

**‘WHISTLEBLOWERS’ PROTECTION LEGISLATION:  
IN SEARCH FOR MODEL FOR NIGERIA**

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**ABSTRACT**

Reporting of wrongdoing in private or public organization in the public interest to the authorities concerned known as ‘whistleblowing’ is globally gaining support. It is no longer strange that some ‘courageous’ current or former employees or even a member of the public exposes a big financial scandal, mismanagement of public funds or grievous breach of health and safety regulation.

The revelation made could be disastrous both to the organization reported and to the person making the report. Ordinarily, because of the existence of the common law duties of trust, loyalty and confidence a whistle-blower could be legitimately dismissed and prosecuted. So many countries are now abandoning this old harsh common law principle in favor of laws protecting whistleblowers against any consequences of their revelation. Among these countries is Nigeria. This paper seeks to test the two bills on whistle-blowing before the Nigerian legislature against the best practices in whistle-blowing.

## INTRODUCTION

Literally, the Cambridge Advanced Learner's Dictionary (2010, online) defined whistle-blowing as "[causing] something bad that someone is doing to stop, especially by bringing it to the attention of other people". A whistle-blower on the other hand has been defined by the Oxford Advanced Learner's Dictionary (2005, online) as "a person who informs people in authority or the public that the company they work for is doing [something] wrong or illegal. Legally speaking however, there may not be a universally acceptable definition of the term because of the uncertainties surrounding it. It has been recently defined as "the reporting of a wrongdoing that needs to be corrected or terminated in order to protect public interest"(Asian Institute of Management 2006, p 15).

Lewis (2001) quoting the Australian Senate Select Committee told us that what is important is not the definition of the term but the definition of the circumstances and conditions under which the employees who disclose wrong-doing are entitled to protection from retaliation. Nevertheless, a working definition for the purpose of this article may be important.

**Guy Dehn** a renown public accountability expert (Testimony of Guy Dehn, 2003) defined whistle-blowing as:

“...a colloquial term usually applied to the raising of concerns by one member of an organization about the conduct or competence of another member of the same organization or about the activities of the organization itself”

Gilan (2003, p. 37 quoting Latimer, quoting Cripps 1986, p. 257) defined whistle-blowing as “passing on information from a conviction that it should be passed on despite (not because of) the embarrassment it could cause to those implicated”. Recently it has been defined as “a culture that encourages the challenge of inappropriate behavior at all levels” (Getting the Balance Right, 2005, Cm 2407). It may also be synonymous with the culture of raising concern by a member of staff about a wrongdoing or misdeed taking place in his place of work (Shipman's Inquiry (b) 2005, para. 11.8). Whistle-blowers are persons (usually workers) who at their own risk, having been “motivated by a sense of personal, and/or public duty, may expose what they perceive as specific instances of wrongdoing, which may be within the private and/or public sector” (Gilan, p. 37). It

may also involve speaking out publicly or to the authorities concerned about any wrongdoing, financial, administrative or regulatory which may harm members of the public taking place in an organization either private or public, by a current or ex-employee of that organization - or even by a member of the public who does not have any relationship with that organization. The wrongdoing may range from *financial scandal or cheat, corruption or mismanagement to health and safety issues* that may bring about the decline or total collapse of the organization or an immeasurable danger to the public, if necessary steps are not taken.

**Some Conceptual elements:**

Amid some disagreements in the early 80s on what exactly constitutes whistle-blowing Robert and Kraft (1990, pp. 849-874, quoted in Asian Institute of Management) identified some conceptual elements to clarify some of the cloudy areas of whistle blowing. They identified the following:

- a. An individual: To them the person reporting or disclosing the wrongdoing can be an employee or ex-employee of that organization, not a journalist or even ordinary member of the society. Nevertheless, as reflected in some legislations the current trends shifts towards considering any person a whistleblower by his/her actions - and he/she must not be registered or identified with any organization(Whistleblowers Australia). This seems to be confusing (Brown, (Ed), 2008).
- b. Information which is of public record: As opposed other dissenters in an organization whistleblowers expect that the information they disclose in public interest should publically and openly be utilized by the public. They expect the recipient to further disclose the information in public interest.
- c. Information about actual or serious wrongdoing: The information must also be about a wrongdoing threatening the wellbeing of the public and not a trivial one. Regard being had to the number of those affected, the seriousness of the consequences and even the amount of money or loss involved.

### **The good and the bad side of whistle-blowing:**

A potential whistle-blower who sees a wrong doing being carried out in an organization has four risky options. Firstly, he may decide to keep silent for fear of dismissal or that he will be called names, or that his family may be targeted. However, his silence may cause grave disaster to the public at large. Secondly, he may decide to blow the whistle internally so that those in charge of the organization are put on the alert to take the appropriate measure to avert or avoid the risk. This is particularly if the employee belongs to organization encouraging the culture of raising concern about wrong doing. Thirdly, he may decide to let everybody know by blowing the whistle outside; for instance by alerting the media. This may be the most dangerous cause as the employee may likely lose his job at the end of the drama for ethical or legal reasons. As Calland and Dehn (2004, p. 7) pointed out, until recently most legal systems do not protect such disclosures even if made in good faith. Fourthly, the employee may anonymously blow the whistle internally or outside; for instance by leaking the information to those in more senior positions or to the media. However, this makes the wrongdoing difficult to investigate as there could be no one to clarify on the matters raised.

