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PROTECTED DISCLOSURE:

Informing the Whistleblowing Debate in Namibia

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Key aspects of this paper

In his 2012 State of the Nation address before the National Assembly[3] in April 2012, President Hifikipunye Pohamba called on legal drafters to come up with a comprehensive law dealing with whistleblower protection.

The section of the State of the Nation speech in which these statements were made reads as follows: "Once again, I call upon all Namibians who have any information about corrupt and other unethical practices, to bring such information to the attention of law enforcement agencies, including the Anti-Corruption Commission. This is a joint fight to which all Namibians have a duty to contribute. It will not help to only level criticisms from the side-lines.

"The fight against corruption must be broadened and continued on all fronts. It must be waged without fear or favour. In this regard, I direct the Ministry of Justice to expedite the tabling of a strong and comprehensive legislation on the protection of whistle blowers (as underlined in the original speech). I believe that such a law will greatly enhance anti-corruption efforts by protecting persons who disclose information on corrupt activities from victimization."

Whistleblower protection has become an imperative of our time, as on any given day, someone somewhere decides to become a whistleblower on real or perceived incidences of abuse of power, corruption, fraud and numerous shades of mismanagement and maladministration in both the public and private sectors.

However, for every one person who speaks out or blows the whistle, there are multitudes who prefer to remain silent and look the other way because for them stepping forward and becoming a whistleblower could be a road to ruin. Studies and surveys done over the years around the subject of whistleblowing point to a general reticence in most people to becoming a whistleblower. Research undertaken by Britain's Institute of Business Ethics in 2007[4] found that "while one in four employees are aware of misconduct at work, more than half (52 percent) of those stay silent". And in a 2009 report[5], following a survey of whistleblower measures in 10 countries, Transparency International (TI) stated: "… the majority of people who experience or suspect wrongdoing do not disclose the information."

Similarly, in Namibia, the 2011 Namibia National Urban Corruption Perception Survey, conducted by the Anti-Corruption Commission (ACC), found a similar trend. Over the five preceding years, back to 2006 when the ACC was established, 67.5 percent of respondents who were aware of an act of corruption did not report it. This just goes to underscore the point made earlier, that most people view whistleblowing as an act of career suicide or detrimental to their advancement, if not inviting physical harm.

Victimisation is ultimately the central concern of whistleblower protection measures, whatever form these might take. The departure point, in the design and implementation processes of such measures, should thus be that whistleblowing is an act of bravery and that, no matter what, such an act will have consequences – most likely negative at a personal level and positive at a general/organisational level – for those who decide to step forward and speak out.

3 25 April 2012.

4 Speak Up Procedures (2007), Institute of Business Ethics.

5 Alternative To Silence – Whistleblower protection in 10 European countries (2009), Transparency International.

Recommendations for Namibia

- Namibia can learn from the vast experience and history of other countries. It is recommended that Namibia, specifically the Anti-Corruption Commission and the Law Reform and Development Commission, open the discussion around whistleblower protection in the Namibian context;
- The aim should be to, within a reasonable period of time, debate, construct, enact and implement a whistleblower protection dispensation that is commensurate to the prevailing conditions in the country;
- It is recommended that this discussion involve a wide range of socio-economic and political actors and incorporate a broad consultative phase;
- Namibia adopts a law, in consultation with all interest groups, that provides for the protection of whistleblowers in both public and private employment and society at large;
- The law should provide for a body similar to the Office of Special Counsel in the United States that would cater for people seeking legal assistance in case of harassment and victimisation;
- The Public Service Act (section 26) should be amended to provide that disclosure of information in the public interest by public servants is not a disciplinary offence;
- The proposed law should have clear linkages to the Anti-corruption Act, the Labour Act, the Public Service Act, the Companies Act and the Criminal Procedure Act.

Recognising an act of bravery

A loyal, long-serving employee of a major South African multinational corporation based in the Namibian capital, Windhoek, in the course of her day-to-day official duties as a risk and compliance officer comes across information that suggests senior employees in the Windhoek office might be engaged in activities that pose a serious risk to the interests of the corporation in question and which might border on criminal conduct.

Realising that if she is to write a report on what appears to be going on she has to collect some hard evidence, the employee surreptitiously goes about collecting information over the course of a number of months, in the process realising that the situation was even worse than she at first thought. To her shock, according to the evidence she has gathered, it becomes apparent that the chief executive officer of the local office and operations of the South Africa-based company is aware of and might even be complicit in the unethical behaviour her evidence appears to point to. As a risk and compliance officer of the company, the employee is duty-bound to report what she has uncovered. However, given the seriousness of the charges and the seniority of those implicated, she starts to wonder who she can contact to report the matter.

Having compiled a report, the employee – the mother of two young children and the main breadwinner in her household – asked herself whether she should not just keep quiet and pretend that she had not come across anything at all. However, being honest and a believer in the sanctity of the company's good governance systems and processes, she decided to report what she had learned as the stress induced by the burden of knowing what she knew was starting to impact on her health and emotional well-being.

Defining 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, 1971.

"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, 1982.

"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.

Feeling that she did not trust any of her local colleagues, she decided to visit the company's Johannesburg head office, ostensibly for routine reasons, to report the matter to the executive responsible for liaising with the Namibian subsidiary.

The seriousness of the allegations springing forth from the employee's report caused shock and consternation at the Johannesburg head office, with the employee, over the course of a few days, being rather aggressively interrogated by various senior executives, including finally the group chief executive officer of the company, who after an intimidating hard-eyed questioning session, thanked the Namibian employee for what she had done and told her not to say a word to anyone in the Windhoek office. The group CEO promised the employee that her allegations would be thoroughly investigated.

On her return to Windhoek, she was accompanied by a three-member investigating team of senior head office managers, who immediately launched into an audit of the activities of the Namibian subsidiary. The employee is heartened to see that the organisation listened to her and appeared to be willing to address issues regardless of who was affected or implicated. For her it seemed as if the channel of disclosure, as defined by the company structure, had worked.

The aforegoing narrative is broadly based on a series of actual events related to the authors by a third party with intimate knowledge of the incidents described. The point of this brief story is that many such incidents occur every day and never make it into the public sphere for a variety of reasons. More importantly, on any given day, someone somewhere to become a whistleblower on real or perceived incidences of abuse of power, corruption, fraud and numerous shades of mismanagement and maladministration in both the public and private sectors.

However, for every one person who speaks out or blows the whistle, there are multitudes who prefer to remain silent and look the other way, because for them stepping forward and becoming a whistleblower is the road to ruin. Studies and surveys done over the years around the subject of whistleblowing point to a general reticence, if not downright aversion, in most people to becoming a whistleblower, even if their identities remain undisclosed or sufficiently obscured through protected disclosure mechanisms, if such exist.

Research done by Britain's Institute of Business Ethics in 2007[6] found that "while one in four employees are aware of misconduct at work, more than half (52 percent) of those stay silent". And in a 2009 report[7], following a survey of whistleblower measures in 10 countries, Transparency International (TI) states: "… the majority of people who experience or suspect wrong doing do not disclose the information."

Similarly, in Namibia, the 2011 Namibia National Urban Corruption Perception Survey, conducted by the Anti-Corruption Commission (ACC), found the same. Over the five preceding years, back to 2006 when the ACC was established, 67.5 percent of respondents who were aware of an act of corruption did not report it. This just goes to underscore the point made earlier, that most people view whistleblowing as an act of career suicide or detrimental to their advancement, if not inviting physical harm.

And this is the crux of the issue. For while people are largely aware of what constitutes corruption and where and how to report it, most people do not perceive that it is in their best interest to disclose corrupt practices or malfeasance that they are aware of. In fact, nearly 43 percent of respondents to the Namibia National Urban Corruption Perception Survey, when asked why they had not reported an act of corruption they knew of or had come across, answered that they feared victimisation.

Thus, preventing victimisation is often the central concern of whistleblower protection measures. The departure point, in the design and implementation processes of such measures, should thus be that whistleblowing is an act of bravery and that, no matter what, such an act will have consequences – most likely negative at a personal level and positive at a general/organisational level – for those who decide to step forward and speak out.

