

MAJOR AMENDMENTS SUGGESTED TO THE GOVERNMENT'S LOKPAL BILL

(As Introduced in Parliament on 4th August 2011)

General remarks

- 1. The proposed bill seems only to cover only the Central government and not the states. We feel that it is crucial that the same law also set up Lokayutkas, with similar powers and functions as the Lokpal, in each of the states. We believe this is within the legislative competence of the Parliament.**
2. We have listed below some of the main problems we have with the current bill (as introduced in LokSabha) in so far as it goes. However, we are alarmed to note that while leaving out many categories of public servants and the redress of grievances, there is nothing in the attached note or elsewhere that reassures us about the government's commitment to also cover these gaps through other legislations or institutions.
3. Specifically, at the very least, we think that there should be a grievance redress mechanism, for central institutions and schemes, and separately for each of the states. We also believe that the Judicial Standards and Accountability bill that is currently before Parliament needs to be significantly strengthened so as to cover the higher judiciary effectively. Also required are Judicial Standards and Accountability institutions in each state to assist the High Courts in ensuring standards and probity in the lower courts.
4. To cover public servants other than group A officers, we believe that the institution of the Central Vigilance Commission needs significant strengthening and renewed independence. Similar independent institutions (state vigilance commissions) need to be created in each state and can, we believe, be done by a Central act.
5. The Public Interest Disclosure and Protection to Persons Making the Disclosures bill (Whistleblowers Protection bill) which is also before Parliament needs to be revamped and made applicable to all the above mentioned institutions and also to all other relevant institutions.
6. A schematic depiction of our proposed collective and concurrent Lokpal measures to control corruption and redress grievances, for all public servants and at all levels, is given in the tables enclosed at the end of the document.

Specifically we have the following issues with the draft Lokpal Bill, as introduced in the LokSabha.

Exclusion of the Prime Minister

Current Provisions in the Government's Bill: Section 2(1)(i) "Minister" means an Union Minister but does not include the Prime Minister;

Our Rationale for Disagreement:

We believe there is no legal or moral justification in excluding the Prime Minister from the purview of the Lokpal Bill. However, we do recognise that public and national interest requires some safeguards, and these have been suggested below.

Our Recommendations:

Replace by: (i) "Minister" means an Union Minister *and includes the Prime Minister;*

- 1. Provided that no investigation would be launched against the Prime Minister unless a reference has been made by a full bench of the Lokpal to the Chief Justice of India and that the Chief Justice of India has constituted a full bench of the Supreme Court which has examined the complaint and the relevant grounds and evidence and come to the conclusion that such an investigation is warranted;*
- 2. Provided further that complaints regarding actions done by others where the Prime Minister is not directly involved but can be held responsible as the head of the government or cabinet would not be entertained (no vicarious liability).*
- 3. Also provided that where the Prime Minister is of the opinion that some information that is asked for by the Lokpal as a part of an investigation is such that its disclosure might compromise national security or other critical national interests, the prime Minister would in confidence brief the CJI, whose decision on whether the information should be disclosed to the Lokpal, and if so, under what conditions, would be final.*

Section 17(1) Subject to the other provisions of this Act, the Lokpal shall inquire into any matter involved in, or arising from, or connected with, any allegation of corruption made in a complaint in respect of the following, namely:—

(a) a Prime Minister, after he has demitted the office of the Prime Minister;

Our Recommendations:

Replace by: 17(1)(a) a Prime Minister;

Qualification for Chairperson

Current Provisions in the Government's Bill:

Section 3(1) As from the commencement of this Act, there shall be established, for the purpose of making inquiries in respect of complaints made under this Act, an institution to be called the "Lokpal".

(2) The Lokpal shall consist of—

(a) a Chairperson, who is or has been a Chief Justice of India or a Judge of the Supreme Court;

Our Rationale for Disagreement:

We believe that there is no justification in restricting the position to judges, especially as the law provides for an adequate number of judicial members. Therefore, the eligibility criteria for the chairperson must be widened, as suggested below.

Our Recommendations:

Replace by: 3(2)(a) A Chairperson, who is or has been a Chief Justice of India or a Judge of the Supreme Court; or is otherwise qualified to be a member of the Lokpal.