It is to be noted that, two things are indisputably true about whistle-blowing: the first is that it “is a risky business” (Vickers, 1997, p.594) and the second is that it is a helpful practice. It is a risky business because of the dangers, the detriment and threats awaiting an employee who courageously decides to say ‘enough is enough’ to the wrongdoing of either his co-workers or his employers. Whistleblowers could commonly “face discipline or dismissal” (Vickers) because they are being seen as “particular threat to, and thorn in the side of, an employing organization” (Bowers and Lewis, 1996 p. 637). They may also earn “more negative labels such as informants, snitches, rats, squabbles, sneaks, or stoolies” (Gilan, p. 38) which could have impact on them or their families. A potential whistleblower with a genuine case may prepare to be silent rather than reporting the matter to the authorities for fear of being seen as troublemaker or ‘maverick’ or for “fear of recriminations and feeling of impotence in the belief that, even if the report is made, nothing will be done about it” (Shipman’s Inquiry (b) para. 11.10). He may also have a fear that having blown the whistle he might end up in being prosecuted or got an action for defamation. There may also be a fear that the report he made about the misdeed may be “interpreted as an attack on an individual or body” (Shipman’s Inquiry (b)). There can also be a fear that members of the group which the person

belongs will gather against the whistleblower – to ostracize him or members of his family.

All these are indisputably true about whistle-blowing and they usually happen. This is because the consequences of whistle-blowing could cause embarrassments and financial loss to many persons and organizations; although of course it could prevent a great disaster or harm befalling on the general public or large number of innocent people. For these and other dangers, a potential whistleblower will be moved to engage in balancing and weighing between the effect and impact of what he is going to reveal and the dangers to his life and livelihood and to his family, refutation and profession.

A study of whistleblowers in the US in the year 2000 (Irish Times) found out that 100% of those who blew whistle were fired and most of them were unable to find new jobs. 17% lost their homes; 54% were harassed by peers at workplaces; 15% were subsequently divorced; 80% suffered physical deterioration; 90% reported emotional stress, depression and anxiety and sadly, 10% of them attempted suicide.

Although whistleblowing may be a dangerous course of justice taken by a courageous, bold and public-spirited individual/s, it is indeed an effective tool in support of good governance and accountability. Through whistle-blowing accidents and disasters could be prevented, lives of innocent people could be saved and huge financial loss could also be barred. It could also deter other potential wrongdoers. All these benefits and more others are the results of making one employee a ‘sacrificial lamb’. However, it should be noted that although whistleblowers are “extremely valuable resources” and “corporate heroes...saving the business from potential financial ruin” (Durant, 2004, p. 152) as well as saving the public from an impending disaster and mischief, “the revelations of whistleblowers may not always be accurate, nor motivated by unselfish concerns” (Gilan, p. 38). Gilan pointed out that it is not all the times that whistleblowing helps. Sometimes whistleblowing “may hamper, rather than help the efforts of law enforcement against harmful behavior” (Gilan).

This means that each case of whistle-blowing should be thoughtfully handled with care, and caution.

Whistle-blowing has always been a controversial issue raising controversial questions. For instance, Gilan (pp. 37-38) raised these controversial questions: “why on earth [in the first place] would one blow the whistle?”; “is a whistleblower a heroine or a villain?” and “what motivates people who blow the whistle given the recriminations

that they are likely to face?”. For these questions among so many others, each case of whistleblowing should be elaborately and objectively investigated to ensure justice is made to all the parties involved.

### **The wind of Whistleblowing:**

Internationally, there has been growing support for whistle blowing, particularly in the areas of good governance, public accountability and fight against corruption. In the recent past, as a result of so many high-profile corporate fraud, whistleblowing legislation has become a necessary choice for so many countries. Evidence of this can be found in a number of treaties/agreement entered between countries to fight corruption. For instance, the United Nations Convention against Corruption (UNCAC), European Council’s Criminal Law Convention on Corruption (Article 22) and Inter-American Convention against Corruption (Article III).

Under Article 33 of the UNCAC signatory countries are encouraged to take domestic measures to incorporate in their legislations and other provisions protecting whistleblower witnesses and their families from any unwarranted treatment. The countries are also urged to set in place measures that facilitate reporting of corruption to appropriate agencies (Asian Institute of Management). Countries have also been called upon to provide effective mechanism for protecting witnesses who disclose wrongdoing and their families and relatives from actual or potential harassment, retaliation or intimidation. (Article32). The Convention advocates for some enhanced support for whistleblowers and witnesses, for instance relocating them to a safer environment.

In Europe, 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. The provision emphasizes the need for the countries to provide effective protection for witnesses with valuable information about corruption related offences and those who are cooperating with all the authorities prosecuting/investigating the allegation. It provides:

“Each Party shall adopt such measures as may be necessary to provide *effective* and *appropriate* protection for:

- a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

b) witnesses who give testimony concerning these offences.

In the Americas, section 8 of Article III of the Inter-American Convention against Corruption emphasizes the importance of whistleblower protection as one of anti-corruption instruments/tools. Member States are categorically enjoined to establish and strengthen mechanisms protecting persons who disclose corrupt practices. Nevertheless, Drew ( n.d) pointed out that because most of these provisions are not legally binding, in a monitoring survey carried out by OAS “only 18% of signatories to the Convention had put in place a national law that protected public servants and private citizens who in good faith report acts of corruption”.

A number of international organizations have also adopted or established whistleblowing policies in order to prevent wrongdoing and corruption among their staff. They are enjoined to report incidences of mismanagement, fraud, and corruption, waste of resources and abuse of authority occurring within them. Consequently, protection is therefore given to any staff who reported these activities against selective, arbitrary or exaggerated administrative and disciplinary action by senior officials and other staff.

