

# WHISTLE BLOWERS' PROTECTION IN TANZANIA: A MYTH OR A REALITY

Lameck Samson<sup>1\*</sup>

## Abstract

*The position of the whistle-blower is known to be a precarious one, with the whistleblower often either regarded as a hero or a reprehensible traitor. The risks associated with reporting of misconduct, fraud and corruption are far-more-great, if persons reporting such misconducts are not supported or protected. In fact, those who report misconducts may be subject to retaliation, such as intimidation, harassment, dismissal or violence by their fellow colleagues or superiors. Various pieces of legislation have attempted to remedy their precarious position, especially within the employment relationship, and in which the whistle-blower more often than not has the most to lose. The protection offered to the whistle-blower within the United Republic of Tanzania context, is embodied within the Whistleblower and Witness Protection Act, 2015 (hereinafter referred to as the "WWPA"). In examining the protection afforded to the whistle-blowing in Tanzania, it is concluded that the heavy price whistle-blowers pay is underscored by the fact that whistle-blowing legislation in Tanzania has been effected in order to regulate various aspects relating to whistle-blowing, such as, who would qualify as a whistle-blower, how the whistle is to be blown and ultimately, what types of protection the whistleblower is afforded.*

## 1.0 Introduction

Corruption, fraud and money laundering are serious problems for the Government of the United Republic of Tanzania and reports and international indicators show persistently high levels of corruption<sup>2</sup>. Corruption has remained a major challenge to development in most developing countries. The legal framework to fighting corruption has been less effective probably because it is evidence-based and the questions underscore the challenges associated with the framework.<sup>3</sup> Suspected cases of corruption must be reported by the citizens, investigated by the appropriate government agencies, and prosecuted in courts of competent jurisdiction. Therefore, the effectiveness of the legal framework may be predicated on the quality of the employees' reports of corrupt practices.<sup>4</sup> The importance of whistleblowing in the drive for a corruption-free society is underscored by the fact that the institutional mechanisms put in place to check corruption may not be effective without whistleblowing, especially from insiders who identify and draw attention to corrupt acts that other mechanisms may fail to pick up. However, lack of support from others may render institutional mechanisms against corruption ineffective and hinder whistleblowing.<sup>5</sup>

2 See the Warioba's Commission Report of 1996

3 Oakley, J., & White, L. (2006). Whistleblowing, virtue, and accountability in an age of precarious employment. Retrieved from <http://www.arts.monash.edu.au/wage/pdfs/Oakley-andWhite.pdf>

4 Ibid

5 Rehg, M. T., Miceli, M. P., Near, J. P., & Van Scotter, J. R. (2008). Antecedents and outcomes of retaliation against whistleblowers: Gender differences and power relationships. *Organization Science*, 19(2), 221–240

Whistle blowing is not per se a technical term, therefore there is no common legal definition of this phenomenon. However, a common understanding of the concept emerges from the various definitions that have been developed overtime. Cambridge Advanced Learner's Dictionary<sup>6</sup> defined whistle-blowing as "causing something bad that someone is doing to stop, especially by bringing it to the attention of other people". The United Kingdom (UK's) Committee on Standards in Public Life defines it as "raising concern about malpractice within an organisation", while the International Labour Organisation refers to "the reporting by employees of illegal, irregular, dangerous or unethical practices by employers".<sup>7</sup> A broad definition of whistleblowing includes the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation;<sup>8</sup> miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest;<sup>9</sup> and acts to cover up of any of these.<sup>10</sup> A whistle-blower on the other hand has been defined by the Oxford Advanced Learner's Dictionary<sup>11</sup> as "a person who informs people in authority or the public that the company they work for is doing something wrong or illegal.

However, there may not be a universally acceptable definition of the term because of the uncertainties surrounding it. In Tanzania, whistleblower has been recently defined to mean any person who makes disclosure of wrongdoing.<sup>12</sup> Wrongdoing has been defined

6 Cambridge Advanced Learner's Dictionary (2010, online), available on <http://dictionary.cambridge.org/define.asp?key=8257&dict=CALD&topic=revealing-secrets-and-becoming-known> [Retrieved March 09, 2018]

7 <http://www.pcaw.co.uk/>

8 Including fraudulent financial disclosures made by government agencies/officials and publicly traded corporations

9 Could also include human rights violations if warranted or appropriate within a national context.

10 David Banisar, "Whistleblowing: International Standards and Developments" in Sandoval, I. (editor), Corruption and Transparency: Debating the Frontiers between State, Market and Society, World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011, p.7

11 Oxford Advanced Learner's Dictionary (2005 online), available at [http://www.oup.com/oald-bin/web\\_getald7/index1a.pl](http://www.oup.com/oald-bin/web_getald7/index1a.pl) [Retrieved March 09, 2018]

12 See s. 3 of the Whistleblower and Witness Protection Act, 2015

by s.4 of the Act<sup>13</sup> to mean and include; a crime has been committed, is about to be committed or is likely to be committed; another person has not complied with a law or is in the process of breaking a law or is likely to break a law which imposes an obligation on that person; the health or safety of an individual or community is endangered, has been endangered or is likely to be endangered; in a public institution there has been, there is likely to be waste, misappropriation, mismanagement of public resources or abuse of office; or the environment has been degraded, is being degraded or is likely to be degraded.<sup>14</sup>

Undoubtedly, whistleblowers play a crucial role in the fight against corruption. Whether it is in the public or private sector, corruption often is hard to detect. Despite the fact that whistleblowing is essential for protecting the public interest and for maintaining accountability and integrity in both the public and private sectors, whistle-blowers who speak up do so at high personal risk, and often suffer great professional and personal costs.<sup>15</sup> Indeed, those who reveal misconducts information are vulnerable to retaliation, therefore, without protection from retaliation, many would-be "whistleblowers" will remain silent, thereby depriving anti-corruption investigators of the inside information they need. Their testimony facilitates the investigation and resolution of corruption cases. Therefore, inside information is critically important, especially when employees or others who know about corrupt behavior voluntarily provide this information.<sup>16</sup> This is why effective legal protection must be provided to whistleblowers and clear guidance on reporting procedures must be set forth in particular to encourage and facilitate whistleblowing hence enabling authorities to monitor compliance and detect violations of anti-corruption laws.

