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*Barriers To Effective Whistleblowing in Botswana
Lessons from the construction industry*

Policy Brief No. 17



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BARRIERS TO EFFECTIVE WHISTLEBLOWING IN BOTSWANA: LESSONS FROM THE CONSTRUCTION INDUSTRY

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EXECUTIVE SUMMARY

Adopting Botswana's construction industry as a case study, this Policy Brief examines key barriers to effective whistleblowing in Botswana. Data were drawn from 117 construction firms and interviews with regulators of this sector. Despite the enactment of the Whistleblowing Act 2016, the study finds the following key barriers to effective whistleblowing: (i) fear of retaliation or punishment, (ii) fear of job loss, (iii) absence of organisational whistleblowing policies, (iv) lack

of incentive to report, (v) lack of education on whistleblowing, and (vi) insufficient action and follow-up on disclosures by authorities. From a policy perspective, there is a need to strengthen the existing legal protection offered to whistleblowers, their families and associates to ensure they are not subject to harm, retaliation or victimisation. There is also a need to increase levels of education and awareness on whistleblowing in general, and the Whistleblowing Act 2016 in particular.

1. INTRODUCTION AND BACKGROUND

Notwithstanding the value of whistleblowing as an anti-corruption tool, this Policy Brief suggests that more needs to be done to promote its utility in Botswana's fight against corruption. The 2016 dismissal of a Statistics Botswana employee for the alleged "improper disclosure of information and abuse of office by accessing confidential information for private gain after filing a complaint with the Directorate on Corruption and Economic Crime (DCEC), detailing incidences of corruption at Statistics Botswana" gained extensive media attention.^{1,2} In another incident, *The Monitor* newspaper (dated 27 February 2017), reported how a public servant was arrested and later suspended from work after they had shared confidential information with a journalist. According to the newspaper, the employee exposed how public funds were used to settle the medical bills of a senior government official.

Job losses present one of the many consequences whistleblowers face; while more severe forms of retaliation, in other jurisdictions, have included intimidation, assault and murder. Although whistleblowing is considered one of the most effective means to combat corruption, Al-Haidar (2018: 1020) opines that due to the "unpredictable consequences of whistleblowing, it is probable that many employees who witness wrongdoing do not consider blowing the whistle because they fear the impact of such action on their relationship with their employers." Therefore, it has become increasingly imperative for policy makers and national anti-corruption bodies to put measures in place aimed at encouraging and protecting whistleblowers.

In spite of these measures (such as the introduction of Botswana's Whistleblowing Act 2016), a number of barriers make it difficult for individuals to report wrongdoing. The findings of this paper are relevant to policy makers, anti-corruption structures (e.g. Anti-Corruption Units and Corruption Prevention Committees) within ministries and departments, as well as anti-corruption researchers. The findings will also assist those organisations seeking to develop internal whistleblowing policies and ensure their effective implementation.

Lessons can be drawn from Botswana's construction industry. Not only is this industry "one of the main engines of economic growth" (Sengwaketse, 2013: 63), it also remains one of the most vulnerable to corruption. In 2018, sixteen construction cases were classified for investigation by the Directorate on Corruption and Economic Crime (DCEC), while one infrastructure project worth P152 million was put on hold pending an investigation. The DCEC (2017) stipulates that most common corruption trends involve procurement practices at the evaluation and adjudication stages; awarding undeserving contractors, bribery and payment of rewards to government officials, poor supervision of projects, bid rigging and poor workmanship.

