations) and their directors, managers, secretaries or other officers brought within the radar of the new Bill.
- Punishment for taking bribes increased to a minimum of (3) three years to a maximum of (7) seven years.
- Investigating police officers are empowered to confiscate property and money obtained through illicit means.
- Trial of offences to be held on a day to day basis and endeavor shall be made to conclude it within two years.

As India continues in its arduous path of shedding its image of corruption, both houses of Parliament finally passed the long pending Prevention of Corruption (Amendment) Bill, 2013 ("Bill") last week.¹ This Bill attempts at making a conscious move towards a matured Indian anti-corruption law in consonance with the United Nation Convention Against Corruption ("UNCAC")² of 2011, but fails to address several issues. The Bill awaits Presidential assent.

In an expected move, the Bill extends the scope of the Prevention of Corruption Act, 1988 ("PCA") to prosecute bribe-givers, commercial organizations and its officials. These amendments are introduced with the aim to reduce corruption and keeping a tighter check not only on the public officials but also on the bribe-giver, who escaped liability till date. Despite best efforts, the Bill raises certain significant concerns which are dealt in detail below.

KEY AMENDMENTS TO THE PCA

With corruption being long recognized as a blight on the vibrancy of the Indian economy, the earlier Government rightly sought to amend the PCA and introduced the Bill in Rajya Sabha in 2013. Given the importance of the amendments, the Bill was referred to a Committee on Personnel, Public Grievances, Law and Justice ("Standing Committee")³ and Law Commission of India ("LCI")⁴. The Bill, as passed by both houses of Parliament will now introduce the following key changes to the PCA:

1. Giving bribe is now an offence⁵ (Section 8-Offence relating to bribing of a public servant)

- The PCA invited severe criticism due to the implied immunity granted to bribe givers inconsistent with international standards, including the UNCAC. Prior to the Bill, prosecution of bribe givers was possible only if a case of 'abatement of offences' could be established under the PCA read with provisions of the Indian Penal Code, 1100%, though instances of such prosecution has been fairly limited. The immunity granted in terms of section 24 of the PCA has now been deleted.⁶
- The Bill extends its scope to those who give or promise to give undue advantage to a person with an intent to induce or reward a public servant to perform their 'public duty' 'improperly'. Explicit provision on this is aimed at creating an effective deterrent to private parties (including companies and their officers) engaging in corrupt practices. Such offence would be punishable with the maximum imprisonment for a period of seven years and / or fine. While performance of 'public duty' 'improperly' has been made an offence, both expressions have not been defined and are a departure from the PCA. It is significant to note that the PCA, even in its present form makes no specific distinction between 'facilitation payments' and other forms of bribery. Thus, any undue advantage including facilitation payments to public servants is prohibited by the PCA.
- The Bill does however grant immunity from prosecution in favour of those who are compelled to give such undue advantage provided such persons report the matter to the law enforcement authorities within seven days from the date of giving the undue advantage.⁷ The Bill seeks to distinguish between those pressured by the system to offer bribes and those intentionally seeking to engage in corrupt practices.

Comment: This amendment is to be seen in light of the newly introduced section 9 (discussed below), which prosecutes commercial organisations and individual officers for offences committed by any 'person associated with such commercial organisations', potentially exposing the commercial organization and directors of such commercial organization to criminal liability without any wrongdoing.

Supply side prosecution was imperative to bring our anti-corruption laws in consonance with international standards and act as a deterrent for private persons who bribed with impunity. However, the ambiguity on the aspect of 'improper discharge of public duty', could pose more concerns and abuse of the process and cause for concern leading to protracted litigation. Given that recently the Supreme Court of India ("Supreme Court") has expanded the scope of 'public official'⁸, clarifications in respect of these key expressions would have provided much needed certainty. This is particularly important considering non-compliance or a violation attracts criminal prosecution.

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Therefore, it is imperative to have objective standards for the expression 'improperly'. The expression 'public official', although defined in the PCA required clarification in light of Supreme Court's ruling and to negate possibility of expansion of private entities which are in collaborative projects with government / state owned enterprises.

2. Commercial organizations now liable for prosecution⁹ (Section 9- Offences relating to bribing a public servant by commercial organization)

- The Bill grants authorities the power to prosecute commercial organizations 'if any person associated with such commercial organizations gives or promises to give any undue advantage to a public servant...'.⁹
- 'Commercial Organizations' have been defined to include bodies, partnerships or any other association of persons incorporated within and outside India which carry on at least a part of their business in India.
- If any director, manager, secretary or other officer of the concerned commercial organization is proven to have consented and / or connived to commit the said offence, such officer would be punishable with imprisonment for a term not less than three years and extendable to seven years and also liable to fine.
- Any person would be said to be associated with the commercial organization if, independent of ingredients of offence in Section 9(1) of the Bill, such person performs services for or on behalf of the commercial organization.
- As per the Bill, it shall be a valid defense for the commercial organization if it is able to prove that it had '*adequate procedures*' in place.