## 1.1 The Wind of Whistleblowing

13 Ibid

14 S. 4 of the Whistleblower and Witness Protection Act, 2015

15 Association of Certified Fraud Examiners, Global Fraud Study 2016, summary available on-line at <http://www.acfe.com/rtn2016/about/executive-summary.aspx#>

16 See David Banisar, "Whistleblowing: International Standards and Developments" in Sandoval, I. (editor), Corruption and Transparency: Debating the Frontiers between State, Market and Society, World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011, p.7

1 \*LL.M (Public International Law), (Mzumbe University), LL.B (Mzumbe University), Diploma in Law (Mzumbe University), currently serving as Assistant Lecturer at the Institute of Judicial Administration Lushoto Tanzania. The views expressed in this Article are those of the author and do not necessarily reflect the views of any Directorate, Department nor the Institute of Judicial Administration Lushoto.

During the past decade, international discussions about the establishment of a whistleblower protection system have taken place in politics, academia and civil society. The main argument favouring whistleblower protection was that the protection would encourage transparency in public and private sector, thereby discouraging corruption, fraud and money laundering.<sup>1</sup> Accordingly, there has been growing support for whistle blowing, particularly in the areas of good governance, public accountability and fight against corruption. The result has been the creation of international and national legal rules to serve as guides or models for creating effective whistleblower protection systems.<sup>2</sup> Whistleblower protection requirements have been introduced in the United Nations Convention against Corruption (UNCAC)<sup>3</sup>, the 2009 Organisation for Economic Co-operation and Development (OECD) Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation),<sup>4</sup> the 1998 OECD Recommendation on Improving Ethical Conduct in Public Service<sup>5</sup>, the Council of Europe Civil and Criminal Law Conventions on Corruption,<sup>6</sup> the Inter-American Convention against Corruption,<sup>7</sup> the African Union Convention on Preventing and Combating Corruption<sup>8</sup> and the Southern African Development Community (SADC) Protocol against Corruption of 2001 and other instruments, have called upon state parties, including Tanzania to develop effective measures for preventing and combating of corruption in their jurisdictions<sup>9</sup>.

- 1 Drew, K., (n.d), Whistleblowing and Corruption: an Initial and Comparative Review, available on <http://www.psiu.org/corruption> [Retrieved May 24, 2018]
- 2 Calland, R. and Dehn, G., (Ed) (2004). Whistle-blowing Around the World: Law, Culture and Practice. Cape Town
- 3 UNCAC Articles 8, 13 and 33
- 4 OECD Anti-Bribery Convention, 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Section IX.iii., and Section X.C.v., and Annex II to the Recommendation, Good Practice Guidance on Internal Controls, Ethics and Compliance, Section A.11.ii.
- 5 OECD Recommendation on Improving Ethical Conduct in the Public Service, Principle 4
- 6 Council of Europe Civil Law Convention on Corruption, Article 9; Council of Europe Criminal Law Convention on Corruption, Article 22
- 7 Inter-American Convention against Corruption, Article III(8).
- 8 African Union Convention on Combating Corruption, Article 5(6).
- 9 See Common Articles 5 of the UN Convention against Corruption

Article 33 of UNCAC provides for the protection of reporting persons by encouraging signatory countries to take domestic measures to incorporate in their legislation and other provisions protecting whistleblower witnesses and their families from any unwarranted treatment. Moreover, countries are also urged to provide effective mechanism for protecting witnesses who disclose wrongdoing and their families and relatives from actual or potential harassment, retaliation or intimidation.<sup>10</sup> The OECD Convention itself does not specifically include provisions on whistleblowing. Nevertheless, various subsequent OECD instruments encourage the adoption of whistleblower protections. For instance, the 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service including the Principles for Managing Ethics in the Public Service and the 2003 OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service were among the first.<sup>11</sup> The latter includes guidelines to advise countries to “provide clear rules and procedures for whistle-blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused. In addition, Article 22 of the European Council’s Criminal Law Convention on Corruption called upon the signatory countries to provide for effective protection for whistleblowers and those who disclose/report criminal activities.<sup>12</sup> The 2001 SADC Protocol against Corruption, Article 4, encourages the creation and maintenance of “systems for protecting individuals who, in good faith, report acts of corruption.”<sup>13</sup> This provision, like that of the African Union Convention, contains mandatory language.<sup>14</sup> Furthermore, both of these documents contain

- of 2003 and the same of the AU Convention on the Prevention and Combating Corruption and Related Offences of 2003
- 10 See Article 32 UNCAC
- 11 Calland, R. and Dehn, G., (Ed) (2004). Whistle-blowing Around the World: Law, Culture and Practice. Cape Town
- 12 Council of Europe Civil Law Convention on Corruption, Article 9; Council of Europe Criminal Law Convention on Corruption, Article 22
- 13 Southern African Development Community Protocol Against Corruption, 14 August 2001 art 4 [SADCPAC]. The Protocol can be accessed at Southern African Development Community, “SADC Protocol Against Corruption” (14 August 2001), online: [http://www.sadc.int/files/7913/5292/8361/Protocol\\_Against\\_Corruption2001.pdf](http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf)
- 14 Ibid, art 4

strongly worded provisions denouncing individuals who make false reports.<sup>15</sup>