Estimates from the African Development Bank show that Africa loses about \$148 billion to corruption every year (UNCTAD, 2020). In his State of the Nation Address on 8 November 2021, His Excellency the President of Botswana, indicated that as a result of the country's compliance with Financial Action Task Force Standards, assets worth over P200 million were likely to be forfeited to the state or released.³ Other estimates of the financial cost of corruption

1 Sunday Standard. (2017). DCEC throws whistle-blower under the bus. <https://www.sundaystandard.info/dcec-throws-whistle-blower-under-the-bus/>

2 The Patriot on Sunday. (2020). Court orders Teisi be reinstated to her post. <https://thepatriot.co.bw/court-orders-teisi-be-reinstated-to-her-post/>

3 Republic of Botswana. (2021). State of the Nation Address by H.E. Dr. Mokgweetsi E.K. Masisi. 8 November 2021

and economic crime in Botswana show that government loses over P1 billion every year⁴ and P30 billion between 2009 and 2019 due to nepotism, bad workmanship, fraud and outright theft.⁵

Given the negative impact of corruption on development, whistleblowers are relied upon to speak out against it, as evidenced by the increasing number of countries that have adopted whistleblowing

legislation over the last two decades. The early detection and disclosure of suspicions of wrongdoing can be effective in preserving the rule of law, remedying wrongdoing and preventing further losses to either the organisation or country. Unfortunately, as this study discusses, a number of barriers make blowing the whistle difficult.

2. WHISTLEBLOWING: WHAT IS IT AND WHY IS IT IMPORTANT?

Whistleblowing is commonly defined as “the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action” (Near and Miceli, 1985: 4). On the other hand, Banisar (2011: 3) suggests that whistleblowing is a “means to promote accountability by allowing for the disclosure of information by any person about misconduct while at the same time protecting the person against sanctions of all forms.” According to Near and Miceli (1995), whistleblowing could be considered *effective* if the questionable or wrongful practice (or omission) is terminated at least partly because of whistleblowing and within a reasonable timeline (likely to vary from situation to situation). Świątek-Barylska and Opara (2016) add that whistleblowing allows for the early detection of abuse and corruption, which decreases

negative consequences and minimises the possibility of future recurrence.

The dilemma of whistleblowing is premised on the conflict that arises between one’s loyalty to the organisation they work for and the moral duty to report any wrongdoing that occurs within that organisation. In sectors such as construction and health, wrongdoing or corruption poses a greater risk to human life, therefore, it is critical for individuals who witness practices that may be deemed harmful, to report them. However, it is equally important for those receiving disclosures to take the necessary steps to address wrongdoing that may not only be potentially harmful to the public, but also detrimental to the reputation of the organisation. The study shows that this does not always happen.

3. WHISTLEBLOWING IN BOTSWANA

3.1 Legal Framework

Prior to the enactment of the Whistleblowing Act 2016, Section 45A of the Corruption and Economic Crime Act 1994 criminalised threats against or intimidation of persons reporting corruption allegations. Additionally, the section provides for the protection of the identity of informers during criminal proceedings. According to the United Nations Office on Drugs and Crime (UNODC, 2019), a review of the Corruption and Economic Crime Act 1994 highlighted the need for whistleblowing legislation, and therefore the Whistleblowing Act No. 9 of 2016 was promulgated in 2016.

The Act aims to provide for the manner in which a person may disclose conduct adverse to the public

interest, as well as provide for the manner of reporting and investigations of disclosures of impropriety, and the protection against victimisation of persons who make the disclosures. Efforts to publicise the Act were carried out on both national television and radio in 2017 by the DCEC. The Act defines a whistleblower as a person who makes a disclosure of impropriety that is made in good faith, is substantially true, and the disclosure is made to an authorised person. Similar to Article 33 (Protection of reporting persons) of the United Nations Convention against Corruption, this definition places an emphasis on the protection of individuals making disclosures in good faith to an authorised body.

4 Mmegi. (2010). Botswana loses billions to corruption – Magistrate. <https://www.mmegi.bw/news/botswana-loses-billions-to-corruption-magistrate/news>

5 Weekend Post. (2019). Botswana lost P30 billion to corruption – Gaolathe. <https://www.weekendpost.co.bw/18217/news/botswana-lost-p30-billion-to-corruption-gaolathe/>

The Act empowers an authorised person to decline to investigate or discontinue an investigation if they are of the opinion that a disclosure was made maliciously or for an illegal purpose. However, the Act does not make provisions for anonymous reporting or establish feedback mechanisms for individuals that make disclosures of impropriety. Furthermore, the Act does not stipulate remedial actions (including

claim or compensation in respect of any loss or injury suffered) in favour of the whistleblower. Nevertheless, the Act protects whistleblowers from victimisation by their employer, a colleague or any other person arising from making a protected disclosure. Victimisation of a whistleblower is an offence that attracts a fine not exceeding P50,000 or to a term of imprisonment not exceeding ten years, or both.