Selection Committee

Current Provisions in the Government's Bill:

4. (1) The Chairperson and Members shall be appointed by the President after obtaining the recommendations of a Selection Committee consisting of—

(a) the Prime Minister — chairperson;

(b) the Speaker of the House of the People — member;

(c) the Leader of Opposition in the House of the People — member;

(d) the Leader of Opposition in the Council of States — member;

(e) a Union Cabinet Minister to be nominated by the Prime Minister — member;

(f) one sitting Judge of the Supreme Court to be nominated by the Chief Justice of India — member;

(g) one sitting Chief Justice of a High Court to be nominated by the Chief Justice of India — member;

(h) one eminent Jurist to be nominated by the Central Government — member;

(i) one person of eminence in public life with wide knowledge of and experience in anti-corruption policy, public administration, vigilance, policy making, finance including insurance and banking, law, or management to be nominated by the Central Government — member.

Our Rationale for Disagreement:

In this committee five out of nine members: the PM, the Speaker, the cabinet minister and the two eminent persons would all be part of/appointed by the central government, This is not acceptable. Therefore, we suggest that the selection committee be a balance between the government, the opposition and the judiciary, as follows.

Our Recommendations:

Replace by: 4. (1) The Chairperson and Members shall be appointed by the President after obtaining the recommendations of a Selection Committee consisting of—

- (a) the Prime Minister — chairperson;
- (b) the Leader of Opposition in the House of the People—member;
- (e) one sitting Judge of the Supreme Court to be nominated by the Chief Justice of India—member;

Process of Selection

Current Provisions in the Government’s Bill:

Section 4(3) The Selection Committee may, if it considers necessary for the purposes of selecting the Chairperson and Members of the Lokpal and for preparing a panel of persons to be considered for appointment as such, constitute a Search Committee consisting of such persons of standing and having special knowledge and expertise in the matters relating to anti-corruption policy, public administration, vigilance, policy making, finance including insurance and banking, law, and management, or in any other matter which, in the opinion of the Selection Committee, may be useful in making selection of the Chairperson and Members of the Lokpal.

Our Rationale for Disagreement:

Our experience has been that high powered selection committees do not have the time to search out appropriate candidates. Therefore, the final selection is invariably decided by the dealing department which often puts before the selection committee an inadequate and/or inappropriate set of choices (as seen in the appointments of the CVC and various information commissioners and chief information commissioners). Therefore, we feel that there must be a search committee, as follows:

Our Recommendations:

Replace by: (3) *The selection committee shall select out of a panel of not less than three and not more than five eligible candidates for each vacancy. This panel of eligible candidates shall be finalised by a search committee set up for the purpose; provided that the selection committee can require the search committee to submit up to two additional names for any vacancy, over and above those initially suggested, if they so deem necessary.*

- a) *The search committee shall comprise of five members appointed by the selection committee.*
- b) *Members of the search committee would be selected from among former:*
 - i. *Chief Justices of India*
 - ii. *Judges of the Supreme Court of India*
 - iii. *Comptroller and Auditor Generals of India*
 - iv. *Chief Election Commissioners of India*
 - v. *Chief Information Commissioners of India*

- vi. *Former or outgoing Chief Lokpals (after the appointment of the first Chief Lokpal)*
- vii. *Former Lokpals (for appointment of Lokpals only)*

Provided that not more than two members should belong to any one of the categories listed above.

Provided further that the following persons shall not be eligible for becoming members of the search committee:

- i. *Any person who has joined any political party.*
 - ii. *Any person who is still in the service of the government in any capacity*
 - iii. *Any person who took up a government assignment after retirement, barring those assignments which are reserved for the post from which the person retired.*
- c) *In addition, the search committee will consist of another five members who would be selected by the five members, appointed under (a) above, from among the civil society and could include activists, academics, journalists, professionals, etc.*
 - d) *The search committee shall devise its own procedures to develop a short list of names that could be considered for recommending to the selection committee.*
 - e) *The search committee shall put up on a website the names and relevant details of all the candidates being considered. The public would be given sufficient time (not less than a month) to send in their views, if any, pertinent to the candidature of any one or more of these candidates, along with relevant material, if any.*
 - f) *The search committee will compile all the comments so received and, wherever it deems necessary, will further investigate the comments about, or credentials of, any of the candidates under consideration.*
 - g) *Based on all this material, the search committee will recommend not less than three and not more than five names to the selection committee for each vacancy.*

All the material received or considered by the search committee in order to reach its final recommendation, as well as the details and documents related to its own proceedings, would be available for public scrutiny once the relevant appointments have been made.

