

## WHISTLEBLOWING ACT, 2016

No. 9



of 2016

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## A.114

**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.**

*Date of Assent:* 26.09.16

*Date of Commencement:* ON NOTICE

ENACTED by the Parliament of Botswana.

### PART I — Preliminary

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| 1. This Act may be cited as the Whistleblowing Act, 2016, and shall come into operation on such date as the Minister may, by Order published in the <i>Gazette</i> , appoint.  | Short title and commencement                                       |
| 2. In this Act, unless the context otherwise requires —  | Interpretation   |
| “Auditor General” means a public officer whose office is created under section 124 of the Constitution;  |  |
| “authorised person” means a person authorised under section 8 to receive a disclosure of impropriety;  |  |
| “Botswana Defence Force” means the Botswana Defence Force established under the Botswana Defence Force Act;  | Cap. 21:05   |
| “Botswana Police Service” means the Botswana Police Service established under the Police Act;  | Cap. 21:01   |
| “Botswana Prisons Services” means Botswana Prisons Services established under the Prisons Act;   | Cap. 21:03   |
| “Botswana Unified Revenue Service” means the Botswana Unified Revenue Service established under the Botswana Unified Revenue Service Act;  | Cap. 53:03   |
| “Competition Authority” means the Competition Authority established under the Competition Authority Act;   | Cap. 46:09   |
| “Directorate of Intelligence and Security” means the Directorate of Intelligence and Security established under the Intelligence and Security Service Act;   | Cap. 23:02   |
| “Directorate on Corruption and Economic Crime” means the Directorate on Corruption and Economic Crime established under the Corruption and Economic Crime Act;   | Cap. 08:05   |
| “disclosure of impropriety” means any declaration of information made by a whistleblower with regard to the conduct of one or more persons where the whistleblower has reason to believe that the information given shows or tends to show an impropriety;                         |  |
| “employee” means any person who has entered into a contract of employment for the hire of his or her labour in terms of the Public Service Act, Employment Act, Botswana Defence Force Act, Police Act or Prisons Act, and includes —  | Cap. 26:01<br>Cap. 47:01<br>Cap. 21:05<br>Cap. 21:01<br>Cap. 21:03 |
| (a) any person who provides a service for reward to a public body; and   |  |
| (b) an employee of a person providing services to a public body;   |  |
| “Financial Intelligence Agency” means the Financial Intelligence Agency established under the Financial Intelligence Act;  | Cap. 08:07   |
| “impropriety” means conduct which falls within any of the matters specified in section 3;  |  |
| “public body” means any office, organisation, establishment or body created by or under any enactment or under powers conferred by any enactment, and includes any company in which the Government has equity shares or any organisation or body where public moneys are used; and |  |

“whistleblower” means a person who makes a disclosure of impropriety that is protected in terms of section 4.

PART II — *Information the disclosure of which is protected*

Disclosure of  
impropriety

3. A whistleblower may make a disclosure of information where he or she has reasonable cause to believe that —
- (a) a criminal or other unlawful act has been committed, is being committed or is likely to be committed;
  - (b) another person has failed, is failing or is likely to fail to comply with any obligation to which that person is subject;
  - (c) a miscarriage of justice has occurred, is occurring or is likely to occur;
  - (d) the health or safety of any person has been, is being or is likely to be endangered;
  - (e) the environment has been, is being or is likely to be endangered;
  - (f) any matter referred to in paragraphs (a) to (e) has been, is being or is likely to be deliberately concealed;
  - (g) the conduct of the person, whether or not a public officer, adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial performance of official functions by the person, public officer or public body;
  - (h) the conduct of the public officer amounts to the performance of any of the public officer’s functions dishonestly or with partiality;
  - (i) the conduct of the person, whether or not a public officer, a former public officer or a public body, amounts to a breach of public trust;
  - (j) the conduct of public officer, a former public officer or a public body amounts to misuse of information or material acquired in the cause of the performance of the public officer’s functions whether for the benefit of that person or public body or otherwise;
  - (k) the conduct of the person, whether or not a public officer amounts to maladministration, which is action or inaction of a serious nature that is —
    - (i) contrary to any law,
    - (ii) unreasonable, unjust, oppressive or discriminatory, or
    - (iii) based wholly or partly on improper motives; or
  - (l) the conduct of the person or public officer would, if proven, constitute —
    - (i) a criminal offence,
    - (ii) a disciplinary offence,
    - (iii) serious and substantial public wastage or abuse of financial or other public resources or assets, or
    - (iv) reasonable grounds for dismissing or dispensing with, or otherwise terminating the services of the person or public officer who is engaged in it.

