

**CONTRIBUTION BY HON. ELMA DIENDA, MP  
ON SECOND READING  
OF THE WHISTLEBLOWER PROTECTION BILL (2017)**

**CHECK AGAINST DELIVERY**

**22 FEBRUARY 2017**

Famous English Writer J.B Morton once said: *"Justice must not only be seen to be done, but has to be seen to be believed."*

**Hon. Speaker, Hon. Members,**

I rise today to contribute to the very important discussion on the Whistleblower Protection Bill (2017).

Namibia has ratified the United Nations Convention Against Corruption, the African Union Convention on Preventing and Combatting Corruption and SADC Protocol Against Corruption; all of these international treaties require that we adopt local laws to encourage and protect whistleblowing.

It is important to note this, because one danger is that in an effort to appease the international community and international corruption ranking agencies we may pass this law as window dressing, when the law itself does not really bring about the change we desire.

That is why I started with the quote: "Justice must not only be seen to be done, but has to be seen to be believed."

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## ***LACK OF POLITICAL INDEPENDENCE OF THE WHISTLEBLOWER PROTECTION OFFICE***

**Hon. Speaker,**

When creating a body or institution such as the Whistleblower Protection Office to promote transparency and accountability, it is important that such an institution is truly independent and is not vulnerable to political influence or influence by external agencies – be it private or government.

This is because in some cases, the complaints it will be tasked to investigate will be relating to improper conduct (e.g. fraud, corruption, maladministration, abuse of resources etc.) by these very same external agencies.

The public will not be able to build trust and have confidence in the Whistleblower Protection Office if it perceived that the body is vulnerable to political and government influence. This will also serve to create fear in potential whistle blowers who will feel unsure as to how confidential their disclosure of improper conduct will be treated.

It is therefore very important that the composition of this office does not accidentally create indirect or direct potential conflicts of interest.

Article 6(1) of the Bill states that “there is established in the public service, an independent and impartial office to be known as the Whistle Protection Office”.

It is not enough to only state that the Office is independent and impartial, but guarantees to maintain independence and impartiality must be built in to the establishing Bill that will guarantee this impartiality and independence.

Unfortunately, Hon. Members, this is not the case.

### ***Composition Of The Whistleblower Protection Office***

Article 6(6) provides that the Accounting Officer of the Whistleblower Protection Office will be the Permanent Secretary (PS) of the Ministry of Justice.

Firstly, the rest of the Staff compliment of the Whistleblower Protection Office are appointed in terms of the Public Service Act through normal Human Resource procedures, why is it that when it comes to the Head of an Organization, there is a tendency in our laws to deviate from this practice and move towards hand-picking? Do we not trust the procedure to produce the best candidate for the position? If we do not trust it, then maybe it should be changed because 99% of staff in Government are appointed through this procedure.

It is common cause that the Permanent Secretaries are political appointees. Does this not create an indirect potential conflict of interest if a political appointee is the Accounting Officer of a body that is intended to be “independent and impartial?” How do you prevent the perception being created that this body is not vulnerable to political influence if the Bill proposes in-built mechanisms which require political appointees to serve in that Office?

It is no secret that in many instances in Namibia, whistleblowers may be required relating to Government procurement procedures. How then does one include a person, in a P.S, who is also responsible for procurement in an Office that would frequently be charged with investigating matters relating to improper conduct in the procurement process?

In addition to this, the Bill tasks the Minister (of Justice) with hand-picking the Commissioner and Deputy Commissioner of the Whistleblower Protection Office. The Minister does not receive recommendations from any existing body or institutions such as the Judicial Service Commission, but he single-handedly decides on his shortlist, after which the National Assembly must approve these names before the President formally appoints the Commissioner and Deputy Commissioner.

Aside from the fact that once again a political appointee is deciding on the identity of the Commissioners, the greater concern is that this decision is being left to a single individual and not a recognised institution. The practice of giving wide powers to one individual to select (pending National Assembly and Presidential approval) a person who is charged with such an important office is one that we must seriously guard against.

How would one expect the Commissioner to undertake an investigation into for example that Minister if he or she was the one who effectively nominated him to that position? This is what I mean by in-built potential conflicts of interest.

The stranger thing is that should there be a reason to institute disciplinary procedures against one of the Commissioners then suddenly the Judicial

Service Commission (JSC) is required to come in and investigate the matter. And yet, at appointment they are excluded.

**Hon. Members,**

As the Head of the Whistleblower Protection Office, it is important that the Commissioner is appointed through an impartial, transparent and public process. This will ensure that the public has full confidence in this institution.

I would like to compare the importance of the Commissioner's role with that of the Public Protector in South Africa. Having said that, I wonder why we do not embrace the practice of public interviews in the National Assembly of candidates who are to take up such positions.

