



**CODE OF GOOD  
PRACTICE FOR**

*Whistleblowing*



# Botswana Centre for Public Integrity

*"integrity in action"*



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## Introduction

Whistleblowing Act, 2016: “an Act to provide for the manner in which a person may disclose conduct adverse to the public interest; to provide for the manner of reporting and investigations of disclosures of impropriety; and the protection against victimisation of persons who make the disclosures; and to provide for related matters”

Whistleblowing has been identified as one of the tools effective for combating fraud and other corrupt acts. It can expose not only corruption, but also a swing of activities – such as environmental risk or discrimination – that can be harmful not only to the public service or company itself, but to the public at large. Yet people may hesitate to disclose information, either because they are unaware of how they can, or because they are frightened of the consequences. A policy on whistleblowing within organisations and departments is a first step for assisting the whistle-blower to disclose but also embedding a culture of openness for everybody's benefit.

Botswana Centre for Public Integrity (BCPI) and the Botswana Federation of Trade Union (BFTU) seeks to draft a Code of Good Practise on Whistleblowing to provide guidelines to assist employers and employees on how to make, facilitate, and manage disclosures, as a way of inspiring whistleblowing policies in various organisations, departments and companies in the Botswana context, against the Botswana Whistleblowing Act (2016).

Throughout this Guide, we will highlight suggestions on particular issues that might be of relevance in a policy.

## Prior to a disclosure

### Why create the right environment for Whistleblowing?


The Whistleblowing Act, which implies Protection of Disclosures and those who make them, is meant to encourage a workplace (government, private sector and civil society) culture that facilitates the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner. There are practical steps, which can be taken to promote a culture of openness in an organisation. This is necessary as, though the Act provides some protections, whistle-blowers may nevertheless be scared to come forward. A safe environment means people will know how to disclose – but also increases the chances that the Act won't even need to be called upon, as victimisation won't happen.

### How do we create the right environment for Whistleblowing?

Creating a considered and detailed whistleblowing policy is a first and necessary step for ensuring the right environment throughout an organisation. In constructing a policy, employers should consult employees and their Trade Union representatives to create a policy and establish procedures which will enable employees and management to raise concerns about wrongdoing. Employees and workers should be confident that their allegations will be taken seriously, that any wrongdoing that is unearthed will be dealt with, and that any persons involved whether directly or indirectly in covering up wrongdoing, will be called to account and, where appropriate, be required to reimburse the employer for undue benefits that they have received.



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It is important for employers to encourage employees to raise concerns that are honest even if they are mistaken. There is also a legal obligation on employers to take reasonable steps to ensure employees and workers know about the policy. Outside of a policy, it is important that all levels of management and staff speak about whistleblowing in a language that acknowledges how useful, and vital, authentic dissent can be for an organisation or department. Whistle-blowers need to be understood as compatriots, who actively contribute to an effective and innovative environment.

## What should be included in a Whistleblowing policy?

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Any policy on how to make a disclosure should explicitly state that any employee, no matter how junior or senior, may disclose their concerns about what they perceive to be unacceptable conduct. The policy should give examples of practices that are appropriate to the workplace, whether by fellow employees, contractors or members of the public. Such case studies are a great help to employees for understanding.

The policy must also be broadly advertised and easily accessible. The policy should explicitly state that anyone who makes a disclosure in good faith will be protected against any victimisation or reprisal by any colleague or manager and that any victimisation or attempt to discourage a person for making or wanting to make a disclosure is a disciplinary offence.

At the same time, malicious and unfounded allegations of wrongdoing will be considered an abuse of the policy on disclosures and will also be a disciplinary offence. The policy should also set out how a disclosure should be made and to whom, e.g. by providing a template, which contains contact details of the person or agency that the employer has authorised to receive a disclosure.

## Who should be involved in Whistleblowing procedures?

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In the Act, the Minister may make regulations for better carrying out of the provision of the Act. However, the answer depends on your organisational context, but the policy itself should set out to whom disclosures may be made. According to the Act, only authorised bodies and persons are involved in the whistleblowing procedures.

A best practice to point out is that it is useful for the Human Resources Department to be fully engaged with the whistleblowing procedures. They are well placed not only to assist in the drafting and distribution of policy, but also to facilitate training and other important general awareness raising activities. They can also engage staff on whether there are any disclosures they would like to make during exit interviews: a time when employees often feel safest to reveal such information.

Any person authorised to receive disclosures must be sufficiently senior to have the confidence to investigate the allegation made from a disclosure without fear or favour. This may in a large government department require the establishment and support for an independent investigative unit staffed with people trained in investigative skills.

If there is no whistleblowing policy in place, a disclosure can be made to any senior person stipulated in Section 8 of the Whistleblowing Act.

## Making the disclosure What can a disclosure be about? (Checklist to be added)

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A disclosure can be about revealing information on the conduct of an employer, or another employee, which might include:



# A RESOURCE GUIDE WHISTLEBLOWING

## Disclaimer

The BCPI and BFTU intends this Guide to provide information to the public and business regarding the application of the Whistleblowing Act. It is a summary in nature. It is not intended to substitute for the advice of legal counsel on specific issues related to the Act.

