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BRIEFING PAPER

**ENCOURAGING THE REPORTING OF  
CORRUPTION: PRINCIPLES OF WHISTLEBLOWER  
PROTECTION**



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## INTRODUCTION

Whistleblower protection is increasingly recognised as being a vital element in the promotion of public accountability and integrity.

Whistleblowers play a crucial role in uncovering mismanagement, fraud and corruption. Their actions can result in the detection of serious crime and misconduct, the recovery of stolen resources, and the prevention of serious harm including the saving of lives.

Without legal protection, individuals are often fearful of being on the receiving end of acts of recrimination if they blow the whistle on corrupt practices and other wrongdoing that they observe in the workplace. Whistleblowers sometimes face victimisation, intimidation, loss of employment, legal action, and occasionally physical threats and violence if they do speak out.

People who are willing to tell the truth about wrongdoing in their work environments deserve to be protected from retaliation. In addition, effective protection for whistleblowers is necessary to incentivise and enable disclosure of wrongdoing and to promote open and accountable workplaces.

A key question asked in the IPPR's previous paper on this subject<sup>1</sup> was whether the measures taken to protect whistleblowers are proactive or passive. In other words whether they are simply a case of going through the motions to satisfy international conventions and expectations or whether they really set out to stimulate and encourage a culture in which citizens are willing to come forward and speak out about corruption and other wrongdoing. Citizens should examine their national whistleblower protection laws as to whether they will really lead to the perpetrators of corruption being called to account. This is especially the case in Namibia where a law on whistleblowing is expected to be enacted before the end of 2016.

Whether legislation on whistleblower protection ultimately proves to be successful depends to a large extent on the broader political culture in a country. Factors that are relevant include:

- The level of democratisation;
- Socio-economic conditions;
- The rule of law;
- The level of public confidence in watchdog institutions;
- The quality and scope of civic education;
- The access to information environment;
- The level to which freedom of expression has been internalised by individuals and communities.

All these factors are pertinent to the Namibian situation - where the effectiveness of the forthcoming legislation will be partly dependent on the political context surrounding its introduction and implementation.

### DEFINITION OF WHISTLEBLOWING

*The disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations to individuals or entities believed to be able to effect action.*

*- Transparency International*

<sup>1</sup> 'Protected Disclosure: Informing the Whistleblower Debate in Namibia' by Frederico Links and Clement Daniels, IPPR 2012.



## GLOBAL AGENDA

International conventions, such as the United Nations Convention Against Corruption (UNCAC), commit signatory countries to implementing appropriate legislation. UNCAC, which was drawn up in 2003, entered into force internationally on December 14 2005. The Convention was signed by Namibia in December 2003, ratified by parliament on April 28 2004 and deposited on August 3 2004.

UNCAC deals with the issue of whistleblower protection under Article 33: Protection of reporting persons -

*"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."*

Namibia is also a signatory to the African Union Convention on Preventing and Combating Corruption, which in Article 5 obliges state parties to take legal and other measures to protect informants and witnesses involved in corruption and related cases. In addition, state parties should adopt legislative measures to punish those who make false and malicious reports against innocent persons.

Namibia has also signed up to the Southern African Development Community (SADC) Protocol Against Corruption which under Article 4 says state parties should adopt measures to create, maintain and strengthen systems for protecting individuals who, in good faith, report acts of corruption and laws that punish those who make false and malicious reports against innocent persons.

## NAMIBIAN CONTEXT

The issue of whistleblower protection has been on Namibia's legislative agenda since at least 2007 when President Hifikepunye Pohamba in a State of the Nation speech called on the Office of the Prime Minister and the Justice Ministry to facilitate the tabling of such legislation.