A number of countries in Europe, the Americas, Asia and even Africa to certain extent have since enacted whistleblower protection legislations. Unfortunately however, most of these legislations come from developed countries in Europe, America and to certain extent Asia with low rate of corrupt practices and mismanagement. In Africa however, it is only in South Africa that comprehensive whistleblower protection legislation can be found. Most of the countries in Africa struggling with abject poverty and chronic corruption are yet see the beauty and benefits in enacting whistleblower protection legislation.

#### **Why do we need whistleblower protection legislation?**

As a general rule 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 protected.

The main purpose of whistleblower protection legislation is to give adequate and appropriate legal protections to workers and employees both in public and private sectors and to other persons and citizens who decide to disclose information which will otherwise lead to some accidents, loss of lives and properties and other misappropriation of public funds. The legislation will also de-stigmatize whistle blowing, encourage others to speak out in public interest thereby provide a real alternative to silence. The legislation is aimed at protecting whistleblowers from the negative consequences of their courageous decision to speak out against an illegality, financial mismanagement, corruption or breach of a health and safety policy or regulation. It also supplements government's effort on transparency and due process in public service and in all matters of governance. In addition to the fact that it will practically reduce the rate of accidents and disasters in Nigeria, the legislation will make public accountability a more serious business. Justifying the culture of whistleblowing Reed Irvine a US journalist gave us the following analogy. He said thus:

"Coal miners used to carry caged canaries into the mines with them. When the canaries stopped singing, they knew they were in trouble and they had better get out fast. Whistleblowers in government and other large organizations are, in a way, our canaries. When they are free to `sing,' those institutions are healthy. When they are silenced, we are in trouble" (quoted in The Hindu, 2003).

A green paper (Green Paper, 2008, p. 3, para. 1.3) recently released noted some of the very important logical reasons why there should be whistleblower legislation. The paper noted:

"It is felt that to the extent that the environment facilitates persons who are willing to take a moral stance and reveal wrongdoing, the more difficult it will be for others to engage in corrupt activities and be later shielded by the silence of fearful would be whistleblowers. An important advantage of whistleblower legislation therefore, is its tendency to require or foster development of internal mechanisms for handling disclosures of wrongdoing within organizations, as this helps to increase accountability and transparency."

In a democratic dispensation, whistleblowing legislation can trigger fundamental reforms in governance generally and without doubt is one of the fundamental ingredients of democratic accountability and integrity. In addition, it can bring about significant decrease in wasting public funds, decrease in corruption and will enhance responsiveness and amicable relationship between the government and the governed. In a democratic Nigeria, whistleblowers protection legislation will further enhance and compliment the legislature's oversight function. Justifying this point, a member of the U.S Congress (Elijah Cummings, MD -07) recently observed:

“Congress has a mandate to oversee the functions of the executive branch to ensure that government runs as effectively and efficiently as possible. But we cannot fulfill this mandate if we cannot get reliable information, and we cannot get that information if people must put their lives on the line.”

#### **THE POSITION IN NIGERIA:**

As at the time of writing this article there is no provision, either in an Act of National Assembly or a Law of any state expressly protecting whistleblowers, either in the public or private sectors in Nigeria. However, there are two bills before the National Assembly protecting disclosures made in public interest and whistleblowers. The bills, as sourced from the official website of the National Assembly have not been passed into law.

The first bill is captioned “WHISTLEBLOWER PROTECTION BILL, 2008” (H.B. 117). It seeks to provide for the manner in which individuals may in the public interest disclose information that related to unlawful or other illegal conduct or corrupt practices of others and to provide for the protection against victimization of persons who make these disclosures. The bill was sponsored by Senator Ganiyu Olanrewaju Solomon.

The second bill which is the most recent is captioned SAFEGUARDED DISCLOSURE (WHISTLEBLOWERS, SPECIAL PROVISIONS, ETC.) BILL, 2009 (H.B. 167). It seeks to make provision for the procedure in terms of which persons employed in the public and private sectors may disclose information regarding unlawful and other irregular

practices and conduct in workplace and to provide protection against any occupational detriment or reprisals of a person making such disclosures. The bill has been sponsored by Honourable John Halims Agoda.

It should be noted however, as at September 11<sup>th</sup>, 2009 no information can be found or accessed on the official website of the National Assembly on the progression of these Bills. It cannot be found whether they have been given the usual 1<sup>st</sup> reading, or they have been debated upon or they have been referred to any committee (The Senate/House of Reps, Bills Progression). Each of these bills is to be briefly analyzed in line with the current trend and international best practices in whistleblower protection.

Nevertheless, there have also been some elements of whistleblower *encouragement and assurance* in some legislations, codes of practice and policy directives. Some of these encourage employee to raise concerns about crimes; fraud, bribery and corruption; contravention of the code of business conduct & ethics taking place in their places of work (Investment and Securities Act). For instance, on the 1<sup>st</sup> March, 2006 the Central Bank of Nigeria issued its code for corporate governance (Code of Corporate Governance for Banks in Nigeria Post Consolidation). Clause 6.1.12 of the code provides:

“Banks should also establish ‘whistle blowing’ procedures that encourage (including by assurance of confidentiality) all stakeholders (staff, customers, suppliers, applicants etc) to report any unethical activity/breach of the corporate governance code using, among others, a special email or hotline to both the bank and the CBN”.