## 1.2 The Rationale for Whistleblower Protection Legislation

Whistleblowing has been increasingly recognised worldwide as an important tool to prevent and detect corruption and other malpractices. By disclosing wrongdoings whistleblowers can avert harm, protect human rights, help to save lives and safeguard the rule of law<sup>16</sup>. Ordinarily, in workplaces the general rule is that every employer is by common law entitled to total loyalty, trust and confidentiality from its employees. Nevertheless, in cases of serious malpractice, corruption, fraud, cheating or when peoples’ lives are involved, public interest supersedes duty of loyalty between the employer and the employee. This over-riding public interest dictates that the public have right to be informed of such wrongdoing and those who disclosed the wrongdoing must be legally protected.<sup>17</sup> Whistle-blower protection is a safeguard for the worker from reprisals including dismissal, and it aims to ensure fair treatment, hence providing adequate working conditions that enable the individual to report wrongdoing without fear, personal risk or intimidation.<sup>18</sup>

Laws to protect whistleblowers help organizations understand that it is in their interests to make it easier and safer for those who work for them to report their concerns and that the public should be alerted to serious wrongdoing or risk, particularly when it is not addressed<sup>19</sup>. However, organizations that defy

- 15 Ibid. Article 4(1)(f) of SADPAC suggests that there should be “laws that punish those who make false and malicious reports against innocent persons.” The African Union Convention on Preventing and Combating Corruption art 5, clause 7, has almost identical requirement.
- 16 Brown, A. J., (Ed.) (2008). Whistle-blowing in the Australian Public Sector: Enhancing the Theory and Practice of InternalWitness Management in Public Sector Organizations. Australia: ANU EPress Available on [www.griffith.edu.au/centre/.../whistleblowing/content\\_pub.html](http://www.griffith.edu.au/centre/.../whistleblowing/content_pub.html)
- 17 Gillan, G., (2003). “Whistleblowing Initiatives – Are they merely Secrecy Games and/or Blowing in the Wind? Company Lawyer, 24 (2)
- 18 Calland, R. and Dehn, G., (Ed) (2004). Whistle-blowing Around the World: Law, Culture and Practice. Cape Town
- 19 Brown, A. J., (Ed.) (2008). Whistle-blowing in the Australian Public Sector: Enhancing the Theory and Practice of InternalWitness Management in Public Sector Organizations. Australia: ANU EPress Available on [www.griffith.edu.au/centre/.../whistleblowing/content\\_pub.html](http://www.griffith.edu.au/centre/.../whistleblowing/content_pub.html)

the law, engage in wrongdoing to boost profit or whose leaders are corrupt will not want to encourage whistleblowing. In such instances, it is important that whistleblowers are legally protected when reporting information to the appropriate authorities and that they have access to appropriate remedies.<sup>20</sup>

Whistleblower protection laws, therefore, offer a safe alternative to silence and reinforce the value of facilitating channels to report risk or wrongdoing. They are also intended to ensure that regulatory authorities act on information they receive and protect those who provide it, and that wider disclosures, to the media for example, are protected when necessary.<sup>21</sup> The latter is more likely to be seen as reasonable where there are no safe alternative routes for reporting such concerns or when they do not work and the wrongdoing is ongoing or covered up. Most legal systems, however, will protect disclosures to the police and competent authorities,<sup>22</sup> for instance when the risk is so serious that any delays would cause irreparable or significant harm, particularly to the lives or safety of others.

## 1.3 The Position in Tanzania

The Government of the United Republic of Tanzania has decidedly indicated in the Anti-Corruption Laws Enforcement Strategy in the National Anti-Corruption Strategies (NACSAP I and II (2006-2020)<sup>23</sup> that fighting corruption within our country is a national priority, as is the strengthening of the position of the whistle-blower in achieving this objective. The recognition of ensuring appropriate protection for whistle-blowers is pivotal. As part of its commitment to fight corruption the government<sup>24</sup> has ratified the United Nations Convention against Corruption of 2003, in 2006 and the African Union Convention on the Prevention and Combating of Corruption and Related Offences of 2003, in 2005. In order to encourage citizens to speak up, the government set forth local legal

- 20 Ibid
- 21 Protection of “whistle-blowers”, Doc. 12006 (14 September 2009), report of the Committee on Legal Affairs and Human Rights, paragraph 1
- 22 See s. 3 of the Whistleblower and Witness Protection Act, 2015
- 23 See the Warioba’s Commission Report of 1996
- 24 The Government of the United Republic of Tanzania

protection, as has been established in the Anti-Corruption Laws Enforcement Strategy in the National Anti-Corruption Strategies (NACSAPI and II (2006-2020))<sup>1</sup>, which focus on the involvement of various stakeholders in the fight against corruption<sup>2</sup>, as well as in Article 18<sup>3</sup> of the Constitution gives citizen's right to obtain and impart information. The said Article<sup>4</sup> states that "every person has the right to freedom of opinion and expression, and to seek, receive and impart or disseminate information and ideas through any media regardless of national frontiers, and also has the right of freedom from interference with his communications".

Before the enactment of the Whistleblower and Witness Protection Act, 2015 the protection and immunity provided to victims of crime and informers were only found under the provisions of section 52 of the Prevention and Combating of Corruption Act 2007 (PCCA)<sup>5</sup> and section 22 of The Anti-Money Laundering Act 2006 (AMLA)<sup>6</sup>. The latter<sup>7</sup>, as amended by the Anti-Money Laundering Amendment Act, 2012), regulates the private sector regarding reporting suspicious transactions which could be from the proceeds of criminal activities. A reporting person is protected by AMLA including various professionals and professional bodies including: banks and financial institutions; cash dealers; accountants; regulators; attorneys; auctioneers; and any other persons who the Minister may specify in the Gazette. The former<sup>8</sup>, governs who is protected when disclosing information and what constitutes that information. The PCCA does not differentiate between private sector and government employees, thus equal protection is afforded to all categories of employees. A person protected by the PCCA is an 'informer'. The PCCA describes a whistleblower as an informer and the definition of informer 'includes a person who in good faith reports

the commission of an offence to the Bureau and includes a whistleblower', a 'protected disclosure' is where an informer discloses to a member of the Bureau that a person, public official, body corporate or public body is or has been involved in an act of corruption. The informer must believe on reasonable grounds that the information may be true and that the information could warrant an investigation.