However, in the following nine years no such legislation was tabled or even published in draft form. Expectations that a law will be introduced in 2016 have been heightened by the inclusion of whistleblower protection as a priority issue in the Harambee Prosperity Plan<sup>2</sup>, which was published by government in early April 2016. Under the Effective Governance and Service Delivery Pillar, the Harambee Plan states:

*"...The speedy enactment of the Whistleblowers Protection Act is a necessary weapon in the war against corruption. This provides the necessary reinforcement of our commitment to transparency and effective governance. This focus also has the advantage of making it easier to hold accountable those who transgress the rules and protect the innocent from false allegations and innuendo."*

*Harambee Prosperity Plan, page 7*

Under the Harambee Plan's milestones it is expected that a Whistleblower Protection Act will be gazetted i.e. become law by September 2016. Previously, it

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<sup>2</sup> The Harambee Prosperity Plan can be downloaded as a PDF from <http://www.op.gov.na/>

**“By over-emphasising punishments for reporting false information, governments sometimes attempt to warn off potential whistleblowers - creating fears that the law could be used to victimise those it is supposed to protect.”**

has been reported that the law will be called a Witness and Whistleblower Protection Act.<sup>3</sup> At a government workshop in June 2016, two separate draft bills - one on whistleblowers and one on witnesses - were presented for discussion.<sup>4</sup>

Namibia is currently being reviewed by the governments of Ethiopia and Canada regarding its implementation of articles 15–42 of Chapter III and articles 44–50 of Chapter IV of UNCAC. As mentioned above, Chapter III includes references to whistleblower protection. In a report released at the end of 2015, the review team recommended that Namibia should take steps towards the swift adoption of laws designed to protect whistleblowers and witnesses in line with UNCAC Articles 32, 33, and 37.

Currently there is limited protection for witnesses and whistleblowers in Sections 52 in the Anti-Corruption Act. Measures for witnesses and reporting persons are also contained in Sections 45 and 50 of the Financial Intelligence Act; 175 and 208 of the Criminal Procedure Act; and 98, of the Prevention of Organised Crime Act.

In terms of section 52 of the Anti-Corruption Act, a witness is not obliged to identify an informer in a corruption trial. The court can only reveal the identity of an informer if it becomes clear that justice cannot be served without such identification or if the informer has lied. An informer or any person who assisted the Anti-Corruption Commission in an investigation is also protected from disciplinary, civil and criminal proceedings.

The ACC has previously said these provisions are not adequate.

Paulus Noa, Director-General of the ACC, is on record as calling for a dedicated law “because protection is not only about the identity, but it has to do as well with the employment and physical security of the whistleblower”.<sup>5</sup>

The Criminal Procedure Act contains a provision on the protection of state witnesses in criminal trials. The Prosecutor-General may approach a judge in chambers and apply for an order that a state witness be placed under protection until the end of the criminal trial or such other period as the judge may order.

The Financial Intelligence Act of 2012 contains sections dealing with the protection of people making reports to the Financial Intelligence Centre and protection of informers.

Section 98 of the Prevention of Organised Crime Act allows for a court case to be heard behind closed doors if there is a likelihood that harm may come to any person as a result of the proceedings being open to the public.

## **BEYOND A LAW**

Whistleblower protection laws have at times been criticised for their ineffectiveness. According to such criticism, a Whistleblower Protection Act can be little more than an attempt at window-dressing aimed at appeasing critics and meeting international obligations, such as UNCAC. The law may create the illusion of protection but is actually only a form of gesture politics attempting to mask a lack of real commitment to fighting corruption. If the law is poorly designed and lacks crucial elements it could have the unintended effect of dis-incentivising the reporting of corruption rather than encouraging it. The introduction of such laws can also have a more sinister intention. By over-emphasising punishments for reporting false information, governments sometimes attempt to warn off potential whistleblowers - creating fears that the law could be used to victimise those it is supposed to protect.

