

# **BOTSWANA CENTRE FOR PUBLIC INTEGRITY POLICY SEMINAR REPORT**



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**WHISTLEBLOWING ACT: TOWARDS PROTECTION OF WHISTLEBLOWERS**  
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## **ABBREVIATIONS**

BDF	Botswana Defence Force Botswana
BFTU	Federation of Trade Union
BOCONGO	Botswana Council for Non Governmental Organisations
BPCI	Botswana Centre for Public Integrity
BURS	Botswana Unified Revenue Service
CSO	Civil Society Organisation
DCEC	Directorate of Corruption and Economic Crimes
DIS	Directorate of Corruption and Economic Crimes
FIA	Financial Intelligence Agency

## **INTRODUCTIONS**

The seminar started with self introductions by participants. Representatives were drawn from Civil Society Organisations (CSOs) including; Botswana Centre for Public Integrity (BPCI), Botswana Council for Non Governmental Organisations (BOCONGO), Ditshwanelo, Botswana Federation of Trade Union (BFTU) the media, Office of the President, Office of the Ombudsman and Directorate of Corruption and Economic Crimes (DCEC).

## **OPENING STATEMENTS**

Dr. Bashi Mothusi, Board Member at BCPI and Mr. Mpho Keatshabe, a representative of BFTU, delivered opening statements.

In his remarks, Dr Mothusi stated that the overall objective of the seminar was to unpack the Whistleblowing Act No. 9 of 2016. This entailed discussing and analysing the Act to gain a common understanding of it.

Presenting his opening statement, Mr. Keatshabe explained that whistleblowing was not alien to Botswana's history and culture. He explained that in the past unruly behaviour by member(s) of the community was reported to the village chief and due process followed to correct that behaviour. He stated that this practice has since eroded with the emergence of nuclear families and neighbours that do not know each other.

Mr. Keatshabe expressed that the aim of this seminar was, to gain insight on the Whistleblowing Act, discuss challenges and opportunities presented by the legislature as well as learn from best practices of Whistleblowing.

He then noted with concern, a surge in corruption and economic crimes in the form of tax evasion, money laundering, and rigging of tender bids which was exposed by various media houses. Mr Keatshabe pointed out that BFTU has noticed with dismay that politicians and some members of the executive are allegedly involved in these crimes.

As succinctly outlined in BFTU position papers and Workers Manifesto, their view is that these are crimes against Botswana's working class because they directly or indirectly contribute to the problems of unemployment, poverty and social inequality. Mr. Keatshabe also argued that costs of these economic crimes hurt the working class the most. A case in point being the misappropriation of P12 billion earmarked for the development of Morupule B power station. This resulted in regular load shedding and higher electricity tariffs for the workers and their families. He also cited the theft of P250 million from the National Petroleum Fund which resulted in increased fuel prices

and consequent increase in commuter fares and food prices. These cases allegedly involved prominent members of the society in the highest positions, affecting public trust.

Mr. Keatshabe expressed BFTU concern regarding the lack of separation of powers between the Legislature and Executive. He also pointed out that their belief is that DCEC should report to Parliament instead of the President, stating that the current structure affects the effectiveness of the institution.

He acknowledged that the Whistleblowing Act is a welcome development in Botswana and recognised the importance of raising awareness on it, to promote the disclosure of impropriety to authorised persons. He however, pointed out that implementation of the Act has been slow to take off and that some critical aspects of it have been lagging behind. Other shortfalls he alluded to was the appointing authorised persons, which they believe can be improved. He called for regular communication and notices at DCEC, Auditor General, Directorate of Intelligence and Security (DIS) and Financial Intelligence Agency (FIA) on the reporting procedure, and the right person to report to, in order to encourage people to report.

Mr. Keatshabe called for the development of guidelines on the process of reporting and receiving reports. He said the following also need to be addressed to ensure smooth implementation of the Act;

- inclusion of private media in the protection;
- sanctions/penalties for the disclosure of names/identities of whistle-blowers to be stricter;
- the authorised person must not be allowed to unilaterally take the decision to close, or reject reports instead that authority be given to a Committee;
- use of technology to make reporting simple and efficient;
- ensure trade unions and NGO's are at the forefront the dissemination of information on the Act to their constituents.

### **Comments on the Opening Remarks**

Office of the President, representative Mr. Mfosi Mfosi, agreed that DCEC should report to parliament, a point supported by Ms. Alice Mkgwe of Ditshwanelo, who stressed that that oversight institutions need to be independent.

Still on the importance of the independence of oversight institutions, Mr. Tsholofelo Bareki from DCEC opined that whether these institutions report to the President or Parliament makes little difference, what matters is the citizenry's perception and trust in them. He went on to explain that in other jurisdictions an institution like the DCEC would for instance be accountable to a Commission which would then report to

Parliament. This would create a buffer which in his view still creates a lack of independence. This Commission would be staffed by persons perceived to be independent, usually staffed with retired Judges. Mr. Govenious Toka from Sunday Standard, expressed that concentration of power in the Executive, as opposed to where these oversight institutions are placed is the challenge.

