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**LAW COMMISSION
OF
INDIA**

Report No.254

**The Prevention of Corruption (Amendment)
Bill, 2013**

February 2015

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D.O. No.6(3)/274/2015-LC(LS)

12 February, 2015

Dear Mr. Sadananda Gowda ji,

As you know, in the meeting taken by Hon'ble Finance Minister on 12 November 2014, in pursuance of the informal decision taken by the Cabinet, it was decided to have the views of the Law Commission of India on the issues relating to the proposed amendments to the Prevention of Corruption (Amendment) Bill, 2013. Accordingly, on 8 January 2015, the Department of Legal Affairs forwarded the proposal received from Secretary, Department of Personnel and Training, to the Law Commission of India, with a request that a report on the matter may be submitted by the end of February 2015.

In view of the short span of time available with us to submit our views, we carried out a study of the United Nations Convention Against Corruption (UNCAC) and other relevant statutes and case-laws of India and the U.K., and a draft of the report was given shape. This was further subjected to extensive deliberations, discussions and in-depth study by the Commission and, thus, we have finalised the Report, which is presented with this letter as Report No.254 titled **"The Prevention of Corruption (Amendment) Bill, 2013"**.

With warm regards,

Yours sincerely,

A. Prakash

[Ajit Prakash Shah]

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The Prevention of Corruption (Amendment)
Bill, 2013
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CHAPTER I

BACKGROUND TO THE REPORT

A. History of Anti-Corruption Law in India

1.1 Regulation of corruption in some form or the other has a long history in India. The first law broadly dealing with corruption and the attachment of property was a pre-independence, war time ordinance called the *Criminal Law (Amendment) Ordinance, 1944 (Ordinance No. XXXVIII of 1944) (hereinafter “1944 Ordinance”)*. It was enacted under the Government of India Act, 1935 to prevent the disposal or concealment of property procured by means of certain scheduled offences, including offences under the Indian Penal Code of 1860 (*hereinafter “IPC”*). The ordinance is one of the few remaining permanent ordinances, given that it was enacted when the India and Burma Emergency Provisions were in effect and when, the six month clause requiring ordinances to be statutorily enacted was suspended. It has subsequently been incorporated in the Prevention of Corruption Act, 1988 (*hereinafter “PC Act, 1988”*) thus giving the ordinance, the status of law.

1.2 The first direct and consolidated law on the subject of corruption was the *Prevention of Corruption Act, 1947*, which was enacted in independent India to supplement the provisions of the IPC. The existing provisions under the IPC and other laws had proved inadequate to deal with cases of bribery and corruption of public servants, which had increased greatly during the war years, due to scarcity and controls. Therefore, a new law was required to deal with various post-war scenarios, which provided multiple opportunities for corruption – these included post-war reconstruction schemes, termination of contracts, and

disposal of a large number of government surplus stores.¹ The 1947 Act sought to incorporate (with modifications) the attachment provisions from the 1944 Ordinance; introduced the offence of criminal misconduct, similar to section 13 of the present 1988 Act; and criminalised attempts to commit certain offences under the Act.

1.3 However, the scope of the 1947 Act was considered too narrow and the PC Act was enacted in 1988 to replace the 1947 Act and certain provisions in the IPC dealing with corruption. It sought to, *inter alia*, widen the scope of the definition of public servant; incorporate the offences under sections 161-165A of the IPC; increase the penalties provided; and provide for day to day trial of cases.

B. The Proposed Amendments to the PC Act, 1988

1.4 The Prevention of Corruption (Amendment) Bill, 2013 (*hereinafter* “2013 Bill”) was introduced in the Rajya Sabha on 19th August 2013 to amend the PC Act, 1988, the Delhi Special Police Establishment Act, 1946 and the 1944 Ordinance. The 2013 Bill was referred to the Standing Committee on Personnel, Public Grievances, Law and Justice on 23rd August 2014, and the Committee submitted its report on 6th February 2014. Subsequently, on 12th November 2014, an informal and improved version of the 2013 Bill was circulated (*hereinafter* “2014 amendment”) and approved at a Cabinet meeting, based on the recommendations of the Standing Committee. This amended draft was sent to the Commission by way of reference.

1.5 The Statement of Objects and Reasons to the 2013 Bill makes it clear that the amendments were necessitated by India’s ratification of the United Nations Convention Against Corruption (*hereinafter* “UNCAC”) in May 2011, judicial

¹ Statement of Objects and Reasons of the Bill preceding the enactment of the Prevention of Corruption Act, 1947.

pronouncements, and the need to bring domestic laws in line with international practices. It reads as follows:

The Prevention of Corruption Act, 1988 provides for prevention of corruption and for matters connected therewith. The ratification by India of the United Nations Convention Against Corruption, the international practice on treatment of the offence of bribery and corruption and judicial pronouncements have necessitated a review of the existing provisions of the Act and the need to amend it so as to fill in gaps in description and coverage of the offence of bribery so as to bring it in line with the current international practice and also to meet more effectively, the country's obligations under the aforesaid Convention. Hence, the present Bill. [Emphasis supplied]

1.6 However, a perusal of the proposed 2013 amendments makes it clear that the amendments substantially replicate the provisions of the UK Bribery Act 2010 (*hereinafter* “Bribery Act”). This creates certain problems because the Bribery Act was enacted to repeal the common law offence of bribery and the whole of the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act, 1906, and the Prevention of Corruption Act, 1916. The UK Law Commission in its 313th Report on *Reforming Bribery* in November 2008 proposed a draft Bribery Bill, which formed the basis for the eventual 2010 Act. It proposed to replace the existing offences with two general offences of bribery, a special offence relating to bribing a foreign public official and a corporate offence for negligently failing to prevent bribery by an employee or agent.²

1.7 More importantly, and this distinction is significant, the Bribery Act applies to *any* person and is not restricted

² The United Kingdom Law Commission, *Reforming Bribery*, Law Com. No. 313 (2008), at xiii.

to public servants, as in India. In other words, in the UK, a bribe by a person 'P' of a company 'A' to another person 'Q' of a company 'B' is made an offence under the Bribery Act, 2010; whereas the same is not covered by the PC Act.

1.8 The UK Law Commission (and the 2010 Act) did not draw a distinction between public servants and the private sector in determining the limits of the bribery offence, partly because of the increasing private sector provision of goods and services in public interest. The Act caters to its wide scope by providing for “*different paths to liability, some of which are especially suited to, but by no means confined to, those who hold public office.*”³ The PC Act in contrast is applicable only to “public servants” or those “expecting to be a public servant”, which along with “public duty”, has been defined very broadly under section 2 of the 1988 Act.

1.9 Thus, the approach of the 2013 Bill to transplant certain provisions from the UK Bribery Act, while well intended, is misconceived and will serve to create further confusion and ambiguity.

C. Mandate of the Present Law Commission

1.10 Pursuant to the informal decision taken at the Cabinet Meeting and the circulation of an improved draft on 12th November 2014 further modifying the 2013 Bill (the “2014 amendments”), the Secretary of DoPT *vide* letter being, D.O. No.428/04/2014-AVD-IV(B) dated 17th November 2014, requested the Law Secretary at the Department of Legal Affairs to make a reference to the Twentieth Law Commission for its views on the proposed amendments in the 2013 Bill and the 2014 amendments.

³ *Ibid.*, at ¶¶ 3.212-3.218.