In an academic paper entitled *Illusions of Whistleblower Protection*, Brian Martin argues, “it is remarkable how ineffectual such legislation is. Not only are whistle-

<sup>3</sup> See - <http://www.informante.web.na/whistle-blower-protection-coming.13750>

<sup>4</sup> See - <https://www.newera.com.na/2016/06/20/iyambo-incentives-whistle-blowers/>

<sup>5</sup> ‘Protected Disclosure: Informing the Whistleblower Debate in Namibia’ by Frederico Links and Clement Daniels, IPPR 2012.



blower laws flawed through exemptions and in-built weaknesses, but in their implementation they are rarely helpful.”<sup>6</sup>

While this view may be unduly cynical, it is worth bearing in mind that whistleblower protection laws can be introduced and used for the wrong reasons. Namibia should avoid such kind of ‘in-built weaknesses’ in its whistleblower protection law.

Sometimes whistleblowing is condemned as treasonous, disloyal or slanderous. However, we should start with the presumption that whistleblowers are acting in the public interest and deserve protection. The next step is to ask how best to protect whistleblowers. Only if it is very clear that the disclosure is false and being made for malicious reasons should any punitive action be considered. Honest errors and mistakes should not be treated harshly or punished.

To be operationally effective, whistleblower protection laws, like much anti-corruption legislation, require a government that is committed to accountability and a society that is open and democratic.

The former President of Kosovo, Artifete Jahjaga, who also helmed an emergent nation following a history of foreign occupation, said:

*“Democracy must be built through open societies that share information. When there is information, there is enlightenment. When there is debate, there are solutions. When there is no sharing of power, no rule of law, no accountability, there is abuse, corruption, subjugation and indignation.”*<sup>7</sup>

The whistleblower’s right to report wrongdoing is linked to freedom of expression, freedom of conscience and to the principles of transparency and accountability. In this context the role of awareness-raising campaigns about the importance of reporting corruption should be emphasised. Such efforts can range from national civic education campaigns to workplace initiatives. Government and private sector should both initiate such campaigns.

#### **What they said about whistleblowing:**

“An act of a man or woman who, believing that the public interest overrides the interest of the organisation he serves, blows the whistle that the organisation is involved in corrupt, illegal, fraudulent or harmful activity.” – Ralph Nader, US consumer activist.

“The disclosure of organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons or organisations that may be able to effect action.” – US academics Marcia P. Miceli and Janet P. Near.

“The reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers.” – International Labour Organisation (ILO).

“[T]he options available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, rather than a personal grievance. Whistleblowing covers the spectrum of such communications, from raising the concern with managers, with those in charge of the organisation, with regulators, or with the public [...] the purpose is not the pursuit of some private vendetta but so that risk can be assessed and, where appropriate, reduced or removed.” – South Africa’s Open Democracy Advice Centre.

**“To be operationally effective, whistleblower protection laws, like much anti-corruption legislation, require a government that is committed to accountability and a society that is open and democratic.”**

<sup>6</sup> Illusions of Whistleblower Protection published in University of Technology Sydney Law Review, No. 5, 2003.

<sup>7</sup> <http://thehill.com/policy/international/232703-kosovar-president-artifete-jahjaga-the-four-key-ingredients-for-peace>

“The challenge facing Namibia is twofold - firstly, crafting an effective whistleblower protection law and, secondly, building a society in which reporting corruption and wrongdoing is regarded as the duty of a good citizen.”

## THREATS TO WHISTLEBLOWERS

There are many officials and others who prefer not to report suspected corruption because stepping forward would carry too many risks including persecution, loss of employment and loss of income. The 2011 Namibia National Urban Corruption Perception Survey, carried out by the Anti-Corruption Commission (ACC), found that 68 percent of respondents who were aware of acts of corruption had chosen not to report them to the appropriate authority. Nearly 43 percent of respondents to the Survey said they feared victimisation when asked why they had not reported an act of corruption they had come across. These findings in themselves indicate the urgent need for whistleblower protection legislation in Namibia. The challenge facing Namibia is twofold - firstly, crafting an effective whistleblower protection law and, secondly, building a society in which reporting corruption and wrongdoing is regarded as the duty of a good citizen.