Mr. Toka explained the importance of specifying what can be reported as bad conduct worthy of whistleblowing. He also emphasised that the risk of reporting should be less than the risk of an act of impropriety being left unreported.

Sharing her comment, Ms. Kapaletswe Somolekae from the Office of the Ombudman agreed that issues of whistleblowing should be further scrutinised and that it would be fruitful to also determine the extent to which this Act has been implemented since it was enacted. This would then assist identify the gaps that need to be addressed.

Commenting on the placement of oversight institutions, she said the government is currently undergoing rationalisation of portfolios of ministries, a process through which the Ministry of Presidential Affairs will relook at its responsibilities and institutions placed under it.

In summary the opening statements discussions covered;

- the importance of the independence of oversight institutions and those focusing on the protection of the rights of citizens;
- recognition that, to build trust in oversight institutions and the Whistleblowing Act, underlying values or guiding principles of transparency, accountability and confidentiality should be incorporated in the code of conduct/ implementation guidelines for Botswana to feel comfortable engaging with them;
- participants should therefore lookout for which of the principle may be lacking in the Act as they unpack it.

## **CHALLENGES AND OPPORTUNITIES CORRUPTION REPORTING**

Mr. Tymon Katlholo was tasked to lead discussions of this session, however he was unable to attend the seminar and sent an apology. DCEC representatives stepped in to lead the discussions. They also suggested focus of discussions should be on challenges and opportunities of whistleblowing instead of corruption reporting.

### **Challenges**

Key challenges highlighted were as follows;

- (a) The Act is supposed to be implemented by ten institutions; DCEC, Auditor General, Directorate of Intelligence and Security (DIS), Botswana Police Service, Ombudsman, Botswana Unified Revenue Service (BURS), Financial Intelligence

Agency (FIA), Competition Authority, Botswana Defence Force (BDF) and Botswana Prisons Services, all equally responsible as per Section 8. All institutions are expected to interpret the Act and implement it in the same way. This may prove problematic. To address this shortcoming, it was suggested that when developing implementation regulations (provided for in Section 23), they should include a provision for the establishment of a Committee that comprises of all the ten oversight institutions. The Committee could facilitate regular meetings/ engagement of these institutions, establish a uniform and systematic way of interpreting and implementing the Act. Institutions receiving reports, represented by persons assigned the responsibility of receiving reports should report to the Commission. For instance giving details on the number of reports received and subsequent actions on them. Mr. Oaitse suggested that an Appeals body should also be established where reports that members of the public could submit reports they feel were not dealt with sufficiently.

- (b) Implementing institutions should appoint the right calibre of authorised persons. It was suggested that the proposed Committee should set criterion for authorised persons, detailing educational requirements and the character required for the position. For instance they should also be in decision making positions from their organisations.
- (c) The definition of a whistleblower is still ambiguous, not entirely distinct from that of an informer and witness.
- (d) Regulations that are to be developed can only do so much to address shortcomings, they can only cover what is already in the Act and cannot bring anything outside of it, therefore key improvements can only come from amendment of the Act.
- (e) All authorised persons are government entities and in some instances improprieties reported may affect principals of these entities, therefore the public may not be comfortable to make disclosures to such institutions.
- (f) From cases reported thus far, there has been evidence of victimisation of whistleblowers.
- (g) The protection of whistleblowers is inadequate. The Act is also not clear on who then protects the Whistleblowers. In other frameworks the the whistleblowing and witness protection legislations are linked. The whistleblower is differentiated from and informer and a witness.
- (h) The list of Authorised persons as outlined in Section 8 may be viewed to be restrictive, taking into consideration the issue that institutions listed are government entities that are perceived not to be independent. The list could be extended to other entities where the public could feel more comfortable disclosing. In other jurisdictions the list also includes parliamentarians and legal advisors.
- (i) Adding to the challenges highlighted, Ms. Somolekae pointed out that whistleblowers will need clarity on which issues to take to which authorised

person and that a formal referral mechanism needs to be established to avoid sending whistleblowers from pillar to post and to also ensure confidentiality of disclosures. She also pointed out that some of the listed authorised persons do not have investigative mandates therefore they will need to refer.

## **Opportunities**

- (a) CSOs have an opportunity to participate in educating the public about the Act.
- (b) Since the Act is new, it can be developed and amended to arrive at the desired standard.
- (c) DCEC has sought funding from UNDP to engage a consultant to draft regulations (provided for in Section 23). The Consultant shall consult with CSOs with interest on fighting corruption to share ideas. The planned first consultation workshop was limited to Section 8 authorised persons. There is an opportunity to widen consultations to other stakeholders to enable development of robust regulations that will address most of the shortfalls of the Act.
- (d) Despite the shortcomings of the Act, the public endeavours to whistleblow, they do come forward to report cases for investigation.