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### The Act? What is it?

A law that enables and provides assurances to individual seeking to report conduct in public administration that is corrupt or harmful to the public interest in nature.

## Reporting is referred to as “disclosure”

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### Why should you disclose?

- To curb corruption in its many forms
- To promote accountability in a public office
- Promotion of open governance and responsibility in decision making

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### What you should know before you disclose?

- Designated person: persons or offices to whom you can disclose wrongdoing to.
- Please Note: making a disclosure to any person other than those named in the Act is not protected.

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### What is covered (What you may disclose)?

A whistleblower may report conduct in public office either by an employer or employee that is harmful to the public interest. For example:

- Criminal corruption
- Failing to comply with legal obligations
- Miscarriage of justice
- Endangering health, safety, environment
- Abuse of office such as maladministration or abuse of discretionary powers.

This list is non-exhaustive (see section 3 of the Whistleblowing Act, 2016)

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### What is not covered?

Malicious and unfounded allegations of wrongdoing. This attracts sanctions stipulated on section 17 of the Act: A person who knowingly makes a disclosure alleging impropriety knowing the information to be false commits an offence is liable to a fine not exceeding P10000 or to a term of imprisonment not exceeding five years or both.

# TO THE BOTSWANA NG ACT OF 2016

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## Who can make a disclosure?

Anyone that becomes aware of the wrongdoing

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## Where to disclose?

You can make a disclosure to the following offices:

- The Directorate on Corruption and Economic Crime
- The Auditor General;
- The Directorate of Intelligence and Security;
- The Botswana Police Service;
- The Ombudsman
- The Botswana Unified Revenue Service
- The Financial Intelligence Agency;
- The Competition Authority;
- The Botswana Defence Force; and
- The Botswana Prisons Services

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## How do I make a disclosure?

Use any form of communication for example writing, email, voice calls, in person where you provide:

- Your details
- Nature and full particulars of the misconduct/impropriety
- Particulars of the offender

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## Are you protected for disclosing impropriety?

YES, you are protected from;

- General victimization by any other person
- Administrative action amounting to victimization.

Victimization may include: dismissal from workplace, harassment and demotion

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## What if I am victimized?

The Act does not offer conclusive consequences for an employer who victimise that disclosed impropriety. Due to there being no legal consequences for an employer that victimises you, you may have to institute legal proceedings yourself against your employer or person.

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## Am I under legal duty to make a disclosure?

No, it depends on your official obligations but to ensure that resources are channelled to the right beneficiaries and no one group of people benefits more, it is a moral obligation to disclose misconduct.



- a criminal offence e.g. theft;
- a failure to comply with a legal obligation
- e.g. meeting income tax or department of labour obligations;
- a miscarriage of justice e.g. lost dockets;
- endangering health and safety;
- damaging the environment; and
- unfair discrimination
- breach of public trust
- maladministration

You can see that the range of issue you can disclose on are broader than just embezzlement. For instance, they might relate to the abuse of power e.g. favouritism in appointments of employees or contractors; abuse of privileged information to secure an advantage for oneself or others, e.g. splitting of purchases to avoid tender thresholds; indulging in or ignoring wasteful expenditure, and conflicts of interest in the procurement of goods or services.

## Is there a difference between a grievance and a disclosure?

A grievance refers to a problem that an individual has, such as problems with his/her pension, or leave calculations, or the behaviour of a colleague. In comparison, a disclosure is about reporting wrongdoing that is taking place at work. Many grievance procedures might confuse the whistleblowing protections since the grievance procedure may say that a grievance must be reported to one's manager.

## Who can make a disclosure?

All employees in the public or private sector can make a disclosure. This now includes former employees and workers, whether permanent or employed under temporary employment services.

I WANT TO MAKE A DISCLOSURE, NOW WHAT? (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, lawyers and CSOs i.e human rights organisations and NGO's. Considerations could be made to replace the DIS.)

A disclosure may be made in writing or orally to authorised persons as appointed in the designated institutions listed below: (as per Section 8)

1. the Directorate of Corruption and Economic crime;
2. the Auditor General;
3. the Directorate of Intelligence and Security;
4. the Botswana Police Services;
5. the Ombudsman;
6. the Botswana Unified Revenue Service ;
7. the Financial Intelligence Agency;
8. the Botswana Defence Force; and
9. the Botswana Prison Services.