## PRINCIPLES FOR A LEGAL FRAMEWORK

Bearing in mind best practice models promoted by organisations like Transparency International and the Organisation for Economic Co-operation and Development (OECD), the following are principles for a legal framework.

### 1. Designated agency

Any designated agency set up by the law, such as a Whistleblowers Protection Commission, should be independent from government influence. Most comprehensive laws usually appoint a public body to receive and investigate complaints of wrongdoing. Such a designated agency should be independent from government influence as many of the complaints it receives could emanate from government departments and bodies. If the agency is perceived as an arm of government lacking any in-built guarantees of independence it will not gain credibility. It may be necessary to appoint an oversight body to act as a check on the designated whistleblower protection agency.

### 2. Scope of application

Whistleblower protection laws should not be limited to corruption but should cover a wide variety of wrongdoing and misconduct including, criminal offences, breaches of legal obligation, miscarriages of justice, dangers to health, safety and the environment, and cover-ups of any of these. Those entitled to protection should include employees in the public and private sectors as well as those who might not be considered direct employees such as consultants, contractors, trainees, volunteers, temporary workers, and former employees. Close associates of whistleblowers who may also become targets for retribution should also be covered by the law.

### 3. Accessible channels for reporting

Whistleblowing legislation may refer to one or more channels by which protected disclosures can be made. These generally include internal disclosures, external disclosures to a designated agency, and external disclosures to the public, often via the media.

Sometimes these options are incremental i.e. a whistleblower would only approach a designated agency if internal reporting has not worked. However, laws can also allow the whistleblower to choose the most appropriate option - internal, to a designated agency, or the public. In general, disclosure channels for whistle-



blowers should ensure:

- Meaningful protection for whistleblowers from all forms of retaliation;
- Effective use of information provided including reforms and corrective actions;
- Protection extends to those who make inaccurate disclosures made in honest error;
- Creation of open organisational cultures where employees have confidence in reporting procedures.

#### **4. Options for remedial action**

The law should offer a range of remedial actions for the whistleblower including the award of damages or payment of compensation for losses and harm suffered, the possibility of court interdicts, and coverage of legal costs. Interim relief pending a full hearing should also be an option. If a whistleblower has lost his or her job or been arbitrarily transferred to another post, reinstatement and reversal of the transfer can also be remedial actions.

#### **5. Fair sanctions for false reporting**

There should be reasonable sanctions to discourage deliberately false reporting. However, honest errors made in good faith should not face sanction.

#### **6. Publication of data**

The law should mandate public and private bodies of sufficient size to publish disclosures (appropriately anonymised) and to report on issues such as compensation and recoveries on a regular basis. However, due regard should be paid to the confidentiality of the whistleblower and the whistleblowing process.

#### **7. Punishments for those who retaliate against whistleblowers**

Some countries also impose criminal sanctions against employers who retaliate against whistleblowers. Namibia's draft law envisages a fine of up to N\$75,000 or a prison sentence not exceeding 15 years or both the fine and imprisonment for a person convicted of taking detrimental action against a whistleblower. Although preventing such retaliatory actions is one of the main purposes of the law, it is of some concern that the punishments for false reporting are heavier.

#### **8. Awareness campaigns**

Although not usually part of the legal framework, information campaigns around the importance of whistleblowing should be synchronised to the introduction and implementation of a whistleblower protection law. Organisations should launch their own awareness-raising, communication, training and evaluation efforts. Communicating to public or private sector employees their rights and obligations when exposing wrongdoing is essential.

Whether or not legislation requires employers to put in place means for whistleblowers to make reports, employers should as a matter of course put in place disclosure mechanisms for whistleblowers since early detection of corrupt practices is crucial in reducing reputational risks and preventing losses due to fraud.