#### 1.4 What is Protected and What is not under the Acts<sup>9</sup>

Before the adoption of the Whistleblower and Witness Protection Act in 2015, there was no law that would address whistleblowing comprehensively. The term itself was hardly commonly used in our legal system. Whistleblower protection was partially addressed by specific sections of the Anti-money Laundering Act, the Prevention and Combating Corruption Act and some other laws. Even though in theory, these legal mechanisms are not entirely ineffective. They can hardly provide a sense of security to potential whistleblowers. Even though the Labour Acts guarantees fair treatment of employees, they do not in effect provide any protection. Employees have to defend themselves through courts. The Penal Code and Tanzania Evidence Act on the other hand defines a duty to report criminal actions, including those related to corruption, but does not provide any protection related to the defending of public interest. The current Whistleblower and Witness Protection Act makes it possible to submit reports anonymously, but does not offer sufficient corresponding protection mechanisms.

In different jurisdictions throughout the world, whistleblowing processes continue to be cumbersome and burdensome and sometimes "very difficult to manage and Tanzania is no exceptional as discussed hereunder.

##### 1.4.1 'Reasonable Belief' and 'Good Faith'<sup>10</sup>

9 See Whistleblower and Witness Protection Act 2015, The Anti-Money Laundering Act 2006 and The Prevention and Combating of Corruption Act 2007

10 See s. 9(a-b) of the Whistleblower and Witness Protection Act 2015

A principal requirement in our legislation is that the disclosures be made on "reasonable beliefs and/or cause to believe that the information disclosed and an allegation of wrongdoing contained in it is substantially valid."<sup>11</sup> For a disclosure to be protected, an employee must have a 'good faith' and 'reasonable belief' that the information is true at the time of disclosure. Impliedly from the wording of s. 4(1)<sup>12</sup> of the Act reasonable belief may be defined as when a person reasonably could suspect wrongdoing in light of available evidence at the time it is disclosed. This is to a large extent a good faith requirement. The section<sup>13</sup> requires the whistleblower to have not only 'reasonable grounds' but also 'good faith'. Accordingly, protection is afforded to an individual who makes a disclosure based upon his or her belief that the information disclosed evidenced one of the identified conditions in the given statute.<sup>14</sup> It follows that individuals who deliberately make false disclosures should not be afforded protection<sup>15</sup>.

As we are aware that 'reasonable cause and/or belief' is a sufficiently clear term<sup>16</sup>, however, 'good faith' is less clear and there is no definition of the term in our laws. In **Street vs. Unemployed Workers' Centre**<sup>17</sup>, the court stated that the core meaning of good faith is **honesty**, opining that by setting good faith as a legislative requirement it was clear that the legislature required more than just a reasonable belief, to form the basis of a disclosure made. Whether or not good faith was present in the making of a disclosure would centre on a finding of fact, with the court considering all the evidence cumulatively.

If 'good faith' is required, but remains undefined<sup>18</sup>, that opens the door to a legal tactic of questioning a whistleblower's motives in every case. However, protection should

11 Ibid  
 12 Of the Whistleblower and Witness Protection Act 2015  
 13 Id note 2  
 14 See Ss. 4,9 of the Whistleblower and Witness Protection Act 2015  
 15 Ibid at s. 17(1)  
 16 From the wording of s. 4(1) of the Whistleblower and Witness Protection Act 2015  
 17 Street vs. Unemployed Workers' Centre 2004 (4) All ER 839 (CA)  
 18 S. 9(a) of the Whistleblower and Witness Protection Act 2015

be extended to those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed. And therefore, it is useful to provide that the whistleblower's good faith is presumed until shown otherwise.<sup>19</sup>

One has to wonder why the legislature did not rather provide for an honest disclosure; as long as the information provided is truthfully made on the basis of reasonable belief, the motive of the whistle-blower should be irrelevant, thus negating the requirement of good faith.

#### 1.4.2 Subject Matter of Protected Disclosures

One of the main objectives of whistleblower protection laws is to promote and facilitate the reporting of "illegal, unethical or dangerous" activities.<sup>20</sup> Therefore, it is useful to specify the acts that constitute violations in any legal hierarchy; however, our laws adopt broader definitions of wrongdoing that apply to criminal acts<sup>21</sup>, a violation of any law, rule, misappropriation, mismanagement, abuse of authority, environment degradation, dangers to the public<sup>22</sup> health or safety, or corrupt acts<sup>23</sup>. Consequently, the scope of protected disclosures can defeat the purpose of the legislation by minimizing the types of wrongdoings covered by the statutory instrument. However, a balance should exist between being overly prescriptive and thus making it difficult to disclose, or overly relaxed, allowing for unlimited disclosures, that in the end may not encourage internal resolution of issues within the organization.<sup>24</sup> Best practice is to promote and protect free expression with "no loopholes" and cover a wide variety of behaviors. In other words, protected disclosures should cover any wrongdoing, including disclosure of abuse of authority, violation of laws and ethical standards, danger to public health or safety,