Pursuant to the above directives, it has now become the tradition of banks in Nigeria to provide for whistleblowing procedure, hotlines, ‘icare services’ and alert. Through this medium “all stakeholders can access and provide any useful information /grievances on any issue that directly and/or indirectly affects them” (Unity Bank Plc Whistleblowing Procedure).

It is to be noted that most of these policies have been directed towards raising concern against some unethical or inappropriate treatment of customers by organizations’ staff only. They have not been directed towards disclosing any illegal or corrupt practices in the public interest in banking or insurance industry by the customers, the staff and other members of the public. They seem to be made to protect business

interests of the ‘stakeholders’ not members of public against the consequences of illegalities taking place and therefore cannot strictly speaking be regarded as whistleblowing policies. They are but complaints hotlines of some sort. It is therefore submitted that the code issued by the CBN and particularly the so-called whistleblower clause should be amended to reflect the current trends in whistleblowing policy in banking industry. One can practically justify these arguments when the CBN astonishingly disclosed to Nigerians the biggest financial fraud in the banking industry. The CBN had on August 14 sacked five banks CEOs “for leading their banks to award bad loans to the tune of N780 billion” (Daily Trust, 2009) and for contravening several banking regulations and laws. Had there been adequate legal protection of whistleblowers in this country or under the CBN code some courageous employees of these banks or even members of the public who knew about these illegalities could have blown the whistle.

Further, the current trend shifts towards substituting the scary tag ‘whistleblower/whistleblowing’ with a more decent name like ‘discloser or reporter’. The language used under Clause 6.1.12 of the Central Bank’s Code of Corporate Governance for Banks in Nigeria Post Consolidation which is being used by almost all the banks in Nigeria will not at all fit with the desired culture of whistle blowing. More neutral terms should be used. Consequently, this will reduce the stigma generally surrounding whistle blowing.

Another fundamental problem with the CBN code is that it mandated banks to establish whistleblowing procedures without mandating them to ensure protection of the whistleblowers. It is one thing to allow people to disclose an illegal act or wrongdoing in the workplace and it is another to protect them if they disclose the information. Literally and practically, there will be no disclosure if there is no protection. It is quite doubtful if the procedures so established will at all be meaningful and effective if protection is never given to their users i.e the whistleblowers.

Of course one may argue that a good private sector whistleblowing policy should be directed towards improving corporate governance and the public sector whistleblowing policy towards enhancing accountability and prevention of public harm. While this is true, it should on the other hand be noted that whether a whistleblowing policy is for private or public sector it can only be a good policy if it can promote public good and prevent public harm. It can only be a good policy if it “promotes the responsible disclosure of information vital to public interest” (Brown).

**WHISTLEBLOWER PROTECTION BILL, 2008 and  
SAFEGUARDED DISCLOSURE (WHISTLEBLOWERS,  
SPECIAL PROVISIONS, ETC.) BILL, 2009**

In different jurisdictions throughout the world, whistleblowing processes continue to be cumbersome and burdensome and sometimes “very difficult to manage” (Principles of good Practice, n.d, p. 2). Most of the schemes made have very low uptake rate and so many mistakes have been duplicated. It is to be noted that the two bills on whistleblowing before the National Assembly contained some of these mistakes which consequently will make the entire scheme virtually ineffective and difficult to manage. There are also some fundamental errors in the bills not only against the best international practices in whistleblower protection scheme but also contravening natural justice and the Nigerian Constitution.

The Whistleblower Protection Bill 2008 (WPB) contains 22 sections. The Bill seeks to provide for the manner in which individuals may in the public interest disclose information that relates to unlawful or other illegal conduct or corrupt practices of others; and to provide for protection against victimization of disclosers.

On the other hand, the Safeguarded Disclosure (Whistleblowers, Special Provisions, etc) Bill, 2009 (SDB) seeks to make provision for the procedure in terms of which persons employed in the public or private sectors may disclose information regarding unlawful and other irregular practices and conduct in a workplace; and to provide protection against any occupational detriment or reprisals against the discloser.

**What type of information is to be disclosed?**

By sections 1(1) – (3) of the WPB a person *may* make disclosure of information (an impropriety)<sup>1</sup> where that person has *reasonable cause to believe* that the information tends to show:

- a) an economic crime has been committed, is about to be committed or is likely to be committed;
- b) 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;
- c) a miscarriage of justice has occurred, is occurring or is likely to occur;

- d) in a public institution there has been, there is or there is likely to be waste, misappropriation or mismanagement of public resources;
- e) the environment has been degraded, is being degraded or is likely to be degraded; or
- f) the health and safety of an individual or a community is endangered, has been endangered or is likely to be endangered.

Accordingly, a whistleblower who in *good faith* makes disclosure of any of the above information is protected *if he has reasonable cause to believe* that the information *is substantially true* and if he makes the disclosure to the *persons or institution prescribed under section 3*.