For Example: The Standing Committee for Constitutional & Legal Affairs could do the shortlisting after which the shortlisted candidates are interviewed publicly in the National Assembly, and the name of the chosen candidate is sent to the President for appointment.

A process like this would encourage openness and transparency. Both of which are objectives which the Office and the Bill seek to promote.

It would also ensure that perceptions of influence by single political parties or individuals are removed, and the public can have greater confidence in the impartiality and independence of the Commissioner and the Office as whole.

## ***Composition Of The Whistleblower Protection Advisory Committee***

**Hon. Members,**

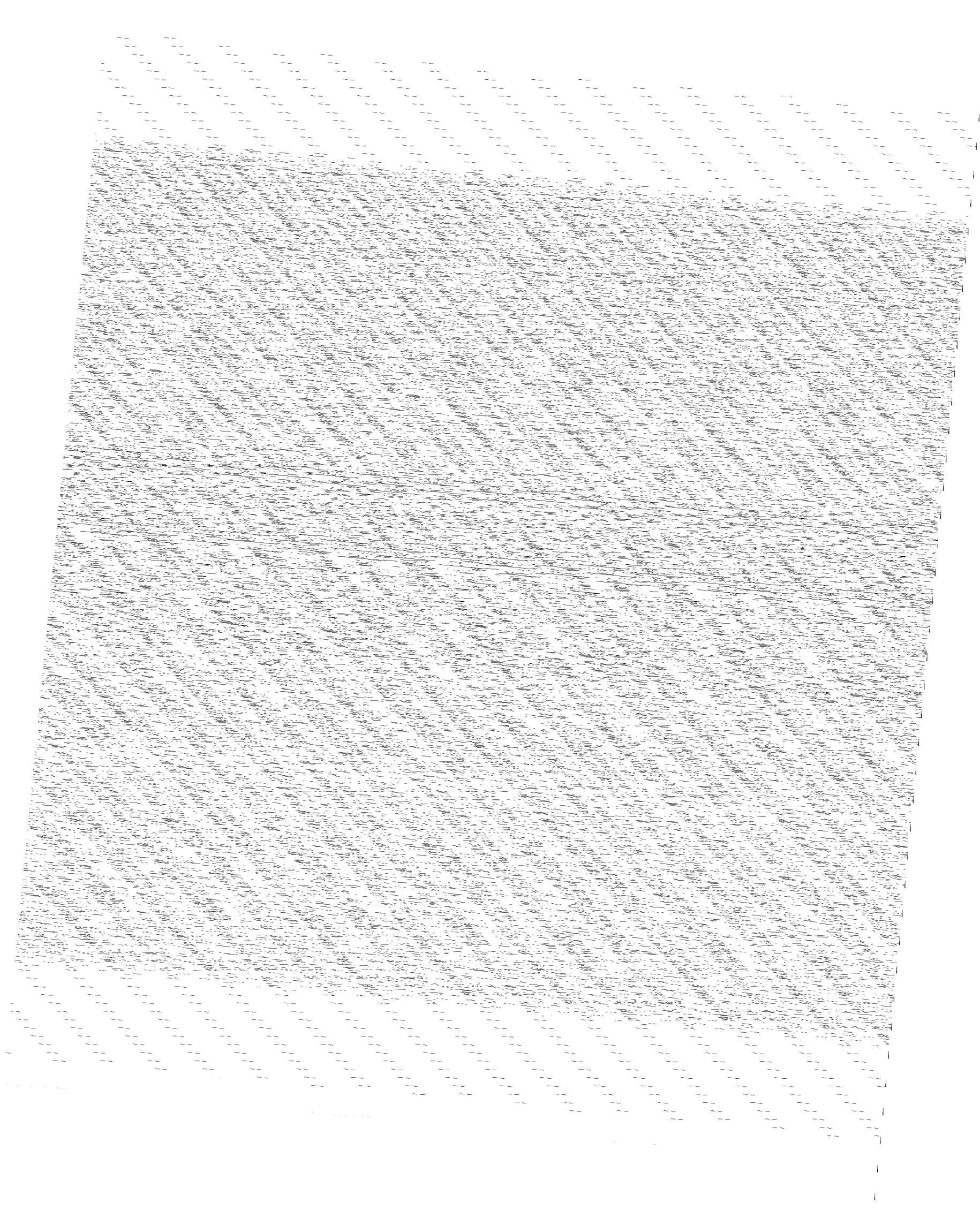
Similarly, the composition of the Whistleblower Protection Advisory Committee raises questions of undue political influence and a lack of true independence and impartiality.

