can it be classified as 'financial fraud' for the express purposes of the proposed Act. This draft Act also provides for establishment of special courts and amendment to the Indian Evidence Act, 1872 relating to trial of cases pertaining to financial frauds.

3.7.8 The Committee also recommended the inquisitorial system of proof in the evidential process. For this, they have suggested amendment of the Indian Evidence Act so that mens rea could be presumed by the court.

3.7.9 The Naresh Chandra Committee on Corporate Audit and Finance recommended in 2002:

1. *A Corporate Serious Fraud Office (CSFO) should be set up in the Department of Company Affairs with specialists inducted on the basis of transfer/deputation and on special term contracts.*

2. *This should be in the form of a multi-disciplinary team that not only uncovers the fraud, but is able to direct and supervise prosecutions under various economic legislations through appropriate agencies.*

3. *There should be a Task Force constituted for each case under a designated team leader.*

4. *In the interest of adequate control and efficiency, a Committee headed by the Cabinet Secretary should directly oversee the appointments to, and functioning of this office, and coordinate the work of concerned departments and agencies.*

5. *Later, a legislative framework, along the lines of the SFO in the UK, should be set up to enable the CSFO to investigate all aspects of the fraud, and direct the prosecution in appropriate cases.*

3.7.10 A Serious Frauds Investigation Office (SFIO) was set up in 2003 as a specialised multi-disciplinary organisation to deal with cases of serious corporate frauds. It has experts from the financial sector, capital market, banks, accountancy, forensic audit, taxation, law, information technology, company law, customs and investigation. SFIO presently carries out investigations under the provisions of Sections 235 to 247 of the Companies Act. Its Charter includes forwarding of its investigation reports on violations of the provisions of other Acts to the concerned agencies for prosecution/appropriate action.

3.7.11 The Expert Committee on Company Law, headed by Dr. Jamshed J. Irani (2004) had observed:

"In addition to investigation, there is also a need to take up prosecution of the concerned corporate and officers in default in the appropriate forum. For this purpose, procedures would need to be simplified to enable SFIO to move swiftly and purposefully for successful prosecution of the guilty. To enable this, there are certain ambiguities in the law which would have to be removed to enable SFIO to take up prosecution under the IPC in addition to violation of the Companies Act. The Committee recommends that a separate statute may be framed to regulate and guide the functioning of the (SFIO) and to address such issues to enable successful investigation and prosecution of cases of corporate fraud. Therefore, presence of SFIO may be recognized in the Companies Act. Officers of the SFIO may also be authorised by Central Government to file complaints for offences under Criminal Procedure Code in addition to for offences under the Companies Act.

The Committee took note of the fact that corporate frauds were generally the result of very complex and intricate series of actions. It may not be easy for the law enforcement agencies at the State Government level to respond effectively to such situations in the absence of proper training and development of skills of the concerned law enforcing personnel for such investigations. The Committee recommends that the SFIO, set up by the Central Government, should serve as a Nodal Agency for development of such expertise and its dissemination to the State Governments, who may also be encouraged to set up similar organisations and provide requisite specialization as a part of their action against economic offences. This would also enable better coordination in respect of prosecution of offences under IPC"

3.7.12 The West Bengal National University of Juridical Sciences, Kolkata had also undertaken a project on drafting of an Economic Offences Code for India. The draft code, entitled 'Serious Economic Offences (Prevention, Control, Investigation and Trial) Act' defines 'Serious Economic Offence' to mean "any dishonest, fraudulent or illegal transaction involving money or property of the value exceeding Rupees Five Crores or such other amount as may be prescribed, which –

a) has serious impact on the national economy or the national security of India, or

b) affects, or is likely to prejudicially affect, the social, economic or political relation of India with other nations, or

c) has adversely affected large number of citizens of India as victims of the offence, or

d) involves person holding high positions of public trust or public duty in government, public or private undertakings, including banks and other financial institutions or other body corporates, and shall also include such offence committed by persons within India or in any place beyond India."

3.7.13 The draft Bill envisages the constitution of a high-powered and autonomous body called the 'Commission for the Control of Serious Economic Offences' to ensure effective implementation of this law. Establishment of special courts and special rules of procedure and evidence relating to investigation and trial of serious economic offence have also been provided.

3.7.14 During the hearing of a PIL filed in the Supreme Court by an NGO, Common Cause, the Reserve Bank of India suggested the creation of an independent and insulated Serious Frauds Office. This PIL was in relation to the mammoth size of non-performing assets plaguing the banking sector and the frequency of economic offences. While appreciating the suggestion, the Hon'ble Supreme Court has asked the Union Government to respond to the idea on priority basis.[48]

3.7.15 The Commission had discussions on this issue with the Reserve Bank of India, the Security and Exchange Board of India and the ICICI Bank. SEBI is of the view that given the absence of an adequate number of persons of appropriate level with skill sets in the area of financial investigation, it might be worthwhile to strengthen existing institutions rather than create new institutions. ICICI Bank is of the view that strong investigation, law enforcement and judicial systems would go a long way in the development of a an effective fraud control mechanism in the financial system; and the Economic Offences Wing and the Cyber Crime wing in the bank are lending specialization and expertise in dealing with frauds/crimes related to Banking. They also stated that a similar specialization and dispensation in the Judiciary will be of immense help in trying cases of frauds in the financial system. RBI was of the view that the recommendations of the Mitra Committee should be implemented.

3.7.16 The Commission is of the view that the current provisions in the Banking Regulation Act, 1949; SEBI Act, 1992 and the Companies Act, 1956 are not strong enough to prevent large scale fraudulent practices nor are they deterrent enough. The present regulatory bodies like RBI, SEBI and Department of Company Affairs are not adequately empowered to address criminality involved in such scams and frauds. There is, therefore, need for a separate institution for investigation and prosecution of serious financial fraud cases and recovery of assets involved therein.