To illustrate, and bring our earlier narrative to conclusion, upon completion of a swift investigation, the three-member investigating team from the Johannesburg head office concluded that the situation at the Namibian subsidiary was even worse than initially suspected. This information was relayed to Johannesburg and the response from head office was instantaneous – close ranks and keep quiet. Executives probably rightly realised that if information of what had been going on at the Namibian subsidiary were to get out, it would severely damage the organisation's reputation and by extension its business, not just in Namibia, but in South Africa as well.

To the shock and dismay of the employee who had blown the whistle on goings-on in Namibia, the company – arguably reasoning that a wholesale change of management would trigger speculation and uncontrollable fallout – decided on a slap-on-the-wrist and rehabilitation approach in dealing with those implicated in the malfeasance. And what followed then was even more shocking, for the company then turned on the female employee who had spoken up.

It became known in the Windhoek office that she was the one who had reported on what had been happening in the Namibian business and almost immediately she was ostracised, both personally and professionally, and unbeknown to her the Johannesburg head office instructed the local office to institute constructive dismissal procedures against her. And while she was reeling from being betrayed, she agreed to leave the organisation and was slapped with a constraint of trade agreement with onerous confidentiality provisions, with the effect of muzzling her with

6 Speak Up Procedures (2007), Institute of Business Ethics.

7 Alternative To Silence – Whistleblower protection in 10 European countries (2009), Transparency International.

the threat of costly litigation hanging over her should she ever disclose any of what she had uncovered to anybody. Being traumatised by the experience she signed and accepted a payout from the company.

It can be argued that this scenario plays out in organisations around the world every day, and people see and experience it, and this inevitably feeds the perception that blowing the whistle on organisational malfeasance is not a wise thing to do.

"They do not have to fear anything"[8]

Namibian anti-corruption authorities have long been aware that one of the weaknesses in their armour is the absence of whistleblower protection measures. ACC Director Paulus Noa has on numerous occasions and platforms over the years stated that the anti-graft legislative environment is in need of whistleblower protection provisions.

In an early April 2012 meeting with members of the IPPR research team, Noa reiterated his past statements on whistleblower protection, underscoring the importance of such measures in the fight against corruption.

The ACC Director categorically stated that he wanted to see a whistleblower protection law on the statute books by 2014 and that such a law would "make provision for all possible ways to protect people".

Namibia is a signatory to various regional, continental and international conventions and protocols which oblige the country to bring its anti-corruption strategies and provisions in line with accepted international best practice. It is through the existence of these conventions and protocols that Director Noa is aiming to see Namibian anti-corruption measures, including adequate whistleblower protection measures, being brought into compliance by 2014.

To a large extent, the ACC currently relies on whistleblowers to alert it to suspected acts of corruption. The agency, through the adoption of a law, would like to encourage potential whistleblowers with information concerning wrongdoing in their possession to come forward with such, in order for the ACC to have evidence around which to immediately build a focused investigation and ultimately a strong, prosecutable case.

In his State of the Nation address before the National Assembly[9] in April 2012, President Pohamba called on law drafting authorities to come up with a comprehensive law dealing with whistleblower protection.

The section of the State of the Nation speech in which these statements were made reads as follows: "Once again, I call upon

8 Paulus Noa, ACC Director, April 2012.

9 25 April 2012.

The aims of a whistleblowing culture

The primary aim of a developing a whistleblowing culture is that concerns about corruption and wrongdoing should be properly raised and addressed in the workplace or with the person responsible. Crucially, it sees the whistleblower as a witness, not as a complainant. Where communication channels in organisations are designed for grievances and complaints that is how they are used by the workforce. In the context of concerns about abuse, it is important to bear in mind that malicious and aggrieved people do already make damaging disclosures when there is not any recognised whistleblowing scheme. Recognising this, a whistleblowing culture should be concerned with the silent majority who think it is not in their interests to blow the whistle on corruption or serious wrongdoing. Drawing on the theory of efficient markets (that competitive forces begin to operate once one quarter of consumers will consider switching suppliers), a whistleblowing scheme will help organisations and societies deter corruption and wrongdoing where a significant minority of those who now stay silent can be encouraged to see whistleblowing as a viable, safe and accepted option.

The main beneficiaries of a culture which disapproves of and penalises people who blow the whistle in good faith are those few corrupt firms, institutions, organisations and individuals. Knowing that the alarm will not be sounded, they are confident that their wrongdoing (especially if it is corruption or bribery) will go undetected and unpunished. (In any case, when the successful investigation and prosecution of criminal activity outside of the workplace depends overwhelmingly on the information the police receive, it is not clear why the communication of information about wrongdoing in organisations is generally assumed to be undesirable.) Quite apart from people with a predisposed criminal intent, the current culture adversely affects the conduct of the great majority of people. For them the strongest deterrent is the fear of being caught and the shame and embarrassment that goes with it. Where a culture of secrecy and silence exists, otherwise reasonable people may be tempted to engage in malpractice because they believe they will not be caught. Equally if such a culture exists in a society, then otherwise responsible organisations may feel they will be at a competitive disadvantage if they do not also pay bribes or engage in illegal practices.

Adapted from: Whistleblowing and integrity: a new perspective, Public Concern at Work (PCAW)

all Namibians who have any information about corrupt and other unethical practices, to bring such information to the attention of law enforcement agencies, including the Anti-Corruption Commission. This is a joint fight to which all Namibians have a duty to contribute. It will not help to only level criticisms from the side-lines.

"The fight against corruption must be broadened and continued on all fronts. It must be waged without fear or favour. In this regard, I direct the Ministry of Justice to expedite the tabling of a strong and comprehensive legislation on the protection of whistle blowers (as underlined in the original speech). I believe that such a law will greatly enhance anti-corruption efforts by protecting persons who disclose information on corrupt activities from victimization."

However, while the above statements and sentiments appear to point to a general realisation that whistleblower protection has become an imperative, if only to comply with commitments under the various conventions and protocols, in the anti-graft struggle, the urgency with which the drafting and implementation of these provisions are being approached is questionable, as to date, as already stated, neither the ACC nor legal drafters have yet even produced a discussion or framework document to guide the whistleblower protection discourse. Against this backdrop it is hoped that the statements, as quoted above, by the Head of State would give this process impetus and that whistleblower protection measures will be in place by 2014, as envisaged by ACC Director Paulus Noa.

Namibia's obligations under various international instruments

When it comes to whistleblower protection in the context of anti-corruption, there are three important international instruments to which Namibia is a signatory and according to which the country is obligated to ensure that measures are put in place to protect informants and others who provide information on incidences or acts, whether perceived or real, of corruption.

At global level, Namibia is a signatory to the United Nations Convention Against Corruption[10] (UNCAC), which under Article 33, deals with the issue of whistleblower protection as follows:

> *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.

It should be noted though, as is the case with such overarching international instruments, that the language used is rather vague and does not compel signatories to draft and implement such "appropriate measures" as are being called for, but merely requires of them to "consider" the provision of such measures in the "domestic legal system".

Whistleblower protection versus witness protection

Whistleblowing should also be distinguished from laws and policies on protection of witnesses.

There is often confusion on this issue with many governments and media mistaking witness protection laws for whistleblower protection laws.

There is some overlap between the two, often including a promise to keep the identity of the individual confidential.

Whistleblowing is about preventing harm to the career and interests of the individual at the workplace. In whistleblowing, the focus is on the information, not the person who made the disclosure. Often, they are not asked to be witnesses but are merely bystanders once the disclosure is made. As noted by the Council of Europe Parliamentary Assembly "a whistleblower will not necessarily wish to, or need to appear in court, considering that whistle-blowing measures are designed to in the first place to deter malpractices or remedy them at an early stage."

As a practical matter, laws on witness protection are relating to a much more serious matter, involving usually the physical protection of the individual who will not testify in a criminal case unless they are promised protection, including from physical threats, and possible relocation.

Witness protection can also be broader in scope, involving people who are not in the organization and might have merely seen something or come across the information they are being asked to testify on as part of their jobs.

