



The (Draft) Whistleblower Protection Bill of 2017
A Detailed Summary

May 2017

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Introduction

In April 2012, then President Hifikepunye Pohamba directed the Ministry of Justice (MoJ) “to expedite the tabling of a strong and comprehensive legislation on the protection of whistle blowers”, and from that seed we may now soon witness the fruition of the legislative process.

The Whistleblower Protection Bill of 2017 was first read in the national assembly on 16 February 2017. At the time of writing, the bill is in committee stage and as such is likely to have amendments made before/if it is passed into law. **Our summary is based on the draft legislation tabled 16 February 2016.**

This summary is aimed at Tip-Offs Anonymous (TOA) subscribers who aim to understand how this legislation could affect their organisation and whistle-blowing policies.

Reading this summary is not a substitute for having your risk and compliance officers analysing the final legislation. If/when the bill is passed into law and directives are issued, we will update clients on how this might impact the TOA service.

Overview of the bill

The bill establishes the Whistleblower Protection Review Tribunal (tribunal) and the Whistleblower Protection Office (WBPO), headed by a commissioner and supported by an advisory committee. It sets out conditional protections for whistle-blowers and how disclosures should be dealt with.

The bill allows for the WBPO to issue directives and guidelines on various issues, so ensuring full compliance will require waiting for and then reviewing these directives.



Active obligations on designated employers

The Minister of Justice, after consulting the committee, *designate employers or classes of employers* to whom the provisions of the act may apply (see Part 4). At this stage it is unclear who will initially be designated.

The chief executive officer (CEO) of a designated employer must:

- Establish a code of conduct that applies to all employees. For the public sector, the code of conduct must align to any code of conduct established by the Office of the Prime Minister.
- Designate a senior officer as the ethics and integrity officer, with overall responsibility for handling disclosures.
- Establish internal procedures for managing disclosure, including:
 - Protection of the identity of whistleblowers
 - Confidentiality of information gathered

When a disclosure is made, it must be reported and investigated.

What can be reported, and to whom?

Disclosures can be made to an *authorised person*. Authorised persons include the ethics and integrity officer at a designated employer, persons otherwise authorised by the employer, a member of the WBPO or persons/entities designated by the Minister.

Disclosures of *improper conduct* can be made, the definition of which is broad and includes the intention of, concealment of, or actual:

- criminal acts;
- miscarriages of justice;
- disciplinary breaches (organisational and professional codes of conduct);
- waste, misappropriation or mismanagement of resources affecting public interest; and
- health and safety infringements.



Investigating a Disclosure

Disclosures must be investigated. Anonymous disclosures may be summarily dismissed if deemed not credible by the authorised person. All other disclosures must be investigated (to an extent that is not specified).

Procedure differs for when an employee blows the whistle related to their employment (i.e. internal whistleblowers), or a disclosure is made from a non-employee or to the WBPO.

Internal whistleblowers

1. An authorised person must decide if a disclosure is justified or not, and submit a report to the chief executive of the findings.
2. If the disclosure is found to be justified (by the authorised person), the report may include recommendations of corrective action to be taken or that further investigation is required that they do not have capacity/capability to carry out.
3. The CEO must refer the report to the commissioner and notify the commissioner and whistleblower of the outcome, including actions taken. If recommended actions were not taken, the CEO compile a statement outlining their reasoning and submit it to the commissioner.

External whistleblower / direct report to the WBPO

The first few parts of the procedure are similar to those for an internal whistleblower, but with the CEO removed from the picture with the authorised person reporting directly to the commissioner, and no immediate obligation of implementing corrective action.

All cases

The commissioner can decide that further actions needs to be taken, and can refer a matter back to a CEO or authorised person with recommendations, or refer the matter to an investigative agency.

If the commissioner has referred a report to an investigator, the commissioner can accept recommendations and take action, reject the recommendations or request further investigation and then notify the relevant CEO, authorised person, investigative agency and whistleblower of the decision.



Protected or not?

Disclosures made to authorised persons, with the belief that the information provided is not false, are protected if the disclosure has been reduced into writing and certified as accurate by the whistle-blower. Any disclosure must contain, as far as practicable, full details of the improper conduct; it is not clear if omission of information is grounds for the removal of protection.