1.11 On 8th January 2015, the Department of Legal Affairs, Ministry of Law & Justice, Government of India *vide* Note No.A-45012/1/2015-Adm.III(LA) forwarded the letter to the Law Commission requesting its views and recommendations on the proposed amendments of the PC Act, 1988, relating to the definition of offences, provisions regarding sanction for prosecution, and other provisions in the 1988 Act. The Commission was requested to examine the matter at the earliest and send its report as soon as possible, preferably before the end of February 2014. Accordingly the present reference came to this Commission in the aforesaid terms.

1.12 Pursuant to this reference, and considering the short span of time within which the Report had to be submitted, the Commission carried out a study of the UNCAC; provisions of Indian law including the 1944 Ordinance, the Prevention of Money Laundering Act 2002, and the Lokpal and Lokayukta Act 2013; provisions in UK law including the UK Bribery Act, the Guidance prepared by the UK Ministry of Justice under the Bribery Act, and the reports prepared by the UK Law Commission; practice and relevant judgments in Indian and British law; and provisions under the American Federal Corrupt Practice Act.

1.13 The Chairman held various meetings with the full time members of the Commission and was very ably assisted by Ms. Vrinda Bhandari, who served as a Consultant to the Commission.

1.14 Thereafter, upon extensive deliberations, discussions and in-depth study, the Commission has given shape to the present Report.

CHAPTER II

ANALYSIS OF SECTION 7 OF THE 2013 BILL

2.1 Section 7 regulates the demand side offence, namely acts relating to a public servant being bribed. As the Statement of Objects and Reasons makes clear, the definition of the offence under the section was:

proposed to be substituted by a new comprehensive definition which covers all aspects of passive bribery, including the solicitation and acceptance of bribe through intermediaries and also acts of public servants acting outside their competence.

2.2 Nevertheless, in attempting to create “a new comprehensive definition”, section 7 of the 2013 Bill has substantially lifted from sections 2-4 of the UK Bribery Act. In doing so, it has created great ambiguity in the interpretation of the section.

A. Section 7: Definitions and Use of Language

S. 7, PC Act, 1988	S. 7(1), 2013 Amendment	S. 2(1) UK Bribery Act
Any public servant who <ul style="list-style-type: none"> • accepts • obtains • agrees to accept • attempts to obtain “any gratification whatever, other than legal remuneration....” in the context of “official acts” or “official functions”	Any public servant who <ul style="list-style-type: none"> • <i>requests</i> any person for • obtains • <i>agrees to receive</i> • accepts • attempts to obtain “any undue financial or other advantage” in the context of “improper performance” of “a relevant <i>public</i> function or activity”	Any <i>person</i> who <ul style="list-style-type: none"> • requests, • agrees to receive or • accepts “a financial or other advantage”..... in the context of “improper performance” of a “relevant function or activity”

2.3 The PC Act, 1988 made it an offence for a public servant to “accept, obtain, agree to accept or attempt to obtain” any gratification whatever, other than legal remuneration under certain circumstances. The amended

Section 7(1) uses the terms “*requests* any person for, obtains, *agrees to receive*, accepts or attempts to obtain” any “undue financial or other advantage” for the “improper performance” of a “relevant public function or activity”. The changes proposed in the 2013 amendment seem to bring it line with the UK Bribery Act, which regulates corruption in the private sector as well, rather than with the UNCAC. This is problematic for a number of reasons.

2.4 The proposed section 7 now covers five types of acts by a public servant, namely *requests* any person for; obtains; *agrees to receive*; accepts; or *attempts to obtain* any undue financial or other advantage.

2.4.2 The 1988 formulation of section 7 included the words “accepts, obtains, or attempts to obtain”, to which the 2013 amendment added “requests for” and “agrees to receive”. These two phrases are lifted from section 2 of the UK Bribery Act (and not the UNCAC) without realising that the phrase “requests for” seems to already be criminalised under “attempts to obtain”.

2.4.3 This amalgamation of five words/activities in section 7(1) thus, seems redundant. Instead of being clarificatory, it will only create confusion and interpretational disputes in the future.

2.4.4 Recommendation: The phrase “requests for” should be deleted from section 7(1)(a), (b), (c), (d) and Explanation 1 of the 2013 Bill.

2.5.1 The phrase “any gratification whatever, other than legal remuneration” was changed to “financial or other advantage”, seemingly to bring it in line with section 2 of the Bribery Act. However, in 2014, this was substituted by a new phrase “*undue* financial or other advantage” throughout the Act, which was then defined under section

2(d) to “mean[s] any gratification, benefit or advantage, property or interest in such property, reward, fee, valuable security or gift or any other valuable thing (other than legal remuneration).” The word “undue” seems to have been taken from the UNCAC’s formulation of “undue advantage”.

2.5.2 To put it simply, the UK Act talks about “financial or other advantage” while the UNCAC talks about “undue advantage”, although neither Act/Convention define these phrases. The effect of the 2013 and 2014 amendments to the PC Act has been to combine these two formulations and introduce (and define) the phrase “undue financial or other advantage”.

2.5.3 The proposed 2014 amendment seems to revert to the spirit of the 1988 formulation, without any clear explanation of the distinction attempted to be drawn, if any, between ‘due’ and ‘undue’ financial or other advantage. Even otherwise, the “financial or other advantage” formulation seems narrower than the existing section 7 formulation of “any gratification whatever, other than legal remuneration”. Unlike the 2013/2014 formulation, “gratification” has been defined by Explanation (b) of the existing section 7 of the 1988 Act to expressly “not [be] restricted to pecuniary gratifications or to gratifications estimable in money”. For example, it clearly covers sexual favours as “gratification” in return for the public servant to do/refrain from doing a certain act. However, “other advantage” in “financial or other advantage” being interpreted using *ejusdem generis*, does not seem to cover sexual favours in return for the public servant’s acts or omissions. Thus, the proposed amendment is actually narrowing the scope of corruption, instead of the stated intent of expanding it.

2.5.4 A better, and more elegant, solution will be to rely on the UNCAC’s formulation of “undue advantage” and

define it using the original 1988 formulation in Explanations (b) and (c) of section 7.

2.5.5 *Recommendation:* The definition of “undue financial or other advantage” in section 2(d) should be deleted and the phrase “undue financial or other advantage” should be dropped from the entire Bill. Instead, it should be substituted with “undue advantage” throughout the 2013 Bill and the 1988 Act.

Section 2(d) should now read as follows:

‘(d) “undue advantage” means any gratification whatever, other than legal remuneration.

***Explanation 1:* The word “gratification” is not limited to pecuniary gratifications or to gratifications estimable in money.**

***Explanation 2:* The expression “legal remuneration” is not restricted to remuneration paid to a public servant, but includes all remuneration which he is permitted by the Government or the organisation, which he serves, to receive.’**

2.6.1 Section 7 repeatedly refers to the term “relevant” public function or activity borrowing from sections 2 and 3 of the Bribery Act’s term “relevant function or activity”. There are two problems with this formulation:

- a. The term “*relevant* function or activity” has been included, and defined in section 3 of the Bribery Act, because the Act sought to punish private acts of bribery, but wanted to classify only some of them as punishable. This is not relevant in the Indian context because the PC Act only deals with corruption amongst public servants. Hence, the word “relevant” is not as useful.

b. Moreover, unlike section 3 of the Bribery Act which defines “relevant function or activity”, the proposed section 7(2)(a) only defines “public function or activity”, thereby creating unnecessary confusion about the use of “relevant”.