Source: Whistleblowing International Standards and Developments, Transparency International, 2009

10 UN General Assembly Resolution 58/4 of 31 October 2003.

At continental level, Namibia is a signatory to the African Union Convention on Preventing and Combating Corruption[11], which under Article 5 states the following:

> *Article 5*
> *Legislative and other Measures*
>
> For the purposes set-forth in Article 2 [Objectives] of this Convention, State Parties undertake to:
>
> 5. Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.
>
> 6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.
>
> 7. Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.

As is clear from the language, by signing up to the AU convention, "State Parties" are compelled to draft and enact whistleblower protection provisions.

And lastly, at regional level, Namibia is a signatory to the Southern African Development Community Protocol Against Corruption[12], which under Article 4 states as follows:

> *Article 4*
> *Preventative Measures*
>
> For the purposes set forth in Article 2 [Purposes] of this Protocol, each State Party undertakes to adopt measures, which will create, maintain and strengthen:
>
> e) systems for protecting individuals who, in good faith, report acts of corruption;
>
> f) laws that punish those who make false and malicious reports against innocent persons;

As with the AU convention the SADC Protocol obliges signatories to draft and enact legal schemes with the specific aim of protecting those "who, in good faith, report acts of corruption".

On the whole, the language of all three instruments is vague, but the call is clear, especially the AU and SADC level instruments. However, while the call for whistleblower protection is clear, the definition and scope of such protective measures are left up to the individual signatories to decide on.

An important consideration in this regard is whether such measures are proactive or passive in nature, in other words whether, in the proactive sense, they stimulate or encourage a culture in which citizens, on their own initiative, take responsibility and come forward and speak out or, in the passive sense, they provide protection in the event and on the occasion of someone stepping forward and blowing the whistle on corruption, without inducing such events. There is a slight, but marked difference in the two approaches and the discussion around this is nuanced by various contributory factors – levels of internalised democratisation; political culture and nature and understanding of power in society; structure of socio-economic relations; confidence in institutions; understanding of concepts such as transparency and accountability as well as what constitutes corruption; the environment of access to information and freedom of expression; levels of education and knowledge in society – which ultimately influence the efficacy of legislative measures and thus the climate of good and ethical governance.

This consideration is important, as the nature of whistleblower protection, as a critical component of the anti-graft armour, can be adjudged to reflect the commitment to the anti-corruption fight, as well as democratic values and principles, as ultimately, widespread corruption, whether perceived or real, undermines democracy and the rule of law, as well as the confidence in institutions tasked with upholding these.

The ensuing discourse will thus implicitly be concerned with the message that envisaged whistleblower protection measures will be sending out to society.

And the explicit concern of this paper is to put forward arguments and proposals as to what needs to be given consideration or incorporated into envisaged whistleblower protection provisions as are required to bring Namibia into compliance with international, continental and regional instruments and strengthen the hand of anti-corruption authorities.

To get the discussion under way proper, it will first be necessary to consider what Namibia already has in terms of whistleblower and informant protection, before going into a discussion of what is needed and should be considered as "appropriate measures". In the next section we will look at the Namibian legislative environment, examples from other countries and at the end put forward some recommendations to strengthen our legal framework.

Whistleblowing and the law in Namibia

Whistleblowing is about raising a concern about malpractice or corruption within a country or organisation. It is a key tool to promoting citizens' responsibility and general accountability within an organisation or country. Many times citizens raise concerns about suspected wrongdoing within their place of employment or in the community in good faith and in the public interest, but they often fall prey to victimisation, intimidation, dismissal and even threats to their lives.

One of the key obstacles in the fight against corruption is the fact that, without legal protection, individuals are often too

11 Adopted in Maputo, Mozambique, on 11 July 2003.

12 Adopted in Blantyre, Malawi, on the 14 August 2001.

intimidated to speak out or blow the whistle on corrupt practices which they observe in the workplace or in the community. Although they may have a duty to report misconduct in terms of their conditions of employment, those who do stick their necks out and raise concerns are mostly victimised, intimidated and have little recourse to legal remedies.

Whistleblowing is important in any country because it is an early warning system to avert possible risks, combat corruption and other economic crimes. Many countries across the world have implemented whistleblower protection legislation to protect whistleblowers.

The law in Namibia

Unlike some other countries, there is no specific law in Namibia that protects whistleblowers. The Anti-corruption Act[13], the Labour Act[14], the Criminal Procedure Amendment Act[15] and the Diamond Act[16] could be interpreted to provide certain limited protection to whistleblowers under certain circumstances. These protections are not however proactive and certainly inadequate in the fight against corruption and other serious crimes.

In terms of the Public Service Act[17] on the other hand, a public servant commits an offence if he/she discloses information to any person without first obtaining permission from the Permanent Secretary of a particular ministry. This provision does not encourage whistleblowers to report on wrongdoing in the public service for fear of victimisation and harassment.

The Anti-corruption Act

In terms of section 52 of the Anti-corruption Act, a witness in a trial for an offence committed under the Act is not obliged to identify an informer or give any information about an informer that would result in that person being identified. The only exception is when it becomes clear that justice cannot be done without revealing the informer's identity or if the informer has lied, then the court may rule that his/her identity be revealed. The court however has the discretion to allow the proceedings to continue *in camera*. The court might also prohibit the release or disclosure of any information or document that could lead to the identity of the informer becoming public. An informer or any person who assisted the Commission in an investigation is also protected from disciplinary, civil and criminal proceedings.

The Director of the Anti-Corruption Commission, Paulus Noa, has since 2006 pointed out that the existing protection afforded to informants in terms of the Act is not adequate and there is a need for more comprehensive legislative provisions to encourage disclosure of corrupt practices and the safety of informers[18].

"I pointed out that though the current ACC Act has a provision prohibiting an action against an informant or a person who has assisted the commission in an investigation or provided information to the commission, that mere provision in my view is not adequate enough to guarantee protection," ACC Director Noa has been quoted saying.

The ACC director stated the need for fully-fledged legislation on the protection of whistleblowers or informants. "This is necessary because protection is not only about the identity, but it has to do as well with the employment and physical security of the whistleblower".[19]

His sentiments were echoed by several public figures and the public at large has expressed their support for this position through letters and opinion pieces in newspapers.

The Criminal Procedures Amendment Act, 2010

The Criminal Procedure Act[20] is the principle Act dealing with the prosecution of offences in Namibia. The Act was amended in 2010 and includes an updated provision on the protection of state witnesses in criminal trials. The Prosecutor-General may approach a judge in chambers and apply to that judge for an order that a state witness, who is likely to give evidence in a trial, be placed under protection pending the proceeding of the case. This will be done on affidavit where the Prosecutor-General is of the opinion that the personal safety of the person who is likely to give such evidence is in danger or that he or she may be prevented from giving evidence or that he or she may be intimidated or considers it to be in the interests of the witness or of the administration of justice that such a witness be placed under protection. The information contained in an application to a judge in chambers shall not be made public in any manner.

Once an order is obtained the witness shall be placed under protection at a place determined by the judge until the end of the criminal trial or such other period as the judge may order. While under protective custody the witness may only be seen by a legal practitioner and/or a public official, acting in his official capacity. The Prosecutor–General may however consent that other persons, such as family members have access to the witness.

The Prosecutor-General may without an order from a judge place a state witness immediately under protection if in his/her opinion the delay in obtaining such an order would endanger the witness. The Prosecutor-General must however within sev-

13 Act No 8 of 2003

14 Act No 11 of 2007

15 Act No 13 of 2010

16 Act No. 13 of 1999

17 Act No 13 of 1995

18 Paulus Noa, Director of the Anti- Corruption Commission – Keynote Address delivered at the Anti-Corruption Conference organised by the Institute for Public Policy Research, 2010.

19 *New Era* Newspaper, 24 May 2011.

20 Act 51 of 1977

enty-two (72) hours obtain an order from a judge in chambers on affidavit.

As summarised above, this protection only relates to persons that will testify in criminal proceedings, but it is nevertheless worth mentioning. It therefore does not fully cover whistleblowers, because whistleblowers are normally employees that come across some wrongdoing at their workplace.