Comment: The impact of these provisions would be far reaching considering that Directors and officers of the company can be sued for acts of the commercial organisations leading to consequential confiscation of property. India, unlike other jurisdictions has faced severe criticisms for abuse of the process despite laws being in place, therefore such provisions could lead to harassment for individuals within companies even if not responsible/involved in the illegal act. It also potentially defeats the principle of 'corporate veil' and hence requires safeguards to be put in place before implementation of these provisions to avoid harassment of professionals. While the provision contemplates prosecution of an individual if the offence under the Bill is '*proved in the court to have been committed with the consent or connivance*' of any director, as a matter of practice, investigating authorities ordinarily do not prosecute companies without making a director a party as well. Consequently, innocent directors / officers could be prosecuted and subject to investigation.

While the Bill does enable the Central Government to prescribe guidelines to be put in place for compliance by such an organization, absence of guidelines at present could lead to considerable uncertainty to determine what would be seen as '*adequate procedures*' and considerable subjectivity in the enforcement of the statute. This could also lead to Directors and officers of commercial organizations extremely vulnerable to prosecution under the Bill and face consequences at the hands of law.

The companies need to introduce compliance programmes, manuals and guidance notes to ensure that employees and consultants are adequately educated about obligations under the Bill, as done in other developed jurisdictions. Failure to do so might exacerbate liabilities under the Bill.

The UK Bribery Act's Six Principles provide an outline for an anti-corruption compliance system that establishes '*adequate procedures*' to prevent a person from bribing on the company's behalf including: *proportionality, tone at the top, risk assessment, due diligence, communication, monitoring and review*, used as a valid defence. India needs to follow the path without any further delay and publish guidelines to determine the adequacy of '*procedures*'.

3. Prior permission to be sought before initiating investigation and prosecution of serving and retired public officials¹⁰ and scope of criminal misconduct restricted. (Section 17A- Introducing new provision on enquiry or inquiry or investigation of offences related to recommendations made or decisions taken by public servant in discharge of duties)

- Considering the sensitive nature of a public servant's role, the Bill makes it mandatory for police officers to seek prior approval before conducting an enquiry into any offence committed by incumbent and retired public servants. The approval would have to be sought from the relevant union or state government in whose employment the accused "*public servant*" committed the offence in discharge of his official functions and duties. The introduction of such provisions are in accordance with other jurisdictions which require prior sanction for all offences and for all persons.
- While the Bill binds such approving authority to pass its decision within three months, further extendable by a month, this may dilute the power of investigating authorities from effectively prosecuting guilty officials.
- However, such prior sanction would not be required in the cases of arrest of officials caught 'red-handed' accepting or attempting to accept any undue advantage for himself or for any other person.
- With a view to protect honest public servants, the Bill has sought to restrict the scope of offences proposed to be covered under the PCA by identifying 'criminal misconduct'.¹¹ This restricted definition no longer takes into account, previously covered grounds such as disregarding public interest, abusing his / her position, using illegal means, etc.¹² The element of criminal intent is added to lend more objectivity to enforcement.

Comment: Requirement of prior sanction for retired public officials and change of scope of '*criminal misconduct*' would encourage retiring bureaucrats to take faster decisions and the checks and balances introduced in the amendment should protect such public officials.

4. Attachment of tainted property (Section 18A– Provisions of Criminal Law Ordinance, 1944 to apply)

The Bill seeks to add a new chapter - Chapter IV A to the PCA, which grants the power to attach property, confiscate money or property and administrate property tainted by corrupt activities as defined under the Bill. The provisions of the Criminal Law Amendment Ordinance, 1944 is now applicable to such attachment proceedings. Earlier, tainted property could be attached through measures under anti-money laundering laws.

Comment: It was important to streamline proceedings and avoid multiple enforcement mechanisms. Based on suggestions and recommendations from LCI on adopting attachment mechanism under the Prevention of Money Laundering Act, 2002 ('PMLA'), or the Lokpal and Lokayukta Act, 2013 or the Criminal Law Ordinance, the Bill has introduced the new chapter to help authorities recover proceeds of crime expeditiously. It may also be possible that

5. Time limit for trial (Section 4 (4))¹³

The Bill now requires trial of offences to be held on a day to day basis and endeavor to conclude it within two years.

Comment: A time bound trial would certainly help expedite the process of effective prosecution and would act as a powerful deterrent for habitual offenders.

ANALYSIS: MISSING THE BUS!