2.6.2 Recommendation: The word “relevant”, where it appears before “public function or activity” should be dropped from the entire Act.

B. Section 7(1) of the 2013 Bill

2.7.1 Section 7(1)(a) deals with situations where a public servant takes a bribe in return for performing a public function “improperly”. On the face of it, thus, section 7(1)(a) does not seem to cover situations, which are very common in India, where public servants take bribes to perform their functions ‘properly’. Conversely, section 7(1)(b) is a take off from section 2(3) of the Bribery Act and it is unclear as to what it seeks to convey and cover, especially when the Bribery Act covers private and commercial bribery as well, whereas this amendment is only for actions of public servants.

2.7.2 Section 7(1)(b), and its interplay with section 7(1)(a) can be understood only if one examines the kinds of situation the UK Parliament had in mind while drafting section 2. Since the Bribery Act was envisaged to cover public and private activities, the UK Law Commission viewed section 2(3) (or section 7(1)(b) of the 2013 Bill) as covering instances where “*R, a civil servant, asks for £1,000 for himself to process a routine application.*” This makes sense when seen in contrast with section 2(2) (or section 7(1)(a) of the 2013 Bill) where the illustration for improper performance is where “*R asks P for £10,000 if he – R – or a colleague destroy supporting documents submitted by rival*

*bidders for a contract P is seeking to secure with R's employer."*⁴

2.7.3 The Law Commission further goes on to state that in the UK, R (any person)

... may commit bribery in one of two main ways, both of which we have included under a single "umbrella" offence. Broadly speaking, first, R may offer to or actually engage in a misuse of his or her position in exchange for an advantage ("doing P a favour"). Secondly, R may misuse his or her position simply by asking for or accepting an advantage in the first place ("compromising R's position").

2.7.4 First, there are the "advantage in exchange for favour" cases. Under our recommendations:

- (a) Either the advantage (or the prospect thereof) must be a reward for improper conduct, or
- (b) the advantage (or the prospect thereof) must be requested, agreed to or accepted with the intention that improper conduct will be performed, or
- (c) the improper conduct must be engaged in, in consequence of or in anticipation of, a request, agreement to or acceptance of the advantage.

2.7.5 Secondly, there are the "compromise of R's position" cases. Under our recommendations the request for, agreement to accept, or acceptance of the advantage must in itself constitute improper conduct.⁵

2.7.6 It is thus clear that first set of cases are covered by section 7(1)(a), (c), and (d) whereas the second set of

⁴ UK Law Commission, *supra* note 2, at xiii and iv.

⁵ UK Law Commission, *supra* note 2, at ¶¶3.193-3.195.

“compromising R’s position” cases are covered by section 7(1)(b) of the 2013 Bill. The intent of the UK Law Commission in distinguishing between the two sets of cases was that *“where public office holders are concerned, it might be thought not to matter a great deal whether or not they misconduct themselves in exchange for an advantage. It is enough that they have misconducted themselves, whatever the reason was.”*⁶

2.7.7 By merely lifting the provisions of the UK Act, without understanding its scope and context or without providing any examples of how the PC Act might apply, the 2013 amendment only increases the ambiguity around the interpretation of the different components of the bribery offence under section 7. This can be resolved by providing an appropriate illustration to resolve the confusion around the word “improper”.

2.7.8 However, the exact phrasing of section 7(1)(b) of the 2013 Bill still causes certain problems. First, it seems to comprise the “minimum morality” of entire section 7 offence insofar as it criminalises the mere act of obtaining/agreeing to receive/attempting to obtain. If the mere asking for a bribe is made an offence, then the purpose of sections 7(1)(a), (c), and (d) seem superfluous, and should instead be re-numbered to subsume it within the main section. For instance, if a public servant asks for a bribe to process a routine application, it will be covered under section 7(1)(b). Section 7(1)(c), which criminalises public servants being rewarded for their actions, is then unnecessary.

2.7.9 Second, having four sub-sections seem to suggest that section 7(1)(a), (c) and (d) are required because there are certain cases, which are not covered by section 7(1)(b), or where the mere act of asking for a bribe is not a criminal offence. That cannot have been the intention of the

⁶ *Ibid.*, ¶ 3.218.

Legislative in expanding the scope of the bribery offence under section 7.

2.7.10 Recommendation: Section 7(1) should be amended (keeping in mind the above suggestions) in the following manner:

(1) Any person, being, or expecting to be, a public servant who obtains or agrees to receive or accepts or attempts to obtain, an undue advantage from any person shall be punishable, with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

(2) Notwithstanding anything contained in subsection (1), any person, being, or expecting to be, a public servant who, –

(a) obtains or agrees to receive or accepts or attempts to obtain from any person, any undue advantage, intending that, in consequence, a public function or activity would be performed improperly either by himself or by another public servant; or

(b) obtains or agrees to receive or accepts or attempts to obtain, an undue advantage as a reward for the improper performance (whether by himself or by another public servant) of a public function or activity; or

(c) performs, or induces another public servant to perform, improperly a public function or activity in anticipation of or in consequence of agreeing to receive or accepting an undue from any person,

shall be punishable, with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation 1. — For the purpose of sub-section (1), the obtaining, agreeing to receive, accepting, or the attempting to obtain an undue advantage itself constitutes the improper performance of a public function or activity.

Illustration: A public servant, ‘R’ asks a person, ‘P’ to give him Rs. 10,000 to process his routine ration card application on time. R is guilty of an offence under this sub-section.

2.8.1 At this stage it is necessary to refer to Explanation 5 in the 2014 amendment, where the terms “obtains” and “attempts to obtain” have been defined *only* for the purpose of section 7(1)(b) of the 2013 Bill. The proposed Explanation 5 reads as “*for the purpose of clause (b) of this sub-section, the expressions “obtains” and “attempts to obtain” shall cover cases where a person being, or expecting to be a public servant, obtains or attempts to obtain, any undue financial or other advantage for another person, by abusing his position as a public servant or by using his personal influence over another public servant, or by any other corrupt or illegal means.*”

2.8.2 However, with the changes proposed to the formulation of section 7(1) of the 2013 Bill above, it is necessary to make certain changes to this proposed Explanation 5.

2.8.3 First, the proposed Explanation 5 defines the terms “obtains” and “attempts to obtain” for the purposes of section 7(1)(b) of the 2013 Bill. Since, as per the Commission’s recommendations, section 7(1)(b) is now section 7(1), Explanation 5 has to be read in consonance *only* with the Commission’s proposed section 7(1).

2.8.4 Secondly, the phrase “any undue financial or other advantage” should be replaced with the phrase “any

undue advantage” in line with the Commission’s recommendation above.

2.8.5 Thirdly, the Explanation only talks about the public servant using such advantage “for another person”, and omits to include the phrase “for himself”, which needs to be changed.

2.8.6 Fourthly, for the sake of clarification, the Explanation should also include the “acting in violation of a statutory duty or any set of rules, government policies, executive instructions and procedures” as part of the proscribed conduct.