On the other hand, the SDB categorically makes it a responsibility (or duty?) under section 1 on every person employed in a public or private sector to disclose information of impropriety in relation to matters enumerated under section 12 of the Bill. These include:

- a) that a criminal offence or unlawful act has been committed or is likely to be committed by an employer or an employee of the employer in a workplace, such as fraud, falsification, forgery, embezzlement, misappropriation, economic sabotage, stealing or wastage of public funds, etc; and the act of aiding or abetting or facilitating of the commission of any such crime or unlawful act, shall be construed accordingly;
- b) that a person has failed, is failing or is likely to continue to fail to comply with any statutory, legal or institutional obligation to which that person is charged to perform;
- c) that miscarriage of justice has occurred, is occurring or is likely to occur with regard to an employee, a group of persons, a community, etc;
- d) that a person or group of persons, a firm, business concern or body corporate is engaged in unlawful business activities such as the production, importation and distribution of fake, substandard, adulterated and unwholesome drugs, product goods or other articles, or involved in any aspect of piracy of any article or thing;
- e) that the environment in any part of the Federation has been, is being or is likely to be polluted, damaged or contaminated by the activities of any organization, firm, company, body corporate, etc, and that the health or safety of any community, group of

persons, village, town, etc has been, is being or is likely to be endangered;

- f) that an unfair discrimination and inhuman treatment has occurred, is occurring or is likely to occur by reason of perceived or real insensitivity displayed by an employer on matters of gender, ethnicity, religion, disability, or other unjust, forbidden or malicious practice which have occurred, is occurring or is likely to occur in a particular workplace; and
- g) that sexual harassment, inducement, immoral and other irregular conduct and practices has occurred, is occurring and is likely to continue to occur in a particular workplace.

Sub-section 2 of this section elaborately provided that, without prejudice to be above stated matters, a disclosure can be made by any person, not necessarily an employee on any action or inaction of by any government official, department, bodies corporate, firms, companies or enterprises that endangered, is endangering or is likely to endanger the economic development and stability of Nigeria, and which action or inaction have potential to cause social injury and damage to the people.

#### **Who can make a disclosure?**

It has been reluctantly provided under section 1(1) of the WPB that a person may make a disclosure of impropriety relating to matters enumerated under the section. And sub-section 3 of section 1 referred that person as whistleblower without defining the term although under section 21(1) it has defined the term employee to be ‘any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive any remuneration; or any other person who in any manner assists in carrying on or conducting business of an employer. Cumulatively, disclosure under the Bill can be made by employee or by a person in respect of another person. It is not clear who among the categories of employees can make a disclosure. It is also not clear who among the categories of persons can make the disclosure. It is hoped therefore by the time this bill is to become law these ambiguities would have been corrected.

Unlike the WPB the SDB expressly provided under section 1(1) of the Bill that every person employed or engaged in both the public and private sectors shall have *responsibility* to disclose information relating to suspected or alleged unlawful or other irregular and forbidden practices or conduct etc *occurring in their workplaces* having the potential of causing social damage or injury to the society or endangering

economic stability and development of Nigeria. The good side of this provision is that it makes it a legal responsibility on employees or persons engaged in private or public sector to make a protected disclosure. The bad side of it is that it narrowed down the disclosure to issues occurring only in the employee's workplaces. Section 15 of the Bill just like section 21 of the WPB defines employee to mean any person, excluding an independent contractor, agent or consultant, who works for another person, an organ of government, body corporate, firm, company, enterprise etc who receives or is entitled to receive any remuneration, and includes any person who in any manner assists in carrying on or conducting the business of employer.

Can a former employee or an applicant to an employment be protected under the bills? Can we extend the definition of employee to cover those in the police, the military, the SSS and intelligence? These and some other controversial but important issues have not been touched by either of the bills.

It is to be noted that section 15 brings more confusions than interpretations. It appears that persons not employed or engaged in private or public sectors, self-employed or ordinary members of the public can only make disclosure at their own risk, for they seem not be protected – except if the disclosure relates to an action or inaction endangering the “economic development and stability of Nigeria” with potential of causing social injury or damage to the people as contemplated by section 12(2) . Unfortunately however, the Bill did not go further to define or enumerate the actions or inactions that can endanger the economic stability of Nigeria with potential of causing social injury or damage to the people.

#### **To whom can a disclosure be made?**

Under section 3 of WPB disclosure of impropriety can be made to some 17 persons generously enumerated. These include the employer of the whistleblower; Inspector General of Police; the Attorney General; the Auditor General; staff of ICPC; a member of the NA; the Human Rights Commission; the media (print and electronic); the NDLEA; a chief; the head or an elder of the family of the whistleblower; a head of a recognized religious body; a minister; the office of the President; Federal Revenue Service or Public Commissioner. In determining the person to whom the disclosure is to be made the potential whistleblower is expected to take into account that he reasonably believes that the disclosure may lead to his dismissal, suspension, harassment, discrimination or intimidation; or that the relevant evidence may be

concealed or destroyed; or that the person to whom the disclosure was made will not frustrate the objective. Another factor to be considered by a potential whistleblower is the seriousness of the impropriety and the place where and the prevailing circumstances under which he lives (section 3(2) of the WPB).

Unlike the WPB the SDB does not contain any one section under which persons to whom disclosures under the bill can be made. However, the cumulative reading of sections 6 – 11 reveal that disclosure under the bill can be made to the following persons:

- i) Legal practitioner or counselor
- ii) An employer
- iii) A member of the National Assembly or House of Assembly
- iv) The Auditor General of the Federation
- v) A member of the Federal Executive Council or Executive Council of the state
- vi) A chairman or member of a local government council or area council
- vii) The Nigeria Police Force
- viii) The National Security Organization
- ix) The EFCC
- x) The ICPC

Besides some unnecessary duplication of duties by the WPB, it is likely to usher in some unchecked opportunities for unreasonable allegations of impropriety to be made maliciously, which by the bill must be investigated. Further, instead of over-listing those to whom disclosure can be made in a way likely to open up filing of a number of unfounded allegations prompting malicious investigation, the bills ought to have made it mandatory for all public authorities and private corporations to establish whistleblower procedure and to provide protection of those who make protected disclosures. And then a body or an office should also be established to oversee the implementation of the bill generally throughout the federation and for the purposes of receiving complaints and providing, where necessary recommending actions against the violators of the bill.