## **ISSUES**

### **Internal v external**

Some laws see reporting to an oversight agency such as a whistleblower protection

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agency as a last resort and seek to encourage whistleblowers to report internally i.e to their employers first. Approaching an external agency or making a report public should only happen if the employer fails to act. However, such an approach is fraught with risk for the would-be whistleblower. The employer can cover up the allegation and take retribution against the employee making the disclosure.

As a result, best practice is moving towards recognising that whistleblowers should not be obliged or pressurised to report internally first before approaching an external body. Employers should still be encouraged to set up effective internal systems for reporting which afford protection to the whistleblower. The draft Namibian law states that an employee can use either an internal option of reporting at his or her workplace or report a matter externally to the office of the whistleblower. Although some laws do require a whistleblower to seek to lodge an internal report first, the Namibian draft law makes it clear that it is up to the whistleblower to choose the route they take.

In some countries, whistleblowers are barred from communicating their concerns to outsiders if their employer possesses an adequate internal reporting system. In Switzerland<sup>8</sup>, a proposed law states that individuals may not alert the media to instances of corruption unless, after informing governmental authorities of their concerns, officials fail to provide them with a status update regarding the procedures initiated in response to their report within two weeks.

However, such stipulations are highly controversial. Laws should not limit whistleblowers' ability to alert the public to significant instances of corruption. It is important that the designated agency also reports to the public on cases of whistleblowing it has dealt with while respecting any confidentiality requirements.

#### **Good faith or just accurate?**

The draft Namibian law understands good faith to mean that the person making the disclosure is acting in the reasonable belief that there has been a case of improper conduct and the report being made is substantially true.

However, the summary of the bill acknowledges a qualification of what good faith means: the motive for making a report should not be an overriding factor in determining whether it should be investigated further - rather emphasis should be placed on the veracity of the claim being made. This is because it is difficult for any designated agency to second-guess the motives of a person making a disclosure. For example, an employee may make an allegation out of professional jealousy - but such an allegation could still be true and worthy of being followed-up.

#### **Rewards**

Should employees be rewarded for blowing the whistle? There are a number of jurisdictions that do allow individuals to claim a percentage of any amount recovered due to the whistleblower's actions. While the notion of incentivising whistleblowers to come forward has become more widely accepted, critics argue that reward systems can encourage false reporting by opportunists seeking monetary gain. Rewards are also sometimes portrayed as undermining the notion that whistleblowing should be carried out in the public interest.

Whistleblowing can produce other benefits for society other than simply the return of money that may have been stolen. Therefore if rewards are to be considered they should also be given to those who disclose information in order to expose wrongdoing as well as to those whose actions result in the return of funds.

In the US the False Claims Act allows individuals to sue on behalf of the government in order to recover lost or misspent money. Such individuals can receive up to 30 percent of the amount recovered.

<sup>8</sup> See - <https://globalanticorruptionblog.com/2014/12/22/a-problematic-proposed-whistleblowing-law-in-switzerland/>



The Dodd-Frank Act also authorises the Securities and Exchange Commission to pay rewards to individuals who provide the SEC with information that leads to successful enforcement actions. Rewards can range from 10 percent to 30 percent of the funds recovered. South Korea's Anti-Corruption and Civil Rights Commission (ACRC) can provide whistleblowers with rewards of up to US\$2 million if their report leads to the recovery of funds. The ACRC can also grant or recommend awards if the whistleblower served the public interest.

In Namibia, an early draft of the Whistleblower Protection Bill envisaged that rewards could be paid out of the Criminal Assets Recovery Fund established by the Prevention of Organised Crime Act, 2004 according to a calculation or percentage to be agreed on. The initial version of the bill, produced for a drafting workshop in June 2016, states that the oversight body (called a Whistleblower Protection Supervisory Committee) could recommend to Cabinet that a whistleblower who makes a disclosure of improper conduct that leads to the arrest and prosecution of an accused person be rewarded with money from the Criminal Assets Recovery Fund.