## **CODE OF GOOD PRACTICE ON WHISTLEBLOWING AND CORRUPTION BLOWING**

Participants agreed that discussions on the environment needed for disclosure and code of practice will be covered as the various sections of the Act are unpacked, so that more time is dedicated to scrutinising the Act. Deliberations then proceeded to discussions of good practices of whistleblowing and corruption reporting.

## **DISCUSSIONS: CODE OF GOOD PRACTICE ON WHISTLEBLOWING AND CORRUPTION**

Ms. Mogwe of Ditshwanelo pointed out that it is important to interrogate who oversees oversight institutions.

Ms. Somolekae clarified that authorised entities have reporting standards, in the case of Ombudsman, an annual report which is supposed to be tabled before parliament. The Ombudsman has consistently prepared the report since inception, but none of the reports have been tabled before parliament. Parliament itself has never questioned where this report is. She also pointed out that there is a Parliamentary Standing Committee on Oversight and Governance, which oversight institutions should be appearing. The Committee but is not robust. She argued that instead of proliferating institutions, effort should be directed towards resuscitating existing ones. She contended the argument that placing oversight institutions under Parliament would improve their autonomy. Rather, it is import to probe if the Parliament is conversant with its role.



Ms. also suggested that the Act should have a provision that prevents abuse of the system, for example an informant going to the police with information, then the same source goes to DIS with the same information.

Ms. Somolekae also indicated that this law only protects whistleblowers and asked who then protects whistleblowers who transcend into witnesses. Responding to Ms. Somolekae's concern, Mr. Bareki affirmed that legislature provides limited protection for witnesses.

Mr. Bareki stressed that CSOs should strengthen engagement and advocacy for improved accountability by political leadership and institutions.

Giving her comments, Ms. Mogwe reiterated the importance of embedding values that make Botswana unique in the country's institutions and legislation.

Participants resolved to then discuss contents of the Act section by section.

#### Section 4.1(a)

Mr. Toka asked how bad faith is tested? In his response, Mr. Bareki explained the term 'good faith' as a sense of honesty without any malicious intent towards the accused persons. He further elaborated bad faith as malice, frivolous and exaggerated reporting with the intention of tarnishing one's character.

#### Section 4.2

It was discussed that this section of the Act appears restrictive to public authority and may confuse whistleblowers. It was suggested that the word 'public' be replaced with a more inclusive one. Persons protected by the Act should be explicitly mentioned.

#### Section 8

Discussions raised sentiments that most authorities are not relevant as they do not have investigative authority, therefore, would be of little assistance to the whistleblower. Doubt was placed on the relevance of BDF and Botswana Prisons services taking into consideration their mandates.

It was then suggested that that the list of authorities could include other institutions such as journalists, lawyers and CSOs i.e human rights organisations and NGO's. Considerations could be made to replace the DIS. After further discussions, it was agreed that the mandate of journalism would contradict the purpose of whistleblowing, i.e journalist may publish information whilst the reported impropriety is under investigation.

## Section 9

The recommendation was to regulate technology used for discerning information. It was also suggested that the Act be regulated to show that it is not limited to economic crimes through reporting to the DCEC but that other authorities were in place to receive reports.

## Section 12

There was suggestion to amend section 12 to explicitly state the authorised persons to report to. Participants noted that in Botswana the public protector role is carried out by DCEC and Ombudsman. The recommendation was therefore to have an independent body by means of setting up a Commission similar to the Gender Commissions or an autonomous public protector.

## Section 14

The recommendation was to explicitly state the private sector with the non-disclosure clause covering employees regardless of the contracts signed between them and the employer. Dr. Nyepi recommended that the Act should make it unlawful for institutions to make employees sign non-disclosures altogether as they may deter reporting impropriety.

## Section 19

Participants perceived penalties of whistleblowers to be too harsh and may inherently hinder the purpose of the Act by imposing fear amongst whistleblowers when reporting matters. It was also discussed that disclosure to third party is inevitable as this may be to a spouse or counsellor when dealing with issues of victimisation or grief due to impropriety or malicious acts reported by the whistleblower. It was therefore recommended that this section be amended to a less harsh sentence and the third-party clause reassessed.

## Section 21

Dr. Nyepi argued that victimisation was a criminal offence and that the Botswana Police service, although being the relevant reporting authority to deal with the matter were not familiar enough with the crime and may therefore be ineffective in delivering the right services to the victim. The recommendation was to provide counselling as well as legal services to deal with the matter of victimisation.

## Section 23

It was recommended that regulations should be put in place to guide and better enforce the implementation of this section.