



# Whistleblower Protection Act 10 of 2017

## What does the law do?

This law protects persons who report information on improper conduct, referred to as “whistleblowers”.

## What is the purpose of the law?

Whistleblowers play a crucial role in exposing mismanagement, corruption and other wrongdoings – but they may be in danger of victimisation for speaking out. They may find themselves at risk of losing their jobs or experiencing other kinds of retaliation. So people might be afraid to report wrongdoing without legal protection against victimisation. The aim of the law is to protect these courageous individuals from any kind of retaliation.

## When did the law come into force?

The law is not yet in force. The Minister of Justice will announce the date that it will come into force.

## What kinds of reporting are covered by the law?

Anyone who reports “improper conduct” can be protected by the law. “Improper conduct” includes:

- criminal activities
- violation of the fundamental rights and freedoms protected by the Namibian Constitution
- a miscarriage of justice
- any action that could be the subject of a disciplinary proceeding in an organisation
- failure to comply with any law
- waste, misappropriation or mismanagement of resources that affects the public interest
- damage to the environment
- endangering the health and safety of an individual or a community
- deliberate concealment of any of these kinds of wrongdoing.

## Who is the improper conduct reported to?

Some workplaces will be required to name an ethics and integrity officer as an “authorised person” to receive disclosures of improper conduct. At other workplaces, employees can speak to their supervisors or some other person authorised by the employer to receive disclosures. Disclosures can also be made to a person or institution designated by the Minister of Justice as an “authorised person”, or made directly to the Whistleblower Protection Office.

In rare cases, disclosure of improper conduct is protected if it is made to the public (such as by giving information to the media) – but ONLY if there is no time to follow the usual routes AND the misconduct involves a serious crime or creates a risk of immediate and serious harm to the life, health or safety of persons or the environment.

It is a serious crime for anyone to use force or other coercion to try to stop a person from disclosing information about improper conduct. The penalty is a fine of up to N\$50 000 or prison for up to 10 years, or both.

## Where does the term “whistleblower” come from?

In some countries in the past, police would blow a whistle to alert others to a crime or a problem. The term also relates to referees at sport events, who blow a whistle to signal a foul or some other violation of the rules of the sport. Today this word is used to refer to a person who exposes wrongdoing in a government, a company or an organisation.



## Do all disclosures lead to protection for the whistleblower?

No. A whistleblower is protected against victimisation ONLY IF disclosure was made to a proper authority in good faith, and ONLY IF the whistleblower had reasonable grounds for believing that the information was true.

Also, there is NO protection for whistleblowers if –

- they are continuing to participate in the improper conduct themselves
- they knowingly made a false statement in their disclosure
- their disclosure was not serious or was made just to annoy
- their main motive for the disclosure was to avoid being disciplined or dismissed
- making the disclosure constitutes a crime on the part of the whistleblower.

Protection that was initially provided to a whistleblower can be taken away if any of these issues come to light later on.

Anonymous disclosures will be assessed and considered, but whistleblowers can be protected only after they have identified themselves.

### False reports

Parliament included penalties for false reports because of fears that people may maliciously make false reports about prominent individuals just to damage their reputations. A whistleblower who intentionally gives a false report will not receive any protection under the law. It is also a crime for a whistleblower to knowingly make a false report. The penalty is a fine of up to N\$30 000 or prison for up to 10 years, or both.



## What is the procedure for reporting improper conduct?

A disclosure can be made orally or in writing. The person who receives the disclosure must record the information along with the time and place that it was made, and give the whistleblower a written acknowledgement that the disclosure has been received.

In the case of a disclosure by an employee about a fellow employee or the employer, the authorised person will normally investigate and compile a report for the employer's chief executive officer (CEO), with either a recommendation for corrective action or a finding that the disclosure did not actually expose improper conduct. The CEO will then –

- take the recommended action
- provide reasons for disagreeing with the conclusions and recommendations of the authorised officer or
- dismiss the matter.

The CEO must notify the whistleblower in writing of his or her decision and make a report to the Commissioner of Whistleblower Protection.