The Labour Act

In terms of section 33(2), read with section 48, of the Labour Act it is automatically unfair to dismiss or discipline an employee because he/she discloses information that the employee is legally entitled or required to disclose. The ambit of this section is a bit vague and to date the Labour Court has unfortunately not had an opportunity to express itself on this section. The literal understanding is that the section only protects a person in employment from unfair dismissal and/or unfair disciplinary action where he/she has made a disclosure. The disclosure does not have to relate to an issue at the employee's workplace, but it could be anything that he has a legal or other duty to disclose. This section is different from the South African Labour Relations Act, which protects employees from dismissal or disciplinary action for making disclosures under the Protected Disclosures Act[21].

In terms of section 44(d) read with section 33(2) of the Labour Act, a health and safety representative has the right to make representations on the safety, health and welfare of employees to a labour inspector without fear of dismissal or disciplinary action.

The Labour Act therefore provides some protection to whistleblowers, but is also limited, because the person must be an employee and he or she must have a legal duty to disclose the information. The employee is also only protected from unfair dismissal and disciplinary action, but not protected from harassment and victimisation. So, it is only once a dismissal or disciplinary action has been taken that the law comes to the rescue of the employee, but by then it might already be too late. This is certainly inadequate protection of employees who can be put on suspension for years without recourse to the law.

As can be seen, an obvious weakness of this law is what happens in a situation where the information in the possession of an employee is not something the employee has a legal or other duty to disclose, but of which the disclosure is nevertheless in the institution's or public interest? Do the provisions of the Act apply then? The law is not clear about this it would seem and could be challenged on this technical point.

The Diamond Act

The Diamond Act, through sections 60 and 61, empowers the line Minister to compel any person to appear before him/her and provide the said Minister with information, which has a bearing on matters falling under and related to the exercise of the ministerial mandate, in their possession. According to the Act, in an instance that such an informant makes an appearance and provides such information as was requested by the Minister, that informant shall be afforded privileges as prescribed and contained in other legal instruments, such as the above discussed Labour Act, in order to protect the informant from potential detrimental actions, visited upon such a person by an employer or associate, which might arise as a consequence of having complied with the ministerial order to provide information.

So, in a sense, the Diamond Act largely indirectly makes provision for the protection of whistleblowers or informants, by piggy-backing on the provisions of the Labour Act. However, as earlier stated, the employee is only protected from unfair dismissal and disciplinary action, but not protected from harassment and victimisation under the Labour Act, for submitting to providing information to the Minister under the Diamond Act.

These provisions, along with the others discussed here, fall woefully short of a more modern appreciation of the act of whistleblowing and can thus be concluded to be wholely inadequate in protecting whistleblowers or informants from adverse consequences which might arise as a result of them having spoken out or provided information, whether compelled to or not, under the provisions of the various legal instruments on the statute books.

As is evident through this discussion, the environment calls for a specific legislative initiative in order to protect whistleblowers and informants and to encourage more individuals to make use of more progressive whistleblower protection measures to speak out or up.

The international experience

Before engaging in a discussion of what a good whistleblower protection law should incorporate and ultimately look like, it is necessary to review already existing legal schemes and statutory dispensations around the topic, for it is from these that Namibia will have to draw out the appropriate experiences in order to design its own whistleblower protection provisions.

It has to be borne in mind though that discussions and innovations around whistleblower and informant protection are fairly or relatively new preoccupations of social activism, law enforcement, judicial protection and in fact administrative justice, as is the global anti-corruption fight, and that most whistleblower protection laws and regulations, where they exist as stand-alone legislative initiatives, have only really been put in place over the last one and a half decades or so in most places.

For this reason, while there has been a lot written and published on the subject, it is clear that in many cases, instances

21 Act 26 of 2000

Recognising Retaliation: The Risks and Costs Of Whistleblowing

If you plan to challenge the agency or corporation that employs you, you should understand how large organizations operate. In particular, you should know the tactics of retaliation most often used against whistleblowers.

Adapted from 'The Corporate Whistleblower's Survival Guide' published by the Government Accountability Project..

Spotlight the Whistleblowers

This common retaliatory strategy seeks to make the whistleblower, instead of his or her message, the issue: employers will try to create smokescreens by attacking the sources motives, credibility, professional competence or virtually anything else that will work to cloud the issues s/he raised.

Manufacture a Poor Record

Employers occasionally spend months or years building a record to brand a whistleblower as a chronic problem employee. To lay the groundwork for termination, employers may begin to compile memoranda about any incident real or contrived, that conveys inadequate or problematic performance; whistleblowers who formerly received sterling performance evaluations may begin to receive poor ratings from supervisors.

Threaten Them into Silence

This tactic is commonly reflected in statements such as, "You'll never work again in this town/industry/agency..." Threats can also be indirect: employers may issue gag orders, for example, forbidding the whistleblower from speaking out under the threat of termination.

Isolate or Humiliate Them

Another retaliation technique is to make an example of the whistleblower by separating him or her from colleagues. This may remove him or her from access to information necessary to effectively blow the whistle.

Employers may also exercise the bureaucratic equivalent of placing a whistleblower in the public stocks: a top manager may be reassigned to tasks such as sweeping the floors or counting the rolls of toilet paper in the bathroom. Often this tactic is combined with measures to strip the whistleblower of his or her duties, sometimes to facilitate subsequent termination.

Set Them Up for Failure

Perhaps as common as the retaliatory tactic of isolating or humiliating whistleblowers by stripping them of their duties is its converse-overloading them with unmanageable work. This involves assigning a whistleblower responsibilities and then making it impossible to fulfill them.

One approach is to withdraw the research privileges, data access or subordinate staff necessary for a whistleblower to perform a job. Another is to put the whistleblower on a pedestal of cards-to appoint him or her to solve the problem s/he has exposed, and then refuse to provide the resources or authority to follow through.

Prosecute Them

The longstanding threat to attack whistleblowers for "stealing" the evidence used to expose the misconduct is becoming more serious, particularly for private property that is evidence of illegality. Government workers even have been threatened with prosecution under a McCarthy-era statue for being "disloyal" to the United States, after they made disclosures to or participated in meetings with environmental groups involved in lawsuits challenging illegal government activity. Until the adoption of the anti-gag statue, passed annually in appropriations legislation since 1987, workers with security clearances risked prosecution unless they obtained advanced permission before blowing the whistle (even on information that was not marked as classified), effectively waiving their constitutional rights.

Eliminate Their Jobs or Paralyse Their Careers

A common tactic is to lay off whistleblowers even as the company or agency is hiring new staff. Employers may "reorganize" whistleblowers out of jobs or into marginalized positions. Another retaliation technique is to deep-freeze the careers of those who manage to thwart termination and hold onto their jobs: employers may simply deny all requests for promotion or transfer. Sometimes it is not enough merely to fire or make the whistleblowers rot in jobs. The goal is to make sure they "will never work again" in their field by blacklisting them – bad references for future job prospects are common.

and countries that circumscribing and implementation difficulties still persist, and that none of those measures which are in place are perfect and should be considered such. In fact, considerable questions and speculation abound about the effectiveness of existing protection measures, some of which will be discussed in the next section. However, and necessarily, for discussion purposes we need to extract that which is worth aspiring to, wherever we might find it, in order to install the best possible, and not just conceptually, whistleblower protection dispensation in the Namibian context.

To cut to the point, there is no one-size-fits-all approach and none of the existing whistleblower protection schemes have been unproblematic in implementation. However, the implementation concerns of such provisions are perhaps the subject of another discussion, and we shall rather confine ourselves here to the broad assessment of the features of whistleblower protection laws by looking at and pointing relevant authorities to some of the more well-known whistleblower protection statutes in the world.

Whistleblower protection in other countries

Republic of South Africa

South Africa has in place the Protected Disclosures Act (PDA)[22], which was adopted in August 2000. The Act should be read together with the Labour Relations Act[23]. The PDA is based on the United Kingdom's Public Interest Disclosures Act (PIDA), but unlike PIDA, compensation for unfair dismissal or unfair labour practice under the PDA is limited to an amount equal to two (2) years' salary. The PDA also does not make allowances for any damages claims.

The objects of this Act are:

(a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;

(b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and

(c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer,

Section 187(1)(h) of the Labour Relations Act renders automatically unfair a contravention by an employer of the PDA. That Act makes 'provision for mechanisms or procedures in terms of which employees may, without fear of reprisal, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers whether in the private or public sector. To enjoy protection, the employee who disclosed the information must bona fide have believed that it was true. If this was not the case, the fairness of the dismissal of a 'whistleblower' must be assessed according to the normal principles relating to dismissals for misconduct.