3.2 Institutional Framework

Section 8 of the Act provides a list of institutions to which disclosures of impropriety may be made. These include:

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

The conditions under which a whistleblower's disclosure is protected are contained in section 4 of the Whistleblowing Act 2016, but this statutory framework does not make provision for the role construction industry regulators such as the Engineers' Registration Board (ERB), Quantity Surveyors' Registration Council (QSRC) and Architects' Registration Council (ARC), and oversight bodies like the Public Procurement and Asset Disposal Board

(PPADB) can play as potential recipients of disclosures of impropriety in the sector. Instead, regulators and oversight bodies are tasked with developing codes of conduct for practitioners to abide by. Arguably, this does not offer potential whistleblowers the same level of protection as the Whistleblowing Act, which might deter individuals from reporting wrongdoing. Section 4 (1.c) of the Act stipulates that a disclosure of impropriety is protected if it is made to an authorised person as outlined in Section 8.

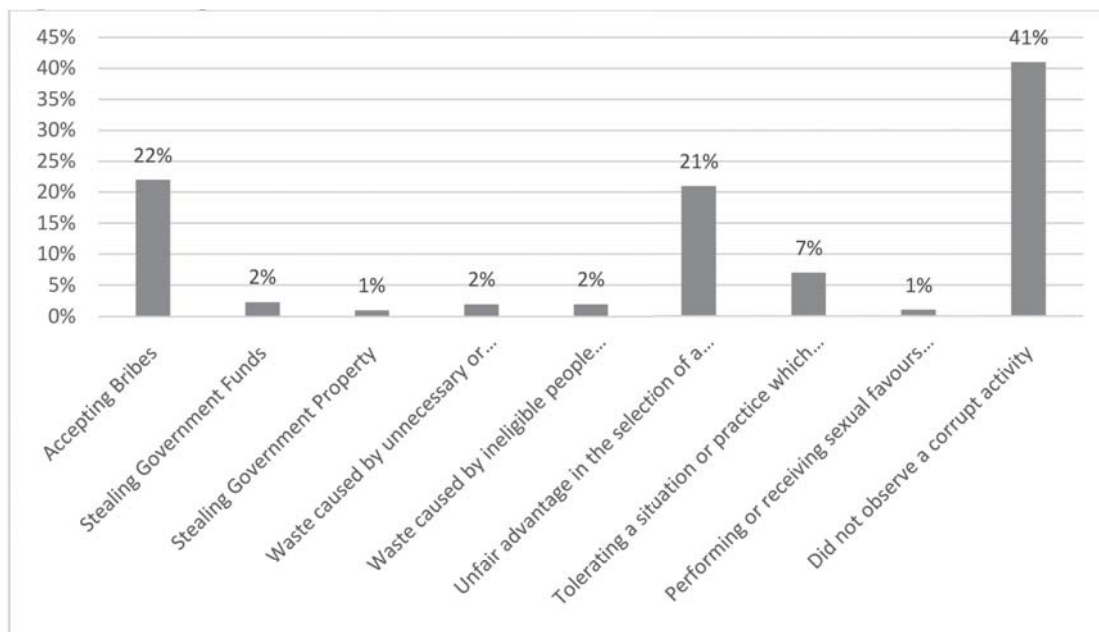
Perhaps what may also be of concern to potential whistleblowers is the requirement for them to provide their personal details (i.e., full names, address and occupation) when making a disclosure, as outlined in Section 9 (3.a). However, there may be valid reasons why individuals wish their identities to remain anonymous. In 2020, 18% of the 541 cases classified for investigation by the DCEC were made anonymously. Transparency International (2018) suggests that preserving confidentiality and allowing anonymous reporting are effective in protecting the identity of a whistleblower. Similarly, Article 13 (2) of the United Nations Convention against Corruption stipulates that State Parties should make provisions for anonymous disclosures.