Treating Employees and Office bearers of NGOs and People's Movements, not funded by the government, as Public Servants

Current Provisions in the Government's Bill:

2(1) (I) "public servant" means a person referred to in clauses (a) to (g) of subsection (1) of section 17;

17(1)

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(g) any person who is or has been a director, manager, secretary or other officer of every other society or association of persons or trust (whether registered under any law for the time being in force or not) in receipt of any donation from the public and the annual income of which exceeds such amount as the Central Government may by notification specify:

Provided that nothing in this section shall apply in relation to the Prime Minister, in whatever capacity he may be holding an office as a public functionary:

Provided further that any person referred to in this clause shall be deemed to be a public servant under clause (c) of section 2 of the Prevention of Corruption Act, 1988 and the provisions of that Act shall apply accordingly:

Provided also that nothing in clauses (e) and (f) and this clause shall apply to any society or association of persons or trust constituted for religious purposes.

Relevant Extract from the PC Act

2(c) "Public Servant" means:

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

Our Rationale for Disagreement:

We believe it is a draconian provision to declare office bearers of NGOs and movements that do not receive any government funds as public servants. Not only would this result in a huge amount of harassment but also be impractical as such bodies are not bound by government rules and procedures, and cannot be held accountable to those. If any of these organisations violate the existing laws relating to the management of funds etc., there are adequate provision to prosecute them. Therefore:

Our Recommendations:

Delete 17(1)(g)

Complaints Against the Chair and Members of the Lokpal

Current Provisions in the Government's Bill:

Section 8(1) Subject to the provisions of sub-section (3), the Chairperson or any Member shall be removed from his office by order of the President on the grounds of misbehaviour after the Supreme Court, on a reference being made to it—

(i) by the President, or

(ii) by the President on a petition being signed by at least one hundred Members of Parliament, or

(iii) by the President on receipt of a petition made by a citizen of India and where the President is satisfied that the petition should be referred, has, on an inquiry held in accordance with the

procedure prescribed in that behalf, reported that the Chairperson or such Member, as the case may be, ought to be removed on such ground.

(2) The President may suspend from office the Chairperson or any Member in respect of whom a reference has been made to the Supreme Court under sub-section (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

Our Rationale for Disagreement:

The current provisions compromise the independence of the Lokpal by giving the Central Government various powers related to complaints against members of the Lokpal. This is not desirable and we propose that these powers and function be given instead to the Supreme Court, as suggested below.

Our Recommendations:

Replace by: 8(1) Subject to the provisions of sub-section (3), the Chairperson or any other Member shall be removed from his office by order of the President on grounds of misbehaviour after the Supreme Court, on a complaint made to it has, on inquiry, held in accordance with the procedure prescribed in that behalf, advised that the Chairperson or such other Member, as the case may be, ought to be removed on such ground.

8(2) The President may suspend from office the Chairperson or any other Member in respect of whom a complaint has been made to the Supreme Court under sub-section (1), if the Chief Justice of India so advises, until the President has passed orders on receipt of the report of the Supreme Court on such a complaint.

40(2) Any complaint against the Chairperson or Member shall be made by an application by the party aggrieved, to the President.

40(3) The President shall, in case there exists a prima facie case for bias or corruption, make a reference to the Chief Justice of India in such manner as may be prescribed for inquiring into the complaint against the Chairperson or Member.

Our Recommendations:

Replace by:

40 (2) Any complaint against the Chairperson or Member shall be made by an application by the party aggrieved, to the Chief justice of India.

40 (3) The Chief Justice of India, on receipt of such a complaint, shall constitute a committee which will examine whether there exists a prima facie case for bias or corruption and this committee shall advise the Chief Justice on whether the complaint merits detailed investigation.

Where the committee advises the Chief Justice of India that an investigation is merited, the CJI may have the matter investigated.