The PDA protects only certain disclosures made in particular circumstances. The disclosure must be made by an employee who has reason to believe that a wrongful act is being committed. The wrongful act must either be a criminal offence which has been, is being, or is likely to be committed, or a failure to comply with any legal obligation, or a 'miscarriage of justice', the endangering of the health and safety of any individual, damage to the environment, or unfair discrimination, or the deliberate concealment of such matters. The disclosure is protected only if made in good faith to a legal advisor, an employer, a member of the Cabinet or Executive Council of a province.

So, basically if the employee comes across impropriety in the organisation, they have to report it within the organisation, otherwise it's not a protected disclosure? This diminishes the concept of public interest.

An employee making a disclosure must also use the procedure prescribed or authorised by the employer for reporting or remedying the impropriety concerned. The definition of 'occupational detriment' includes being subjected to disciplinary action, dismissed, suspended, demoted, harassed, transferred or refused promotion or otherwise being adversely affected in respect of employment, including employment opportunities and work security. The final conditions are that the employee must reasonably believe the information disclosed, and the disclosure must not be made for personal gain or reward. But how do you measure or determine how or what sort of 'occupational detriment', especially when such is subtle, has taken place? And most organisations are averse to having their flaws and faults pointed out, so by engaging in an internal procedure isn't the employee already then disadvantaging themselves, as given the nature of work places, any serious internal matter does eventually and inevitably become public knowledge within the organisation.

The South African law has been working quite well, despite its initial lukewarm reception by employers. The courts have interpreted "occupational detriment" to include suspension pending disciplinary action and this has enabled employees to challenge an occupational detriment while they are still employed and still receiving a salary.

22 Act No 26 of 2000

23 Act No 66 of 1995

The new Companies Act[24] expands on the protection granted to whistleblowers in South Africa. Protection is now also granted to registered trade unions that make protected disclosures. In addition to the protection granted to employees in terms of the PDA, employees and trade unions who make protected disclosures are, in terms of s 159(4) of the Companies Act, immune from civil, criminal or administrative liability for that disclosure and have qualified privilege in respect of the disclosure. They are furthermore entitled to "compensation ... for any damages suffered" because of any threats made to them as a result of a possible or actual protected disclosure. But, again, what about disclosure to the media, if the employee does not have faith in internal procedures and those administering them?

Republic of Ghana

The Parliament of the Republic of Ghana passed The Whistleblower Act 2006[25] in October 2006. The Act shares close similarities with other such legislative initiative and states with regard to disclosure of "impropriety":

Disclosure of impropriety

1. *(1) A person may make a disclosure of information where that person has reasonable cause to believe that the information tends to show*

(a) an economic crime has been committed, is about to be committed or is likely to be committed;

(b) another person has not complied with a law or is in the process of breaking a law or is likely to break a law which imposes an obligation on that person;

(c) a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) in a public institution there has been, there is or there is likely to be waste, misappropriation or mismanagement of public resources;

(e) the environment has been degraded, is being degraded or is likely to

be degraded; or

(f) the health or safety of an individual or a community is endangered, has been endangered or is likely to be endangered.

It goes on to state:

(3) A person who makes a disclosure of impropriety is in this Act referred to as a "whistleblower".

The Act goes on to lay-out the profile of a "whistleblower" and the persons or entities to whom a disclosure can and should be made.

The Ghanaian Act has interesting features, not least of which is the fact that amongst the "specified" persons to whom a protected disclosure can be made are the following:

(k) a chief;

(l) the head or an elder of the family of the whistleblower;

(m) a head of a recognised religious body;

Quite clearly this takes into account the real and perceived power and authority structure in Ghanaian society and should be seen as an attempt to mainstream the whistleblowing phenomenon. Another interesting feature of this law is that it also sets out the procedure in respect of which a blind whistleblower can make a disclosure, as well as the procedure in cases where oral disclosures are made by illiterate whistleblowers.

Another feature which deserves mention here is the establishment of the Whistleblower Reward Fund, from which whistleblowers are to be compensated. This particular element will be discussed more later on in this paper.

Republic of Uganda

The Whistleblowers Protection Act 2010[26] of the Republic of Uganda is a good example of what a generic legislative whistleblower protection scheme should look like. The features of this law are straightforward and clear.

With regard to a disclosure, the Act states:

(2) Subject to any other law to the contrary, any disclosure of an impropriety made by a whistleblower is protected where he or she—

(a) makes the disclosure in good faith;

(b) reasonably believes that the disclosure and any allegation of impropriety contained in it are substantially true;

(c) makes the disclosure to an authorised officer;

(d) maintains the confidentiality of his or her identity as whistleblower and takes reasonable steps to avoid its discovery; and

(e) maintains the confidentiality of the information contained in the disclosure.

(3) The protection afforded to a whistleblower under this Act shall not cease when his or her identity as whistleblower has been revealed, where the whistleblower was not responsible for the revelation.

24 Act No 71 of 2008

25 Act 720

26 Date of Commencement: 11th May, 2010.

As with the Ghanaian and South African laws, the Ugandan Act sets out the procedures and agencies to which a protected disclosure can be made, as well as an outlining of the form disclosure is to take. The Act affords protection to individuals in both public and private employment.

According to the provisions of the Act, once a disclosure has been made to an "authorised" person or agency, and in the event that person or agency, on the basis of a preliminary investigation, determines that the disclosure is frivolous or groundless, and communicates such to the person who made the disclosure, the whistleblower can approach the relevant Minister, as specified in the Act, to review the decision of the investigatory agency.

The provisions of the Act also expressly do not exclude the making of an anonymous disclosure, although anonymous disclosures are not afforded any protection.

United States of America

The United States of America (USA) has adopted the Whistleblower Protection Act of 1989. It is a federal law that protects federal whistleblowers, or persons who work for the government who report agency misconduct or maladministration. There are however many other laws protecting whistleblowers at State level. For the purposes of this discussion we shall look at the Whistleblower Protection Act and briefly also highlight the salient features of the Sarbannes-Oxley Act of 2002.

The purpose of the Act is stated as follows:

The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by-

(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

(2) establishing--

(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

A federal agency violates the Act if it fails to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

The law created the Office of Special Counsel (OSC), charged with investigating complaints from bureaucrats that they were punished after reporting to Congress about waste, fraud, or abuse in their agencies. The OSC must act in the interests of employees who seek assistance from the Office. This is the foundation both for reducing the OSC's discretionary authority to undercut complainants' rights, and increasing its power to seek relief for prohibited personnel practice victims. The OSC has jurisdiction over allegations of whistleblower retaliation made by employees of the U.S. Securities and Exchange Commission (SEC). The OSC presents an annual report to Congress on its activities.

Disciplinary action may be instituted by the OSC against a person who contravenes this Act and depending on the violation the Merit System Protection Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed US$1,000.

As is clear, the provisions of this Act largely concern whistleblower disclosures from within the Federal structure of the American state and creates a protection scheme concerned with whistleblower protection for employees of Federal departments and agencies, as well as those at State level. However, this should not be understood to preclude covering whistleblowers within private entities.

As concerns mainly private sector whistleblowers, in 2002 the US Congress passed the Sarbannes-Oxley Act[27], dealing with securities and exchange fraud and contraventions at stock-market listed entities and companies. Amongst the provisions of the Act are measures to protect whistleblowers in these listed companies.

Of interest here are Sections 806 and 1107 of Sarbannes-Oxley.

Section 806 states as follows:

"(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge,

27 PUBLIC LAW 107–204—JULY 30, 2002.

demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the mployee—

"(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

"(A) a Federal regulatory or law enforcement agency;

"(B) any Member of Congress or any committee of Congress; or

"(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

"(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."

In similar vein, Section 1107 states:

(a) IN GENERAL.—Section 1513 of title 18, United States Code, is amended by adding at the end the following:

"(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.".

These provisions speak quite clearly for themselves.