2.8.7 Recommendation: Thus, the Commission recommends that the proposed Explanation 5 in the 2014 Bill should be deleted and re-introduced as Explanation 2 to section 7 of the 2013 Bill (given that the Commission next recommends the deletion of Explanation 2 to section 7(1) of the 2013 Bill) as follows:

***Explanation 2:* For the purpose of sub-section (1), the expressions “obtains” or “attempts to obtain” shall cover cases where a person, being, or expecting to be, a public servant, obtains or attempts to obtain, any undue advantage for himself or for another person, by abusing his position as a public servant or by using his personal influence over another public servant; or by acting in violation of a statutory duty or any set of rules, government policies, executive instructions and procedures; or by any other corrupt or illegal means.**

2.9.1 The proposed Explanation 2 to section 7(1) in the 2013 Bill is also problematic. It states that:

It shall be immaterial, whether such person being, or expecting to be, a public servant knows or believes that the performance of the public function or activity is improper or whether the public servant who is induced to perform improperly a relevant public function or activity knows or believes that the performance of the public function or activity is improper.

2.9.2 The Explanation is a combination of sections 2(7) and (8) of the Bribery Act, although it does not take into account the specific classes sections 2(7) and (8) seek to cover. For instance, section 2(7) of the Bribery Act states that it is immaterial “in cases 4 to 6”, whether R knows or believes that the performance of the function or activity is improper. Thus, section 2(7) does not apply to Case 3 (under section 2(2) of the UK Act, and similar to section 7(1)(a) of the 2013 Bill), where R receives an advantage, intending that in consequence, a relevant function should be performed improperly.

2.9.3 The incongruity of Explanation 2 to section 7(1) in the 2013 Bill is evident because, unlike the Bribery Act, it applies to *all* cases. Moreover, it seems completely unnecessary and unclear in the Indian context, given that the PC Act relates only to public servants, and defines “public duty” (and hence, “public servant”) under sections 2(b) and (c) of the 1988 Act very broadly.

2.9.4 Recommendation: Explanation 2 to section 7(1) of the 2013 Bill should be deleted.

2.10.1 Explanation 4 to section 7(1) has omitted to cover any person “expecting to be a public servant”.

2.10.2 Recommendation: The phrase “person expecting to be a public servant” should be inserted after the term “public servant” in Explanation 4 to

section 7(1) of the 2013 Bill, now Explanation 3 as per the Commission’s recommendations.

C. Section 7(2) of the 2013 Bill

2.11.1 Section 7(2) is a take-off from sections 3, 4 and 5 of the UK Bribery Act. Sections 3 and 4 of the Bribery Act are relevant in the UK context because, although they sought to punish private acts of bribery, they wanted to classify only some acts as punishable. This made it important to define the terms “relevant function or activity” or “improper performance” to which the bribe relates or “relevant expectation”.

2.11.2 However, the PC Act only deals with corruption by public servants and already defines the terms “public servant” and “public duty” in section 2 of the 1988 Act. For this reason, the definitions under section 7(2) are not relevant or necessary in the Indian context, and in fact, will only create confusion.

S. 7(2)(a), 2013 Amendment	S. 3 UK Bribery Act
<p>It is a “public function or activity” if</p> <ul style="list-style-type: none"> • It is a the function or activity is of a public nature; • the function or activity is performed in the course of a person's employment as a public servant; • the person performing the function or activity is expected to perform it impartially <i>and</i> in good faith; <i>and</i> • the person performing the function or activity is in a position of trust by virtue of performing it; 	<p>It is a “relevant function or activity” if</p> <ul style="list-style-type: none"> • it falls within sub-section (2) <ul style="list-style-type: none"> (a) any function of a public nature, (b) any activity connected with a business,(including trade or profession), (c) any activity performed in the course of a person’s employment, (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate) • AND meets one or more of conditions A to C. <ul style="list-style-type: none"> <u>Condition A</u>: a person performing the function or activity is expected to perform it in good faith <u>Condition B</u>: person performing the function or activity is expected to perform it impartially <u>Condition C</u>: person performing the function or activity is in a position of trust by virtue of performing it

2.11.3 Section 7 (2)(a) dealing with the definition of a “public function or activity” is completely derived from sections 3(2)(a), (c), 3(3), 3(4) and 3(5) of the UK Act, instead of the provisions of the UNCAC. Given that the UK Act did not want to bring all private activities within the fold of the Bribery Act, it was necessary to determine the public nature of the function or whether it was performed in a position of trust. Therefore, various permutations and combinations of activities were brought within the section’s ambit. In the 2013 amendment, we are only looking at functions being performed by a public servant, and as such the same exclusions/conditions may not be relevant. Even then, the scheme operating in the UK Act is not replicated and the definitions of “public function or activity” and “relevant expectation” having been made cumulative, create unending confusion.

2.11.4 For instance, the focus in section 7(2)(a)(i) and (ii) on the public nature of the activity or the performance in the course of a person’s employment as public servant seems completely unnecessary given that section 2(b) of the existing PC Act defines “public duty” (and hence, “public servant”) in the broadest of terms. While the first two sub-clauses of section 7(2)(a) seem unnecessary, the final two sub-clauses in section 7(2)(a), namely section 7(2)(a)(iii) and (iv) are just confusing. First, they make cumulative, conditions that are supposed to be disjunctive. The UK Law Commission gives using examples of referees and agents accepting contractors’ bids, emphatically states that “*the duty to act in good faith is not the same as a duty to act impartially,*”⁷ and therefore treats the two as disjunctive conditions. Section 7(2)(a)(iii) places both conditions simultaneously on the public servant.

⁷ UK Law Commission, *supra* note 2, at ¶ 3.108. For instance, paying an academic referee to write an unduly partial reference is a breach of the duty of good faith, and not the duty of impartiality. Similarly, when agents accepting bids from contractors, are not under a duty to assess the bids impartially, they must only assess the bids in good faith. The duty of impartiality on the other hand, is cast on the mediator.

2.11.5 Moreover, section 7(2)(a)(iv)'s requirement that in addition to the aforesaid conditions, the "person" performing the function or activity must be in a position of trust by virtue of performing it is unnecessary, confusing and redundant. The exact lift from section 3(5) of the Bribery Act is evident when one considers the use of the word "person" whereas the PC Act, the section, and even the sub-section (a)(ii) talk about the function or activity being carried out in a person's course of employment as a "public servant".

2.11.6 More importantly, however, is the fact that the Bribery Act introduced this concept of "position of trust", keeping in mind facts, such as the "*position in which [R] is expected to safeguard, or not to act against, the financial interests of another person*".⁸ The UK Law Commission expressly rejected the idea of placing any special reliance on the legal concept of trust and instead looked at this provision covering those under a recognised 'relationship' of trust such as banker-clients/ doctor-patients, as all those in a position of trust by virtue of their circumstances such as access to documents or premises. Thus, they give an example of a security guard R, paid to look the other way while a person, P, from the rival company enters the company premises and sifts through confidential documents.⁹ In the Indian context, it is very unclear how this "position of trust" will be interpreted given that the doctrine of public trust has not yet been brought into criminal law (and only applies to large tort cases).

2.11.7 Further, sections 7(2)(b)-(c) of the 2013 Bill are derived from sections 4(1) and (2) of the UK Act. For the reasons of the scope of the Bribery Act and the impracticality of blatant lifting its language without consistency of theme and coverage, these sub-sections

⁸ *Ibid.*, at ¶ 3.156-3.157.