3.7.17 There is need to define 'Serious Economic Offence' under a statute and prescribe deterrent punishment for it. The existing SFIO, though a positive step, can investigate offences only under the Companies Act. The complex and multi-disciplinary nature of 'Serious Economic Offences' would require the constitution of an empowered body to investigate and prosecute the cases under all such offences. This would require the

[48] Reported in The Times of India, New Delhi Edition on 11th November, 2006

establishment of a new and adequately empowered Serious Frauds Office (SFO) which would, necessarily, subsume the existing SFIO. The Serious Frauds Office thus constituted should be under the control and supervision of a Serious Frauds Monitoring Committee chaired by the Cabinet Secretary with representatives from the financial sector, capital and futures markets, commodity markets, accountancy, direct and indirect taxation, forensic audit, criminal and company law, investigation and information technology. The SFO should be empowered to take up cases suo motu or upon reference by the Union or the State Governments.

3.7.18 As getting conviction for economic offences under the existing laws is difficult and moreover, because these offences many times generate funds for other organized crimes and terrorist activities, the Commission agrees with the suggestion made by the Mitra Committee that for 'Serious Frauds' the Court may presume the existence of mens rea.

3.7.19 Recommendations:

a. A new law on 'Serious Economic Offences' should be enacted.

b. A Serious Economic Offence may be defined as :

   i. One which involves a sum exceeding Rs 10 crores; or

   ii. is likely to give rise to widespread public concern; or

   iii. its investigation and prosecution are likely to require highly specialized knowledge of the financial market or of the behaviour of banks or other financial institutions; or

   iv. involves significant international dimensions; or

   v. in the investigation of which there is requirement of legal, financial, investment and investigative skills to be brought together; or

   vi. which appear to be complex to the Union Government, regulators, banks, or any financial institution.

c. A Serious Frauds Office (SFO) should be set up (under the new law), to investigate and prosecute such offences. It should be attached to the Cabinet Secretariat. This office shall have powers to investigate and prosecute all such cases in Special Courts constituted for this purpose. The SFO should be staffed by experts from diverse disciplines

such as the financial sector, capital and futures market, commodity markets, accountancy, direct and indirect taxation, forensic audit, investigation, criminal and company law and information technology. The SFO should have all powers of investigation as stated in the recommendation of the Mitra Committee. The existing SFIO should be subsumed in this.

d. A Serious Frauds Monitoring Committee should be constituted to oversee the investigation and prosecution of such offences. This Committee, to be headed by the Cabinet Secretary, should have the Chief Vigilance Commissioner, Home Secretary, Finance Secretary, Secretary Banking/ Financial Sector, a Deputy Governor RBI, Secretary, Department of Company Affairs, Law Secretary, Chairman SEBI etc as members.

e. In case of involvement of any public functionary in a serious fraud, the SFO shall send a report to the Rashtriya Lokayukta and shall follow the directions given by the Rashtriya Lokayukta (see para 4.3.15).

f. In all cases of serious frauds the Court shall presume the existence of *mens rea* of the accused, and the burden of proof regarding its non-existence, shall lie on the accused.

3.8. Prior Concurrence for Registration of Cases: Section 6A of the Delhi Special Police Establishment Act, 1946

3.8.1 As per Section 6-A of the Delhi Special Police Establishment Act, 1946

"The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 except with the previous approval of the Central Government where such allegation relates to-

b the employees of the Central Government of the level of Joint Secretary and above; and

c such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

3.8.2 It has been argued that given the prevailing corruption ridden environment, there is danger of such a provision being misused to protect corrupt senior public servants, and if at all such a protection is to be given, the power should vest with an independent body like the CVC, which can take an objective stand.

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3.8.3 The counter argument is that officers at the level of Joint Secretaries and above have an important role in decision making in the government. Also while taking these decisions or rendering advice they should be able to do so without any fear or favour. Exposing these officers to frequent enquiries could have a demoralizing effect on them and encourage them most of the time to 'save their skin' and not act in a manner that would best serve the public interest.

3.8.4 The Commission on balance is of the view that it would be necessary to protect honest civil servants from undue harassment, but at the same time in order to ensure that this protection is not used as a shield by the corrupt, it would be appropriate if this permission is given by the Central Vigilance Commissioner in consultation with the Secretary to Government concerned and if the Secretary is involved, a committee comprising the Central Vigilance Commissioner and the Cabinet Secretary may consider the case for granting of permission. In case of Cabinet Secretary such permission may be given by the Prime Minister.

3.8.5 Recommendation:

a. Permission to take up investigations under the present statutory arrangement should be given by the Central Vigilance Commissioner in consultation with the concerned Secretary. In case of investigation against a Secretary to Government, the permission should be given by a Committee comprising the Cabinet Secretary and the Central Vigilance Commissioner. This would require an amendment to the Delhi Special Police Establishment Act. In the interim the powers of the Union Government may be delegated to the Central Vigilance Commissioner, to be exercised in the manner stated above. A time limit of 30 days may be prescribed for processing this permission.

3.9 Immunity Enjoyed by Legislators

3.9.1 The National Commission to Review the Working of the Constitution recommended (Para 5.15.6) that Article 105(2) may be amended to clarify that the immunity enjoyed by Members of Parliament under parliamentary privileges should not cover corrupt acts committed by them in connection with their duties in the House or otherwise. Such a recommendation was made because corrupt acts include accepting money or other valuable considerations to speak and/or vote in a particular manner and, for such acts, they should be liable for action under the ordinary law of the land.

3.9.2 The NCRWC stated as follows

> *"The law of immunity of members under the parliamentary privilege law was tested in PV Narsimha Rao Vs. State (CBI/SPE), (AIR 1998 SC 2120). The substance of the charge was that certain members of Parliament had conspired to bribe certain other members to vote against a no-confidence motion in Parliament. By a majority decision the Court arrived at the conclusion that while bribe-givers, who were Members of Parliament, could not claim immunity under Article 105, the bribe-takers, also Members of Parliament, could claim such immunity if they had actually spoken or voted in the House in the manner indicated by the bribe-givers. It is obvious that this interpretation of the immunity of Members of Parliament runs counter to all notions of justice, fair play and good conduct expected from Members of Parliament. Freedom of speech inside the House cannot be used by them to solicit or to accept bribes, which is an offence under the criminal law of the country. The decision of the court in the aforesaid case makes it necessary to clarify the true intent of the Constitution. To maintain the dignity, honour and respect of Parliament and its members, it is essential to put it beyond doubt that the protection against legal action under Article 105 does not extend to corrupt acts".*

3.9.3 Right to equality and equal protection of law is a fundamental right and the Constitution enshrines this principle of equality. The Ruling in the above case creates an anomalous situation wherein the Members of Parliament are immune from prosecution for their corrupt acts if they are related to voting or speaking in the Parliament. This runs contrary to norms of justice and fair-play. Members of Parliament, being the lawmakers have to maintain the highest standards of integrity and probity. It is, therefore, necessary to amend the Constitution to remove this anamoly.