### **Punishments for false reporting**

In some countries individuals who deliberately make unfounded disclosures to the official oversight body can face criminal penalties. In most dispensations, protection would be withdrawn from anybody making a false disclosure. The issue here is whether the threat of criminalisation, combined with heavy fines and jail sentences, has the effect of discouraging honest disclosure of wrongdoing and in so doing diminishes the possibility of creating organisational environments that recognise the importance and value of disclosure. The issue is linked to the independence of the designated agency for overseeing whistleblower protection. If the agency that decides on the veracity of reports is not regarded as fully independent from government influence or other external pressures - then this could lead to a situation whereby potential whistleblowers feel the risk of reporting is not worth it. In short, they might fear they will be persecuted by a politically-aligned oversight body to the point where they face serious criminal charges and the threat of jail.

The issue for the proposed Namibian law is to find a way of discouraging false reporting without creating an atmosphere in which disclosure in good faith and in the public interest is also discouraged. Some latitude should be given - whistleblower laws should not impose sanctions for misguided reporting while protection should still be afforded for disclosures made in honest error. It is suggested that before any criminal sanction is sought, the oversight body should establish that the false report was deliberate in nature and made in *male fide* i.e. bad faith.

The Namibian draft law presented to the Swakopmund workshop in June 2016 said that "a person who intentionally makes a disclosure knowing or believing that the information contained in the disclosure is false commits an offence and is, on conviction, liable to a fine not exceeding N\$100,000 to imprisonment for a period not exceeding 20 years or to both the fine and imprisonment." In contrast, a person who takes detrimental action against a whistleblower "commits an offence and is, on conviction, liable to a fine not exceeding N\$75,000 or to imprisonment for a period not exceeding 15 years or to both the fine and imprisonment."

### **Designated employers**

People are also more likely to report wrongdoings within an organisation when there are appropriate structures in place that offer different reporting options for individuals and guarantee confidentiality. Most recent laws also require employers to adopt procedures or policies for an initial handling of disclosures. In the draft Namibian law designated employers in both the private and public sectors will be

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identified. These are likely to be large employers which have to establish codes of conduct designed to prevent improper conduct such as corruption or misuse of resources. Designated employers must establish internal procedures for employees to disclose improper conduct, which includes appointing an integrity officer to receive and investigate disclosures.

### **Oversight and enforcement**

Whistleblower legislation often sets up a designated agency to fulfil oversight and enforcement roles. Such an agency would both receive reports of corruption and other wrongdoing and investigate complaints of retaliatory action taken against whistleblowers. In Canada, the Public Sector Integrity Commissioner is empowered to receive and investigate complaints of wrongdoing and reports of reprisals. If violations of a whistleblower’s rights under Canada’s Public Servants Disclosure Protection Act take place, the Public Servants Disclosure Protection Tribunal can order remedies and impose sanctions.

Under US law, the Office of the Special Counsel (OSC) has the authority to investigate and, where appropriate, prosecute claims of “prohibited personnel practices” taken against Federal employees, including reprisals for whistleblowing. Korea’s ACRC is empowered under the ACRC Act to launch an inquiry into claims of reprisals against whistleblowers who have reported corruption offences. In the US, the Dodd-Frank Act also called upon the SEC to create an Office of the Whistleblower to work with whistleblowers, handle their tips and complaints, and help the SEC determine whistleblower awards.

Enforcement of legislation can be problematic. There is a danger of cases getting backlogged while many reports can be dismissed for lack of information. This underscores the need for public education so that potential whistleblowers know the kind of information and detail they are expected to provide. It is important that any oversight body complements rather than duplicates the work of other integrity agencies such as an ombudsman or anti-corruption commission. Best practice suggests that the designated agency should not have exclusive jurisdiction over whistleblowing related matters.

A major policy consideration is whether an office of a Commissioner should be established to receive disclosures. One option is to extend the mandate of current structures such as that of the Ombudsman or Anti-Corruption Commission to include the receipt and investigation of disclosures and complaints of detrimental action.