While this Bill certainly marks an epoch in India's fight against corruption, the reality of corruption in the country seems to be far more complicated and deep rooted than what this Bill hopes to cure. The Bill will raise significant concerns to be addressed in the absence of any clarity on the newly introduced provisions. With its catalytic statute being the UNCAC, the Bill is the result of a series of amendments and revisions to the original text of the Bill as introduced in the Lok Sabha in 2013. After a series of recommendations, further amendments to the Amendment Bill were circulated in Parliament in November, 2015. However, the Bill fails to reflect certain key provisions of the UNCAC:

- The Bill does not provide for prosecution of corrupt practices amongst private entities such as payments made beyond a contract, or payments made to fraudulently secure contracts in the private sector which could have far reaching impact on public interest. The UNCAC and most matured jurisdictions have legislated for prosecution of private parties for illegal gratification such as making or accepting payments beyond a contract or fraudulent payments made to secure contracts, as well.
- Further, contrary to more matured jurisdictions like US and UK dealing with bribery of foreign public officials, the Bill does not recognize illegal gratification paid to foreign government officials or official of a public international organization. This has been an obvious departure from the UNCAC which specifically prohibits giving undue advantage to any foreign public official or official of a public international organization.
- The Bill fails to clarify an important expression - 'public duty' and does not define 'improperly' leading to ambiguity and scope for misuse. The clarification was particularly required in the context of private enterprises being engaged in large infrastructure and public-private-partnership projects. The absence of a certainty with respect to 'improperly' could expose public servants and employees and directors of private companies to investigation and prosecution under the Bill.
- India's corruption laws fail to include preventive anti-corruption policies and practices. Although the new Bill provides for '*adequate procedures designed to prevent persons associated with it from undertaking such conduct*' as being a valid defense, compliance guidelines setting precedent for what may constitute as '*adequate procedures*' to escape prosecution for bribery is absent in the Bill and the Statement of Objects and Reasons as to what would constitute 'adequate procedure'.
- The Lokpal and Lokayukta Act ("**Lokpal Act**") enacted in 2013 with a view to kick start India's fight against corruption. Based on news articles, we note that till date the anti-corruption ombudsman has not been appointed. Pending appointment of the Lokpal and Lokayukta, practical and effective implementation of the Bill may be stunted.
- It may also be worth revisiting the practical effectiveness of granting leniency to those compelled to give undue advantage. Those so 'compelled' are unlikely to be in a position to take the risk of coming forward to report such corrupt government officials. In the absence of safety being accorded or a viable protection mechanism in place, it would be not be hard to imagine a situation where the distinction between those compelled and those truly corrupt is blurred beyond recognition and causing severe abuse of the process.
- In contrast to the UNCAC¹⁴ the Bill does not include any provisions dealing with the right of an aggrieved party to seek compensation / damages for loss caused due to corrupt practices. Government would do well to have a mechanism to ensure that no claims under bilateral investment treaties are made against India.
- It remains to be seen whether the objectivity in relation to enforcement against public servants and protection of retired public servants encourages bureaucrats to bold decisions and expedite the decision-making process. It will be interesting to see these provisions being applied as it comes in the backdrop of the CBI filing a charge-sheet against current and former bureaucrats in relation to foreign investments approved nearly a decade back. With its stringent provisions on prosecution of private persons, corporate organizations and attachment of tainted property and money, the Bill could act as an effective deterrent for habitual offenders and enablers of corruption, if implemented and used in the right manner.

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You can direct your queries or comments to the authors

¹ The Bill was passed by the Rajya Sabha on July 19, 2018 and the Lok Sabha on July 24, 2018. The hotline has been prepared on the basis of the bill passed by Rajya Sabha and based on news reports, it does not appear that Lok Sabha has made amendments.

² The UNCAC was adopted by the General Assembly of the United Nations on 31 October 2003. It is "*the only legally binding universal anti-corruption instrument. The Convention covers five main areas: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. The Convention covers many different forms of corruption, such as bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector. A highlight of the Convention is the inclusion of a specific chapter on asset recovery, aimed at returning assets to their rightful owners, including countries from which they had been taken illicitly. The vast majority of United Nations Member States are parties to the Convention.*" - <https://www.unodc.org/unodc/en/treaties/CAC/>

³ The Bill was referred to the Standing Committee in August, 2013 and submitted its report in February 2014.

⁴ LCI submitted its report (Law Commission Report No. 254, February 2015) in February 2015.

⁵ **Section 8.** (1) Any person who gives or promises to give an undue advantage to another person or persons, with intention-
(i) to induce a public servant to perform improperly a public duty; or
(ii) to reward such public servant for the improper (ii) to reward such public servant for the improper performance of public duty; shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both:
Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage:
Provided further that the person so compelled shall report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such undue advantage:
Provided also that when the offence under this section has been committed by commercial organization, such commercial organizations shall be punishable with fine.

