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Media Release

MPs urged to refer Whistleblower Protection Bill to Standing Committee

The Whistleblower Protection Bill, which was tabled in the National Assembly on February 16, contains several serious flaws.

In order to allow time to address these shortcomings, the ACTION Coalition of civil society organisations, is calling on the National Assembly to refer the Bill to a Standing Committee which can investigate these issues further and hold a public hearing to allow for citizen input.

ACTION is an umbrella group of organisations which has advocated for greater access to information and freedom of expression in Namibia since 2012.

Unless the Whistleblower Protection law has the confidence of the Namibian public, it will fail to achieve its aim of encouraging those who know of wrongdoing to come forward to report such matters in the public interest while receiving protection from retaliation.

There are three main features of the Bill that should be addressed by a Standing Committee. The **first** concerns Section 52 (1d), which deals with the grounds on which whistleblower protection can be revoked. One of these grounds is

"the disclosure of improper conduct principally involves questioning the merits of government policy, including the policy of a public body."

In essence, Section 52 (1d) says that a whistleblower can have their protection revoked if his or her disclosure involves criticism of a government policy. However, from the types of improper conduct outlined in Section 2 of the Bill, it is clear that disclosures could quite easily concern matters of policy. For example a whistleblower who reports about waste in a government department could be seen as questioning budgetary policy. Equally, a threat to the health and safety of a community or concerning environmental protection could also be due to the application of a government policy. Therefore, 52 (1d) undermines the very purpose of the law. The clause would seem to be included in the Bill purely to ensure whistleblowers cannot criticise government when making a disclosure.

But more fundamentally Section 52 (1d) is unconstitutional - in that it violates the whistleblower's rights to freedom of expression and thought (Article 21 (1a & b) of the Constitution). Article 17 (1) of the Constitution also states that: "All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government."

As prominent lawyer Norman Tjombe has pointed out: "Section 52 (1d) is blatantly unconstitutional. It will in fact discourage people from disclosing suspected cases of corruption, especially if there is a perception that such corrupt practices are official policy. This provision will ensure that less and less people will be willing to expose themselves to the wrath of this law."

The **second** area of concern is Section 30 (5a), which states that a person who intentionally makes a disclosure while knowing it is false commits an offence. On conviction that person is liable to a fine not exceeding N\$100 000 or a prison term not exceeding 20 years.

We do not believe that criminal sanctions for false reporting will serve the

intended purpose of the Bill. It has to be remembered that any person who deliberately makes a false report will not receive protection under the Bill and could therefore face potential dismissal or disciplinary action at their workplace. Depending on the nature of the false disclosure and its impact, they could also face a defamation case.

The inclusion of false reporting as a criminal offence (and the potential heavy sentences associated with such an offence) will have a chilling effect on would-be whistleblowers who may already be risking their livelihoods, friendships and other associations by coming forward with information. The criminal sanction for false reporting is not necessary and should be removed from the Bill.

Thirdly, there is a need to strengthen the independence of the various bodies created by the Bill. Since the Whistleblower Protection Office will potentially be investigating government departments and public agencies, it is important that it operates at 'arms-length' from government. This would involve ensuring the Commissioner for Whistleblower Protection is interviewed and recommended for appointment by an independent panel. The independence of the Whistleblower Protection Office should be stressed in the law through the addition of a clause stating that no person, including members of the Cabinet or Legislature, should interfere with the work of the Office - in much the same way that the Office of the Ombudsman is protected from interference in the Constitution (Article 89 (3)).

The Whistleblower Protection Advisory Committee should also be broadened to include non-state actors - so that it is not dominated by state officials.

If passed in its current form, the law will have the effect of warding off whistleblowers, thereby rendering the Act null and void. Once a law, the Whistleblower Protection Act is also likely to face a legal challenge on the basis of the Constitution if appropriate amendments are not introduced.

As a result of the factors listed above, the Bill should be referred to a Standing Committee of the National Assembly for public hearings as soon as possible.

For further information contact:

Frederico Links

Chairperson: ACTION Namibia Coalition - 081 233 4705

Graham Hopwood

Executive Director

Institute for Public Policy Research (IPPR) - 081 294 3340