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INTERNATIONAL
KENYA

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Comprehensive legislation on whistleblower protection in Kenya

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Situational Analysis

Kenya has various laws that have a bearing on whistleblowing. Such laws aim at reducing corruption and encouraging good governance. They assure any person who is a witness to a crime, protection from retaliation by those mentioned.

These laws however do not prioritise whistleblowing and hence, no single law or institution established under these laws has promoted a culture of whistleblowing in Kenya to ensure that vices that are obstacles to Kenya's socio-economic development are eliminated.

The Anti-Corruption and Economic Crimes Act, 2003 provides protection for “assistants, informers, witnesses and investigators.” However the Act does not define an “informer”; thereby making it difficult to determine whether it means the same thing as whistleblower¹.

1. Kichana, Philip 2006, ‘Kenyan Laws Cannot Protect Whistle Blowers’, ADILI 81, August, Transparency International Kenya website, p.3 <http://www.tikenya.org/documents/adili81.pdf>

The Public Officer Ethics Act, 2003 states that “A person who, without lawful excuse, divulges information acquired in the course of acting under the Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.”

The irony is that this section of the Act outlaws whistleblowing, while at the same time the rest of the Act purports to introduce and standardise the ethical code and standards of public officials.

Policy Issues

There is lack of a comprehensive and dedicated law on whistleblower protection at the national level.

The lack of a comprehensive legal safeguard for whistleblowers presents a potential weakness in the country's fight against corruption. This is because systematic victimisation of whistleblowers has contributed to a ‘culture of silence’ in both public institutions and private sector organisations.

Policy Statement

While whistleblower protection is provided for as part of numerous individual laws, there is currently no single overarching law providing for whistleblower protection in Kenya. This lack of protection for whistleblowers results in the fear of retaliation which is a significant factor inhibiting people from speaking out in the public interest.

In order to ensure certainty, clarity and seamless application of the framework, a stand-alone legislation is preferable to a fragmented or a sectoral approach to whistleblower protection.

Policy Objective

The policy objectives are to:

1. Develop legislation to ease the disclosure and investigation of significant and serious matters in public entities that a person or persons believe may be unlawful, dangerous to the public or injurious to public interest.

2. Protect persons who make these disclosures.

Policy Intervention

1. Clear legislation and an effective framework should be developed to protect from discriminatory or disciplinary action persons who disclose certain suspected acts of wrongdoing or corruption to competent authorities in good faith and on reasonable grounds.

This will entail:

- i. Enactment of dedicated legislation to ensure legal certainty and clarity, and to avoid a fragmented approach to establishing whistleblower protection.
- ii. Requirement or strong encouragement for companies to implement control measures that will provide for and facilitate whistleblowing (for example through internal controls, ethics and compliance programmes, distinct anti-

- corruption programmes, fraud risk management among others).
2. The legislation should provide a clear definition of the scope of protected disclosures and of the persons afforded protection under the law.
 - i. Protected disclosures include: a violation of law, rule, or regulation; gross mismanagement; waste of funds; abuse of authority; a substantial and specific danger to public health or safety; or types of wrongdoing that fall under the term “corruption”, as defined under domestic law(s).
 - ii. Individuals are not afforded whistleblower protection for disclosures that are prohibited by domestic laws in the interest of national defense or the conduct of foreign affairs, unless the disclosures are made in a specific manner and to the specific entity/entities those require.
 - iii. Public and private sector employees are afforded protection, including not only permanent employees and public servants, but also consultants, contractors, temporary employees, former employees, volunteers among others.
 - iv. Clear definition of “good faith” or “reasonable belief”; although individuals are not afforded protection for false disclosures made deliberately, protection is afforded to an individual who makes a disclosure based upon the individual’s reasonable belief that the information disclosed evidenced one of the identified conditions in the statute, even if the individual’s belief is incorrect.
 3. The legislation should ensure that the protection afforded to whistleblowers is robust and comprehensive.

- i. Due process for both parties (the whistleblower and the respondent), including, among other things, the need for protecting confidentiality.
- ii. Protection from any form of discriminatory or retaliatory personnel action, including dismissal, suspension, or demotion; other disciplinary or corrective action; detail transfer, or reassignment; performance evaluation; decision concerning pay, benefits, awards, education or training; order to undergo medical test or examination; or any other significant change in duties, responsibilities, or working conditions.
- iii. Protection from failure to take personnel actions, such as selection, reinstatement, appointment, or promotion.
- iv. Protection from harassment, stigmatisation, threats, and any other form of retaliatory action.
- v. Protection from other forms of retaliatory conduct, including through waiver of liability/protection from criminal and civil liability, particularly against defamation and breach of confidentiality or official secrets laws.
- vi. Protection of identity through availability of anonymous reporting.
- vii. Clear indication that, upon a prima facie² showing of whistleblower retaliation, the employer has the burden of proving that measures taken to the detriment of the whistleblower were motivated by reasons other than the disclosure.
- viii. Protection against disclosures an individual reasonably believes reveals wrongdoing even if the whistleblower is incorrect.
- ix. Protection of persons mistakenly believed to be whistleblowers.

2. A fact presumed to be true unless it is disproved.

4. The legislation should clearly define the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, and encourages the use of protective and easily accessible whistleblowing channels.
 - i. Provision of protection for disclosures made internally or externally.
 - ii. Establishment of internal channels for reporting within the public sector.
 - iii. Strong encouragement for companies to establish internal reporting channels.
 - iv. Protection afforded to disclosures made directly to law enforcement authorities.
 - v. Specific channels and additional safeguards for dealing with national security or state secrets-related disclosures.
 - vi. Allowing reporting to external channels, including to the media, civil society organisations, etc.
 - vii. Incentives for whistleblowers to come forward, including through the expediency of the process, follow-up mechanisms, specific protection from whistleblower retaliation among others.
 - viii. Positive reinforcements, including the possibility of financial rewards for whistleblowing.
 - ix. Provision of information, advice and feedback to the whistleblower on action being taken in response to disclosure.

REFERENCES

- i. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation IX.
- ii. United Nations Convention against Corruption (UNCAC) (2005), Article 33.
- iii. Council of Europe Civil Law Convention on Corruption (1999), Article 9.
- iv. OECD Guidelines for Managing Conflict of Interest in the Public Service (2003)107, 28 May 2003.
- v. OECD, Commentary on the OECD Guidelines for Multinational Enterprises <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.
- vi. Whistleblowing International Standards and Developments* David Banisar. May 2006 Revised February 2009. Paper presented at the Primera Conferencia Internacional sobreCorrupción y Transparencia: Debatiendo las Fronteras entre Estado, Mercado y Sociedad, Mexico City, 23-25 March 2006.



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Every effort has been made to verify the accuracy of the information contained in this brief. All information was believed to be correct as of July 2015.

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