Exempting Statements of MPs in Parliament

Current Provisions in the Government's Bill:

17(2) Notwithstanding anything contained in sub-section (1), the Lokpal shall not inquire into any matter involved in, or arising from, or connected with, any such allegation of corruption against any Member of either House of Parliament in respect of anything said or a vote given by him in Parliament or any committee thereof covered under the provisions contained in clause (2) of article 105 of the Constitution.

Our Rationale for Disagreement:

This is an unjustified exemption, but as its deletion would involve amendment of the Constitution, it should not be dropped at the moment but there should be a government undertaking that it would appropriately move Parliament with such a proposal for the amendment of the Constitution within a year. For the moment, the Lokpal bill could more faithfully reflect the constitutional position

Our Recommendations:

Replace by:

17(2) Notwithstanding anything contained in sub-section (1), the Lokpal shall not inquire into any matter in respect of any thing said or any vote given by him in Parliament or any committee thereof .

Complaints Against the Lokpal Staff

Current Provisions in the Government's Bill:

41. (1) Every complaint of allegation or wrongdoing made against any officer or employee or investigation agency under or associated with the Lokpal for offence punishable under the Prevention of Corruption Act, 1988 shall be dealt with in accordance with the provisions of this section.

(2) The Lokpal shall complete the inquiry into the complaint or allegation made, within a period of thirty days from the date of its receipt.

Our Rationale for Disagreement:

In keeping with the philosophy behind the independent Lokpal that no institution should be solely responsible for investigating and prosecuting its own officers in matters related to corruption, we think that it is only appropriate if the Lokpal does not deal with corruption complaints against its own officers. Therefore, an alternate system is being suggested.

Our Recommendations:

Replace 41(2) by: The Lokpal shall refer the matter to the Ombudsman appointed for the purpose by an independent committee, who will complete the inquiry into the complaint or allegation made, within a period of thirty days from the date of its receipt. Towards this end, the Ombudsman would be empowered to utilise the services of any investigating agency with the central government or that of the Lokpal.

In 41(3) and 41(4) replace “Lokpal” with “Ombudsman” appropriately.

Transfer of Cases

Current Provisions in the Government’s Bill:

21. On an application for transfer made by the complainant or the public servant, the Chairperson, after giving an opportunity of being heard to the complainant or the public servant, as the case may be, may transfer any case pending before one bench for disposal to any other bench.

Our Rationale for Disagreement:

This clause would give enormous power to the chairperson, which could be used arbitrarily to the detriment of justice or of members of the Lokpal. We believe this power needs to be qualified, as below:

Our Recommendations:

Replace by: 21. On an application for transfer made by the complainant or the public servant, the Chairperson, after giving an opportunity of being heard to the complainant or the public servant, as the case may be, may transfer any case pending before one bench for disposal to any other bench; *provided that no such transfer would be made unless the chairperson is satisfied that there are good reasons to believe that the ends of justice could not be met without such a transfer. Provided, further, that the reasons for such a transfer must be, within a week of the transfer being ordered, put into the public domain.*

Opportunity to be Heard at the Preliminary Enquiry Stage

Current Provisions in the Government’s Bill:

23(4) Before the Lokpal comes to the conclusion in the course of a preliminary inquiry and after submission of a report referred to in sub-section (3) that a prima facie case is made out against the public servant pursuant to such a preliminary inquiry, the Lokpal shall afford the public servant an opportunity of being heard.

Our Rationale for Disagreement:

There is no need to provide this right to the accused at this stage, especially as this is not provided under any other criminal procedure. However, there is nothing to stop the Lokpal from

hearing an accused at any stage, if the Lokpal feels that this is required in the interest of justice. This need not be a statutory right of the accused.

Our Recommendations:

Delete 23(4)

Inspection of records by accused

Current Provisions in the Government's Bill:

Section 24 In cases where, an investigation or inquiry into a complaint is proposed to be initiated by the Lokpal, every person against whom such inquiry or investigation is proposed to be conducted, shall be entitled to inspect any record in connection with the commission of any alleged offence and take an extract therefrom, as is considered necessary to defend his case.