4. WHISTLEBLOWING IN BOTSWANA'S CONSTRUCTION INDUSTRY

4.1 Corrupt Activities Witnessed

Approximately 59% of the study's survey respondents indicated having personally experienced or witnessed an act of corruption, whereas 41% had not observed a wrongdoing (Figure 1).

Figure 1: Corrupt Activities Witnessed in the Sector



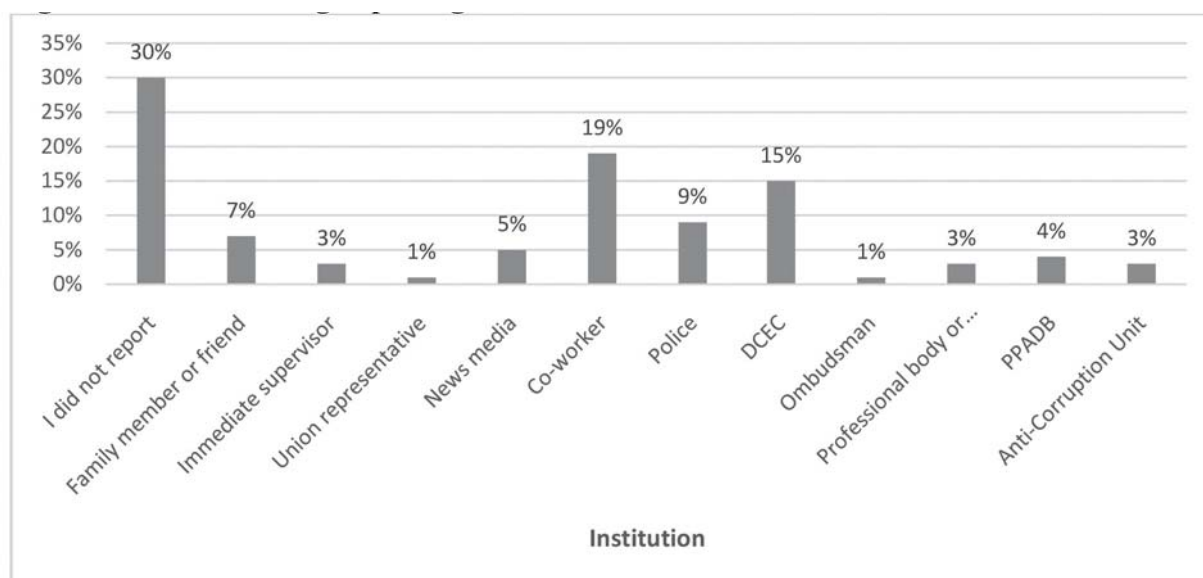
The main corruption activities related to an employee of the procuring entity accepting a bribe (22%), unfair advantage in the selection of a contractor or consultant (21%) and tolerating a situation or practice which posed a substantial danger to public health or safety (7%). Similarly, Legae and Adeyemi (2017) found that bribery in the form of cash inducement, gift, favour and kickback was the most prevalent form of corruption in Botswana’s construction industry. In June 2021, the Director General of the DCEC revealed that there was a growing trend in which public officers are rewarded by private companies for their preferential treatment and favours to such companies during procurement processes.⁶

4.2 Whistleblowing Reporting Actions

The study further aimed to find out which actions, if any, observers of organisational wrongdoing took. The findings are reported in Figure 2. The primary objective of blowing the whistle is to effect change by either preventing or stopping and rectifying organisational wrongdoing. Transparency International (2018) states that whistleblowers also need to trust the reporting mechanism and feel comfortable using it. Typically, three main avenues for reporting disclosures exist: internal (within the workplace), to authorities, and to external or third parties (e.g., media). In principle, “they should each provide several channels allowing safe reporting, ensure that disclosures are acted upon and allow for participation of the whistleblower.” (Ibid.)