19 See South Korea's 2008 Act makes clear that all it requires is that the whistleblower does not know that the report is false. Proper citation for the SA Act?  
 20 U4 Anti-Corruption Resource Centre, Good Practice in Whistleblowing Protection Legislation (2009), p. 5.  
 21 See the Anti-Money Laundering Act 2006  
 22 See s. 4 of the Whistleblower and Witness Protection Act 2015  
 23 See the Prevention and Combating of Corruption Act 2007  
 24 Robert G Vaughn, The Successes and Failures of Whistleblower Laws (Cheltenham, UK: Edward Elgar, 2012) at 152

gross waste, illegality and mismanagement.<sup>1</sup>

### 1.4.3 Coverage of Persons Afforded Protection

There are big variations across countries of whose disclosures are protected. Some legal regimes (say Ghana, South Africa and Canada) adopted a single disclosure regime for both the private and the public sectors while others limit protection to public servants or private employees. In Tanzania, our laws does not differentiate between private sector and government employees, thus equal protection is afforded to all categories of employees.<sup>2</sup> Moreover, reporting persons protected including various professionals and professional bodies including: banks and financial institutions; cash dealers; accountants; regulators; attorneys; auctioneers; and any other persons who the Minister may specify in the Gazette.<sup>3</sup> The scope of coverage of protected persons should be broad in order to cover all persons that may potentially come to know of acts that may be disclosed.

A “no loophole” approach to the scope of coverage of protected persons should be adopted to ensure that, in addition to public servants and permanent employees, coverage also extended to consultants, contractors, temporary employees, former employees and volunteers. Furthermore, a more expansive approach to the “no loophole” principle could also extend protection to a wider range of persons, including job applicants, the unemployed, persons who have been blacklisted and family members.<sup>4</sup>

### 1.4.4 The Reporting System

Our Whistleblower Act provides for protected disclosure to ‘a competent authority’, to a

- 1 D. Banisar, *Whistleblowing: International Standards and Developments*, (2009), p. 22.
- 2 See the Prevention and Combating of Corruption Act 2007
- 3 See the Anti-Money Laundering Act 2006
- 4 U4 Anti-Corruption Resource Centre, *Good Practice in Whistleblowing Protection Legislation* (2009), p. 4
- 5 See s. 4(1) of the Whistleblower and Witness Protection Act 2015

person who has authority in a locality or a person in whom he has trust and that person shall transmit the disclosure to a competent authority<sup>6</sup>. A ‘Competent Authority’, defined in the case of a wrongdoing committed within a public or private institution, a superior person of that institution who has an authority to investigate the wrongdoing reported or, if the matter is beyond his powers, to forward the same to another institution responsible for investigation<sup>7</sup> and in the case of a wrongdoing that is committed outside a public or private institution, a superior person who has an authority to investigate the wrongdoing reported<sup>8</sup>. Again, the provision of s.5(2)<sup>9</sup> allows whistleblowers to go public with any disclosure, while it is conditional upon meeting the provisions of section 4, which appears to mean that the information must also be provided to a ‘competent authority’. This implies that whistleblowers should make internal reporting first and only go outside if their report is not being followed up; this always favors the organization or the institution. From the point of view of the organizations themselves, internal channels are an opportunity to investigate allegations and correct wrongdoing instead of seeing it publicly exposed.

However, internal channels often do not work. Safe access to external reporting channels is therefore indispensable to ensure that the internal process is accountable to a higher level or authority and to make organizations accountable for internal wrongdoing.<sup>10</sup> Since whistleblower legislation is important to maintaining accountability in the public and private sector, whistleblowing to non-government organizations such as the media and parliament should be encouraged, respected and protected in a democratic society to bring evidence of wrongdoing to the attention of the public.<sup>11</sup>

In South Africa and Australia whistleblowers

- 6 Ibid at, s. 4(2)
- 7 Ibid at, s. 3(a)
- 8 Ibid at, s. 3(b)
- 9 Of the Whistleblower and Witness Protection Act 2015
- 10 Park et al: *Cultural Orientation and Attitudes Toward Different Forms of Whistleblowing: A Comparison of South Korea, Turkey and the UK*, *Journal of Business Ethics* (2008) 82:929–939.
- 11 David Lewis and Tina Uys, ‘Protecting Whistleblowers at Work: A Comparison of the Impact of British and South African Legislation’ (2007)

are provided with an opportunity to choose the avenue which works best for them, section 4 is too unclear. Whistleblowers should have the opportunity to choose freely between different reporting channels, whether to report internally or externally. The availability of multiple channels enables employees to select the person(s) with whom they are most comfortable sharing sensitive information, and the channel they find easiest to use.<sup>12</sup>

### 1.4.5 Institutions for protection

The institutional framework for the oversight of whistleblower protection in our country is left entirely to, national authorities. That is to say, in the case of a wrongdoing committed within a public or private institution, a superior person of that institution who has an authority to investigate the wrongdoing reported or, if the matter is beyond his powers, to forward the same to another institution responsible for investigation<sup>13</sup> and in the case of a wrongdoing that is committed outside a public or private institution, a superior person who has an authority to investigate the wrongdoing reported<sup>14</sup>. Thus, our legislation does not designate an independent body that is empowered to receive and investigate complaints of retaliatory, discriminatory or disciplinary action taken against whistleblowers. It is argued that the establishment of specific independent agencies with the legal capacity to receive complaints related to retaliation, investigate them and provide remedies has proved effective.<sup>15</sup> And when setting up an oversight and enforcement agency is to ensure that it is independent, and that it has sufficient budgetary resources to ensure it operates effectively and meets the objectives of the law.