4. (1) Notwithstanding any other law to the contrary, a disclosure of impropriety is protected if --
- (a) the disclosure is made in good faith;
  - (b) the whistleblower reasonably believes that the disclosure and an allegation of impropriety contained in the disclosure is substantially true; and
  - (c) the disclosure is made to an authorised person.
- (2) A disclosure of impropriety made by a public officer to the Auditor General or by any person is protected under this Act where it shows or tends to show that a public body or officer of the public body has seriously and substantially wasted public money.
5. (1) An authorised person may decline to investigate or may discontinue the investigation of any matter raised by a disclosure of impropriety made to the authorised person of a kind referred to in this Part if the authorised person is of the opinion that the disclosure was made maliciously, frivolously, vexatiously, in bad faith, for pecuniary gain or for an illegal purpose.
- (2) A disclosure of impropriety referred to in subsection (1) is not, despite any other provision in this Part, protected by this Act if an authorised person declines to investigate or discontinues the investigation of a matter under this section.
6. (1) A disclosure of impropriety made by a public officer that principally involves questioning the merits of Government policy is not, despite any other provision in this Part, protected by this Act.
- (2) In this section, "Government policy" includes the policy of a local authority.
7. A disclosure of impropriety that is made solely or substantially with the motive of avoiding dismissal or other disciplinary action, not being action referred to in section 14, is not, notwithstanding any other provision of this Part, a protected disclosure.
8. The following shall appoint authorised persons to receive disclosures of impropriety --
- (a) the Directorate on Corruption and Economic Crime;
  - (b) the Auditor General;
  - (c) the Directorate of Intelligence and Security;
  - (d) the Botswana Police Service;
  - (e) the Ombudsman;
  - (f) the Botswana Unified Revenue Service;
  - (g) the Financial Intelligence Agency;
  - (h) the Competition Authority;
  - (i) the Botswana Defence Force; and
  - (j) the Botswana Prisons Services.

PART III — *Procedures for disclosure of impropriety and related action*

9. (1) A disclosure of impropriety may be made in writing or orally.
- (2) Notwithstanding the generality of subsection (1), all forms of information communication technology may be used to convey a disclosure of impropriety.
- (3) A disclosure of impropriety shall contain as far as practicable --
- (a) the full name, address and occupation of the whistleblower;
  - (b) the nature of the impropriety in respect of which the disclosure is made;
  - (c) the name and particulars of the person alleged to have committed, who is committing or is likely to commit the impropriety;

- (*d*) the time and place where the alleged impropriety is taking place, took place or is likely to take place;
- (*e*) the full name, address and description of a person who witnessed the commission of the impropriety;
- (*f*) whether the whistleblower has made a disclosure of the same impropriety or of some other impropriety on previous occasion and if so, about whom and to whom the disclosure was made;
- (*g*) if the whistleblower is making an employment-related disclosure, whether the whistleblower remains in the same employment; and
- (*h*) any information that the Minister may prescribe.
- 10.** (1) Where the whistleblower makes a disclosure of impropriety orally, the authorised person shall cause the disclosure to be reduced into writing.
- (2) Where the whistleblower cannot or is unable to write, the writing required to be made under subsection (1) shall be read over, interpreted and explained to the whistleblower by the authorised person in a language the whistleblower understands and the whistleblower shall approve of the writing before making a mark to such writing and a certificate to this effect shall be attached by the authorised person to the writing.
- (3) In the case of a whistleblower who is blind or with some physical disability, a certificate required under subsection (2) shall be made with the necessary modification.
- 11.** When a disclosure of impropriety is made, an authorised person shall —
- (*a*) make a record of the date, time and place where the disclosure of impropriety is made;
- (*b*) give to the whistleblower an acknowledgement in writing of receipt of the disclosure of impropriety; and
- (*c*) keep the disclosure confidential pending investigation of the impropriety.
- 12.** (1) An authorised person shall receive all disclosures of impropriety made by a whistleblower.
- (2) Notwithstanding subsection (1), receipt of a disclosure of impropriety by an authorised person shall not preclude the exercise of the authorised person's discretion in determining whether or not the information reveals impropriety.
- (3) An authorised person may, after a preliminary investigation, close the investigation where the authorised person considers that —
- (*a*) the disclosure of impropriety is malicious, frivolous, vexatious or made in bad faith;
- (*b*) the disclosure of impropriety is misconceived or lacking in substance;
- (*c*) the disclosure of impropriety is trivial;
- (*d*) there is a more appropriate method of dealing with the disclosure of impropriety reasonably available;
- (*e*) the disclosure of impropriety has already been dealt with adequately; or
- (*f*) the disclosure of impropriety is made maliciously, frivolously, vexatiously, in bad faith, for pecuniary gain or for an illegal purpose.