United Kingdom

The United Kingdom adopted the Public Interest Disclosures Act (PIDA) in 1998[28] as its main whistleblowing protection law. The Act sets out a framework for public interest whistleblowing, which provides almost every individual in the workplace with full protection from victimisation where they raise genuine concerns about malpractice.

Only a disclosure that relates to one of the broad categories of malpractice can qualify for protection under the Act. These include concerns about actual or apprehended breaches of civil, criminal, regulatory or administrative law; miscarriages of justice; dangers to health, safety and the environment; and the cover-up of any such malpractice. The emphasis of the Act is on the prevention of malpractice with the guarantee of full compensation for whistleblowers.

For a disclosure to be protected, (a) the whistleblower must make the disclosure in good faith; (b) as to all external disclosures, he/she needs to show some substantive basis for his belief; and (c) as to wider public disclosures - unless there is some good reason why not - the concern should have been raised internally or with a prescribed regulator first.

The key issue for employers is to reduce any risk of creating grounds for protected public disclosures. Such steps will include (a) introducing, reviewing and refreshing a whistleblowing policy; (b) promoting the policy effectively; (c) ensuring that the workforce understands that victimisation for whistleblowing is not tolerated; and (d) making it clear that reporting malpractice to a prescribed regulator is acceptable.

Why organisations encourage whistleblowing

An organisation where the value of open whistleblowing is recognised will be better able to:

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

The main reason enlightened organisations implement whistleblowing arrangements is that they recognise that it makes good business sense. On the other hand, those few organisations that deliberately engage in wrongdoing to boost profits or that routinely flout the law will not want to encourage whistleblowing.

British Standards Institution (BSI)
Whistleblower Arrangements Code Of Practice
PAS 1998:2008 (2008)

28 Brought into force on 2 July 1999.

Summary of practices in other countries

As illustrated by the examples discussed above, these countries have embarked on a deliberate legislative path to protect whistleblowers from harassment, victimisation and threats to their livelihood by providing certain protections.

In terms of the legislation, it is clear that organisations, whether public or private, are encouraged to build whistleblowing channels into their structures and to appropriately inform employees and employers of this, in order to bring malpractice, misconduct and corrupt activity to the attention of the employer. Thus the law is aimed at stimulating employers to adopt an internal culture openness. The aim is to protect whistleblowers while they are in employment and/or when, because of their speaking out, an act or acts of 'occupational detriment' was the consequence.

As seen by the example of the United Kingdom, whistleblowers who are victimised are compensated for damages suffered. In Ghana whistleblowers are compensated from a special fund created under law for this purpose, in the event of a successful prosecution. In South Africa the law is closely linked to the employment legislation and company law in that country. The disclosure of information to a lawyer with the aim of obtaining legal advice is also protected.

In the United States the Office of Special Council serves as the legal representative and has the same professional duty as a legal practitioner when dealing with complaints of retaliation by employers.

It is also clear from these examples that some countries have taken the protection and compensation of whistleblowers out of the normal criminal and civil courts. Complaints of victimisation of victims are dealt with in terms of labour law tribunals or the Merit System Protection Board (USA) that are much speedier than the normal court system.

These features and differences notwithstanding, the legislative whistleblower protection schemes discussed above should be considered as generally representative of the substance and form of such initiatives, wherever they might be on statute books, as the trend internationally has been one of mimicry. However, while the features of whistleblower protection laws share similarities, there are, as has been illustrated, elements to be extracted from each which speaks to the local contextualising of the particular country-specific law.

That said, it is the similarities which we shall concern ourselves with and refer to as the 'elements of protection' in the following section. As already stated with regard to earlier sections, the brief discussion of these features is done with a view to guiding legal drafting authorities towards the issues and topics deserving of deliberate consideration in the legal construction of a Namibian whistleblower protection dispensation.

THE ELEMENTS OF PROTECTION

When aggregating the features of various legislated whistleblower protection schemes, it becomes clear that these statutes share certain pivotal commonalities. On the other hand, it is also clearly discernable that although in basic structure whistleblower protection laws share important features, there are also notable departures – whether additions, omissions or amplifications – which themselves constitute pivotal facets of the particular laws of which they form constituent parts. Pursuant to the purposes of this paper attention will be drawn to both the common features as well as the notable departures.

This shall be the purpose of this section. In order to adequately illustrate the discussion the provisions of some of the laws already briefly assessed will be used.

Protected Disclosure = Qualifying Disclosure

In order for a disclosure to be protected it has to be a qualifying disclosure, meaning it has to meet the first of several tests as set out by law. Typically this means making use of internal disclosure mechanisms. All the laws looked at for this paper are preoccupied with the procedural correctness of making use of internal channels to make such disclosures.

The standard format for an internal disclosure requires simply that the whistleblowing employee disclose to the "employer", whoever that term might refer to in the structure of a particular organisation.

Blowing the whistle externally is generally discouraged and only allowed in the event of the following circumstances existing:

(a) where the complaint does not pertain to the whistleblower's employment;

(b) where the whistleblower reasonably believes that he or she will be subjected to occupational detriment if he or she makes a disclosure to his or her employer;

(c) where the whistleblower reasonably believes or fears that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer; or

(d) where the complaint has already been made and no action has been taken or the whistleblower reasonably believes or fears that the employer will take no action.

The laws then go on to specify who the "authorised" or "specified" outside person or agency would be to whom a protected disclosure can be made. This authorised external entity is usually a direct regulator or a law enforcement agency.

Impropriety

Using one of the earlier discussed laws as example, acts of impropriety include concerns about actual or peceived breaches of civil, criminal, regulatory or administrative law; miscarriages of justice; dangers to health, safety and the environment; and the cover-up of any such malpractice.

These categories of impropriety or wrongdoing, in respect of which a protected disclosure can be made are necessarily very broadly circumscribed in legislation.

Good faith, bad faith and malice

In most cases the laws state that protected disclosures are to be made in "good faith", which is defined as meaning:

"the honest intent to act without taking an unfair advantage over another person and includes honesty, fairness, lawfulness of purpose and absence of any intent to defraud"

Malicious disclosures are treated severely and usually are met with hefty fines and prison sentences, or both, and the confidentiality of a whistleblower's identity lapses when malicious intent is established. A malicious disclosure is defined as one devoid of truth.

However, the question has to be asked what happens in a situation where a 'bad faith' disclosure is made, say as an act of revenge, which does not constitute a malicious disclosure? In other words, if the motivation to disclose is not 'honourable, but the quality of the evidence indicates substantial wrongdoing on the part of the subject of the disclosure. Existing laws in general do not appear to adequately address this concern.

The good faith test also provides for the situation where the whistleblower does not have all the facts of the matter of concern in the disclosure, but substantially believes in or assumes the truthfulness of the facts of his/her disclosure.

Victimisation and occupational detriment

In the event of a protected disclosure having been made and the whistleblower subsequently becoming the target of victimising actions or suffers occupational detriment as a result of the disclosure, existing laws make provision for avenues of redress and remedy.

Victimisation or occupational detriment broadly constitutes the following:

(a) dismissal;
(b) suspension;
(c) denial of promotion;
(d) demotion;
(e) redundancy;
(f) harassment;
(g) negative discrimination measures;
(h) intimidation; and
(i) threat of any of the above.

In the event of an allegation of victimisation or occupational detriment having been made, the burden of proof rests with the employer to disprove such and allegation.

Confidentiality and state secrecy

Typically, the provisions of whistleblower protection laws supersede the conditions of employment in respect of which employees are required to maintain organisational secrecy at all times and in all instances. This means, even though an employee might have signed a confidentiality agreement at the commencement of the employment contract, in the event that such an employee then later on makes a protected whistleblower disclosure, the courts will ultimately consider the rights of the whistleblower and the public interest superior to the conditions of an employment or confidentiality contract.