3.9.4 Recommendations:

a. The Commission, while endorsing the suggestion of the National Commission to Review the Working of the Constitution, recommends that suitable amendments be effected to Article 105(2) of the Constitution to provide that the immunity enjoyed by Members of Parliament does not cover corrupt acts committed by them in connection with their duties in the House or otherwise.

b. The Commission also recommends that similar amendments may be made in Article 194(2) of the Constitution in respect of members of the state legislatures.

3.10 Constitutional Protection to Civil Servants – Article 311

3.10.1 Civil servants in India enjoy unique protection in terms of specific provisions in Part XIV of the Constitution, which authorize the regulation of their conditions of service. Article 309 stipulates that subject to the provisions of the Constitution, acts of appropriate legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. Under Article 310, - persons serving the Union or a State hold office during the pleasure of the President or the Governor of the State as the case may be. The exercise of this pleasure is, however, circumscribed by the provisions of Article 311. The Article reads as follows :

"Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State–

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where, it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply —

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the

authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

3.10.2 The procedure laid down in Article 311, subject to the provisos, or exceptions, therein, is intended to, first, assure a measure of security of tenure to government servants, who are covered by the Article and, second, provide certain safeguards against arbitrary dismissal or removal of a government servant or reduction to a lower rank. These provisions are enforceable in a court of law and where there is an infringement of Article 311 orders passed by the disciplinary authority are ab-initio void. The provisions of Articles 310 and 311, apply to all government servants.

Arguments in favour of retaining Article 311

3.10.3 Article 311 of the Constitution has been a matter of much debate over the past fifty years. Arguments range from its retention in its present form, or even strengthening it, to its total deletion. Those in favour of retaining Article 311 argue that the Article subjects the doctrine of pleasure contained in the preceding Article 310 to certain safeguards. Indeed, this Article earlier also envisaged giving an opportunity to the accused official to protest the quantum of punishment proposed if the charges were proved - this requirement was, however, dispensed with through the 42nd amendment to the Constitution.

3.10.4 It is further argued that the safeguards under Article 311 are focused and that the framers of the Constitution were mindful of the rare eventualities in which even such minimal safeguards would not be necessary. Indeed, the safeguard of an opportunity of being heard has been held to be a fundamental principle of natural justice. Even if Article 311 were to be repealed, it is argued, the need for giving an opportunity to be heard cannot be dispensed with. The requirement that only an authority which is the appointing authority or any other authority superior to it can impose a punishment of dismissal or removal also appears reasonable as the government follows a hierarchical structure where the appointing authority for different categories of employees are assigned to different levels- the obvious principle being that for positions having higher responsibility, the appointing authority is higher up in the hierarchy.

3.10.5 Moreover, if Article 310 stands without the procedural safeguards of Article 311, it is highly unlikely that the rules governing disciplinary proceedings and departmental inquiries can be dispensed with on the ground that the President or the Governor have a right to dismiss an official from service without proving charges after due inquiry. In such a situation the only outcome would be an increase in litigation concerning service matters.

3.10.6 Besides, judicial review is an integral part of our Constitution and a substantial portion of the appellate work of the Supreme Court concerns Article 311. A random check of the decided cases from the Index notes of the Supreme Court cases yields various rulings, which indicate that the Article is not an obstacle in dealing with delinquent public servants:

(i) The disciplinary authority is free to take a view contrary to the finding of 'not guilty' by the inquiry officer. (*High Court v Shrikant Patil* 2000 1SCC 416).

(ii) Where the charges are proved in a departmental inquiry while the person is acquitted of the same charges in criminal prosecution, acquittal will have no effect on disciplinary action as the degree of proof required in the two proceedings is quite different. (*Senior Superintendent v A. Gopalan* AIR 1999 SC 1514).

(iii) Where the appointing authority is the President or the Governor, it is not necessary for these office-holders to be personally satisfied about the justification for disciplinary penalty. (*Union v Sripati Ranjan* 1975 4 SC 699).

(iv) Where the three eventualities envisaged in second proviso to Article 311 (2) are attracted, recourse to Article 14 cannot be had to get an opportunity of being heard. (*Union v Tulsiram Patel* 1985 3 SCC 398).

(v) Where witnesses are intimidated, it is open to the disciplinary authority to take a view that an inquiry is not "reasonably practicable" (*Satyavir v Union* 1985 4 SCC 252).

(vi) Article- 311 is also not attracted if age of retirement is reduced. (*Andhra Pradesh v Moinuddin* AIR 1994 SC 1474).

(vii) Compulsory retirement also does not attract the aforesaid Article (*Biswanath v Bihar* 2001 SCC 2 305).

(viii) Courts do not sit in appeal over findings of Departmental inquiries. The role of the higher courts is restricted to ascertain whether the inquiry was fairly or properly conducted; once that is proved, the court will not interfere with the ultimate finding. The court will interfere only in cases where there is no evidence whatsoever to support the finding of guilt. (*Kuldeep v Commissioner of Police 1999* 2 SCC 10).

3.10.7 It is argued that it is the rules governing disciplinary enquiries, and not Article 311 itself, that are responsible for the delays in enquiry and even in the removal of delinquent government servants. Most of the relevant procedures antedate the Constitution and little information exists about their origin, or, in some cases, even about their *raison d'etre.* It will be clear from the rulings cited above that the Supreme Court has adopted a judicious approach to Article 311 and it would be unreasonable to take the view that the said Article has proved a panacea for delinquent Government employees.