However, it may not be possible or desirable for a protection institution itself to look into all the various issues that whistleblowers raise, but they should retain oversight of investigations carried out by others, ensure

- 12 Miceli, Marcia et al: *A Word to the Wise: How Managers and Policy Makers can Encourage Employees to Report Wrongdoing*, *Journal of Business Ethics* (2009) 86:3, pp. 379–396.
- 13 See s. 3(a) of the Whistleblower and Witness Protection Act 2015
- 14 Ibid at s. 3(b)
- 15 See D. Banisar, *Whistleblowing: International Standards and Developments*, (2009), p. 32.

these are completed in a timely fashion and be able to criticize the results if the need should arise. In Tanzania, the mandate to investigate, raise awareness and guide government on anti-corruption issues as well as prosecute cases of corruption, either directly or via the Director of Public Prosecutions was given to the Prevention of Corruption Bureau (PCB). The PCB is placed under the president’s office. This is likely to undermine its independence, in particular its financial independence. The president appoints members of the PCB. To add salt to the wound, the body does not have the power to prosecute cases involving public officers without the consent of the Director of Public Prosecutions, which is reportedly difficult to obtain. The PCB also suffers from lack of resources and capacity. Between 2000 and 2004, 9,507 reports of corruption were investigated, of which 357 were prosecuted resulting in 48 convictions. It, follows, therefore that adequate oversight is required to ensure that the legislation is doing the work that it was designed for, and this may be accomplished through independent bodies, an ombudsperson, sectoral bodies, or courts and tribunals.<sup>16</sup>

### 1.4.6 Anonymity and Confidentiality

There is widespread recognition of the need for ensuring whistleblower confidentiality; section 4(1)<sup>17</sup> provides that a person receiving the disclosure shall at all times maintain confidentiality of the disclosure and the whistleblower. Our law requires whistleblowers to give their names to the competent authorities<sup>18</sup>, but ensure confidentiality by making strict requirements that employees of these authorities will not release any personal details and the release of which is subject to sanction<sup>19</sup>. The aforementioned sections does not clearly provides under which circumstances the identity of a whistleblower must be revealed and what measures should be taken into account when such need arises.

- 16 Tom Devine & Shelley Walden, “International Best Practices for Whistleblower Policies” (25 April 2017) at 4, online: [https://www.whistleblower.org/sites/default/files/pictures/Best\\_Practices\\_Document\\_for\\_website\\_March\\_13\\_2013.pdf](https://www.whistleblower.org/sites/default/files/pictures/Best_Practices_Document_for_website_March_13_2013.pdf).
- 17 Of the Whistleblower and Witness Protection Act 2015
- 18 Ibid at s. 5(1)
- 19 Ibid at s. 16(1)

The sections also do not provide whether or not the legislation allows anonymous disclosure. Anonymity may be useful (not to say essential) in some cases, such as in jurisdictions where the legal system is weak or there are concerns about physical harm or social ostracisation. One essential ingredient of an effective system is to assure whistleblowers who do not wish to be identified that their confidentiality will be respected; and anonymity can provide a strong incentive for whistleblower to come forward. However, caution must be taken into consideration when allowing anonymity disclosures since anonymous reports are difficult to corroborate, hard to investigate and often impossible to remedy, while casting suspicions on the whistleblower's unaccountability.<sup>1</sup> Allowing unconditional anonymous disclosures might, therefore, increase the volume of disclosures so as to make reporting systems less effective and increase the difficulty of investigations.

#### 1.4.7 Confidential and Secret Materials

The Constitution of the United Republic of Tanzania, 1977 (hereinafter referred to as "the Constitution"), which is seen to be the supreme law of the country, does not in its text explicitly make provision for the protection of whistle-blowers. Indeed, it does not directly provide for whistleblowers or whistle-blowing, it does indirectly provide for whistle-blowing within the provisions of Article 18, which provides for freedom of expression. More specifically, section 18(1) (b-d), provides that everyone has the right to freedom of expression which includes the freedom to seek, receive, disseminate or impart information or ideas. It is argued that blowing the whistle in fact amounts to imparting information and or ideas.

However, section 6<sup>2</sup> accompanied by the provision of Section 18 of the Tanzania Public Service Act<sup>3</sup> as they stand have a deterrent effect on speaking up by prohibits disclosure of information, furnishing any such information or answering any such

1 Paul Latimer & AJ Brown, "Whistleblower Laws: International Best Practice" (2008) 31:3 UNSW LJ 766 at 774.

2 Of the Whistleblower and Witness Protection Act 2015

3 Act No. 8 of 2002, Cap. 298

question or producing any document or information or rendering any other assistance in the investigation by public servants and any person which is likely to prejudicially affect the interest of the sovereignty and integrity of the United Republic of Tanzania, the security of the State, friendly relations with a foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to commit an offence and the disclosure of proceedings of the Cabinet. This is to the effect that act of reporting and the related protection are being superseded by these laws which prohibit the release of information under the umbrella of confidentiality requirements. Undeniably, countries like China and Russia impose criminal sanctions if employees disclose information concerning official secrets or national security.<sup>4</sup> Therefore, even if a whistleblower's information is strong enough to stand up in court, the uncertainty as to whether they will enjoy proper legal protection will substantially put on ice the willingness of whistleblowers to come forward, thus eroding the main purpose of the Act.<sup>5</sup>

The provisions of section 6 of the WWA and Section 18 of the PSA are perhaps indirectly attempt to enforce a type of state privilege in respect of disclosures sought to be made, and involving for example classified information. This position seems intolerable, especially when seen in light of the constitution imperative in terms of Article 18 of the Constitution, as aforementioned. Whistle-blowers should not be potentially unconstitutionally and unfairly bound as a result of classified information; the legislature should rethink this provision, and perhaps construct strict guidelines and requirements to be met in this respect in order to be in accordance with the requirements of an open and accountable democratic society based on fairness and equality.<sup>6</sup>

#### 1.5 Nature and Extent of Protection

4 D. Banisar, Whistleblowing: International Standards and Developments, (2009), p.32.

5 Tanzania: Analysis of the Whistleblower and Witness Protection Act, 2015, The Centre for Law and Democracy

6 See the reasoning of the court in the case of Swissborough Diamond Mines (Pty) Ltd & others vs. Government of the Republic of South Africa 1999 (2) SA 279 (T) 343-344

Whistleblowing is not without consequences. Many whistle-blowers have been widely celebrated for blowing the whistle; however, retribution taken against whistle-blowers is unfortunately also a common occurrence. Some of the most famous or infamous whistle-blowers include a former Member of Parliament (MP), and long-time anti-corruption activist, David Kafulila was subject to retaliation from powerful enemies, and fought years for a fair investigation. He received many death threats and attempts on his life, forcing him and his family to relocate; was sued for defamation by one of the companies involved in the scandal; and lost his seat as an MP. Kafulila and his family lived in constant fear for years. Despite immense hardship, Kafulila refused to remain silent hence shaped history.