The proposed Namibian law establishes an Office of the Whistleblower Protection Commissioner and a Whistleblower Protection Supervisory Committee. An employee can report improper conduct to the Office of the Commissioner which then has the power to conduct investigations and can also refer cases to other bodies like the police or the ACC. Investigations of retaliatory action against whistleblowers are also undertaken by the Commissioner’s office which refers its findings to a Whistleblower Protection Tribunal which has the power to grant remedies to victims of retaliatory action.

One issue that is not often addressed in the literature on whistleblowing is the independence of the oversight body. This is especially important in one-party dominant states like Namibia where it can be difficult to find genuinely independent figures (who are not connected either directly or indirectly to ruling party or government) to head or oversee watchdog institutions.

In the draft Namibian law a Whistleblower Protection Supervisory Committee oversees the activities of the Office of the Commissioner. The Committee is chaired by the Permanent Secretary for Justice.



The Commissioner and Deputy Commissioners are appointed by the Prime Minister after consultation with the Minister while the rest of the staff members are civil servants.

### Timelines

Bearing in mind that Namibia's judicial system is often criticised for poor case management which can lead to protracted delays in trials coming to a conclusion, consideration should be given to making sure whistleblowing cases are dealt with in a timeous manner. This would mean guaranteeing that a whistleblower receives feedback and guidance within a certain timeframe and that the process of investigation and referral to a tribunal is not unjustifiably lengthy.

### WHISTLEBLOWING IN THE AGE OF SNOWDEN

Edward Snowden has called for a complete overhaul of US whistleblower protections. Snowden said he had tried to raise his concerns with colleagues, supervisors and lawyers and been told by all of them: "You're playing with fire."

Snowden is the computer analyst whistleblower who leaked top-secret NSA documents leading to revelations about US surveillance on phone and internet communications. To avoid arrest in the US he fled to Russia in 2013.

He told the Guardian newspaper: "We need iron-clad, enforceable protections for whistleblowers, and we need a public record of success stories. Protect the people who go to members of Congress with oversight roles, and if their efforts lead to a positive change in policy – recognise them for their efforts. There are no incentives for people to stand up against an agency on the wrong side of the law today, and that's got to change."

Snowden continued: "The sad reality of today's policies is that going to the [Pentagon] inspector general with evidence of truly serious wrongdoing is often a mistake. Going to the press involves serious risks, but at least you've got a chance."

"When I was at the National Security Agency everybody knew that for anything more serious than workplace harassment, going through the official process was a career-ender at best. It's part of the culture," Snowden told the Guardian.

### WHAT HAPPENS WITHOUT LEGAL PROTECTION?

- In 1995, Allan Cutler, a Canadian public servant, reported procurement practices that failed to follow proper procedures in a Canadian sponsorship programme. His reports were dismissed and he was demoted. Five years later the programme was suspended and significantly reviewed. Allan Cutler was ultimately reinstated and his case raised awareness on whistleblowing in Canada. Canadian legislation protecting whistleblowers in federal civil service was passed in 2007.
- John Githongo is a former Kenyan journalist who investigated bribery and fraud in his home country and later took a government position to fight corruption. In 2005 he resigned from that position and subsequently reported four high-level politicians as allegedly responsible for a major corruption

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scandal. He later went into exile in the UK, returning to Kenya in 2008.

- In 2005, Nicole Barlow raised concerns about the construction of a petrol station on wetlands in South Africa. It came to light that 35 million rand worth of bribes had allegedly been paid to start construction. As she had no money to bring about a legal case she reported the issue to the media. After months of pressure, a government investigation was launched. It found the government authorisations had been forged. The developer took legal action against Barlow but she won the case.
- Eugene McErlean, a former auditor at Allied Irish Bank, disclosed alleged fraud to state regulatory bodies in 2001. The allegations were not followed up and he had little choice but to leave the bank one year later. Only in 2009 did the bank's Chief Executive Officer apologise for their treatment of him. The country's financial regulator has continued to be criticised for allegedly not overseeing the Irish financial sector properly.