Illustration.—A person, 'P' gives a public servant, 'S' an amount of ten thousand rupees to ensure that he is granted a license, over all the other bidders. 'P' is guilty of an offence under this sub-section.

Explanation.—It shall be immaterial whether the person to whom an undue advantage is given or promised to be given is the same person as the person who is to perform, or has performed, the public duty concerned, and, it shall also be immaterial whether such

undue advantage to a person or promised to be given to the person directly or through a third party.

(2) Nothing in sub-section (1) shall apply to a person, if that person, after informing a law enforcement authority or investigating agency, gives or promises to give any undue advantage to another person in order to assist such law enforcement authority or investigating agency in its investigation of the offence alleged against the later.

Section 24. Statement by bribe-giver not to subject him to prosecution. — Notwithstanding anything contained in any law for the time being in force, a statement made by person in any proceeding against a public servant for an offence under Sections 7 to 11 or under Sections 13 or Section 15, that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under Section 12.

Section 8 (1) Provided that the provisions of this section shall not apply where a person is compelled to give such undue advantage: Provided further that the person so compelled shall report the matter to the law enforcement authority or investigating agency within a period of seven days from the date of giving such undue advantage:

⁸ The Inspector of Police, Central Bureau of Investigation v. Ramesh Gelli (2016 (3) SCC 788)

⁹ **Section 9.** (1) Where an offence under this Act has been committed by a commercial organization, such organization shall be punishable with fine, if any person associated with such commercial organizations gives or promises to give any undue advantage to a public servant intending—

- (a) to obtain or retain business for such commercial organization; or
- (b) to obtain or retain an advantage in the conduct of business for such commercial organization:

Provided that it shall be a defense for the commercial organization to prove that it had in place adequate procedures in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.

(2) For the purposes of this section, a person is said to give or promise to give any undue advantage to a public servant, if he is alleged to have committed the offence under section 8, whether or not the person has been prosecuted for such offence.

(3) For the purposes of section 8 and this section,—

(a) "commercial organization" means—

- (i) a body which is incorporated in India and which carries on a business, whether in India or outside India;
- (ii) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India;
- (iii) a partnership firm or any association of persons formed in India and which carries on a business whether in India or outside India; or
- (iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India;

(b) "business" includes a trade or profession or providing service;

(c) a person is said to be associated with the commercial organization, if, such person performs services for or on behalf of the commercial organization irrespective of any promise to give or giving of any undue advantage which constitute an offence under sub-section (1).

Explanation 1.—The capacity in which the person performs services for or on behalf of the commercial organization shall not matter irrespective of whether such person is employee or agent or subsidiary of such commercial organization.

Explanation 2.—Whether or not the person is a person who performs services for or on behalf of the commercial organization is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between such person and the commercial organization.

Explanation 3.—If the person is an employee of the commercial organization, it shall be presumed unless the contrary is proved that such person is a person who has performed services for or on behalf of the commercial organization.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence under sections 7A, 8 and this section shall be cognizable.

(5) The Central Government shall, in consultation with the concerned stakeholders, including departments and with a view to preventing persons associated with commercial organizations from bribing any person, being a public servant, prescribe such guidelines as may be considered necessary which can be put in place for compliance by such organizations.

Section 10. Where an offence under section 9 is committed by a commercial organization, and such offence is proved in the court to have been committed with the consent or connivance of any director, manager, secretary or other officer shall be of the commercial organization, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation.—For the purposes of this section, "director", in relation to a firm means a partner in the firm."

¹⁰ **Section 17A.** (1) No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—

- (a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;
- (b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;
- (c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.

Section 19. Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless—

- (i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and
- (ii) the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding:

Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant:

Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:

¹¹ Section 13(1). A public servant is said to commit the offence of criminal misconduct,—

- (a) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or any property under his control as a public servant or allows any other person so to do; or
- (b) if he intentionally enriches himself illicitly during the period of his office.

Explanation 1.—A person shall be presumed to have intentionally enriched himself illicitly if he or any person on his behalf, is in possession of or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income which the public servant cannot satisfactorily account for.

Explanation 2.—The expression "known sources of income" means income received from any lawful sources.'

¹² **Section 13(1)(d)** if he, — (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest;

¹³ **Section 4(4)** Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the trial of an offence shall be held, as far as practicable, on day-to-day basis and an endeavour shall be made to ensure that the said trial is concluded within a period of two years:

Provided that where the trial is not concluded within the said period, the special Judge shall record the reasons for not having done so: Provided further that the said period may be extended by such further period, for the reasons to be recorded in writing but not exceeding six months at a time; so, however, that the said period together with such extended period shall not exceed ordinarily four years in aggregate.

¹⁴ **Article 35.** Compensation for damage. Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

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