Whistleblower legislations must find a way to encourage the conveying of the message while protecting the messenger and to guarantee that the individual and his or her household will be protected from retribution.<sup>7</sup> This is due to the fact that without protection, the cost of reporting may be too high for individuals to come forward. As once opined by Camerer<sup>8</sup>, putting effective legal protection in place for bona fide whistle blowers is but one of a number of measures necessary to fight corruption effectively. This lies at the heart of the matter, in other words, the rationale behind the importance of the protection of whistle-blowers.

#### 1.5.1 Immunity from Civil and Criminal Liability

The preamble to the WWA clearly states that part of the purpose of the WWA is to promote and facilitate reporting of organized crimes, corruption offences, unethical conduct, illegal and dangerous activities without fear of reprisals. Section 52(2)(a-b) of the PCCA provides that "an informer will not incur civil or criminal liability as a result of a protected disclosure". Also the provision of section 22

7 Dehn, Guy and Calland, Richard, Whistleblowing - The state of the art, The role of the individual, organizations, the state, the media, the law and civil society. London: Public Concern at Work (2004).

8 Camerer L "Protecting whistle blowers in South Africa: The Protected Disclosures Act, no 26 of 2000" 2001 Occasional Paper 47 Institute for Security Studies

of the AMLA is to the effect that "no action, suit or other proceedings may lie against any reporting person or any director, officer, employee or representative of the reporting person on grounds of a breach of banking and professional secrecy due to any loss resulting from an investigation, prosecution or legal action subsequent to the transmission of the information in good faith; also, no informer will not incur civil or criminal liability as a result of a protected disclosure".<sup>9</sup>

However, the provision of sections 6 and 18 of the WWA and PSA puts restrictions over whistleblowing on the ground that somebody may be defamed by a whistleblower's disclosure and on ground of classified information. The wording of section 6 of the WWA appears to suggest that any person would potentially commit an offence in attempting to make a protected disclosure involving such information, and as such would not enjoy the protection offered by the WWA. Furthermore, the provision of section 18(1-2) make it a criminal offence for the person disclosing information and to the person to whom the information has been disseminated too hence disincentive for the whistleblower.

Generally, we are in a position to say that this immunity provided forth under provision of sections 22 and 52(2) of the AMLA and PCCA respectively is not absolute, and therefore, it only applies to the whistle-blower subject to any prohibition of or restriction on the disclosure of information under any legislation, contract, oath or practice.

#### 1.5.2 Burden of Proof in Cases of Reprisal

A major hindrance to blow the whistle is the possibility or probability of reprisal or retaliation. The whistleblower may be seen as disloyal and a traitor to the organization and its culture. Whistleblower legislation seeks to protect a whistleblower worker from occupational detriment(s) on the ground that the worker has made a protected disclosure<sup>10</sup>.

9 Section 52(2)(a-b) the Prevention and Combating Corruption Act, 2007

10 David Landa, 'Whistleblowing: Betrayal or Public Duty' <http://www.transparency.org.au/documents/dland6aug.pdf> at 25 Ma,

However, this is curtailed by the requirement that the whistleblower must prove the occupational detriment(s) suffered were the principal result of protected disclosure. Section 10 of the WWA<sup>1</sup> place a burden of proof to a whistleblower to establish an occupational detriment. Section 10<sup>2</sup> is to the effect that in cases where whistleblower is subjected or likely to be subjected to dismissal, suspension, harassment, discrimination or intimidation, fear of life or property or the life or property of close or interpersonal relationship is endangered the whistleblower is required to show that such acts or actions is the direct result of protected disclosure made by him/her.

It needs to be borne in mind that in the actions aforementioned the whistle-blower must not only show that he or she was subjected to such occupational detriment(s), but also that he was subjected to them on account of or partly on account of having made a protected disclosure. It is then for the employer to show that the employee was not subjected to such occupational detriment on account of or partly on account of having made a protected disclosure. And therefore, the burden of proof flips onto an employee to establish that the principal reason for such actions is other than the making of a protected disclosure. If they cannot establish this, their employers may avoid liability.

### 1.5.3 No Penal or Civil Sanction(s) to Perpetrators of Retaliation

The effectiveness of whistleblower regulation will depend on its ability to protect whistleblowers from reprisal. This can take the form of prohibiting reprisals in whistleblower legislation, through sanctions or remedial powers by competent authorities. Our Act<sup>3</sup> only provides punishment for any competent authority or person who divulge information relating to the identity of a whistleblower, or who fails to take action in relation to the wrongdoing reported by the a whistleblower, who knowingly discloses information relating to a wrongdoing

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1 Of the Whistleblower and Witness Protection Act 2015  
2 Section 10 of the Whistleblower and Witness Protection Act 2015  
3 The Whistleblower and Witness Protection Act 2015

which is false or a person who discloses information reported to him/her to a person against whom the disclosure was made.<sup>4</sup> However, the Act<sup>5</sup> imposes no direct civil or criminal penalties on those who carry out retaliation against whistleblowers. This means that although a whistleblower may be bullied, harassed or victimized, Act will not punish the individual perpetrators. The law has no provision for accountability to deter retaliation.