## How do I make a disclosure?

All forms of Information and Communications Technology (To be removed) may be used for the disclosure and the disclosure must contain the following information:



- full details of occupation of whistle-blower;
- the nature of the impropriety;
- the name of the name and particulars of the person who is alleged to have committed a crime;
- the time and place of the crime,
- the full name and description of the person who witnessed the impropriety;
- whether the whistle-blower has made a disclosure of the same impropriety has been lodged before;
- whether the whistle blower remains in employment at the same if the whistle-blower is making an employment related issue;
- any information that the Minister may prescribe in the regulations;

## Which is the best route?

Since all routes receive the same protection it doesn't matter which route you take for the disclosure. It is only important that you select the one that is the most convenient to you. (TO be removed) (To be replaced with select relevant institutions)

### DOES IT MATTER WHEN I MADE THE DISCLOSURE?

The Act took effect on 26 September 2016. However, you will be protected if you made the disclosure after September 2016, even if the disclosure is about something that happened before then.

## After the disclosure

### AS AN EMPLOYER, WHAT SHOULD BE OUR IMMEDIATE STEPS AFTER A DISCLOSURE HAS BEEN MADE TO US?

Employers, supervisors should do everything they can to keep the identity of the whistle-blower confidential. You should also follow up and investigate the complaint as soon as possible, or refer the complaint to someone best placed to investigate. Throughout this time, you must keep the whistle-blower aware of what actions are being taken. The Regulations stipulated in Section 23 should be very specific rules about the obligations to inform the employee or worker of what steps are being taken.

If serious wrongdoing is revealed, the employer should take appropriate measures, including criminal and civil proceedings to recover losses that have been incurred. This is not only for financial recovery reasons – the act of following up ensures other employees that their disclosures won't be made in vain. Particular efforts should be made to take direct action against anybody who may try and victimise the whistle-blower at work

### WHAT AM I PROTECTED FROM? (Witness protection should be added as an incentive and should offer an extra layer of protection)

The Act says that, if you made a disclosure described in it, you will be protected from "victimisation" for having made that disclosure. This includes any adverse treatment to the whistle-blower, including being disciplined or dismissed, harassed, demoted or denied promotion, subject to a civil claim for an alleged breach of confidentiality, being forced to transfer, being denied any workplace benefit, or being subjected to a discriminatory or adverse measure by the employer or a fellow employee as a consequence of making a disclosure.

WHAT SHOULD I DO IF I AM BEING VICTIMISED? To be edited (victimisation is 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)

If you believe you have been subject to an occupational detriment, you can try pursue a workplace



grievance using any applicable grievance policy. If you are threatened with an occupational detriment, for example you get a notice of a potential disciplinary hearing, you can approach the Labour/Industrial Court on an urgent basis to try to interdict the employer's conduct. The Labour/Industrial Court may grant an interim order that the employer stop the occupational detriment.

Highly important, a contract of employment is void if it seeks to prevent you from making a disclosure of impropriety, precludes an employee from making a complaint in respect of victimisation under Section 14 or prevents an employee from bringing an action in court or before an institution to claim relief or remedy in respect of victimisation under Section 14.

**WHAT DO I DO IF I AM DISMISSED?** (To be edited, Stating that dismissal even though awful other situations can occur, e.g. murder, threats to life etc., these should be made explicit and assessed)

Dismissal is of course a kind of detriment. If you are dismissed, you may refer a dispute about the dismissal in terms of the Labour Act or to the particular bargaining council with jurisdiction over your sector. If the dispute is not resolved after conciliation the complainant may refer a dispute about the dismissal to the Labour/Industrial Court alleging that the dismissal is automatically unfair because it amounts to an occupational detriment.

The whistle-blower should approach his or her Trade Union, a specialist advice office, the Legal Aid Board or Botswana Law Society's pro-bono service for advice and support in initiating legal proceedings.

**WHAT ARE THE REMEDIES AVAILABLE?**

The Act is not clear on the explicit remedies, they might be stipulated in the Regulations that ought to be made by the Minister (Section 23). – (To be revised)

## **What if someone made a disclosure in bad faith?**

Any disclosure you make to the Section 8 bodies or persons, as a generally protected disclosure, must be made in good faith to count as a disclosure that is protected by the Act. An employee who intentionally discloses false information may be guilty of an offense.

Also, the fact that a person has made a disclosure does not give that person immunity from fair managerial authority or criminal prosecution if the person making the disclosure has also been involved in the wrongdoing.

**OUTSIDE OF THE ACT**

**ARE THERE ANY OTHER PROCEDURES FOR MAKING A DISCLOSURE?** (to be revised)

No. The Act does not provide for any other procedures yet, except those in Section 9.

## **When am I under a legal duty to make a disclosure? (To be revised)**

While the law does not oblige anybody to reveal wrongdoing, there are some other laws and regulations that create a duty to disclose certain types of information. For instance, if the information relates to corruption or other crimes and involves a 'substantial' amount (to be removed), people in positions of authority in the public and private sector must report the information to the relevant authorised bodies.

Employees are obliged in terms of the Corruption and Economic Crimes Act, to report fraud, corruption, nepotism, maladministration and other conduct which is prejudicial to the national interest. If they are aware of the wrongdoing, but choose to ignore it, it is in itself a criminal offence. (To be removed)

You should always be aware of your sector-specific legal obligations – and a good employer should ensure its employees are all well versed in these requirements.







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