In the case of a disclosure that does not involve an employment situation, the process works in much the same way – but the communication about the initial investigation will go straight from the authorised person to the Commissioner of Whistleblower Protection, who will assign a staff member to look into the matter and report back on it.

Whenever the Commissioner receives a report about a disclosure through any of these routes, the Commissioner must decide whether the person who made the disclosure is actually a whistleblower who is entitled to protection under the law. The Commissioner must notify the whistleblower of the decision on protection. Whistleblowers who are not satisfied with the Commissioner's decision on their entitlement to protection can appeal to the Whistleblower Protection Review Tribunal.

Depending on the issue involved, the matter might be referred to an investigation agency, such as the Ombudsman, the Anti-Corruption Commission, the Namibian Police, the Namibian Central Intelligence Service or the Namibian Correctional Service.

The **Commissioner of Whistleblower Protection** must have a legal qualification. The President appoints the Commissioner for a term of five years from nominations made by the Magistrates Commission and approved by the National Assembly.

The **Whistleblower Protection Review Tribunal** consists of a magistrate or a judge assisted by two other persons with appropriate expertise. They are appointed by the President on the recommendation of the Minister of Justice for five-year terms. The Tribunal convenes only when it is needed.

## What kind of protection does the law give to whistleblowers?

The law protects whistleblowers (and persons related to them or associated with them) from “*detrimental action*” such as intimidation, harassment, harm to persons or property, or negative employment consequences. Retaliation in the employment context might take many forms, including dismissal, suspension, demotion, transfer, changed working conditions or other negative treatment.



A whistleblower who experiences any detrimental action can make a complaint to the Commissioner. The Commissioner will get a staff member to investigate if necessary, and then either dismiss the complaint or refer it to the Whistleblower Protection Review Tribunal to decide on a remedy. The Tribunal might award damages or compensation, or get a court order against the person taking the detrimental action. It also has the power to correct any negative employment consequences, by ordering reinstatement or back pay, reversing or ordering a transfer, or taking other appropriate measures. In addition, it can order an employer to take disciplinary action against the person responsible for the retaliation against the whistleblower.

It is a crime to take detrimental action against whistleblowers or persons connected with them. The penalty is N\$50 000 or prison for up to 15 years, or both. As another form of protection, whistleblowers cannot be subjected to civil or criminal action for making disclosures that they believed to be true. For example, the whistleblower cannot be sued for defamation for a good faith disclosure.

It is essential that the identity of whistleblowers is kept confidential, along with other personal information about them and persons connected to them. This includes their address, their occupation and any other information that could put them at risk if revealed. It is a crime for anyone to reveal confidential information about the whistleblower.

## How does the law encourage whistleblowing?

The law provides for the possibility of rewards whenever a disclosure leads to arrest and prosecution, or a percentage of money or property that is recovered as a result of the whistleblower’s information.

The provisions of the law on whistleblowing override any contracts or conditions of employment that require secrecy – but they do NOT override any law that restricts the disclosure of information in the interests of national security, national defence, crime prevention or detection, the administration of justice or the sovereignty and integrity of Namibia.

The law establishes a **Whistleblower Protection Advisory Committee** to advise the Minister on high-level policy matters relating to whistleblower protection. The Committee members are –

- the Executive Director of the Ministry of Justice
- the Executive Director of the Office of the Prime Minister
- the Ombudsman
- the Director-General of the Anti-Corruption Commission
- the Inspector-General of Police
- the Director of the Namibia Central Intelligence Service
- the Environmental Commissioner
- a person nominated to represent employers’ organisations
- a person nominated to represent trade unions.