Though it seems the bills could have copied from the UK's Public Interest Disclosure Act by which under Public Interest Disclosure (Prescribed Persons) Order 1999 about 40 persons were prescribed to receive disclosures, some cautions were exercised. All of those mentioned under the Order were mentioned for the purposes of their respective offices and for receiving type of disclosures relating to their respective offices. It is not as open and uncontrolled as under the WPB and SDB.

In the US for instance the WPA established the Office of Special Council as an independent agency which has the duty of receiving allegations of prohibited personnel practices (violation by the employers of the protections given to whistleblowers) and to investigate such allegations. The office also has power to conduct an investigation of possible prohibited personnel practices on its own initiative, without any allegation.

### **To what extent is the whistleblower protected?**

Protection afforded to whistleblowers in the two bills can be categorized into three:

Pre- disclosure protection: By this provisions are made in the bills to the extent of invalidating any provision in a contract of employment or similar arrangement between the employer and employee throughout Nigeria which is intended to exclude the provisions of the bill or which precludes responsibilities imposed or which discourages the employee from making a safeguarded disclosure under the bills (sections 3(2) of the WPB

Post- disclosure protections: Categories of this type of protection are contained under sections 12-18 of WPB and sections 4 and 5 and to certain extent 13 of the SDB. Under section 12 of the WPB no whistleblower shall be subjected to victimization by his employer or fellow employees because he has made a protected disclosure. Where a whistleblower has been victimized as a result of his disclosure he can lodge a complaint before the Commission on human Rights and Administrative Justice for redress. He can also bring an action in the High Court for damages breach of contract (section 14 and 15 of WPB).

Further, where a whistleblower has reasonable cause to believe that his life or property or that of any his member is in danger he may request protection from the police. The police are mandated by the bill to provide adequate protection (section 17 WPB)

By section 18 of the WPB a whistleblower is not liable to civil or criminal proceedings because of his disclosure unless it is proved that he knew that the information he disclosed is false and was made with malicious intent.

### **SOME ISSUES FOR CONSIDERATION**

#### **Whistleblower Protection Bill?**

The title of any piece of legislation should be consistent with the overall objective of that legislation. It is to be argued that the term 'whistleblower' will have some negative implication to the overall objective of the WPB and is inappropriate. It has some 'exaggerated and negative connotations' and therefore counter-productive to the overall objective of the Bill. Some more decent and respectable term should be used carrying stronger message that protection is given by the provisions of the Bill to those courageous persons making disclosure of wrongdoing in the public interest. This has been the current trend and best practice the world over. In the UK for instance the legislation is titled Public Interest Disclosure Act, 1999 (PIDA); in South Africa it is titled Protected Disclosure Act, 2000; in Israel Employees Protection Law, 1997 and in New Zealand Protected Disclosures Act, 2001. It is submitted that term whistleblower should be entirely removed from the Bills.

#### **Some elements of breach of natural justice:**

One of the fundamental defects in WPB is that it completely overlooked and ignored incorporating any provision for fair hearing in the process of investigating report of an alleged impropriety. Despite the fact that it incriminates the disclosure of the investigation process to anyone, no opportunity is given in the bill to the person or the institution being investigated to defend the allegation. The entire process is to be confidential to the extent of breaching one of the non-derogable fundamental rights of the person being investigated. This is unconstitutional by virtue of Section 36(1) Constitution of Federal Republic of Nigeria, 1999 (CFRN, 1999). Even the Attorney General himself has only three options under section 11 of the bill. That is to say he can accept the recommendation of the investigation; he can ask for further investigation to be carried out and he can reject the report and the recommendation. From the time the report of the alleged impropriety is made to the prescribed persons up to the time the report of the investigation and its recommendation reach the Attorney General for

action the person being investigated does not know about it. And nowhere is mentioned in the bill that the person being investigated is to respond to the allegations against him (*State v Onagoruwa* (1992)).

In addition to the fact that this omission contradicts rules of natural justice, an opportunity has been missed for the person being investigated to take necessary action to remedy the situation himself. Making the entire process strictly confidential may not in any way serve the interest of the process well. For, practically speaking there are so many ways the person being investigated can know about it formally or informally so as to take negative action if one wishes against the entire process.

On the other hand, since section 9 of the WPB permits the investigator to apply to court for an order where it appears to him that the relevant documents or evidences are to be suppressed, concealed, tampered or destroyed it contemplates the disclosure of the whole process and its non-confidentiality to the person being investigated – else who will destroy the relevant evidence in the process of investigation?

Some may argue that some elements of fair hearing can be found under section 14 of the WPB. Section 14 is providing a remedy for whistleblower who blown the whistle and received or is likely to receive his employer's reprisal. It permits the whistleblower to complain to what the bill calls "Commission on Human Rights and Administrative Justice" which will investigate the complaint and hear the whistleblower and the person against whom the complaint is made. It is to be noted that the person against whom the complaint is made is to be heard by the commission following whistleblower's complaint after he was initially denied hearing at the investigation stage, before the disclosure was made by the whistleblower. By this omission the bill seems to be speaking from two sides of its mouth. Further, there is no provision for the establishment of "Commission on Human Rights and Administrative Justice" as contemplated by WPB and it is not clear whether the bill by mentioning such commission is referring to the Human Rights Commission.