However, there is exception to this, in that in some cases, including in the UK, whistleblower protection schemes do not extend as far as covering disclosures made by operatives in intelligence, security and/or the military services. There is a need to carefully consider this particular facet, as the current technological environment makes the maintenance of secrecy, whether in private or public matters, an increasingly difficult enterprise. The concern here should be whether the maintenance of secrecy, where it is desirous and even sometimes nearly vital, should in all instances trump the public interest, regardless of the circumstances which push individuals to make disclosures. Here international precedent suggests that disclosures made by intelligence, security and/or military services operatives hardly tends to be frivolous in nature and invariably are very much in the public interest, as such operatives on occasion do have access to very sensitive information and are able to give first-hand witness accounts of covert events. Besides, such operatives hardly ever disclose, in instances where such has happened, events and information related to the ordinary mandate of their duties, even if such is borderline illegal, but rather such disclosures appear to come about because of perceived gross illegality hidden under a convenient cloak of secrecy. In a situation such as this, whistleblower protection would appear to be appropriate. This is

something authorities are grappling with around the world and it would do Namibia well to carefully study matters currently unfolding at international level.

Incentivising whistleblowing

Some whistleblower protection schemes make provision for monetary compensatory measures in the event a protected whistleblower disclosure has led to successful prosecution of those implicated or monies and goods recovered in the course of an investigation following a protected disclosure.

In this regard, the Ghanaian whistleblower protection scheme is instructive, as the law[29] makes provision for the establishment of the Whistleblower Reward Fund.

The relevant provisions of the Ghanaian law read as follows:

Establishment of Whistle blower Reward Fund

20. *There is established by this Act a Whistleblower Reward Fund.*

Sources of money for the Fund

21. *The moneys for the Fund consists of*

(a) voluntary contributions to the Fund, and

(b) other moneys that may be allocated by Parliament to the Fund.

Object of the Fund

22. *The object of the Fund is to provide funds for payment of monetary rewards to whistleblowers.*

Reward on conviction

23. *A whistleblower who makes a disclosure that leads to the arrest and conviction of an accused person shall be rewarded with money from the Fund.*

Reward on recovery of money

24. *A whistleblower whose disclosure results in the recovery of an amount of money shall be rewarded from the Fund with*

(a) ten percent of the amount of money recovered, or

(b) the amount of money that the Attorney-General shall, in consultation with the Inspector-General of Police, determine.

These provisions are worth pondering in the legal construction of a Namibian whistleblower protection dispensation.

Namibia already has a whistleblower or informant compensation scheme in place under the provisions of the Diamond Act, which reads almost similar to the provisions of the Ghanaian dispensation as outlined above. Perhaps the Diamond Act provisions in this regard should be considered in the light of the whistleblower protection discussion currently underway in Namibia. Also, informant compensation measures, upon a successful prosecution, currently being employed by the Namibian Police, should also be considered in this discussion.

Note: Some of the features discussed in the preceding section suggest that there are a number of ways in which different elements of a whistleblower protection scheme can be approached and ultimately legislatively addressed. Provisions of existing laws should be considered as pointers in the design and construction of a Namibian scheme.

Incidental considerations

FOI & ATI

Conspicuous by its absence amongst the provisions of all whistleblower protection schemes assessed for the purposes of this paper is express protection of disclosure made to the media as a disclosure recipient of first instance.

As already pointed out, whistleblower protection laws are primarily preoccupied with internal procedural correctness, and this should be seen as indicative of organisational cultures in general which make of organisations, even in an age of proliferating news and social media with immense reach, inherently media-shy beasts that do not want institutional flaws aired in public as the exposure of such flaws has the potential to cause great harm to the organisation's image and business. The UK's PIDA is about the best when it comes to protecting whistleblowers who make disclosures to the media, and in this regard, the South African law is similar, while US constitutional provisions ultimately protected citizens who disclose information to the media in the public interest. However, the test for disclosure to the media to be protected is very hard, for disclosing to the media in the first instance is ultimately frowned upon and whistleblower protection laws emit the message that running to the media should only be the very last resort.

It is recommended that Namibian legal drafters thoroughly look into provisions allowing for protected disclosure in the event such disclosure is made to a journalist or media organisation.

This should be viewed against the suggestion, according to research into the subject, that most people do not make use of whistleblower protection schemes and are averse to speaking out, which could beggar questions around the confidence in internal disclosure mechanisms and thus the efficacy of such institutional measures. It is in this regard, where there exist or might considerably exist the belief that nothing will get done internally anyway and that the disclosure will be quashed in some way,

29 Act 720

while the whistleblower is subtly made to feel unwelcome, that protected disclosure to the media should be considered.

In a way, this of course speaks to the governance culture within the organisation and can be drawn out to invite reflection of the general governance and political culture in a given country.

In the context of this particular discussion, according to some literature[30] certain structural preconditions need to be in place in order for a whistleblower protection scheme to be effective. These structural preconditions include, but are not limited to, the following:

- Free and diverse mass media
- Free elections.
- Simple and cheap electoral candidacy processes.
- Reduction in the power of political party machines.
- FOI that is effective, speedy and cheap.
- Judicial and merit review of official determinations that is effective, speedy and cheap.
- Workable ethical regimes in government and business.
- Racial, gender and other forms of equality.
- Rising standards of living.
- Constitutional guarantees of all the basic freedoms.
- An allowable culture of dissent.
- Non-politicised bureaucracy and military.

These preconditions basically reflect a culture of democratic openness and accountability.

However, in many developing societies, where whistleblower protection schemes are currently being considered or experimented with, some or many of these preconditions might as yet not be in place, a situation which it is alleged makes whistleblower protection nothing more than a toothless legislative exercise.

Contributory is the fact that the geo-political situation has locked openness and concealment into permanent conflict. States are more and more moving to shore up or amplifying secrecy provisions on statute books and the message has become that there is a vested interest in maintaining wide-ranging secrecy measures at state level.

A case in point is the controversial and contentious Protection of State Information Bill[31] passing through South African legislative processes at the time of writing. In its form at the time, this Bill criminalised the mere possession of state information and literally suggested classification of any and all public sector records by almost any public servant. The Bill proposed to supersede the provisions of South Africa's Promotion of Access to Information Act[32]. At the same time it weakened whistleblower protection provisions and undermined public interest arguments in public sector protected disclosure instances, as public servants would immediately have been classified as having acted unlawfully. All-in-all the Bill suggested an intention to black-out state information.

In Namibia, the Public Service Act (section 26) makes the disclosure of state information without consent from the relevant Permanent Secretary a disciplinary offence, even if such a disclosure is in the public interest.

What all this of course calls out for is an environment which exemplifies openness through entrenched freedom of and access to information, as far as conceivably possible, in order that there be a general free flow of information and consequently limited space or avenues for malfeasance to occur. An environment such as this would in actual fact render whistleblower protection measures largely irrelevant.

The point here is that, arguably, whistleblower protection schemes are only truly viable and effective in the context of liberal democratic values having shot deep root and been widely internalised at all socio-economic and political levels in a given society.

State of the justice system

Another factor in need of brief highlight and discussion for the purposes of this paper, is the state of the justice system in Namibia, as this too has an impact on the perception of the efficacy of the fight against corruption and ultimately confidence in the law enforcement and legal processes.

At the time of writing the Namibian law courts were clogged with outstanding judgements and a backlog of cases dating back almost a decade in some instances. This of course can lead to, if it hasn't yet, the undermining of the public trust and belief in judicial processes and administration.

This was a concern expressed again by ACC Director Paulus Noa, during an early April meeting with members of the research team, when he said: "When it comes to case delays, you are demoralising whistleblowers.

"We try to do everything in our mandate, but certain things have to be handled by certain [other] offices," Noa concluded.

This is arguably one of the central concerns which need consideration when discussing what sort of whistleblower protection scheme would work in Namibia.

30 See: Common Law – Common Mistakes by Dr William De Maria (2002).

31 [B 6B-2010].

32 Act No 2 of 2000.

RECOMMENDATIONS FOR NAMIBIA

It is important to research and read as widely as possible when evaluating whistleblower protection schemes, in order to have a substantial departure point when eventually the whistleblower protection discussion gets underway for proper in Namibia. As stated, this paper serves to spotlight some of the common and varied features of whistleblower protection laws, where such exist, and it is proposed and hoped that law drafting authorities and those tasked with enforcement, as well as agencies with a direct interest in the matter, use this and similar papers as an entry point into broader and richer discussion of the topic and eventually the construction and implementation of a comprehensive whistleblower protection scheme for the Namibian anti-corruption landscape.