Arguments in favour of repealing Article 311

3.10.8 But the argument above is itself the starting point of the argument in favour of repealing Article 311. It can be argued that if the decisions of the judiciary did not obviate the need to act against delinquent officials, then why retain the Article with its potential to protect the corrupt through any unintended interpretation? Indeed, it is not as if in all cases involving Article 311 the Supreme Court has taken a 'pro Government' stance. There are cases where the apex court has struck down the actions of the disciplinary authority or the Government. Some instances can be cited illustratively;

(i) Where a temporary servant was accused of accepting bribe, it was held that the matter should have been dealt with in accordance with Article 311 and if proved guilty the penalty of dismissal, instead of termination of service should have been imposed. (*Madan Gopal v Punjab* AIR 1963 SC 531).

(ii) Where a temporary constable was discharged from service, it was held that "the order of discharge, though couched in innocuous terms and stated to be made in accordance with (the rules) was really a camouflage for an order of dismissal from service on the ground of misconduct as found on an enquiry into the allegations behind her back. It was penal in nature as it cast a stigma on the service career of the appellant. The order was made without serving the appellant any charge sheet, without asking for any explanation from her, without giving any opportunity to show cause against the purported order of dismissal from service and without giving any opportunity to cross-examine the witnessess. It, therefore, contravenes Article 311(2) of the Constitution and is liable to be quashed and set aside." (*Smt. Rajinder Kaur v State of Punjab and Another,* AIR 1986 SC 1790).

(iii) Where an inquiry was held at a place away from the place of posting and the accused employee could not attend the proceedings due to lack of funds as he was not paid any subsistence allowance (during the period of suspension), it was held that the inquiry was vitiated. (*Fakirbhai v Presiding Officer* 1986 3 SCC 111).

(iv) It is necessary for the Disciplinary Authority to furnish copy of report of Inquiry Officer to Charged Officer and give him an opportunity to make a representation

against it before taking a decision on the charges. (*Union of India v. Mohd. Ramzan Khan,* 1991 (1)SLR SC 159 : AIR 1991 SC 471)

(v) (a) Adverse entries awarded to an employee lose their significance on his promotion to a higher post and cannot be taken into consideration for forming opinion for prematurely retiring him.

(b) Uncommunicated remarks or remarks pending disposal of representation cannot be the basis for premature retirement. (*Brij Mohan Singh Chopra v. State of Punjab*, 1987 (2) SLR SC 54).

(vi) It has been been observed, "But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Govenment may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with." (*P.L. Dhingra v Union of India*, 1958 SCR p.828 at 862).

3.10.9 There are a number of decisions of the lower courts which have tied down the disciplinary authorities with technical detail where the procedure has become more important than the substance.

3.10.10 In present times, the position prevailing in India has to be viewed against the practice followed in other countries, where such punitive action is possible with a hearing permitted at the discretion of the appropriate authority, not as a matter of right. Even in the UK, whose administrative systems were adopted in India, such freedom does not exist. India is perhaps one of very few countries where a public servant, who, though an agent of the government, has the power to invoke Constitutional rights against the government which is his/her employer.

3.10.11 The Constitution has been amended to recognize the needs of governance as felt from time to time. The Indian Constitution, and Part XIV thereof, was drafted at a time when, in the aftermath of partition, and post-colonial administrative upheavals, it was felt necessary to prescribe certain guarantees to the bureaucracy. In the present scenario, that protection does not appear quite necessary. For one, the recent growth of the economy has ensured that Government is no longer the only significant source of employment. Indeed, in the present debate of even providing outcome oriented contractual appointments for senior positions, there is a new focus on the question of permanency in the civil services. Inflexibility and compartmentalization, created over decades within the bureaucratic structure, has been encouraged by the difficulty in even transferring staff who have rushed to courts against their transfer; this was presumably not the intention of the framers of the Constitution. The increase in corruption and inefficiency in Government has been

acknowledged as requiring major "surgery". The role of Government as a model employer cannot take away from the fact that public good must override individual right, certainly of the corrupt and inefficient public servant.

3.10.12 It is no doubt essential that reasonable opportunity is provided to a government official against what might be arbitrary or vindictive action. But this should be only reasonable, not excessive, and that must be the criteria for assessing the nature of legal protection that the employee must receive. The protection required to be provided in terms of security of tenure or permanancy in the civil service must not lead to a situation where delayed action becomes common reason for emboldening errant officials into committing acts against public interest.

3.10.13 It has been held that, for proper compliance with the requirement of 'reasonable opportunity' as envisaged in Article 311(2), a government servant against whom action is contemplated should, in the first instance, be given an opportunity to deny the charges. If, as a result of an inquiry, the charges are proved and it is proposed to impose any of the penalties of dismissal, removal, or reduction in rank, such penalty may be imposed on the basis of the findings of the inquiry. It is not necessary to give him any opportunity of making a representation on the penalty proposed after the amendment of clause (2) of Article 311 of the Constitution with effect from 3rd January, 1977. The Santhanam Committee had listed as many as 15 criteria laid down by the Supreme Court and the High Courts in order to enable conduct of an inquiry in accordance with the spirit of the Constitution. The interpretations and requirements laid down by the highest courts have made disciplinary proceedings for major penalties very convoluted, tedious and time consuming involving a large number of sequential steps before a person can be found guilty of the charges and punished. The process unfortunately does not end there. Provisions exist for appeal, revision and review only after completion of which, the delinquent officer would begin to suffer the penalty. The accused officer also has the right to challenge the legality of the action of disciplinary authority before the Administrative Tribunal, get an interim stay of the proceedings and relief thereafter, and to substantively appeal against the decision of the disciplinary authority or the government as the case may be in the Tribunal. This apart, he reserves his fundamental right to invoke the writ jurisdiction of the High Court and the Supreme Court protesting the violation of such rights in the conduct of the inquiry.

3.10.14 Understandably, this has given rise to the demand for curtailing rights of the public servant in relation to his employment. The only amendment of any substantial nature that has been affected is to dispense with the requirement of a second opportunity to show cause. The Santhanam committee had observed:

"…In view of the constitutional requirements and the judicial pronouncements, we consider that it would not be possible to radically simplify the procedure unless the Constitution is suitably amended. However, we examined the possibility of simplifying the procedure in relation to disciplinary proceedings to the extent possible within the existing legal framework".