## **Public procurement and whistleblowing**

In Nigeria just like in other countries public procurement which literally ought to be a transparent, competitive, fair and impartial process of using public money to purchase or sell public goods and services is full of stories and complaints of corrupt practices. In fact in most developing countries the process is being seen by the public as the 'legitimate' technical process of easily converting and misappropriating their money by some few individuals.

In Nigeria, since the coming back of democracy in 1999 there have been some persistent pressure for legislative intervention in public procurement, hence the passing into law of the Public Procurement Act on 4<sup>th</sup> June, 2007. By the provisions of the Act, the federal government, all procurement entities and other entities deriving at least 35% of the funds appropriated from the federation share of Consolidated Revenue Fund must comply with the provisions of the Act in their procurement processes (section 15). The Act however does not apply to procurement of special goods; works and services involving national defense or security except with express approval of the President (15(2)).

To ensure adequate implementation of the Act, the National Council on Public Procurement and the Bureau of Public Procurement are established by the Act. It is the responsibility of the Council to make policies on public procurement throughout the country including supervising and auditing the Bureau. The Bureau on the other hand is the regulatory body directly involved in enforcing the provisions of the Act and supervising the implementation of the established procurement policies (sections 1-6). In order to curb corruption characterizing most public procurements particularly in developing countries the Act expressly stated that all procurements must be carried out in a manner which is transparent, timely, equitable for ensuring accountability and conformity with the Act and regulations deriving there from. Section 16 elaborately provided that all bidders in addition to requirements contained in any solicitation documents shall possess the necessary professional and technical qualifications, financial and capability, adequate personnel to carry out particular procurements; and none of its directors has been convicted in any country for any criminal offence relating to fraud, financial impropriety, falsification or criminal misrepresentation. In addition to all these, every bid must be accompanied with an affidavit "disclosing whether or not any officer of

the relevant committees of the procurement entity or Bureau is a former or present director, shareholder or has any pecuniary interest in the bidder and confirm that all information presented in its bid are true and correct in all particulars” (section 16 (6) (f)). The Bureau has powers to stipulate a Code of Conduct for all public officers, suppliers, contractors and service providers. And all officers of the Bureau and other persons involved in procurement process must subscribe to an oath as may be approved by the Council that their conduct at the procurement shall at all times be governed by principles of honesty, accountability, transparency, fairness and equity (section 57). Part XII of the Act deals with the offences under the Act. Interestingly, mere non-compliance with any provision of the Act attracts imprisonment of not less than 5 years without option of fine. Offences under the Act include bid-rigging, influencing or attempting to influence procurement, tender-splitting, collusion agreement etc.

Without doubt, the 44 paged Act has been to certain extent carefully drafted in line with best international practices of public procurement. Nevertheless, in Nigeria like in many developing countries, it is one thing to state the law and completely another thing to implement or enforce it. As at the time of writing this paper there were several complaints for non-compliance with the Act and more are being reported everyday in the Nigerian dailies. However, there is no report of prosecution or conviction of persons involved in contravening provisions of the Act. In terms of whistleblower protection, the Act has not made any provision to encourage and protect either the staff of the Bureau or other bidders, the media or members of public who observe non-compliance with the provisions of the Act to disclose it in the public interest. Of course there are provisions for internal administrative remedy or review and for lodging complaints to the Bureau or appealing to courts of law (section 54). In terms of whistleblowing these provisions seem to be practically useless as the only person who has standing to internally complain for non-compliance is the bidder. Corruption can indeed take many forms including many persons and can occur in stages. In public procurement for instance, corruption can occur even before the contracts are awarded; or when they are being awarded or even after the contracts are awarded. It can take so many forms. It can involve so many people as participants. These necessitate the need for whistleblower protection provision in Public Procurement Act. It is rather absurd to find out that the same way that the Public Procurement Act did not speak of whistleblowing so also the two whistleblower protection legislations did not speak of public procurement all. What a big irony.

## **LEARNING FROM OTHER COUNTRIES:**

### **The American Model:**

Whistleblowing legislation was pioneered in the United States as early as 1863 with the enactment by Congress of the False Claims Act. In 1989 the Whistleblower Protection Act was passed. Initially, the legislation was part of the Civil Service Reform Act of 1978. The Act was the “first example of national whistleblowing legislation” in the US (Drew, n.d). A number of federal statutes and state laws already exist with a view of protecting private and/or public sector employees in respect of violation of certain provisions of laws relating for instance to environment, health and safety, etc. The Act seeks to protect federal workers disclosing any information they reasonably believe violate the law, rule or regulation or any information disclosing abuse of authority, gross waste of funds, mismanagement, significant and specific risk to public health and safety. It should be noted however, the Act excludes employees of the intelligence agencies such as the FBI as well as congressional and judicial staff. Disclosures can be made either internally or externally or even to the press. Regardless of the channel followed, any channel is given protection under the Act. In order encourage and support whistleblower, the United States Office of Special Counsel (OSC) was established in 1979 and operates as confidential disclosure channel for whistleblowers in the federal employment. The scope of the protection under the Act is quite broad as it protects employees who refuse to follow their superiors’ order which require them to do something in violation of a law; it also protects anonymous whistleblowers and even potential whistleblowers. Nevertheless, Drew pointed out that one of the most significant weaknesses of the Act in view of the weak employment laws in the US is that it provides protection only to federal employees. The Act has also not provided for employees of certain national security, contractors and science-based agencies.