Our Rationale for Disagreement:

It must be ensured that the provision of this right does not compromise the interests of “whistleblowers”, witnesses and other vulnerable persons connected with the complaint or the investigation.

Our Recommendations:

Add: Provided that where the complaint involves allegations or information from a whistleblower or a witness who wishes to have his identity protected, the Lokpal shall ensure that advance notice is given to such whistleblower and/or witness and they are given an opportunity of being heard prior to the accused being given access to any records: provided further that in no case would the identity and/or witness be revealed without their prior consent in writing.

Contempt Powers

Whereas the earlier ministerial draft of the Lokpal bill had given the Lokpal ‘contempt powers’ in Section 31. This section has been dropped from the bill introduced in the Lok Sabha.

Our Recommendation:

Whereas, we were not in favour of giving broad criminal contempt powers to the Lokpal, and we even think that those with the upper judiciary should be significantly curbed, after dropping this section, it is unclear how the Lokpal would ensure that its directions under this Act are complied with. Therefore, some specific provisions should be added for this, in the form of civil contempt powers.

Time Frame for Conducting Trials

Current Provisions in the Government's Bill:

Section 38(2) The Special Courts constituted under sub-section (1) shall ensure completion of each trial within a period of one year from the date of filing of the case in the Court:

Provided that in case the trial cannot be completed within a period of one year, the Special Court shall record reasons therefor and complete the trial within a further period of not more than three months or such further periods not exceeding three months each, for reasons to be recorded in writing, before the end of each such three months period, but not exceeding a total period of two years.

Our Rationale for Disagreement:

Whereas there must be a time frame for the trial of cases, the law should not create a situation where if there is a delay that becomes a basis for the case being closed. Also, there must be some adverse consequences on the judge responsible for unreasonable delays.

Our Recommendations:

Replace by:38 (2) The Special Courts constituted under sub-section (1) shall ensure completion of each trial within a period of one year from the date of filing of the case in the Court:

Provided that in case the trial cannot be completed within a period of one year, the Special Court shall record reasons therefor and complete the trial within a further period of not more than three months or such further periods not exceeding three months each, for reasons to be recorded in writing, before the end of each such three month period, but *ordinarily* not exceeding a total period of two years; *provided that no case would be closed on the basis of the trial not having been completed within two years. However, wherever a trial continues beyond two years, a mandatory reference would be made to the High Court which shall examine the matter and pass such directions as it might deem necessary to bring the trial to an early conclusion and, where the High Court thinks it appropriate, pass strictures against the trial judges(s).*

Penalties

Current Provisions in the Government's Bill:

49. (1) Notwithstanding anything contained in this Act, whoever makes any false and frivolous or vexatious complaint under this Act shall, on conviction, be punished with imprisonment for a term which shall not be less than two years but which may extend to five years and with fine which shall not be less than twenty-five thousand rupees but which may extend to two lakh rupees.

Our Rationale for Disagreement:

This is another draconian provision, especially as it is impossible to objectively define “frivolous” or “vexatious”. This would strongly discourage most people from making any complaints.

Our Recommendations:

Replace by: 49(1) Notwithstanding anything contained in this Act, whoever makes any *malafide and false complaint, with malicious intent, under this Act, shall, on conviction, be punished with fine which shall not be less than five thousand rupees but which may extend to one lakh rupees.*

Providing legal assistance to the accused

Current Provisions in the Government’s Bill:

56. The Lokpal shall provide to every person against whom a complaint has been made, before it, under this Act, legal assistance to defend his case before the Lokpal, if such assistance is requested for.

Our Rationale for Disagreement:

Though this might be fair in order to ensure that the innocent among the accused do not have to spend large amounts of money that they cannot afford to defend themselves against malicious or false allegations, this should not end up subsidising the corrupt on public expense.