⁹ *Ibid.*, at ¶ 3.160.

further create confusion. For instance, it is unclear why section 7(2)(c)(i) uses impartially and good faith as disjunctive terms, whereas in section 7(2)(a)(iii) on the definition of public function they are used conjunctively. Similarly, the invocation of the concept of “position of trust” in the definition of “relevant expectation” is also confusing.

2.11.8 Section 7(2)(d) is a copy of section 4(3) of the UK Act, as is evident from the table below:

S. 7(2)(d), 2013 Amendment	S. 4(3), UK Bribery Act
Anything that a <i>public servant</i> does, or omits to do, arising from or in connection with that person's past performance of a <i>public</i> function or activity shall be treated as being done, or omitted, by that person in the performance of that function or activity	Anything that a <i>person</i> does (or omits to do) arising from or in connection with that person's past performance of a <i>relevant</i> function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

2.11.9 However, it is unclear what it conveys. The UK Law Commission Report provides some guidance through this example:

“R has recently retired from an influential position in the civil service. He or she is approached by P who is seeking a lucrative contract with a Government department. P pays R a large sum of money to provide confidential information to P about the bidding processes. In this example, a prosecution should not fail at the outset simply because R is not currently engaged in a profession or performing a public function. The transaction between P and R clearly relates to past conduct of a public or professional kind. That should be sufficient

to bring the matter within the scope of the offence.”¹⁰

2.11.10 The incongruity of such a provision in the 2013 Bill or the PC Act is evident from the fact that the section 4(3) of the Bribery Act, 2010 focuses on the acts of “any person” and hence relates to the past performance of a person in the private sector as well. In fact, the blatant lifting and non-application of mind to the Indian context is evident that while the word “person” arising in the first line of section 4(3) has been changed to “public servant” in section 7(2)(d), the rest of section 7(2)(d) talks about “person”. This is completely unnecessary in the PC Act context, insofar as it only relates to public servants.

2.11.11 Recommendations:

- **Sections 7(2)(a), (b), (c), (d) and (e) should be deleted. Thus, the definition of “public function or activity” and “relevant expectation” should be deleted.**
- **If this is not accepted, then the conditions in section 7(2)(a) and (b) should be made disjunctive, instead of being cumulative.**

2.12 Keeping in mind all the changes proposed in this Chapter, and other consequential amendments that follow, the comprehensively drafted section 7 will now read as follows:

7. Offence relating to public servant being bribed

(1) Any person, being, or expecting to be, a public servant who obtains or agrees to receive or accepts or attempts to obtain, an undue advantage from any person shall be punishable, with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

¹⁰ UK Law Commission, *supra* note 2, at ¶¶ 3.26-3.27.

(2) Notwithstanding anything contained in sub-section (1), any person, being, or expecting to be, a public servant who, –

(a) obtains or agrees to receive or accepts or attempts to obtain from any person, any undue advantage, intending that, in consequence, a public function or activity would be performed improperly either by himself or by another public servant; or

(b) obtains or agrees to receive or accepts or attempts to obtain, an undue advantage as a reward for the improper performance (whether by himself or by another public servant) of a public function or activity; or

(c) performs, or induces another public servant to perform, improperly a public function or activity in anticipation of or in consequence of agreeing to receive or accepting an undue advantage from any person,

shall be punishable, with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation 1. — For the purpose of sub-section (1), the obtaining, agreeing to receive, accepting, or the attempting to obtain an undue advantage itself constitutes the improper performance of a public function or activity.

Illustration: A public servant, ‘R’ asks a person, ‘P’ to give him Rs. 10,000 to process his routine ration card application on time. R is guilty of an offence under this sub-section.

Explanation 2.— For the purpose of sub-section (1), the expressions “obtains” or “attempts to obtain” shall cover cases where a person, being, or expecting to be, a public servant, obtains or attempts to obtain, any undue advantage for himself or for another person, by abusing his position as a public servant or by using his personal influence over another public servant; or by acting in violation of a statutory duty or any set of rules, government policies, executive instructions and procedures; or by any other corrupt or illegal means.

Explanation 3.— For the purpose of this section, it shall be immaterial whether—

(a) such person being, or expecting to be, a public servant obtains or agrees to receive or accepts, or attempts to obtain (or is to agree to receive, or accept) the advantage directly or through a third party;

(b) the undue advantage is, or is to be, for the benefit of such person being or expecting to be, a public servant or another person.

Explanation 4. — “Expecting to be a public servants” – For the purpose of this section, if a person not expecting to be in office agrees to receive or accepts or attempts to obtain from any person, any undue advantage by deceiving such other person into a belief that he is about to be in office, and that he will then serve him, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

Explanation 5. — For the purpose of this section, where a public servant, or a person expecting to be a public servant, induces a person erroneously to believe that his influence with the Government has obtained a title or other benefit for that person and thus induces that person to give the public servant, any undue

advantage as a reward for this service, the public servant has committed an offence under this section.

CHAPTER III

ANALYSIS OF SECTION 8 OF THE 2013 BILL

3.1 Section 8 introduces a new supply side offence, namely acts relating to bribing of a public servant, given that the 1988 Act did not directly criminalise “active domestic bribery”. The Statement of Objects and Reasons makes it clear that the proposed section 8 was introduced to make domestic law consistent with the UNCAC (there being no mention of the UK Bribery Act) because:

Experience has shown that in a vast majority of cases, the bribe-giver goes scot free by taking resort to the provisions of section 24 and it becomes increasingly difficult to tackle consensual bribery. The aforesaid Convention enjoins that the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, be made a criminal offence. Accordingly, it is proposed to substitute a new section 8 to meet the said obligation.

A. Sections 8(a) and (b) of the 2013 Bill

3.2 The issues regarding the definition of “undue financial or other advantage”, the improper performance of a “relevant public function or activity” and the definition of “relevant expectation”, discussed in the context of section 7, are applicable here as well.

3.3.1 Section 8 (a) suffers from similar problems as section 7(1)(a) in that it *prima facie* suggests that the section criminalises only those cases where the person bribes a public servant to perform a public function or activity “improperly”. It does not seem to cover those cases, which

are very common in India, where the bribe giver is seeking the performance of a routine, or ‘proper’ public function e.g. giving a bribe to process a routine application.

3.3.2 Section 8(b) is similar to Section 7(1)(b) of the 2013 Bill and is also unclear, unless we see the examples given by the UK Law Commission while discussing these principles in the context of attempting to cover both the private sector and public servants under the Act. The UK Law Commission intended that the section 8(b) provision of the 1988 Act (section 1(3) of the UK Act) cover routine “facilitation” payments where, regardless of the public servant doing anything for the bribe giver, merely accepting the financial or other advantage would be improper. Consider this example:

“Suppose R must by law issue P with a licence. Even so, P gives R £500 to issue the licence (for example, to rest assured in his or her own mind that R will issue the licence). In such a case, P will be guilty of bribery under our scheme if P knew or believed that it would be improper for R to accept the £500. We recommend that even where P is not trying to persuade R to perform a relevant function or activity improperly (or to reward R for such conduct), it should still be bribery if P knew or believed that it would in itself be improper for R to accept an advantage.”¹¹

3.3.3 Recommendation:

Sections 8(a) and (b) should be amended to provide the following illustrations to bring clarity in the interpretation of section 8:

¹¹ UK Law Commission, *supra* note 2, at ¶¶ 3.76-3.77.