The Committee is chaired by the P.S. The other members are:

- The P.S in the Office of the Prime Minister;
- The Ombudsman;
- The Director General of the ACC (Anti-Corruption Commission);
- The Inspector General of the Police;
- The Director of the Namibia Central Intelligence Service;
- The Environmental Commissioner;
- A nominee from Employer's Organizations, chosen by the Minister;
- A nominee from Trade Unions, chosen by the Minister; and
- The Commissioner, who serves as the Secretary of the Commission.

This Committee is once again primarily composed of political appointees. All of whom, in our current political climate, would in all likelihood originate from one party. I've already touched on the dangers of such a practice above.

However, one question I do have, is why Trade Unions and Employer Organizations are not given the authority to directly appoint their nominee to the Committee. Why is the final selection left to the Minister?



For example, if someone is found guilty of taking “detrimental action” against a whistle blower due to the information he has leaked that person could be fined N\$ 75,000.00 or be imprisoned to no more than 15 years or both, but if a whistle blower is found to have provided incorrect information (perhaps innocently thinking it to be correct), then the whistle blower could be fine N\$ 100,000.00 or imprisoned for 20 years or both.

Comparing these two creates an imbalance which suggests that it is more important to protect public figures from defamation and whistleblowing, than it is to protect whistle blowers from their employers or somebody else firing them or victimizing them.

Also, if a person, probably a staff member of the Whistleblower Protection Office, leaks confidential information relating to an investigation (e.g. the identity of a whistle blower or details of the investigation), then that person may only be fined maximum N\$ 50,000.00 or be imprisoned for no more than 10 years.

In all these instances, everybody else is being given more protection than the actual whistle blower.

In addition to this, as stated above, the Bill makes provision for whistle blowers to be sued for defamation and have to pay compensation, but then Article 51 does not compel the Director of Legal Aid to provide legal representation to whistle blowers should they be sued as a result of their whistle blowing.



**Hon. Speaker,**

Another issue that is not properly addressed in this Bill is the setting of investigation timelines and periods.

I'm sure many of the Hon. Members throughout their business activities have at times been involved in legal proceedings. That means most of us will be aware of the long delays and postponements involved in investigation, trials and appeals and so on.

Throughout the Bill, there is an overall lack of timelines which indicate how long certain processes must take. Meaning the whistle blower will not know how long processes will take should they come forward.

To use a few examples, none of these processes contain any required action time lines:

- a) A18 – Investigation Reports To Employers
- b) Part 6 – Investigation Of Disclosures Of Improper Conduct  
(Articles 37 – 43)
- c) Part 8 – Complaints Of Detrimental Action (Articles 53 – 56)
- d) Part 10 – Proceedings Before Tribunal & Remedies (Articles 65 – 73)

The lack of certainty with time lines will create a lot of frustration and uncertainty and may lead to whistle blowers withdrawing from the process half-way through, because they may feel the process taking too long. Even if only as guidelines, it is important that clear timelines are set, this will also help the staff members of the Whistle Blower Protection Office and Investigators to know what is required of them.

We must discourage situations like Social Security where the investigations seems to have gone on forever. The longer the processes take, the less likely it becomes that whistle blowers will remain willing to cooperate or even if willing, accurately remember the information.

## **DANGERS OF DUPLICATION & BLOATING OF CIVIL SERVICE**

**Hon. Members,**

I would lastly like to enquire from the responsible Minister to kindly explain to this Assembly how the function and purpose of the Whistleblower Protection Office substantially and significantly differs from that of the Ombudsman and the Anti-Corruption Commission (ACC).

Before creating new institutions which will further bloat and already huge public service, it is important to first assess what the existing institutions like the Ombudsman and the ACC do, and whether it may not be more cost-effective to address challenges affecting those institutions and get them functioning properly.

I say this because Namibia is faced with a difficult moment from the economic perspective, and so duplicating functions is the last thing we can afford to do. Especially since Government has said that it wants to “do more with less”, as the Hon. Minister of Finance has so well put it.

For example, could the Anti-Corruption Act or the establishing Act for the Ombudsman be amended to incorporate the Whistle Blower Protection Office? If not, then maybe the Minister could explain why there is this specific need and distinguish between the functions of all these

institutions. I'm sure there are many members of the public who have the same question.

## **CONCLUSION**

### **Hon. Speaker, Hon. Members**

In conclusion, I would like to re-affirm that the Official Opposition is committed to transparent, accountable and good governance. It is however important that when creating institutions of such importance and sensitivity we do so with the deliberate and focussed intention to ensure impartiality, genuine independence and accountability.

This would mean not building-in clauses which have the indirect effect of potentially creating possible conflicts of interest down the line. Currently that is not the case.

For that reason, at this point, I cannot support the Bill without amendments.

I will make further contributions about other specific sections when we enter the Committee Stage.

**THANK YOU.**

