

Comment - Whistleblower Protection Bill

Introduction

The IPPR welcomes the tabling of the Bill which indicates Namibia's commitment to a key part (Articles 32, 33, and 37) of the UN Convention Against Corruption (UNCAC) and also marks another milestone in the achievement of targets set out in the Harambee Prosperity Plan.

As pointed out in the IPPR's July 2016 publication, Encouraging the Reporting of Corruption: Principles of Whistleblower Protection¹:

"To be operationally effective, whistleblower protection laws ... require a government that is committed to accountability and a society that is open and democratic."

Factors that are relevant here include: the level of democratisation; entrenchment of the rule of law; high public confidence in watchdog institutions; the scope of civic education; and strong access to information provisions.

Much will depend then on the way the Whistleblower Protection Bill is implemented once it becomes law and the effectiveness of public awareness campaigns focussing on the importance of whistleblowing.

An important indication of the commitment to whistleblower protection from Namibia's politicians will come in the next few days as the Bill is debated in the National Assembly and the National Council.

Positive Aspects

There are many aspects of the Bill that should be welcomed. The IPPR notes in particular:

- The definition of improper conduct is wide-ranging. Disclosures of improper conduct can be made when a person believes a crime has been committed or is likely to be committed; when an institution is wasting, mismanaging or misappropriating resources; if there are threats to the health or safety of an individual or community; or if the environment is being degraded or is likely to be degraded, among others.
- The Bill offers different options for making disclosures - internally (e.g. to an ethics and integrity officer within a government department/organisation/company) as well

¹ <http://ippr.org.na/publication/encouraging-the-reporting-of-corruption/>

as externally (e.g. to the Office of Whistleblower Protection).

- The Bill is not only applicable to government and its officials but also covers the non-state sector.
- The Bill includes a comprehensive list of detrimental actions that a whistleblower should be protected from including dismissal, redundancy, demotion, transfer or refusal to transfer, disciplinary action, discriminatory treatment, and change in working conditions. The Bill also recognises that detrimental action can also be taken against a person associated with or related to a whistleblower.

Concerns and Recommendations

1. Improper conduct

While the list of types of improper conduct is reasonably extensive (as mentioned above) it should also include breaches of human rights and unfair discrimination. **These items should be added to Section 2 of the Bill.**

2. Good faith

Section 30 (4a) states that a disclosure of improper conduct may be protected only if the disclosure is made in good faith. As long as a whistleblower exposes wrongdoing, and believes that their disclosures are true, their motivations should not be relevant. Any emphasis should be placed on the veracity of the disclosure. This is because it is difficult for any designated agency to second-guess the motives of a person making a disclosure. Any doubts about the 'good faith' of a whistleblower should not be reason enough for not affording protection. Section 30 (4b), which emphasises that for a disclosure to be protected the whistleblower should have reasonable cause to believe that the information is substantially true, is adequate on its own. **In view of this, Section 30 (4a) should be removed from the Bill.**

3. Independence of various bodies

If any of the agencies set up by the Whistleblower Protection law are perceived primarily as arms of government lacking in-built guarantees of independence they will not gain credibility with the public.

a) Whistleblower Protection Office

The Office is supposed to be independent and impartial yet functions as part of the public service. In terms of its administration it falls under the Ministry of Justice with the Justice Permanent Secretary acting as its accounting officer.

This Office investigates disclosures by whistleblowers, investigates reports of detrimental action against whistleblowers, decides on appropriate action to be taken, initiates criminal charges, and gives policy directions on best practice. This mandate will in all likelihood mean that it has to investigate and take action concerning ministries, government departments, and state agencies (this would

include potentially the Ministry of Justice). Therefore the independence of the Office should be strengthened and guaranteed to ensure it is protected from undue influence.

The process by which the Commissioner and Deputy Commissioners are appointed - by the President with the approval of National Assembly - does not adequately ensure the independence of the Office.

In fact, the process for removing a Commissioner from office is more exacting than the process of appointment - in that the Judicial Service Commission has to appoint a review board if the President considers that a Commissioner may not be fit for office. The final decision on whether a Commissioner should be removed from post rests with the National Assembly.