Protection remains regardless if disciplinary and/or legal actions result from the disclosure.

If there are other laws or regulations that prohibit a disclosure, the disclosure is not protected.

The commissioner may revoke protection if the commissioner deems that

- a whistle-blower subsequently participated in improper conduct
- the disclosure is frivolous or vexatious
- the disclosure was made substantially to avoid disciplinary action
- the disclosure principally involves questioning the policies of government or public bodies



Types of Disclosures

Public disclosures

Public disclosures are only protected when there is insufficient time to make the disclosure due to imminent risk to life, health and safety of persons or the environment, or if it is a serious offence under Namibian law. As far as practicable, steps have to be taken to verify the veracity of information and identity of the whistleblower. Laws that prohibit disclosures on grounds of national security or crime prevention/detection override this act.

Anonymous disclosures

A whistleblower who makes an anonymous disclosure is not protected under the act, until they comply with the same provisions as non-anonymous disclosures. For example, a disclosure becomes protected once whistleblower provides their details and the details of improper conduct to an authorised person and such details are reduced to a written form.



Protections in place

Detrimental action is prohibited against a whistleblower.

Detrimental action includes intimidation, harassment, personal harm/injury, property damage and interfering with employment by an employer.

Interfering with employment includes dismissal, suspension, redundancy, demotion, refusal of transfer or promotion, forced transfer, altered (disadvantageous) working conditions, discriminatory or adverse treatment, disciplinary action or threatening any of the aforementioned.

Unless a disclosure is made in bad faith, a whistleblower is not liable to civil or criminal proceedings for making a disclosure.

The tribunal may adjudicate on complaints of detrimental action and decide on sanctions to be applied to infringers, operating similarly to a magistrate's court. The tribunal can award compensation, order re-instatement or transfer of an employee, or order "any other relief as the tribunal sees fit" in the event that detrimental action has taken place.

Rewards

The commissioner may request the Criminal Assets Recovery Committee recommend to cabinet that a whistle-blower be rewarded financially for a disclosure leading to arrest and prosecution of an accused person, or if the disclosure leads to the recovery of money or property.

Punishment

The following table below indicates the *maximum* penalty for infringements.

Infringement	Fine, N\$	Imprisonment (years)
Authorised person who contravenes the prescribed code of conduct	10 000	1
Committee member failing to disclose an interest, or transacting with the WBPO	50 000	5
CEO of an organisation who fails to protect the identity of those involved in the whistleblowing process, or fails to establish safeguards, or fails to follow the required processes.	75 000	15
Any person who coerces a potential whistleblower to prevent them from making a disclosure	100 000	20
Any person who makes a disclosure knowing or believing the information is false	100 000	20
Investigator who suppresses or conceals evidence	25 000	5
Any person who discloses confidential information protected by the act publically or otherwise outside of permitted channels (with or without an explicit order preventing this)	50 000	10
Any person who takes detrimental action against a whistleblower or associated person based on their disclosure	75 000	15
Any person failing to provide information or other assistance to an investigator	50 000	10
Any person interfering with the tribunal proceedings or findings, or failing to comply with tribunal procedures (similar to contempt of court)	10 000	1
Any person failing to comply with ministerial regulations related to the act	10 000	1

What does this all mean for Deloitte Tip-Offs Anonymous and its subscribers?

Deloitte TOA will continue to operate exactly as before. The bill has yet to be gazetted, and some civil society groups are pressing for a review in a parliamentary standing committee.

Much will depend on what organisations become designated employers, who the WBPO appoint as authorised persons and the codes of conducts laid out for authorised persons.

It is our hope that TOA subscribers who are designated employers would be able to make use of the service to receive disclosures, reducing the administrative burden and the expense of training individuals to receive and report on disclosures.

We will continue to provide guidance to clients as the bill passes through the legislative process and/if directives and guidelines are issued by the WBPO.

Contact



Melanie Harrison

Associate Director
Risk Advisory

061 285 5003
melharrison@deloitte.co.za



Kristian Endresen

Senior Manager
Risk Advisory

061 285 5043
kendresen@deloitte.co.za



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