## Criticism

The ACTION Coalition in Namibia (a group of NGOs) has criticised the provision that makes it a crime for whistleblowers to knowingly report false information. They say that fears about possible criminal sanctions might discourage genuine whistleblowers who are already placing themselves at risk by coming forward with information. False reports will not qualify whistleblowers for any protection under the law, meaning that they might face dismissal or disciplinary action at their workplace or a lawsuit for defamation. This might be sufficient to discourage false reports, without criminal penalties.<sup>1</sup>

Another concern cited by the ACTION Coalition is the need to strengthen the independence of the offices and bodies created by the law. For example, they recommend that candidates for the Commissioner for Whistleblower Protection should be interviewed and recommended for appointment by an

<sup>1</sup> Media Release, “[MPs urged to refer Whistleblower Protection Bill to Standing Committee](#)”, ACTION Coalition Namibia, 7 March 2017

independent panel. They also suggest that the law should protect the Whistleblower Protection Office against interference by anyone, including members of the Cabinet or Parliament – in the same way that the Constitution protects the Office of the Ombudsman from such interference.<sup>2</sup>

The law does contain some protections for the independence of investigations and decision-making in terms of the law. It is a crime for someone who is conducting an investigation into improper conduct to conceal or suppress evidence, or for anyone who has relevant information to refuse to assist in an investigation. It is also a crime for anyone to try to prejudice or influence the Whistleblower Protection Review Tribunal. But there is no general protection for the independence of investigators or the Whistleblower Protection Office.

## How does this law fit together with the *Witness Protection Act*?

Whistleblowers fall under the definition of “witness” in the *Witness Protection Act 11 of 2017*, whether or not the whistleblower gives information in court. This means that a whistleblower is also entitled to the protections provided by the *Witness Protection Act*, which is explained in a separate summary. Whistleblower protection is about preventing retaliation, particularly detrimental action in the workplace. Witness protection involves broader protective measures such as identity change or relocation. The *Whistleblower Protection Act* and the *Witness Protection Act* complement each other.

## Other laws that protect whistleblowers and witnesses

Some limited protections for whistleblowers and witnesses are also contained in other laws:

- **Anti-Corruption Act 8 of 2003:** This law protects the identity of informants who assisted in a corruption investigation. Other witnesses are not required to identify the informer or provide information that could reveal the informer’s identity, except where the informer has given false information on purpose, or where justice cannot be done without revealing the informer’s identity. Even if the court decides that the informer’s identity must be revealed, the informer can be protected by closing the court to the public or prohibiting the publication of any information about the informer’s identity. This law protects informers who act in good faith against disciplinary proceedings and civil or criminal lawsuits related to their reporting.<sup>3</sup>
- **Financial Intelligence Act 13 of 2012:** This law protects persons who make or contribute to reports to the Financial Intelligence Centre. Their identity will be kept secret unless they are required to give evidence in criminal proceedings.<sup>4</sup>
- **Prevention of Organised Crime Act 29 of 2004:** This law allows the court to hold proceedings behind closed doors and to limit the publication of information that might put people at risk.<sup>5</sup>
- **Labour Act 11 of 2007:** This law makes it unfair to dismiss or discipline an employee for disclosing information that the employee is legally entitled or legally required to disclose.<sup>6</sup> But it does not provide any protection against other kinds of victimisation for speaking out about wrongdoing.

The *Whistleblower Protection Act* and the *Witness Protection Act* supplement these other laws by providing more comprehensive protection for persons who expose wrongdoing.



<sup>2</sup> Media Release, “[MPs urged to refer Whistleblower Protection Bill to Standing Committee](#)”, ACTION Coalition Namibia, 7 March 2017; Iheb Chalouat, Carlos Carrión-Crespo and Margherita Licata, “[Law and practice on protecting whistle-blowers in the public and financial services sectors](#)”, International Labour Office (ILO), 2019, page 43. Section 89(3) of the Namibian Constitution gives this protection to the Ombudsman: “No member of the Cabinet or the Legislature or any other person shall interfere with the Ombudsman in the exercise of his or her functions and all organs of the State shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman.”

<sup>3</sup> *Anti-Corruption Act 8 of 2003*, section 52

<sup>4</sup> *Financial Intelligence Act 13 of 2012*, section 45

<sup>5</sup> *Prevention of Organised Crime Act 29 of 2004*, section 98

<sup>6</sup> *Labour Act 11 of 2007*, sections 33(2)(a) and 48