3.10.15 The Hota Committee, while recommending measures to make civil services responsive, citizen, friendly and ethical, has stated as follows:

"We recommend that Article 311 of the Constitution be amended to provide that if there are allegations against a civil servant / person holding a civil post of accepting illegal gratification or of having assets disproportionate to his known sources of income and the President or the Governor is satisfied that the civil servant / person holding a civil post be removed from service forthwith in the public interest, the President or the Governor may pass an order removing the civil servant / person holding the civil post from service and give him an opportunity in a post-decisional hearing to defend himself.

If the person removed from service is prosecuted in a court of law, the President or the Governor may also specify by order that a post-decisional hearing may be given to the person removed from service only after a judgement of the court of law acquitting him becomes final and conclusive. The person so removed shall be given a post-decisional hearing in a regular departmental inquiry to defend himself against the charge. If he is exonerated of the charge, he shall be reinstated in service with full restoration of his service conditions, including his seniority, and shall be paid the arrears of pay and allowances due to him in full.

In our view, such a Constitutional amendment would :

- *Facilitate summary removal from service of a corrupt officer;*
- *Inspire confidence in the minds of the common people that corrupt practice by members of the civil service / persons holding civil posts will not be tolerated;*
- *Ensure justice to the official so removed in a post-decisional hearing.*

3.10.16 The National Commission to Review the Working of the Constitution had recommended :

"Yet the services have remained largely immune from imposition of penalties due to the complicated procedures that have grown out of the constitutional guarantee against arbitrary and vindictive action (Article 311). The constitutional safeguards have in practice acted to shield the guilty against swift and certain punishment for abuse of public office for private gain. A major corollary

has been erosion of accountability. It has accordingly become necessary to revisit the issue of constitutional safeguards under Article 311 to ensure that the honest and efficient officials are given the requisite protection but the dishonest are not allowed to prosper in office. A comprehensive examination of the entire corpus of jurisprudence has to be undertaken to rationalize and simplify the procedure of administrative and legal action and to bring the theory and practice of security and tenure in line with the experience of the last more than 50 years".

3.10.17 The view favouring the deletion of Article 311 argues ultimately that, over time, the provisions of Article 311 have given rise to a mass of judicial pronouncements which have led to much confusion and uncertainty in interpretation. These pronouncements should not continue to have significance and effect on the strength of the continued existence of Article 311. If this Article is deleted, judicial pronouncements based on the Article would no longer be in force and binding. This could be made clear in the statement of objects and reasons of any proposed amendment to the Constitution so that these rulings are not relied upon to claim a protection which was not intended.

Summing up – Removing Article 311

3.10.18 The Commission has given deep consideration to the case for and against Article 311 remaining in the Constitution of India. No other Constitution appears to contain the kind of guarantees that this Article does. The Government of India Act-1919 was the first enactment to apply the 'doctrine of pleasure' in India, through Section 96B thereof. Its application was "subject to rules", and the courts while examining challenges to penalties under that Act applied the extant rules to determine whether these were rightly imposed. In other words, when this doctrine was first applied in India, it was deemed sufficient to provide protection against any unjust exercise of 'pleasure'. With the provisions of Judicial review now available in our Constitution, the protection available to Government employees is indeed formidable even outside Article 311. This is borne out by the fact that ample relief is available to employees invoking judicial intervention in cases involving compulsory retirements even though Article 311 does not extend to such cases.

3.10.19 When Sardar Patel argued for protection of civil servants, the intention was clearly to embolden senior civil servants to render impartial and frank advice to the political executive without fear of retribution. But the compulsions of equal treatment of all public servants and judicial pronouncements have made such a protection applicable to employees of PSUs, para-statal organizations and even body corporates like cooperatives and this has crated a climate of excessive security without fear of penalty for imcompetence or wrong-doing. The challenge before the nation now is to confront this exaggerated notion of life-time security irrespective of performance and to create a climate conducive to effective delivery of services and accountability with reasonable security of tenure.

3.10.20 The Commission believes that the rights of a civil servant under the Constitution should be subordinate to the overall reqirement of public interest and the contractual right of the State. It cannot be an argument that a corrupt civil servant's rights are more important than the need to ensure an honest, efficient and corruption-free administration. Ultimately, the public servant, an agent of the State, cannot be superior to the State and it is his fundamental duty to serve the State with integrity, devotion, honesty, impartiality, objectivity, transparency and accountability.

3.10.21 It is true that the government as an employer is expected to act in a fair manner and it has to be a model employer worthy of emulation by others. It has also to be ensured that honest and efficient public servants are not subjected to the whims and fancies of their superiors. No government can be expected to dispense with the services of a government servant in an arbitrary manner or without a proper enquiry. Such arbitrary removal is not possible even in the private sector. Strictly, there should be no need for retaining Article 310, and legal safeguards may be provided through legislation under Article 309.

3.10.22 Articles 309, 310 and 311 form a continuum. If the whole gamut of "conditions of service" is codified as required by the substantive part of Article 309, this can include matters such as disciplinary proceedings and imposition of penalties. Moreover, as noted above, with rule of law accepted as an integral part of the basic structure of the constitution, reasonable protection now attributed to Article 311 will continue to be available to satisfy the requirements of 'rule of law'.

3.10.23 Taking into account these considerations and a fairly common perception that explicit articulation of "protection" in the Constitution itself gives an impression of inordinate 'protection', the Commission is of the view that on balance Article 311 need not continue to be a part of the Constitution. Instead appropriate and comprehensive legislation under Article 309 could be framed to cover all aspects of recruitment and service, even with regard to dismissal, removal or reduction in rank. Appropriate legislation by the respective legislatures may also be ensured through a revised Constitutional provision. The Commission will examine in detail issues related to such enactment in its Report on Civil Services Reforms.

3.10.24 Recommendations:

a. Article 311 of the Constitution should be repealed.

b. Simultaneously, Article 310 of the Constitution should also be repealed.

c. Suitable legislation to provide for all necessary terms and conditions of services should be provided under Article 309, to protect the bona fide actions of public servants taken in public interest; this should be made applicable to the States.

d. Necessary protection to public servants against arbitrary action should be provided through such legislation under Article 309.