- **Illustration for section 8 (a): A person, ‘P’ gives a public servant, ‘R’ Rs. 10,000 to ensure that he is granted a license, over all the other bidders. P is guilty of an offence under this sub-section.**
- **Illustration for section 8 (b): A person ‘P’ goes to a public servant, ‘R’ and offers to give him Rs. 10,000 to process his routine ration card application on time. P is guilty of an offence under this sub-section.**

B. Explanation to Section 8 of the 2013 Bill:

3.4.1 The 2014 amendment inserted a new sub-section (2) to section 8 clarifying that

“Nothing in sub-section (1) shall apply to a person, if that person has, after informing a law enforcement authority or investigating agency, offered or gave any undue financial or other advantage to another person in order to assist such law enforcement authority or investigating agency in its investigation of the offence alleged against the latter.” [Emphasis supplied]

3.4.2 There is a potential for confusion with this Explanation: The use of the phrase “to another person”, instead of to a “person, being or expecting to be a public servant” is to take into account that in many instances, cases relating to trap are not always restricted to public servants directions. Many times, the person giving the bribe may be required to pay the bribe money to a third person, a conduit, which would then be subsequently delivered to the public servant.

3.4.3 Thus, the use of the word “person” in the proposed sub-section (2) will cover all such cases where the immediate recipient of the bribe may be a person other a

public servant or a person expecting to be a public servant. However, for the avoidance of doubt it is recommended that an Explanation is added to this sub-section clarifying that “another person” shall include a public servant or a person expecting to be a public servant.

3.4.4 Recommendation: After Section 8(2), add the following Explanation:

“Explanation: For the avoidance of doubt it is hereby clarified that the phrase “another person” in this sub-section shall include a person being, or expecting to be, a public servant.”

3.5 Keeping in mind all the changes proposed in this Chapter, and other consequential amendments that follow from the Commission’s recommendations, the comprehensively drafted section 8 will now read as follows:

8. Offence relating to bribing a public servant

Any person who—

(a) offers, promises or gives an undue advantage to another person, and intends such undue advantage—

(i) to induce a public servant to perform improperly a public function or activity; or

(ii) to reward such public servant for the improper performance of such public function or activity;

or

(b) offers, promises or gives an undue advantage to a public servant and knows or believes that the acceptance of such undue advantage by the public servant would itself constitute the improper performance of a public function or activity,

shall be punishable with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine:

Provided that when the offence under this section has been committed by a commercial organisation, such commercial organisations shall be punishable with fine.

Illustration for sub-section (a): A person, 'P' gives a public servant, 'R' Rs. 10,000 to ensure that he is granted a license, over all the other bidders. P is guilty of an offence under this sub-section.

Illustration for sub-section (b): A person 'P' goes to a public servant, 'R' and offers to give him Rs. 10,000 to process his routine ration card application on time. P is guilty of an offence under this sub-section.

Explanation.—It shall be immaterial whether the person to whom the undue advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the public function or activity concerned, and, it shall also be immaterial whether such undue advantage is offered, promised or given by the person directly or through a third party.

(2) Nothing in sub-section (1) shall apply to a person, if that person has, after informing a law enforcement authority or investigating agency, offered or given 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 latter.

Explanation.— For the avoidance of doubt it is hereby clarified that the phrase “another person” in this subsection shall include a person being, or expecting to be, a public servant.

CHAPTER IV

ANALYSIS OF SECTIONS 9 AND 10 OF THE 2013 BILL

4.1 Section 8 of the 2013 Bill criminalises the commercial organisation's act of bribing a public servant; the proviso to section 8 of the 2013 Bill clarifies that "*when the offence under this section has been committed by a commercial organisation, such commercial organisations shall be punishable with fine.*" Section 9 on the other hand, holds a commercial organisation liable for failure to prevent persons associated with it from bribing a public servant to obtain/retain business or an advantage in the conduct of business for such commercial organisation. Section 10 follows from section 9 (and not section 8) and states that in cases where the "*commercial organisation has been guilty of an offence under section 9*", every person in charge of and responsible to it shall be deemed guilty, unless he/she can prove that the offence was committed without their knowledge or that they had exercised all due diligence.

A. Section 9 of the 2013 Bill

4.2.1 Section 9 creating an offence relating to bribing of a public servant by a commercial organisation is taken from section 7 of the UK Act, which deals with the failure of a commercial organisation to prevent bribery. In the UK context, it would be punishable for a private person to bribe another private person or a public servant in the context of commercial organisations intending to obtain or retain business. In the proposed 2013 amendment, the only bribery that is made punishable is when it pertains to a public servant for the purposes of section 9(1)(a) and (b). Hence, section 9 is a distinct offence from section 8.

4.2.2 The proviso to section 9 of the 2013 Bill provides for a defence for the commercial organisation to prove that it

had in place adequate procedures designed to prevent “any person associated with it” from undertaking the stipulated criminalised conduct. This bears reference to section 7(2) of the UK Bribery Act, read with sections 7(4) and 9 thereof, with the underlying premise that the “*individual failings of particular members of staff do not necessarily illustrate systematic failures in the way that it [company] sought to prevent the commission of bribery.*”¹²

4.2.3 Section 9 of the UK Act, however, creates a mandatory obligation on the Secretary of State to publish “guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)”. The section further envisages a regular revision to the guidance. The UK authorities have put in place a detailed “guidance” for such procedures,¹³ to provide clarity and certainty. As the UK Law Commission noted:

*...the adequacy of a system can be made to depend on the size (and, we might add, the resources) of the company in question. In a small company with five employees, it might be perfectly adequate for the managing director simply to remind the employees (and others) periodically of their obligations.*¹⁴

4.2.4 The Guidance published by the UK government lists six principles, in addition to case studies, to help determine the adequacy of procedures:

(a) The principle of proportionate procedures- A commercial organisation’s procedures to prevent bribery by persons associated with it are

¹² UK Law Commission, *supra* note 2, at ¶ 6.108.

¹³ Ministry of Justice, *Bribery Act of 2010: Guidance*, (2011), <<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>.

¹⁴ UK Law Commission, *supra* note 2, at ¶ 6.109.

proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

- (b) Top-level commitment: The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.
- (c) Risk assessment: The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.
- (d) Due diligence: The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.
- (e) Communications (including training): The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.
- (f) Monitoring and review: The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated

with it and makes improvements where necessary.¹⁵

4.2.5 However, the proposed amendment to section 9 of the 2013 Bill does not require any such guidance and places no obligation on the government in this regard. This is especially important given that the proviso places the burden of proof on the commercial organisation. This provision will lead to an immediate and significant impact on the conduct of business by corporations, especially in light of the fact that they will not have any clarity on what is expected of them and will not even know if the procedures and processes they adopt are in compliance or in possible breach. This might also impede the efficient functioning of small businesses, which will not be able to determine the “adequate standard” themselves.

4.2.6 Moreover, even the Foreign Corrupt Practices Act (*hereinafter* “FCPA”), 1977 in the United States mandates the US Attorney General to issue guidelines. While the UK Bribery Act mandates consultation of the Secretary of State with the Scottish Ministers, the FCPA Act requires the Attorney General to consult all the interested persons through public notice and comments procedures before publishing the guidelines. In both countries thus, there are extensive guidelines on procedures, which commercial organisations may use on a voluntary basis to conform their conduct to the law and relevant government policy on enforcement.

4.2.7 In the Commission’s recommendation, section 9 should be brought into force only when the guidelines under the proposed section 9(5) are prescribed and published by the Central Government.