Our Recommendations:

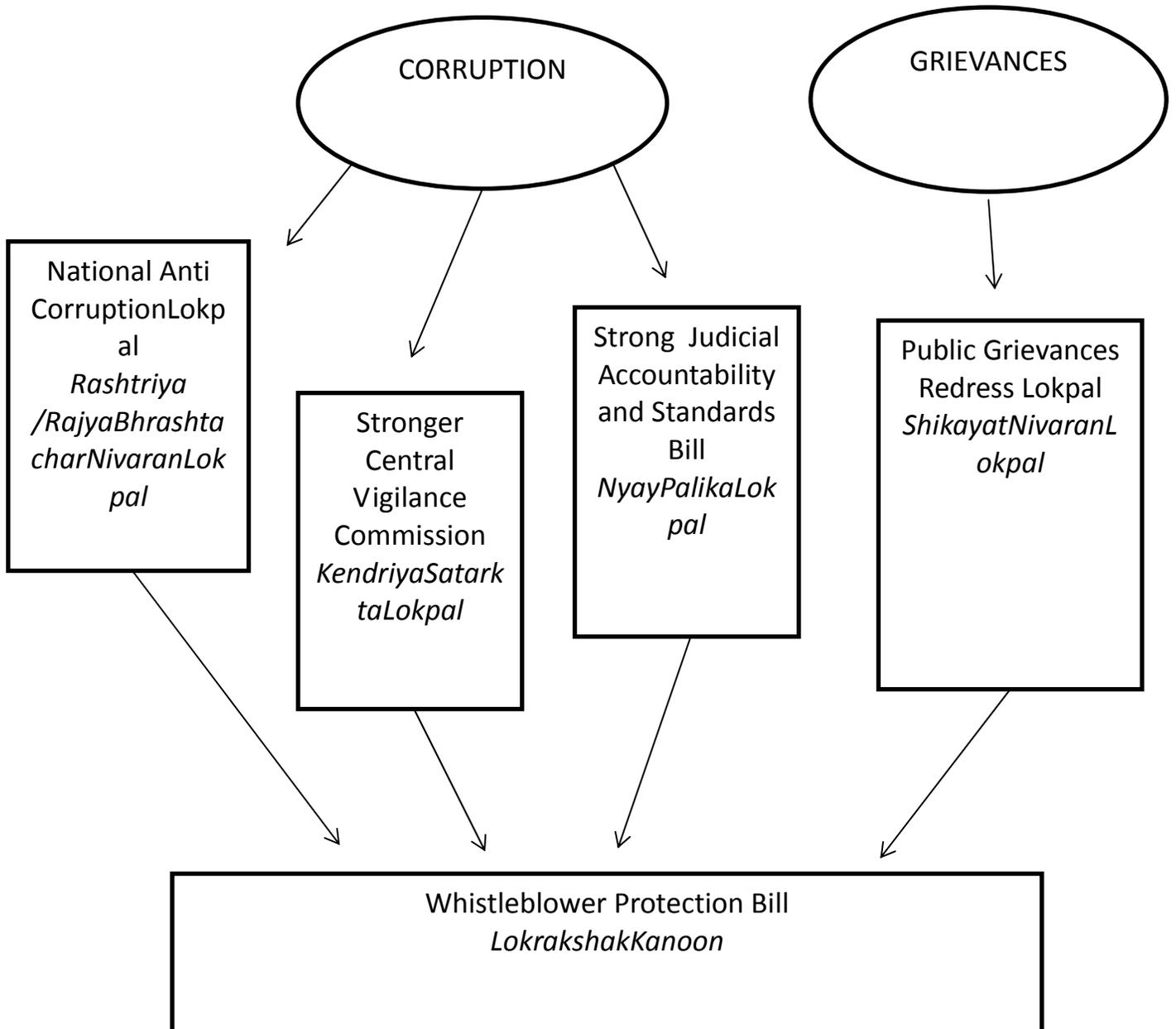
Add: Provided that where the accused is finally found guilty of any of the charges made against him, by the special court provided for in the Act, and subject to further appeals, the accused would be required to refund the total cost of the assistance so provided. In exceptional circumstances where the Lokpal so determines that the recovery of such dues might result in unwarranted hardship to the accused or his family, the amount can be adjusted against confiscation of property as specified under sections 33 and 34.