3.11 Disciplinary Proceedings

3.11.1 The term, "Disciplinary Proceedings" has not been defined under any legislation or rules. A working definition would, however, run something like; *Action initiated to find whether an employee has violated a prescribed or implicit code of ethical and professional conduct to enable the employer to impose penalties like forfeiture of employment or denial of employment related benefits on the guilty.* In the entire repertoire of measures to deal with misconduct by civil servants, disciplinary proceedings occupy a special place as the entire process is carried out within the civil service system. It is axiomatic that an efficient disciplinary system promotes efficiency and professionalism and drastically inhibits recourse to external judicial processes.

3.11.2 Prior to the enactment of the Government of India Act, 1919, there was no formal system of departmental inquiries as a prelude to disciplinary action. Police manuals and regulations governing Forest Departments provided penalties like dismissal, monetary fines and stoppage of increments etc. Such penalties were imposed after calling for, and considering explanations. A system of oral inquiry appears to have first started in the Railways in the early 1920s although at that time the Indian Railway system was an amalgam of private and public initiatives. Insofar as the system of disciplinary proceedings is concerned, enactment of the Government of India Act, 1919 is rightly regarded as a watershed. Section 96B of that Act, while prescribing that "every person in the civil service of the crown holds office during His majesty's pleasure", had made this "subject to provisions of this Act and Rules made thereunder". The importance of this provisions was that specific rules were envisaged for the first time to regulate conditions of service, including imposition of penalties.

3.11.3 Pursuant to the above provision, the Civil Services Classification Rules, 1920 were framed. Rule XIV of these Rules, for the first time, prescribed a procedure for conducting disciplinary proceedings. The provisions of these rules were amplified in the form of the amended Civil Services Regulations of 1930. The basic provisions currently in vogue essentially remain unchanged. [The early history of these measures can be gleaned from a number of judicial pronouncements such as; the judgement of the Privy Council in **R. Venkata Rao v Secretary of State for India** *AIR (1937) PC 31,* and of the Calcutta and Rangoon High Courts respectively in **Satish Chandra Das v Secretary of State** *ILR (54) Cal 44* and **J.R Baroni v Secretary of State** *AIR (1929) Rang 207*].

3.11.4 It is also pertinent to note that the provisions relating to "Services under the Union and the States" in Part XIV of the Constitution, and in particular Articles 309 to 313 thereof, reproduces verbatim, provisions of the Government of India Act, 1935. As such, the present framework for prescribing penalties, including the method of imposition thereof, contained in the Central Civil Services (Classification, Control and Appeal) Rules, 1965 essentially continues the pattern firmed up in pre independence days with certain modifications brought in pursuance of the recommendations of the Santhanam Committee. Rules on the subject framed by State Governments are also remarkably similar to the Central Rules (to be referred hereinafter as the 'CCA Rules") for the obvious reason that they share a 'common lineage' as the 'parent rules' of 1920 had all India application including to the local governments.

3.11.5 A major change that has been brought about, post independence, is that the Code of Conduct has been separated from CCA and analogous Rules in the form of Central Civil Services (Conduct) Rules and the All India Services (Conduct) Rules etc on the lines suggested by the Santhanam Committee have been notified. That Committee, after examination of the separate rules then prevailing in regard to discipline and appeal for the All India Services, the Central Civil Services, the Railways and the civilians in Defence Services recommended unified set of rules. The Committee stated: *"Our intention was that the conduct rules, particularly those relating to integrity should be uniform. If, for any reason, it is necessary to promulgate the rules separately for a service or a department there could be no objection to the rules being promulgated separately provided the rules, particularly those relating to integrity are uniform".* Accordingly, in the present pattern, the norms of professional and, to a limited extent personal behaviour, are laid down in the conduct rules while the consequences of violation of these norms are dealt with in the CCA and similar rules.

3.11.6 CCA Rules envisage two kinds of penalties. **Minor penalties** consist of "Censure", "Withholding of promotion for a specified period", and "Withholding of increment and recovery from the salary of whole or part of pecuniary loss caused by the employee". Minor penalty can be imposed after calling for and considering the explanation of the accused employee. **Major Penalties** comprise reduction in rank through reversion to a lower scale of pay or to the parent cadre etc, compulsory retirement, removal or dismissal from service. Such penalties can be imposed only after a detailed inquiry except in cases covered by the second proviso to Article 311 (2) i.e. in the eventuality of conviction for a criminal offence, on grounds related to security of the state and where an inquiry is considered not practicable.

3.11.7 Detailed procedures governing the initiation of disciplinary proceedings, and the progress and culmination, thereof, is diagrammatically depicted in **Figure 3.1**. While there are minor variations in this pattern in the states or even in the Union Government in respect of the non Gazetted establishment, broadly the 'flows' indicated therein embrace the entire community of central and state government employees including those of the public sector and nationalized banks. Without going into the details of such procedures, but to be able to appreciate the issues involved, it will be sufficient to note the following procedural outlines along with the time limit within which the Central Vigilance Commission (CVC) expects these to be attended to:

- Complaints received or lapses noticed are examined to ascertain whether they involve a 'vigilance angle' (essentially violation of conduct rules) - 1 month .
- Decision about whom to refer complaints to ascertain whether these have any substance to the CBI or departmental agencies-3 months.
- Submission of findings of investigations- 3 months.
- Department/CBI report to be sent for **'First Stage Advice'** to the CVC- 1 month from the date of reference.
- Formulation of CVC's advice-1 month.
- Issue of charge-sheet, statement of imputation of misconduct, and list of witnesses and documents etc, if it is decided to proceed in departmental inquiry - 1 month from the receipt of CVC advice.
- Consideration of Defence Statement of the accused employee- 15 days.
- Issue of final orders in minor penalty cases-2 months from receipt of Defence Statement.
- Appointment of the Inquiry Authority (IA) and Presenting Officer (PO) where the 'first stage advice' recommends major penalty which requires detailed inquiry- Immediately after receipt of Statement of Defence.
- Completion of inquiry- 6 months from the date of appointment of the Inquiry Officer and the Presenting Officer.
- Sending a copy of the inquiry report, (where the accused is held guilty or the disciplinary authority records reasons for disagreement with an inquiry report holding that charges are not proved), to the charged officer for representation, if any- 15 days from the receipt of representation.