### 1.5.4 Transfer and Relocation

The Act<sup>6</sup> under the provision of s. 12 stipulates in generality without specificity about transfer and relocation of a whistleblower to another employment or place of residence. As we have seen above whistleblowing might come at a high personal and professional cost, with reprisal, retaliation or the risk thereof so serious that the whistleblower may only feel safe by relocating and starting a new life. Whistleblower best practice should include entitlement to transfer or to relocate.<sup>7</sup> The law must state specifically and provides for the steps and procedures for transfer and relocation either within our territories or t another country with or without identity change. This has profound impact on the lives of such whistleblower as it means severing all ties to the past and leaving behind family and friends and anything else that might identify or be traced back to the whistleblower.

Relocation is especially hard for family members and can result in depression as well as other psychological disorders. Moreover, if the security of a whistleblower is even accidentally compromised, he/she and any family members will have to be relocated and begin again the process of adjustment and reintegration.<sup>8</sup>

4 See Ss. 16, 17 of the Whistleblower and Witness Protection Act 2015  
5 Ibid  
6 Of the Whistleblower and Witness Protection Act 2015  
7 Fredric Lederer, The legality and practicality of remote witness testimony, p. 20  
8 Ibid

### 1.5.5 Rewarding Whistleblowing

From a practical standpoint, a reward system for whistleblowers is a way in counteracting the chilling effect on disclosing wrongdoing that results from fears of reprisal. If whistleblowers are necessary to rooting out corruption but face suffering and financial peril if they do so, it only stands to reason that whistleblowers should be rewarded for doing the right thing in the face of personal risk.<sup>9</sup> S. 13<sup>10</sup> give the Minister in consultation with Ministers responsible for law enforcement agencies the power to make regulations providing the procedure and the manner by which rewarding and compensation of whistleblower shall be made. The provision is too general. The provision evident the patchiness of protecting the whistleblower when it comes to guarantees that whistleblowers will be compensated if they have suffered reprisals in the workplace. However, from the wording of the section<sup>11</sup> compensation, like protection, is a feature that typically relates to the countries' Labour Acts in cases of unfair dismissal, rather than to whistleblowers who disclose wrongdoing. It is a downstream protection for awarding damages suffered from the loss of employment signifying that the system has failed to protect its workers and classifying the matter as a labor conflict.

### 1.6 Conclusion

The main piece of legislation aimed at the protection of whistle-blowers in Tanzania is the WWA supplemented by the PCCA and AMLA in respect of definitions, restrictions, and protection afforded to whistleblowers against reprisals. The purpose of the WWA is two-fold, namely to promote and facilitate the disclosure, and investigation of matters of serious

9 Robert Howse and Ronald J. Daniels, "Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy," in *Corporate Decision-Making in Canada*, ed. Ronald J. Daniels, (Calgary: University of Calgary Press, 1995) [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1003&context=law\\_series](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1003&context=law_series)  
10 See the Whistleblower and Witness Protection Act 2015  
11 S. 13 of the Whistleblower and Witness Protection Act 2015

wrongdoing by individuals and organizations, and the protection of whistle-blowers within this context.

Moreover, it worth noted that the effective whistleblower protection can only exist in a democratic society that values accountability and transparency; in other words, a precondition for whistleblower laws is the rule of law, including an independent legal system and independent judiciary.<sup>12</sup> In a similar vein, the efficacy of whistleblower protection will be dependent not only on what is found within the four corners of the applicable legislation, but more importantly how the appropriate bodies put legislative protections into practice.

However, in Tanzania inefficiency in the court process prosecuting corrupt individuals brings the feeling that the whistleblowing process is clumsy. Although the constitution<sup>13</sup> provides for judicial independence, the judiciary has, in practice, rarely restrained the government in politically important cases. High-level government officials are rarely prosecuted for corrupt practices. A 2008 Bertelsmann Foundation report<sup>14</sup> shows that out of the more than 10,000 reported cases, only several hundred have been prosecuted and even fewer convicted. Hardly any high level officials have been tried on corruption charges. Only around 5% of corruption cases reported to the PCB's regional offices between 2000 and 2005 were heard by a court of law. The report invokes the lack of resources and heavy caseload for judicial inefficiency.<sup>15</sup> Therefore, when whistleblowers feels that wrongdoers are more powerful and that their reports might not enhance the outcome of the organization's fight against corruption but culminate in serious consequences for them weakens' whistleblowing.

Again, there is a lack of integrity in the anti-corruption crusades and trust in the anti-corruption agencies. In Tanzania, the PCCB is the key institution in the Government of Tanzania's (GoT's) fight against corruption,

12 Paul Latimer & AJ Brown, "Whistleblower Laws: International Best Practice" (2008) 31:3 UNSW LJ 766 at 769  
13 See Article 107B of the Constitution of the United Republic of Tanzania, 1977  
14 <http://report.globalintegrity.org/Tanzania/2007>  
15 Ibid

its mandate<sup>1</sup> being to advise and review the practices and procedures of public, parastatal and private organizations; to facilitate the detection and prevention of corruption; to work with international institutions, agencies or organizations in the fight against corruption; to investigate and, subject to the directions of the Director of Public Prosecution (DPP), prosecute corruption offences; and to educate the public and enlist their support to fight corruption. PCCB independence is potentially compromised by the fact that it reports directly to the President and that the Bureau and its role may become too closely associated with just one individual, and thereby find itself politically vulnerable.

For example, the credibility of the PCCB suffered when it gave a clean bill of health to a government deal (The\_Richmond\_Scandal), which was subsequently alleged to have involved corruption. This also weakens whistleblowing because corruption seems endemic and intractable and the little drop of whistleblowing from the whistleblowers appeared unimportant.

Therefore, although the legal frameworks to fight corruption and for whistleblower protection are in place but appears to be insufficient to protect potential whistleblowers from reprisals and victimization and leaves room for improvement in many areas.

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<sup>1</sup> Under the Prevention and Combating of Corruption Act 2007