Covering the Private Sector

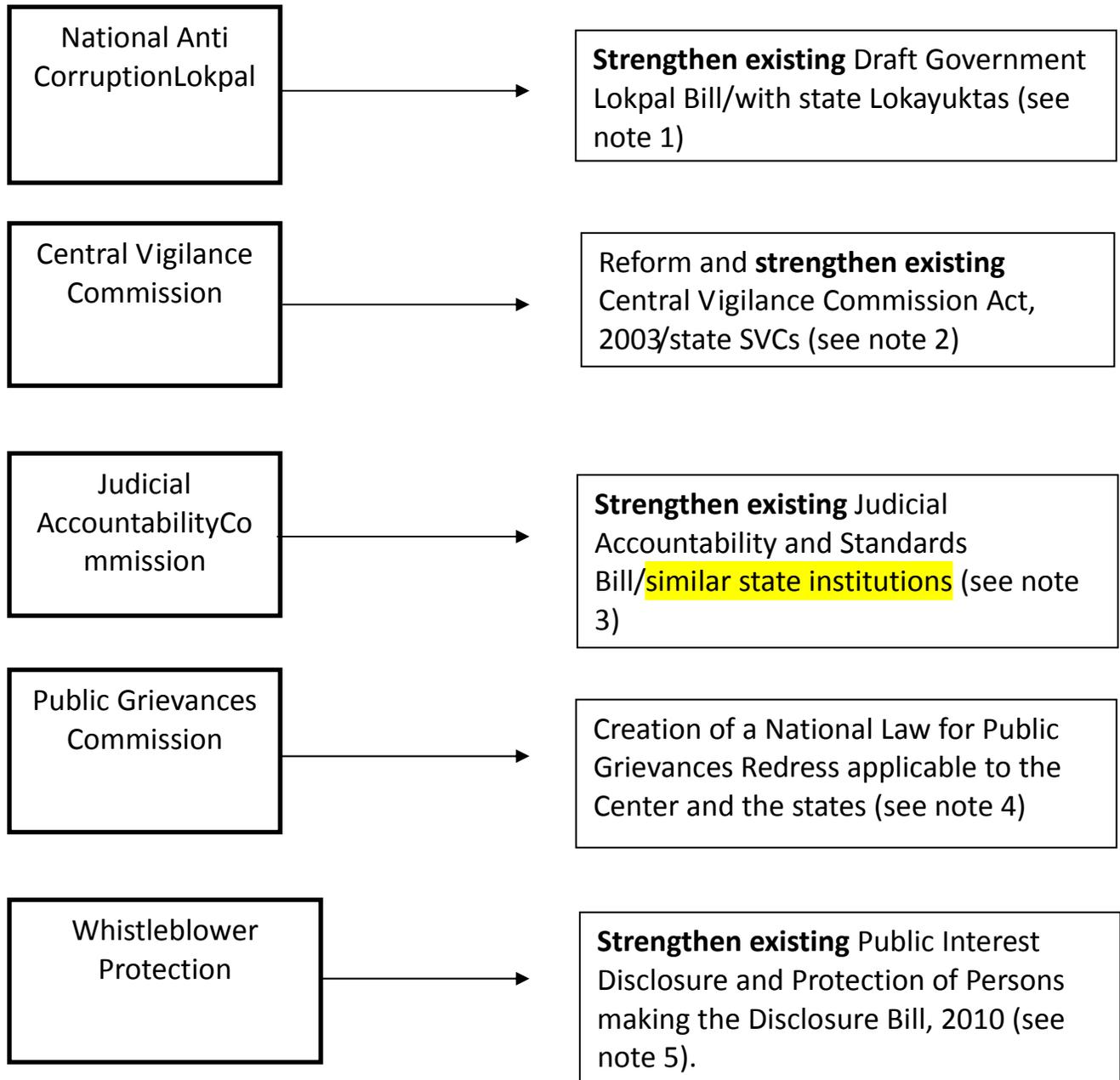
Our Recommendation:

Add: (appropriately amend the PCA to include) Where any private body, corporation or profit seeking entity receives from any public authority any concession or dispensation, including but not restricted to licences, subsidies, contracts, orders, quotas, allocations, clearances, grants, etc, that is in violation of the law or of any prevailing rules, it would be deemed to have indulged in corrupt practices unless it can show that it was unreasonable to expect the corporation to know that a law or a rule had been violated.

Scope and Coverage of the Lokpal Basket of Measures



Scope of the Lokpal Basket of Measures



Jurisdiction of proposed Anti-Corruption Measures