¹⁵ Guidance, *supra* note 13, at 20-32.

4.2.8 Recommendation: Section 9 should be amended to provide for a section, along the lines of section 9 of the UK Bribery Act, introducing a statutory obligation on the government to publish guidance as to the procedures that commercial organisations can take to put in place “adequate systems”.

In Section 9, a further sub-clause (5) can be added to the following effect:

(5) The Central Government shall prescribe and publish guidelines about the adequate procedures, which can be put in place by commercial organisations to prevent persons associated with them from bribing any person, being or expecting to be, a public servant.

***Provided* that such guidelines shall be prescribed and published by the Central Government after following a consultation process in which the views of all the interested stakeholders are obtained through public notice.**

B. Section 10 of the 2013 Bill

4.3.1 Section 10 extends the liability of the commercial organisation to every person in charge of and responsible to the organisation for the conduct of its business through a deeming provision. Given that the section begins with “when a commercial organisation has been guilty”, it is clear that section 10 only pertains to section 9, and is not connected to section 8 – it again provides differing standards of how to treat corporate bribery within the same enactment.

4.3.2 The effect of section 10 is that if an employee (P) of a company (C), sitting in Bangalore bribes a local official (R) to get its clearance on time, then the combined effect of

the 2013 Bill is that P will be liable under section 8; R under section 7; and C under section 9, unless it can prove it has in place adequate procedures designed to prevent such conduct. However, section 10 will operate to *deem every* single person in charge of, and responsible to, C – thus, every Director on the Board of Directors, who may be sitting in Delhi more than 2000 kms away – guilty, and the burden on proof will shift on each of these Directors to prove they had no knowledge or had exercised due diligence. The situation could be even worse if for instance, P had the high level clearance of one of the sitting Directors to bribe R, because of which every other Director will now be faced with the difficult task of discharging their high burden of proof.

4.3.3 As is evident thus, section 10(1) of the 2013 Bill is overbroad and unlike the provisions in the UNCAC or the UK Bribery Act. However, even section 10(2), with its elements of negligence, is overtly broad and not along the lines of section 14(2) of the UK Bribery Act. To provide for consistency and coherence between sections 9 and 10 of the 2013 Bill and to remove the over-broad elements of negligence, section 10 should be redrafted.

4.3.4 Recommendation: Section 10 of the Bill should be amended, with sub-section (1) being deleted and sub-section (2) being modified. The revised Section 10 will read as follows:

“10. Where an offence under section 9 is committed by a commercial organisation, and such offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the commercial organisation, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and punishable with imprisonment which shall not be less than

three years but which may extend to seven years and shall also be liable to fine.”

4.4 Keeping in mind all the changes proposed in this Chapter, and other consequential amendments that follow from the Commission’s recommendations, the comprehensively drafted sections 9 and 10 will now read as follows:

9. Offences relating to bribing a public servant by a commercial organisation

9. (1) A commercial organisation shall be guilty of an offence and shall be punishable with fine, if any person associated with the commercial organisation offers, promises or gives an undue advantage to a public servant intending—

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

Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

(2) For the purposes of this section, a person offers, promises or gives an undue advantage to a public servant if, and only if, such person is, or would be, guilty of an offence under section 8, whether or not the person has been prosecuted for such an offence.

(3) For the purposes of section 8 and this section,—
(a) "commercial organisation" 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 including charitable service;
- (c) a person is said to be associated with the commercial organisation if, disregarding any offer, promise or giving an undue advantage which constitutes offence under sub-section (1), such person is a person who performs services for or on behalf of the commercial organisation.

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

Explanation 2.—Whether or not the person is a person who performs services for or on behalf of the commercial organisation 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 organisation.

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

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

(5) The Central Government shall prescribe and publish guidelines about the adequate procedures, which can be put in place by commercial organisations to prevent persons associated with them from bribing any person, being or expecting to be, a public servant.

Provided that such guidelines shall be prescribed and published by the Central Government after following a consultation process in which the views of all the interested stakeholders are obtained through public notice.

10. Person in charge of commercial organisation to be guilty of offence

Where an offence under section 9 is committed by a commercial organisation, and such offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other officer of the commercial organisation, such director, manager, secretary or other officer shall be guilty of the offence and shall be liable to be proceeded against and punishable with imprisonment which shall not be less

than three years but which may extend to seven years and shall also be liable to fine.

CHAPTER V

ANALYSIS OF SECTION 11 OF THE 2013 BILL

5.1.1 Section 11 of the 1988 PC Act has been omitted because it dealt with a public servant accepting a valuable thing, without consideration (or for inadequate consideration), from a person concerned in proceeding or business transacted by such public servant – this was considered to have been included in the new, comprehensive definition of bribery under section 7.

5.1.2 On plain reading, it seems that section 11 has not been retained in any form in the proposed section 7. Section 11 of the 1988 Act deals with cases where for instance, a public servant takes free treatment in private hospital, knowing fully well that the private hospital has applied for certain permissions, which are under the public servant's jurisdiction. Section 11 of the 1988 Act criminalised this act.

5.1.3 However, under the proposed re-formulation of section 7, with the main offence being the mere acceptance of an “undue advantage” defined to include “any gratification whatever, other than legal remuneration”, such an offence is now covered under section 7 of the 2013 Bill.

5.1.4 Recommendation: Section 11 should remain deleted, if section 7 is recast as suggested.

CHAPTER VI

ANALYSIS OF SECTIONS 12 AND 15 OF THE 2013 BILL

6.1.1 Section 12 of the 1988 PC Act criminalises the abetment of “any offence punishable under this Act”, whereas section 15 criminalises an attempt to commit offences under section 13(1)(c) and (d) [now section 13(a) of the 2013 Bill].

6.1.2 Pursuant to the 2013 Lokpal and Lokayukta Act (*hereinafter* “Lokpal Act”), section 12 was amended to provide for a minimum punishment of three years, up to five years for abetment, whereas section 15, was amended to provide for a minimum period of imprisonment of two years, up to five years.

6.1.3 A conjoint reading of the two sections under the 2013 Bill reveals that the minimum punishment for the abetment of any offence, including the attempt to commit an offence is three years, whereas the minimum punishment of actually attempting an offence is two years. There is a clear discrepancy insofar as the punishment given for the principal act (of attempt) is less than the abetment of the act.

6.1.4 Recommendation: Section 12 of the 2013 Bill needs to be amended and after the words “punishable under this Act”, the words “apart from any offence under Section 15” needs to be inserted.

6.2 Thus, section 12 will now read as follows:

12. Punishment for abetment of offences defined in the Act

Whoever abets any offence punishable under this Act, apart from any offence under section 15, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than three years but which may extend to seven years and shall also be liable to fine.

CHAPTER VII

ANALYSIS OF SECTION 17A(1) OF THE 2013 BILL

7.1.1 The proposed Section 17A of the PC Act, introduced pursuant to the 2014 amendment, provides for investigation of offences relatable to recommendations made or decision taken by a public servant in the discharge of their official duties. Section 17A(1) provides for “previous approval” to be taken from the Lokpal or the Lokayukta, as the case may be, where the *“alleged offence is relatable to any recommendation made or decision taken by a public servant in the discharge of his official functions or duties.”* The proposed Section 17A(1) reads as follows:

17A. Investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.