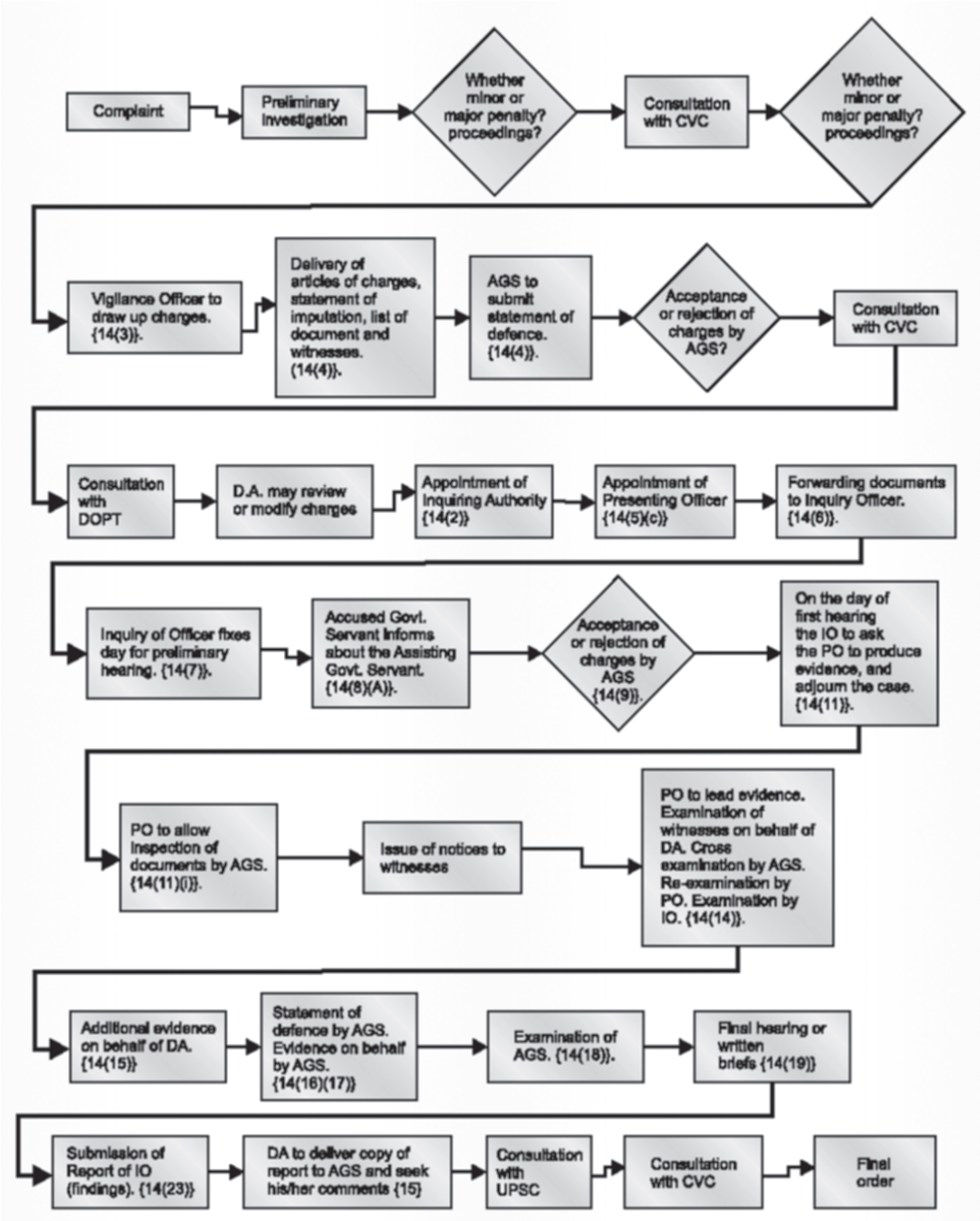

Figure 3.1 - Stages in a Disciplinary Proceeding

- Considering the representation of the accused employee and forwarding the inquiry report for **Second Stage Advice to the CVC**- 1 month from the date of receipt of the representation.

- Issue of orders on the inquiry report- 1 month from the receipt of CVC's 'second stage advice (or 2 months from the date of inquiry report where such advice is not required).

(It may be noticed that the above schedule does not include the time taken between commission of a 'wrong' and its detection or receipt of a complaint about it. A very rough calculation would also indicate that even if the above time schedule is adhered to, the estimated time taken in bringing to culmination cases involving minor and major penalties can be respectively estimated at 10 month 15 days and 16 months. It needs to be added that this schedule excludes the time required for consultation with the UPSC wherever required)

3.11.8 In order to appreciate the problems involved in the conduct of actual proceedings, it will be necessary to also invite attention to the following factors impinging on departmental inquiries particularly in the Union Government.

- The CVC has emerged as the nodal, statutory authority to over-see vigilance administration and, also to a certain extent of the working of the Central Bureau of Investigation. Initiation and completion of inquiries require clearance of this authority.

- Each Ministry/Department or other organization in the Union Government now has an internal vigilance set-up under a whole-time or part-time Chief Vigilance Officer (CVO) with the responsibility of conducting or supervising preliminary investigations in complaints, preparing the article of charge etc. keeping a watch on progress of proceedings and examining inquiry reports apart from undertaking preventive vigilance and surveillance etc.

- The total civil establishment of the Government of India consists primarily of Groups "C" and "D" staff. The monitoring and supervisory role of the CVC is, however, confined to only Groups "A" and Gazetted "B". In other words, the bulk of disciplinary cases do not benefit from the attention of the CVC.

- Disciplinary proceedings are often resorted to in cases originally investigated by the CBI for criminal prosecution if warranted by the investigation, but where the investigating agency eventually reaches the conclusion that the incriminating evidence collected is not sufficient to secure conviction but is of a degree to

suffice for the finding of guilt in departmental proceedings. (The degree of proof required in a criminal case must prove guilt 'beyond reasonable doubt; in departmental proceedings, as also in civil cases, 'preponderance of probabilities is sufficient).