In this regard the following recommendations are made:

- Namibia can learn from the vast experience and history of other countries. It is recommended that Namibia, specifically the Anti-Corruption Commission and the Law Reform and Development Commission, open the discussion around whistleblower protection in the Namibian context;
- The aim should be to, within a reasonable period of time, debate, construct, enact and implement a whistleblower protection dispensation, commensurate to the prevailing and unfolding conditions in the country;
- It is recommended that this discussion involve a wide range of socio-economic and political actors and incorporate a broad consultative phase;
- Namibia adopts a policy, in consultation with all interest groups, that provides for the protection of whistleblowers in both public and private employment and society at large.
- The law should provide for a body similar to the Office of Special Council in the USA that would cater for people seeking legal assistance in case of harassment and victimisation.
- The Public Service Act (section 26) should be amended to provide that disclosure of information in the public interest is not a disciplinary offence.
- The proposed law should have clear linkages to the Anti-corruption Act, the Labour Act, the Public Service Act, the Companies Act and the Criminal Procedures Act.

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APPENDIX 1
International Chamber of Commerce (ICC) Guidelines on Whistleblowing

1) Enterprises are encouraged to establish, within their organization and as an integral part of their integrity programme, a whistleblowing system, commensurate with their size and resources.

2) Such whistleblowing system should aim to:

(i) receive and entertain, in full confidentiality, all reasonable requests for advice and guidance on business conduct matters and ethical concerns raised by the employees of the enterprise and of its subsidiaries or affiliates (the group), but also, to any extent possible, by any of the group's agents,
suppliers and customers; and to;
(ii) receive and handle, at the earliest stage possible, by the same categories of persons, all reports made about any occurrence, whether established or soundly suspected, of a breach of applicable laws and regulations, the enterprise's code of conduct or the ICC Combating Extortion and Bribery
Rules of Conduct and Recommendations, which could seriously harm the enterprise or the group, if no remedial action is taken.

3) Enterprises should appoint high level personnel of undisputable repute and extensive work experience to be in charge of the management and administration of their whistleblowing units or ombudsservice. This personnel should be given a large autonomy within the enterprise and report to the highest echelon possible within the
group.
As part of these arrangements, an enterprise may designate a firm, external to the group, specialized in receiving and handling whistleblowing reports. Such firm should be independent, of undisputable repute and should offer appropriate guarantees of professionalism and secrecy.

4) It is up to each individual enterprise to define the kind of communication channels it wants to use for whistleblowing purposes: oral or written communication, telephone-based communication (toll free call help lines or hot-lines) or computer-based communication (Intranet) or any other tool which it considers adequate.
Enterprises should endeavor to use in these communication channels as many of the languages spoken in the different countries of operation as reasonably possible.

5) A whistleblowing system, being part and parcel of the enterprises' voluntary integrity programmes, will only be successful if it is not over-regulated from the outside.
Enterprises, however, should be aware that, in certain jurisdictions and cultural environments and because of inter alia data protection and labour law concerns, legal restrictions have been imposed on whistleblowing procedures, which they will have to comply with.

6) Each individual enterprise may decide, taking into account the applicable law of every country, in which a whistleblowing system will be put into place:

i) whether reporting under the whistleblowing system will be made compulsory or voluntary, and
ii) whether reporting can be done on an anonymous as well as on a disclosed basis.
In deciding to opt for an anonymous whistleblowing system, a company may take into account its cultural environment, as well as issues relating to the protection of privacy and the risk of unfair reporting.

If an enterprise considers that reporting is made on a voluntary basis, its employees may opt to report a serious occurrence, as defined under § 2 above, under any other internal or external procedure, which is available.

7) All whistleblowers' reports should be diligently acknowledged, recorded and screened.
A whistleblower, whose report is not considered bona fide, should forthwith be told so and such report should be disregarded.
If there is abuse of the process, disciplinary action can be envisaged. All bona fide reports should be investigated by the enterprise's whistleblowing unit and forwarded, under strict confidentiality rules, to the appropriate person(s) or department(s) in the enterprise or group.
As soon as reasonably possible, the main results of the due diligence examination should be appropriately communicated as feedback to the whistleblower.
The person whose behaviour has been reported, should also be informed of the main object of the ongoing procedure, thereby allowing this person to present objections.

8) All employees should be in a position to report serious occurrences, as defined above, without fear of retaliation or of discriminatory or disciplinary action.
Therefore, the whistleblower's employment, remuneration and career opportunities should be protected by the enterprise during a reasonable period of time. Enterprises should maintain, to the fullest extent possible and at all times, the confidentiality of the data revealed through whistleblowing, and the identity of the whistleblower, subject to overriding legal requirements, and should protect such data with the most appropriate means.

Source: http://www.iccwbo.org/uploadedFiles/ICC%20Guidelines%20Whistleblowing%20%20as%20adopted%204_08(2).pdf

APPENDIX 2
Principles for whistleblowing legislation

Broad application

The law should have a broad application. It should cover a wide variety of wrongdoing including violations of laws, rules and ethical norms, abuses, mismanagement, failures to act and threats to public health and safety. It should apply to public and private sector employees and also those who may face retribution outside the employer-employee relationship such as consultants, former employees, temporary workers, volunteers, students, benefit seekers, family members and others. It should also apply to national security cases.

Disclosures procedures

The law should set up reasonable requirements to encourage and facilitate internal procedures to disclose wrongdoing. However, the procedures should be straightforward and easily allow for disclosure to outside organisations such as higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective. There should be easy access to legal advice to facilitate disclosures and reduce misunderstandings.

Outside agency

The law should create or appoint an existing independent body to receive reports of corruption, advise whistleblowers and investigate and rule on cases of discrimination. However, this body should not have exclusive jurisdiction over the subject. The whistleblower should be able to also appeal cases to existing tribunals or courts. Legal advice and aid should be available.

Confidentiality

The law should allow for whistleblowers to request that their identity should remain confidential as far as possible. However, the body should make the person aware of the problems with maintaining confidentiality and also make clear that the protection is not absolute.

Protection against retribution

The law should have a broad definition of retribution that covers all types of job sanctions, harassment, loss of status or benefits, and other detriments. Employees should be also to seek interim relief to return to the job while the case is pending or be allowed to seek transfers to other equivalent jobs within the organisation if return to the existing one is not advisable due to possible retribution.

Compensation

Compensation should be broadly defined to cover all losses and place the person back at their previous situation. This should include any loss of earnings and further earnings. This loss should not be capped. There should also be provisions to pay for pain and suffering incurred because of the release and any retaliation.

Protection of free speech

The law should recognize that there is a significant importance in free speech whistleblowing. Public interest and harm tests should be applied to each release and for public bodies it should be expressly stated that the unauthorized release of any information that could have been released under freedom of information laws cannot be sanctioned.

Waiver of liability

Any act of authorized disclosure should be made immune for liability under other acts such as Official Secrets and libel/slander laws. An even more significant move would be to eliminate archaic Official Secrets Acts such as already has been done in New Zealand.

Rewards

In some cases, whistleblowers should be rewarded for making disclosures that result in important recovery of funds or discoveries of wrongdoing. Qui Tam cases, such as have been used in the US, may be an appropriate mechanism for recoveries.

No sanctions for misguided or false reporting

The law should still protect whistleblowers who made a disclosure in good faith even if the information was not to the level of a protected disclosure. The law should not allow for the threat of criminal sanctions against whistleblowers who make false disclosures. In cases of deliberate falsehoods, allowing for normal sanctions such as loss of job should be sufficient.

Extensive training and publication

Governments and private bodies should be required to adopt management policies to facilitate whistleblowing and train employees on its provisions. A high level manager should supervise this effort and work towards developing internal culture to facilitate disclosures as nonconfrontational processes.

Reviews and disclosures

Government bodies and large corporate bodies should be required to publish annually a review of disclosures and outcomes, reports on discrimination and outcomes including compensation and recoveries. The law should require a regular review of the legislation to ensure that it is working as anticipated.

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About the IPPR

The Institute for Public Policy Research (IPPR) is a not-for-profit organisation with a mission to deliver independent, analytical, critical yet constructive research on social, political and economic issues that affect development in Namibia. The IPPR has been established in the belief that development is best promoted through free and critical debate informed by quality research.

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