- Transparency International

### **WHY ORGANISATIONS SHOULD ENCOURAGE WHISTLEBLOWING**

- to deter wrongdoing;
- to pick up potential problems early;
- to enable critical information to get to the people who need to know and can address the issue;
- to demonstrate to stakeholders, regulators and the courts that they are accountable and well managed;
- to reduce the risk of anonymous and malicious leaks;
- to minimise costs and compensation from accidents, investigations, litigation and regulatory inspections; and
- to maintain and enhance reputation.



## RECOMMENDATIONS

- A draft law should be issued for public consultation as soon as possible (the draft produced for the June 2016 workshop only had limited circulation). The Harambee Prosperity Plan timeline of having a law enacted by September 2016 should not be used to 'force through' a piece of legislation that has not been thoroughly considered to the extent that it is appropriate for the Namibian context and reflective of international best practice. Since whistleblowing legislation has consequences for the public and private sectors (and all employees in these sectors), it is vital that it has the buy-in of a wide variety of stakeholders.
- The independence of any designated agency created by the whistleblower protection law should be guaranteed - especially in the manner in which top officials are appointed. Therefore key senior appointments in bodies such as the Office of the Whistleblower Protection Commissioner, Whistleblower Protection Supervisory Committee, and Whistleblower Protection Tribunal should be made in way that distances such bodies from the influence of government in particular cabinet and the presidency - for example in a manner similar to the way in which electoral commissioners are appointed.
- Any sanctions for deliberate and malicious false reporting should be proportionate and measured - so that they do not act as a disincentive to reporting of wrongdoing in general. There should be an understanding for the possibility that people making disclosures can make honest errors in the information they submit.
- The proposed law should have clear linkages to the Anti-Corruption Act, the Labour Act, the Public Service Act, the Companies Act, the Prevention of Organised Crime Act and the Criminal Procedures Act. These laws may need to be amended if they are to work alongside the Whistleblower Protection Act. For example, the Public Service Act (Section 26) should be amended to make clear that disclosure of information in the public interest is not a disciplinary offence. The whistleblower law should also be aligned to the forthcoming Access to Information Bill.
- The whistleblower law should be comprehensive - covering both public and private sectors. This will help to promote accountability across both government and business environments.
- As far as possible the new law should promote open organisational cultures in both the public and private sectors. Employees should be aware of how to report and have confidence in reporting procedures.
- The law should promote workable mechanisms in public and private sector organisations that ensure disclosures are properly handled and thoroughly investigated.
- The introduction of whistleblower legislation should be linked to a major public awareness campaign. Any legislation and related awareness campaigns should include clear guidance on reporting procedures. Emphasis should be

placed on information and training that tells the public about the benefits of whistleblowing.

- Civil society should play a part in any awareness-raising campaigns - as to the importance of reporting corruption and other wrongdoing. This should include offering training opportunities for employers and employees as to how the law works. Civil society groups can also offer legal advice on how employees can utilise whistleblower legislation and other forms of support to would-be whistleblowers.

## **FURTHER READING**

- International Principles for Whistleblowing Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest: 2013 Transparency International.
- International Handbook on Whistleblowing Research edited by edited by A J Brown, D Lewis, R Moberly, W Vandekerckhove. 2014. Cheltenham: Edward Elgar Publishing Ltd.
- Protection of Whistleblowers, Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation. 2010. G20 Anti-Corruption Action Plan
- Whistleblowing: An Effective Tool in the Fight Against Corruption. 2010. Transparency International
- Whistleblower Protection: Encouraging Reporting. 2012. OECD.
- Country Review Report of the Republic of Namibia (UN Convention against Corruption). 2015. UN Office on Drugs and Crime
- Protected Disclosure: Informing the Whistleblowing Debate in Namibia by Frederico Links and Clement Daniels. 2012. IPPR



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