- Historically, departmental proceedings were entrusted for inquiry to officials from within the organization, chosen at random subject only to the consideration that the inquiry officer be senior to the accused in rank. The present trend is to have full time inquiry officers working as Commissioner Departmental Inquiries in the CVC. This, however, only supplements the system of part-time inquiry officers as the number of departmental inquiries is significantly high.

- The Department of Personnel and Training now has a very limited role in conduct of departmental inquiries except in case of members of All India services and, for the most part, the various Ministries/Departments exercise the functions of disciplinary authorities in respect of officials borne on their establishment.

  With the formation of Central Administrative Tribunals (CATs) in the 1980s most of the judicial proceedings arising out of departmental inquiries are handled in these fora which, not infrequently, entertain pleas to stay disciplinary proceedings on technical grounds and even entertain pleas against interlocutory orders. Public servants are able to challenge the orders of the tribunal in High Courts. There is, in addition, recourse to the Supreme Court under Article 136 of the Constitution of filing 'appeal by special leave".

3.11.9 The Commission takes note of the fact that there is considerable dissatisfaction among all sections of stake-holders about the way the process of disciplinary proceedings is operating. The Hota Committee which had gone into some aspects of such proceedings had also drawn attention to the delays and procedural aspects therein which prevent disciplinary penalties from becoming a tool for ensuring efficiency and probity. That committee had also suggested measures like more frequent resort to proceedings for minor penalties, relieving the inquiry officer of all other duties while conducting the inquiry, and furnishing copies of the documents proposed to be utilized to prove the case against the accused employee along with the charge-sheet etc.

3.11.10 A recent study[49] brings out some revealing information. Some of the salient findings (cases studied) are;

- In 116 cases studied, the average time taken between reference to CVC for the 'first stage advice' and receipt of the advice in cases studied was 170 days (these cases apparently involved imposition of minor penalty).

[49] *Source*: "Disciplinary Proceedings as a Tool of Anti Corrupcion Strategy", W R Reddy (IIPA New Delhi, 2005)

- In 234 cases involving proceedings for a major penalty the average time taken between appointment of the Inquiry Officer and completion of inquiry was 584 days.
- In 56 cases the average time taken from receipt of the inquiry report to sending the case to the CVC for 'second stage advice' was 288 days.
- In 33 cases the average time taken between the 'date of occurrence of misconduct'* and sending the cases to the CVC for 'first stage advice' was 1284 days.
- Analysis of certain completed cases revealed the following 'break-up' of time taken by various agencies;

Administrative Department	- 69%
Inquiry Officer	- 17%
CVC	- 9%
UPSC	- 5%

- There was considerable variation in the time taken often in the same stages depending on the source relied upon viz. Disciplinary Cases Monitoring and Management Information System (DCMMIS) of the Administrative Vigilance Division of the Department of Personnel and Training, CVC data of 'first stage advice' i.e. cases resulting in closure or minor penalties and 'second stage advice' of the same organization i.e. cases referred again after departmental inquiry.

(The concept of 'date of occurrence of misconduct', though an innovative bench-mark, needs to be used with caution in a situation where the 'discovery' of misconduct is necessarily possible only at some future date).

3.11.11 From the above data two facts clearly emerge: f*irst, there* is no congruence between the time taken in completion of various stages and the schedule prescribed for their completion by the CVC; and *second,* while it would be unrealistic in such cases to expect 'immediate report of the offence', the discovery of the commission of a 'misconduct' is shockingly delayed. In fact, it is not very clear, on the whole, as to how such 'misconducts' come to light- whether a significant number of cases could be detected within the organization or whether most such cases were disclosed through complaints of 'affected-outsiders'. These are aspects on which greater clarity and empirical evidence are clearly required.

3.11.12 The Commission is of the view that the existing regulations governing disciplinary proceedings need to be recast and the following broad principles should be followed in laying down the new regulations.

a. The procedure needs to be made simple so that the proceedings could be completed within a short time frame.

b. Emphasis should be on documentary evidence, and only in case documentary evidence is not sufficient, recourse should be made to oral evidence.

c. An appellate mechanism should be provided within the department itself.

d. Imposition of major penalties should be recommended by a committee in order to ensure objectivity.

The Commission would be elaborating these aspects in its Report on civil services reforms.

3.12 Statutory Reporting Obligations

3.12.1 Statutory provisions have cast reporting obligations on the citizen. Such provisions apply to both citizens and public servants backed with penal provisions in the event of failure to comply with such obligations. Section 39 of the Code of Criminal Procedure, 1973 makes it mandatory for any person to report to a magistrate or officer of the law any alleged corrupt offence by a public servant failing which he shall be liable for prosecution. However, this provision has remained a dead letter because no mechanisms are available for protection of the informants. Obviously, fear of potential whistleblowers being subjected to reprisals by the perpetrators of corrupt acts, and the inability of the government to protect their person and property in the event of such threats are powerful deterrents which far outweigh the moral pressure of duty as a citizen. In the case of a civil servant, the threat is not only from the actual agents who perpetrate the crime reported, but also from the government apparatus where there is collusive corruption. Thus, he suffers both from external physical threat and internal official harassment.

3.12.2 Failure to give information as required by law also constitutes an offence under Sections 176 or 202 of the Indian Penal Code which deal with omission to give notice to public servant by a person legally bound to give it and intentional omission to give information of offence by a person bound to inform. Section 125 of the Indian Evidence Act, 1872 also covers aspects of the interest and integrity of the information given in respect of offences. Official communication with regard to crime is privileged, and a police officer or a magistrate cannot be compelled to disclose the source of information received by him with regard to the commission of the offence. These provisions indicate how the law makers had, over a century ago, realized the importance of the need to encourage public and official reporting of crimes or of the intention to commit crimes of corruption. In this context, Malaysia has stipulated that a public official who is offered a bribe but fails to report it, may be convicted and imprisoned for up to ten years. The Commission feels that making a law on whistleblower's protection would provide the necessary protection against departmental victimization (para 4.7.4) thus creating an environment where public servants would come forward and reveal details of corrupt practices within their organizations.