Reduction of disclosure into writing

Action by person who receives disclosure of impropriety

Compulsory receipt of disclosures

13. (1) An authorised person shall after receipt of a disclosure of impropriety under section 12, investigate or cause an investigation into such disclosure of impropriety and take appropriate action.

Investigation

(2) Where a disclosure of impropriety is not related to —

- (a) the conduct of the authorised person or of a public officer in relation to the authorised person; or
- (b) a matter, or the conduct of any person that it has the function or the power to investigate,

the authorised person shall, within reasonable time and not exceeding seven working days, refer the disclosure of impropriety to the appropriate agency that has the function or power to deal with the conduct or the matter that the disclosure of impropriety concerns.

#### PART IV — *Protection for making disclosure of impropriety*

14. (1) A whistleblower shall not be subjected to victimisation by his or her employer or by a fellow employee or by another person for making a disclosure of impropriety.

Protection of whistleblower

(2) A whistleblower shall be considered as having been subjected to victimisation under subsection (1) if —

- (a) the whistleblower, being an employee —
  - (i) is dismissed or suspended from work,
  - (ii) has his or her post being declared redundant,
  - (iii) is denied promotion,
  - (iv) is transferred by the employer,
  - (v) is harassed or intimidated by the employer or fellow employee,
  - (vi) is threatened by the employer with any of the matters set out in subparagraphs (i) to (iv), or
  - (vii) is subjected to a discriminatory or other adverse measure, by the employer or a fellow employee; or
- (b) the whistleblower, not being an employee, is subjected to harassment, intimidation or discrimination by another person.

(3) A whistleblower shall not be considered as having been subjected to victimisation if the employer or fellow employee who is alleged to have taken an action against the whistleblower under subsection (2) has the right in law to take the action complained of and the action taken is shown to be unrelated to the disclosure of impropriety by the whistleblower.

15. A whistleblower shall not be liable to civil or criminal proceedings in respect of a disclosure of impropriety.

Protection against civil and criminal action

16. (1) A provision in a contract of employment between an employer and an employee is void if it —

Void provision in employment contracts

- (a) seeks to prevent the employee from making a disclosure of impropriety;
- (b) precludes the employee from making a complaint in respect of victimisation under section 14; or
- (c) 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.

(2) Subsection (1) shall apply to a contract of employment or agreement in existence on the commencement of this Act.

PART V — *Offences and penalties*

Making false disclosures	<b>17.</b> A person who knowingly makes a disclosure alleging impropriety knowing the information to be false commits an offence and is liable to a fine not exceeding P10 000 or to a term of imprisonment not exceeding five years, or to both.
Disclosing the identity of a whistleblower	<b>18.</b> A person who unlawfully discloses, directly or indirectly, the identity of a whistleblower, commits an offence and is liable to a fine not exceeding P10 000 or to a term of imprisonment not exceeding five years, or to both.
Disclosure of information to a third party	<b>19.</b> A whistleblower who, after making a disclosure of impropriety under this Act, proceeds to disclose the same information to a third party, commits an offence and is liable to a fine not exceeding P10 000 or to a term of imprisonment not exceeding five years, or to both.
Disclosing the details of the disclosure	<b>20.</b> Where any person fails to keep confidential the disclosure of impropriety made under this Act, he or she commits an offence and is liable to a fine not exceeding P10 000 or to a term of imprisonment not exceeding five years, or to both.
Victimisation of whistleblower	<b>21.</b> A person who, either by himself or herself or through another person, contravenes the provisions of section 14, commits an offence and is liable to a fine not exceeding P50 000 or to a term of imprisonment not exceeding ten years, or to both.
Failure to take action by an authorised person	<b>22.</b> An authorised person who willfully fails to take action upon receipt of a disclosure made to him or her, commits an offence and is liable to a fine not exceeding P12 000 or to a term of imprisonment not exceeding seven years, or to both.

PART VI — *Miscellaneous*

Regulations	<b>23.</b> The Minister may make regulations for the better carrying out of the provisions of this Act, and such regulations may provide for — <ul style="list-style-type: none"> <li>(a) the procedure for disclosing an impropriety;</li> <li>(b) other persons to whom a disclosure of impropriety may be made; and</li> <li>(c) any matter in this Act that is required to be prescribed.</li> </ul>
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PASSED by the National Assembly this 3rd day of August, 2016.

BARBARA N. DITHAPO,  
*Clerk of the National Assembly.*