6 The Botswana Gazette. (2021). Civil Servants on Private Companies’ Payroll – DCEC. <https://www.thegazette.news/news/civil-servants-on-private-companies-payroll-dcec/>

Figure 2: Whistleblowing Reporting Actions



Source: Author, based on survey data

Figure 2 shows that most respondents (30%) stated that they did not report, while 15% reported to the DCEC and others chose to report to a co-worker (19%), family member or friend (7%) or the police (9%). Although it is encouraging to see that individuals report wrongdoing to organisations such as the DCEC and Botswana Police Service, it is concerning that most people choose not to report corruption or report to individuals and organisations that are not authorised (as per the Whistleblowing Act) to receive disclosures. 42% of reported disclosures were made to unauthorised persons or institutions. On the other hand, Anti-Corruption Units are mandated to ‘receive, analyse and conduct inquiries into allegations of corruption and complaints received from various sources’⁷, but only 3% of the study’s whistleblowers approached this structure to report wrongdoing, with slightly more individuals reporting to the media (5%) and the PPADB (4%).

This finding is consistent with previous studies on whistleblowing, and Malek (2010) is of the view that it raises challenging questions. Are would-be whistleblowers who choose not to report misconduct acting immorally? Or could there be good moral reasons against blowing the whistle in some situations? Anvari et al. (2019) suggest that people can respond to perceived in-group wrongdoing by conforming and remaining silent, disengaging and exiting the group, or they can attempt to change in-group behaviour via internal means such as dissent or via external means through whistleblowing. Therefore, to address this conflict, whistleblowing policies should explicitly communicate the core moral values that all members of the organisation are expected to abide by and management should ensure their unequivocal enforcement.

4.3 Barriers to Effective Whistleblowing

What prohibits observers of wrongdoing from making a disclosure, either internally or externally? An analysis of the survey results (Figure 3) revealed that fear of punishment (30%) and fear of losing job (33%) were identified as some of the main reasons for the non-reporting of corrupt activities in construction firms. This finding was affirmed during in-depth interviews with industry regulators, who stressed that protection of whistleblowers is of paramount importance, but that this was not always achieved. As such, employees or observers of wrongdoing may decide not to make a

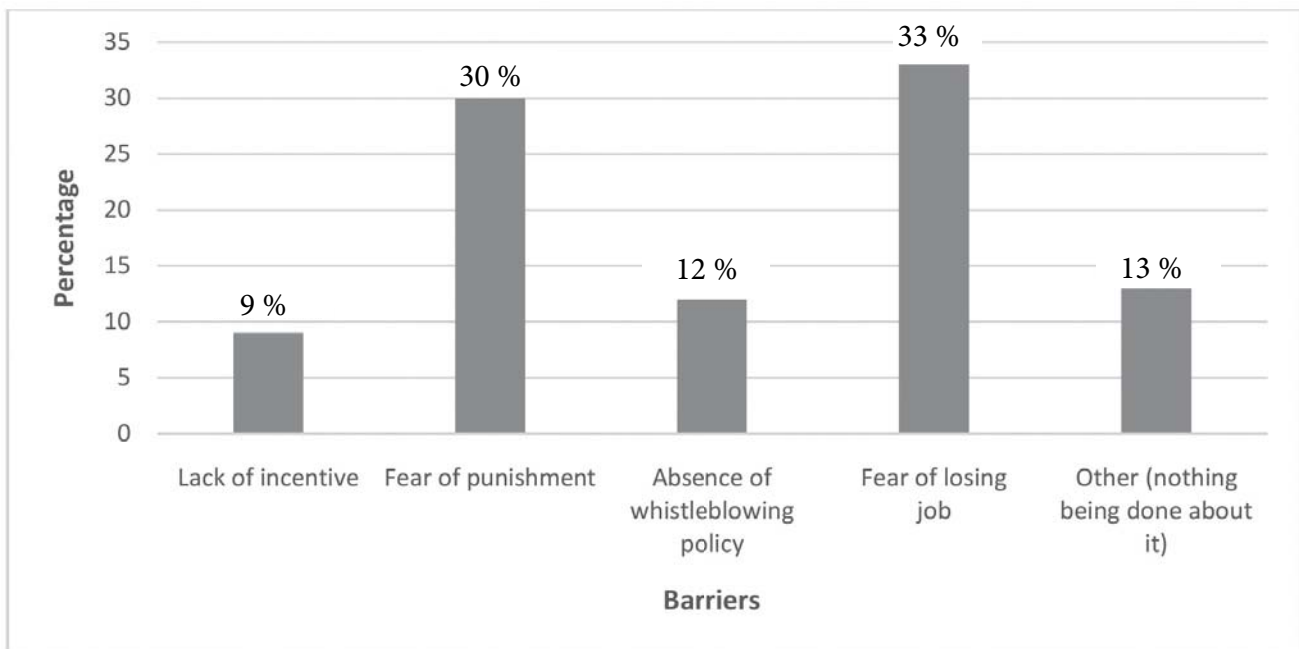
disclosure because of the perception that they will be punished or lose their job. Despite the fact that the Whistleblowing Act 2016 was specifically introduced to address this concern, there was a view that individuals lack the courage to report organisational wrongdoing. Emphasis was placed on the need to ensure adequate legal protection of whistleblowers, as well as sensitising potential whistleblowers on these protective measures.