The lack of sufficient independence is underlined by the fact that the Commissioner is allowed to appoint investigating officers but in the case of special administrators and administrative directives this has to be done with the approval of the Minister of Justice (Sections 16 and 17).

To ensure the independence of the Office it would be preferable if the Commissioner was appointed following a transparent process involving public interviews by an independent panel made up of representatives from bodies such as the Law Society, the Public Accountants' and Auditors' Board as well as the Registrar of the High Court and the Ombudsman. Following this selection process, the top candidates could then be forwarded to the National Assembly for approval. The process would be similar in some respects to the one outlined in the Electoral Act of 2014 for the appointment of Electoral Commissioners.

Furthermore, **the independence of the Office should be emphasised in the law.** There may need to be an additional clause stating that that: no person, including members of the Cabinet or Legislature, should interfere with the work of the Office - in much the same way that the Office of the Ombudsman is protected from interference in the Constitution (Article 89 (3)).

b) Whistleblower Protection Advisory Committee

This Committee is intended to advise the Minister of Justice and the Whistleblower Office on matters relating to whistleblowing such as policy issues and regulations. At present in the Bill, the composition of the Committee is dominated by senior state officials - the PS of Justice (chairperson); the PS of the Prime Minister's Office; the Ombudsman; the Director-General of the Anti-Corruption Commission; the Inspector-General of the Police, the Director of the Namibia Central Intelligence Service; and the Environmental Commissioner; plus representatives of employers and trade unions.

The Committee is heavily weighted in favour of state officials. Instead **the Committee should be a more balanced body including representatives of various professional bodies, the church, civil society, and other esteemed individuals such as retired judges and former journalists.**

4. False disclosures

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

The fact that people who come forward with disclosures can be held criminally liable and may face such excessive punishments could be enough to deter them from becoming whistleblowers. Whistleblowers are already involved in a nerve-racking process that may involve going against friends and colleagues and making powerful enemies. The disincentives against coming forward with false information are already strong enough.

Such criminal penalties, as outlined in Section 30 (5), are unnecessary and could undermine the whole purpose of the Bill - which is to encourage whistleblowers to come forward rather than frighten off genuine whistleblowers who may already be nervous about the process.

The IPPR recognises that the Bill has been changed since its draft form of June 2016 when these harshest of punishments were reserved solely for false reporting alone. An additional clause has now been added which makes any person who uses force, coercion, threats, or intimidation to prevent another person from making a disclosure also criminally liable. This attracts the same punishment of a maximum N\$100 000 fine or 20 years in prison.

The punishment for false reporting should not be the same as the punishment for preventing a disclosure of improper conduct from being made. The IPPR believes the clause on false reporting should be removed altogether. If lawmakers feel it has to be left in the Bill then the maximum punishments should be vastly reduced.

5. Public Education

According to Sections 7 (1g) and 79, the Whistleblower Protection Office has the responsibility to educate the public about the provisions of the law and necessity for disclosures of improper conduct. The Office can also issue practical guidelines to help the public understand the processes involved in making a protected disclosure. As the various options and procedures outlined in the Bill are quite complex, it is vital that the Office is resourced and capacitated to do this public education work effectively. **Only a large-scale public information campaign will encourage whistleblowers to come forward and play their role in tackling corruption and other misconduct in Namibia.** Civil society organisations, such as the IPPR can also assist with this.

Conclusion

The introduction of the Whistleblower Protection Bill is a major step forward for the promotion of accountability and integrity in Namibia. Whistleblowers play a crucial role in uncovering misconduct, mismanagement, corruption and other forms of wrongdoing. Their actions can result in the detection of misconduct and crime, the

recovery of stolen resources, and the prevention of serious harm including the saving of lives. It is hoped that MPs in the National Council and the National Assembly will give the intention behind the Bill their strong backing while also scrutinising carefully the various sections and clauses to ensure the envisaged whistleblower protection measures work in an optimal manner.

February 22 2017