(1) No police officer shall conduct any 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 a public servant in the discharge of his official functions or duties, without the previous approval-

- (a) of the Lokpal, in the case of a public servant who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union, and is a person referred to in clauses (a) to (h) of sub-section (1) of section 14 of the Lokpal and Lokayuktas Act, 2013;
- (b) of the Lokayukta of the State or such authority established by law in that State under whose jurisdiction the public servant falls, in the case of a person who is employed, as the case may be,

was at the time of commission of the alleged offence employed in connected with the affairs of a State,

conveyed by an order issued by the Lokpal in accordance with the provisions contained in Chapter VII of the Lokpal and Lokayuktas Act, 2013 or Lokayukta of the State or such authority referred to in clause (b) for processing of investigation against the public servant

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 financial or other advantage_for himself or for any other person intending that, in consequence, a relevant public function or activity shall be performed improperly either by himself or by another public servant.

7.1.2 The proposed section 17A (1), introduced in 2014, thus extends such a limited requirement of “previous approval” to public servants who are or were in service at the time of the alleged offence. This is in line with the provisions of section 197 Cr.P.C. and the scheme of section 14 of the Lokpal Act.

7.1.3 The proviso to the proposed section 17A (1) is similar to Clause (2) of the repealed section 6A of the Delhi Special Police Establishment Act, 1946 (*hereinafter* “DSPE Act”) which provided that in certain factual scenarios/gross cases, no sanction/previous approval would be necessary. However, the proviso to the proposed section 17A (1) is narrower than Section 6A (2) of the DSPE Act – now requiring that even if a person is caught on the spot while accepting illegal gratification (“undue financial or other advantage”), it would have to be shown by the prosecution

that it was *intended* that such acceptance consequential to a relevant public function or activity being performed improperly.

7.1.4 Recommendation: The following expression should be deleted from the proviso to Section 17A(1):

“intending that in consequence a relevant public function or activity shall be performed improperly either by himself or another public servant”

7.2 The amended version of the proposed section 17A(1), introduced *vide* the 2014 amendment, along with other consequential amendments, should now read as follows:

17A. Investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.

(2) No police officer shall conduct any 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 a public servant in the discharge of his official functions or duties, without the previous approval-

(c) of the Lokpal, in the case of a public servant who is employed, or as the case may be, was at the time of commission of the alleged offence employed in connection with the affairs of the Union, and is a person referred to in clauses (a) to (h) of sub-section (1) of section 14 of the Lokpal and Lokayuktas Act, 2013;

(d) of the Lokayukta of the State or such authority established by law in that State under whose jurisdiction the public servant falls, in the case of

a person who is employed, as the case may be, was at the time of commission of the alleged offence employed in connected with the affairs of a State,

conveyed by an order issued by the Lokpal in accordance with the provisions contained in Chapter VII of the Lokpal and Lokayuktas Act, 2013 or Lokayukta of the State or such authority referred to in clause (b) for processing of investigation against the public servant

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.

CHAPTER VIII

ANALYSIS OF SECTIONS 18A-I OF THE 2013 BILL

8.1.1 Provisions regarding attachment and forfeiture have been introduced *vide* sections 18A-N of the 2013 Bill. However, they are bound to create confusion given that separate procedures for attachment and forfeiture in cases of corruption of public servants are covered under the following three laws:

- a. The Criminal Law (Amendment) Ordinance 1944;
- b. Prevention of Money Laundering Act, 2002 (“*hereinafter* PMLA”);
- c. The Lokpal and Lokayukta Act, 2013.

8.1.2 Hence, it might be better suited to replace the proposed sections 18A-18N with a single provision referring to the forfeiture and attachment procedures in the PMLA Act or the Criminal Law Ordinance of 1944. This will ensure our compliance with the UNCAC.

8.1.3 However, there may be some practice difficulties in the adoption of the PMLA procedure in cases investigated and prosecuted by State Government agencies such as the State Police, State Anti-Corruption Bureaus etc. It may not be desirable to load the Enforcement Directorate, the Adjudicating Authority and the Appellate Tribunal with thousands of cases under the PC Act all over the country as an exclusive forum for handling matters relating to attachment and forfeiture of property.

8.1.4 Further, the reach of the 1944 Ordinance is slightly different than that of the PMLA inasmuch as the Ordinance enables the filing of application for attachment by the appropriate government merely on the belief that any person has committed a scheduled offence *and the said person* has procured money or other property by means of

the offence, whether or not any court has taken cognizance of the offence.

8.1.5 PMLA on the contrary enables provisional attachment where the Director or authorised Deputy Director believes that any person is in possession of any proceeds of crime (not necessarily the person who committed the crime) and such proceeds are likely to be concealed, transferred, etc. which may result in frustrating any proceedings for confiscation of such proceeds. PMLA requires that an order for provisional attachment cannot be passed by the Director or authorised Deputy Director unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the CrPC or a complaint has been filed by a person authorised to investigate the offence before a Magistrate or court for taking cognizance of the scheduled offence.

8.1.6 Having regard to these factors, a better option would be to provide for recourse for both the PMLA and the Criminal Law Amendment Ordinance of 1944, whichever may be found most convenient, depending upon the nature of the case.

8.1.7 It may, therefore, be desirable to delete the proposed new Chapter IVA and in its place, incorporate a new Section 18A along the lines of the provision made in the earlier Prevention of Bribery of Foreign Public Officials and Official of Public International Organisations Bill, 2011, which was introduced in the Lok Sabha in 2011 but lapsed with the dissolution of the 15th Lok Sabha.

8.1.8 Recommendation: The proposed Chapter IVA should be deleted and be re-cast as follows:

“18A. Save as otherwise provided under the Prevention of Money Laundering Act, 2002, the

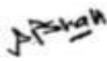
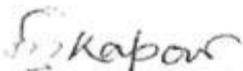
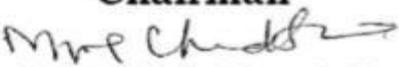
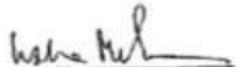
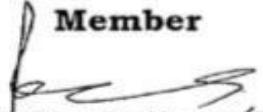
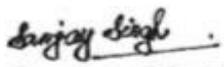
provisions of the Criminal Law Amendment Ordinance, 1944 shall, as far as may be, apply to the attachment, administration of attached property and execution of order of attachment or confiscation of money or property procured by means of an offence under this Act.”

Consequential amendments will also need to be made to the PMLA, 2002 so as to include all the offences under the PC Act, as now redefined, as predicate offences under the Act by appropriate substitution of Paragraph 8 of Part A of the Schedule to the PMLA.

8.2 The amended version of the proposed Chapter IVA, introduced under the 2013 Bill, will now read as follows:

Chapter IVA: ATTACHMENT AND FORFEITURE OF PROPERTY

18A. Save as otherwise provided under the Prevention of Money Laundering Act, 2002, the provisions of the Criminal Law Amendment Ordinance, 1944 shall, as far as may be, apply to the attachment, administration of attached property and execution of order of attachment or confiscation of money or property procured by means of an offence under this Act.”

	 [Justice A.P. Shah] Chairman	
 [Justice S.N. Kapoor] Member	 [Prof. (Dr.) Mool Chand Sharma] Member	 [Justice Usha Mehra] Member
 [Dr. S.S. Chahar] Member-Secretary	 [P.K. Malhotra] Ex-officio Member	 [Dr. Sanjay Singh] Ex-officio Member