⁷ Ministry of Local Government and Rural Development. (2014). Anti-Corruption Policy.

A lack of incentives (9%), absence of whistleblowing policy in private firms (12%) and reasons such as previous disclosures not being acted upon (13%) were identified as other prohibitive factors. The absence

of supportive organisational policies, coupled with employee cynicism that an organisation will not take action on a report, will deter employees from disclosing impropriety.

Figure 3: Barriers to Effective Whistleblowing



Source: Author, based on survey data

Section 14 of the Whistleblowing Act 2016 provides for the protection of whistleblowers, particularly stating that 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’ and exonerates the whistleblower from being liable to civil or criminal proceedings in respect of a disclosure (section 15). Though these provisions exist, the survey found that 58% of the respondents were not familiar with the Whistleblowing Act and its stipulations on the protection of whistleblowers. Twenty-five percent were uncertain, while sixteen percent indicated knowing about the Act. These findings largely coincide with discussions held with regulators regarding the need for greater public education efforts on whistleblowing.

Arguments for and against rewarding or incentivising potential whistleblowers form a core part of the debate on whistleblowing reforms. Should employees or observers of organisational wrongdoing be rewarded for blowing the whistle or are they morally obligated to report wrongdoing? Nine percent of the study’s respondents indicated that a lack of incentive was a key barrier to making a disclosure of impropriety. The

Whistleblowing Act 2016 does not make provisions for rewarding or incentivising individuals for making disclosures. However, in practice, the DCEC rewards whistleblowers during the course of or at the end of the investigation without informing the individual prior to the investigation. Perhaps, lessons could be adopted from similar legislation such as the Namibia Whistleblower Protection Act 2017. This Act clearly outlines provisions for rewarding a whistleblower who makes a disclosure of improper conduct that leads to the arrest and prosecution of an accused person, as well as a disclosure that results in the recovery of money or other property.

Notwithstanding the scepticism concerning the use of rewards to encourage whistleblowing, this system has proven effective in other jurisdictions (see for example, Nyreod and Spagnolo, 2018). Sanctions against false disclosures are provided for in Section 17 of Botswana’s Whistleblowing Act, which will arguably, minimise opportunities for malicious reporting. Therefore, making clear stipulations in the Act about the reward system could positively influence individual attitudes towards whistleblowing and subsequently encourage reporting.

5. POLICY IMPLICATIONS AND RECOMMENDATIONS

Whistleblowers play a critical role in exposing corruption and harmful practices that pose a threat to public safety. However, these individuals face significant personal risk when they expose wrongdoing. Thus, ensuring that whistleblowers are adequately protected from any form of retaliation, discrimination or disadvantage is central to promoting an effective whistleblowing framework.

Based on the findings of the study, fear of job loss and punishment or retaliation were identified as the biggest barriers of whistleblowing. Despite the enactment of the Whistleblowing Act 2016, individuals choose not to report wrongdoing or report to unauthorised persons or institutions. Other key factors include the absence of whistleblowing policies within some private organisations, nothing being done about reports of wrongdoing, a lack of incentives (to encourage reporting), and inadequate public education on whistleblowing in general and the Whistleblowing Act 2016 in particular.

In light of the aforementioned, the paper recommends the following:

1. Strengthen protection measures for whistleblowers or any person related to or associated with the whistleblower. This includes their physical protection;
2. To encourage and increase awareness on whistleblowing, provide continuous education and awareness of the Whistleblowing Act 2016 and its provisions on the protection of whistleblowers amongst employees, as well as the general public;
3. Considerations should be made to authorise construction industry regulators, the Public Procurement and Asset Disposal Board, and private media to receive disclosures of impropriety;

4. Amend the Whistleblowing Act 2016 to enable it to make provisions for financial rewards (where disclosures lead to successful prosecution) and financial compensation (in instances that the whistleblower suffers or incurs expenses e.g., medical, legal, relocation, and loss of wages);
5. Review and amend the anti-corruption legal and policy framework to ensure that it is aligned to the Whistleblowing Act 2016. This also includes considerations to amend the Whistleblowing Act 2016 to allow whistleblowers to make anonymous disclosures, provided that such disclosures are made in good faith as outlined in section 4 of the Act;
6. The business sector needs to develop and or effectively implement anti-corruption measures (e.g., corruption risk assessments, whistleblowing policies), and report publicly on measures they are taking;
7. Business Botswana and the Public Procurement and Asset Disposal Board should consider incentivising or even making it compulsory for private sector firms to subscribe to the Code of Conduct for the Private Sector, should they wish to undertake any business with the government.

Appendix 1 proposes a framework for establishing an effective whistleblowing system. To an extent, Botswana's whistleblowing framework is aligned to some of these best practices. However, this could be further enhanced by integrating several other measures.

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APPENDIX 1: ELEMENTS OF AN EFFECTIVE WHISTLEBLOWING FRAMEWORK⁸

Dimension of analysis	Sub-dimension of analysis	Recommendation
Protection	Anti-retaliation	<ol style="list-style-type: none"> 1. The possibility of reporting retaliation of reporters 2. Anti-retaliation policy that prohibits any form of retaliation against a reporter who, in good faith, makes a complaint or raises a concern
	Anonymity	<ol style="list-style-type: none"> 3. The possibility of reporting wrongdoing on an anonymous basis given to reporters 4. The protection of reporters' identity ensured throughout all stages of the investigation process
Procedure	Report mechanism	<ol style="list-style-type: none"> 5. More than two different channels available 24/7/365 for reporting wrongdoing
	Response mechanism	<ol style="list-style-type: none"> 6. Feedback provided to reporters throughout all stages of the investigation process 7. Case management system for recording, investigation and monitoring reports 8. Assigned clear accountability for all stages in the process 9. Screening reports to assess the relevance and type of wrongdoing
	Monitoring	<ol style="list-style-type: none"> 10. The key statistics on whistleblowing cases collected and reviewed on a regular basis
Culture	Commitment from the top	<ol style="list-style-type: none"> 11. Senior executives accountable for the whistleblowing frameworks 12. Statistics on whistleblowing cases monitored and discussed regularly by executive or board of directors 13. Whistleblowing frameworks reviewed on a regular basis 14. Regular employee surveys to measure the awareness of whistleblowing frameworks 15. Regular trainings for employees responsible for receiving and investigating reports 16. Confidential advisor appointed for advising employees about the reporting of wrongdoing
	Communication	<ol style="list-style-type: none"> 17. Regular trainings for employees on whistleblowing frameworks 18. Regular communication to employees about whistleblowing frameworks 19. Lessons learned from whistleblowing cases spread internally among employees 20. Statistics about whistleblowing reports published externally (e.g., annual report, website)

⁸ Transparency International Netherlands. (2017). <https://www.transparency.nl/wp-content/uploads/2017/12/Whistleblowing-Frameworks-final-report.pdf>



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