In view of these, on March 9, 2007, the House Committee on Oversight and Government Reform (H.R. 985 (110th Cong.) H.Rept. 110-42) came up with the Whistleblower Protection Enhancement Act of 2007, with a view of amending the WPA by providing protections for certain national security, government contractor, and science-based agency whistleblowers, and by enhancing the existing whistleblower protections for all federal employees. With this amendment, it can be said that the new Whistleblower Enhancement Act is one of the most significant legislations in the history of the US (Economic model for Whistleblower Policy).

### **The UK Model:**

In 1999, the Public Interest Disclosure Act (PIDA) was passed. PIDA protects both public and private sector employees who make 'qualifying disclosure'. Qualifying disclosure is any disclosure of criminal offence, of a failure to comply with any legal obligation, of a miscarriage of justice, danger to the health and safety of any individual, of damage to the environment or of a deliberate concealment of information relating to any of the above that has been, is being or is likely to be committed. Mayne (1999, p. 325) pointed out that before the introduction of the Public Information Disclosure Act "employee's rights, duties and obligations were subject to vaguer obligations under common law [which] left him more exposed" to the employer's regime of harsh retaliatory acts. Thus, the fear of victimization, retaliation and recriminations forced many potential whistleblowers to become silent – which led to many disasters in which lives of innocent people were lost and huge amount of money stolen.

For instance, the Public Concern at Work reported that following occurrences of many disasters in the 90s "[almost] every public enquiry found that workers had been aware of the danger but had either been too scared to sound the alarm or had raised the matter in the wrong way or with wrong person" (Annotated Guide From Public Concern at Work). It was pointed out that the Hidden Inquiry on the Clapham Rail crash found out in the cause of its hearing that "an inspector had seen the loose wiring but had said nothing because he did not want 'to rock the boat'" (Annotated Guide From Public Concern at Work). The Public Concern at Work further added that even Cullen Inquiry into the Piper Alpha disaster pointed out that one of the reasons for the disaster was that workers were not willing to make disclosures before the accident because of fear of reprisal. And nobody could ever forget the lost of innocent lives in Zeebrugge Ferry calamity in 1987 in which the Herald of Free Enterprise sank causing the death of 193 people. The Sheen Inquiry found out that a staff made complaint about five times that the bow doors were left open; unfortunately the complaints were either ignored or were not taken up. And nobody could also forget about "[the] case of Dr. Andrew Miller and his battle with the British Biotech" (Mayne, p. 34). As of recent, even the Shipman Inquiry heard some testimonies that as at the time Dr. Shipman was taking the lives of his patients some of his colleagues had strong concern that if not for the fear of what would be the consequences of their disclosures they would have made some revelations about what was going on.

Vickers (2002, p. 133) pointed out that the aim of PIDA is therefore "to

prevent some of the disasters of the past recurring because of management remaining unaware of, or ignoring, the concerns of their staff". The general purpose of the Act is to inculcate and encourage "a culture of openness within an organization... [so that] prevention is better than cure." (Annotated Guide From Public Concern at Work, quoting Committee on Standards in Public Life, Second Report, p. 21). The Act came into force on July the 2<sup>nd</sup>, 1999 to give further protection to employees regardless of the time they started working, either in the public or private sector against victimization or incrimination as a result of disclosures they make. The Act, although added to the pre-existing common law and statutory protections to employees, differs in some respects from them. For instance, it is now automatically unfair to dismiss an employee because he made a protected disclosures, regardless of it been in the public interest. And now as opposed to the past, compensation under the Act for unfair dismissal is unlimited. It is interesting particularly for whistleblowers to note that PIDA is generally an Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimization; and for connected purposes.

Section 43B of the Act provides that a worker will be protected if he makes a "qualifying disclosure" which is a disclosure in which a worker with "reasonable belief" tends to show that:

- a) a criminal offence has been committed, is being committed or is likely to be committed,
- (b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) the environment has been, is being or is likely to be damaged, or
- (f) information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

## Conclusion

Cumulatively, from the above brief discussion it is clear that the culture of disclosing wrongdoing in the public interest has been accepted and recognized globally as one of the tools of good governance and curbing corruption. The old and harsh common law principles of employee's duty of loyalty and confidentiality are gradually fading for a more responsible culture of raising concern against illegalities affecting the public and in the public interest. Internationally and domestically this culture has been recognized and protected. Nevertheless, African countries seem to have been left behind in coming up with comprehensive legislations protecting whistleblowers. Of course Nigeria is not left behind in this regard; nevertheless the two bills before Nigerian legislature have been abruptly drafted without due regard to some of the best international practices in whistleblower protection. Most of the provisions in these bills are complicated and lack cogency. There are no appropriate mechanisms established under them for proper implementation of their provisions. There are no reward mechanisms for courageous whistleblowers. There is no provision for appropriate support to whistleblowers. Their titles do not fit their general objectives. It is important if the bills be re-drafted in line with the most accepted norms and practices of whistleblower protection.

### Key thrusts of the pending Bills:

Test	<i>WP BILL, 2008</i>	<i>SD(W,SPET C.) BILL, 2009</i>
The short title fits into the purpose	<i>No</i>	<i>Yes – to certain extent</i>
It defined protected disclosure	<i>Yes</i>	<i>Yes</i>
It has mentioned forms of wrong doing while defining protected disclosure	<i>Yes</i>	<i>Yes</i>

Encourages exposure of wrongdoing internally	<i>Yes – but not expressly made</i>	<i>Yes – but not expressly made</i>
Strengthens corporate responsibility by protecting private sectors whistleblowers	<i>Yes</i>	<i>Yes</i>
Establishes Public Interest Disclosure Agency	<i>No</i>	<i>No</i>
Establishes Whistleblowers Support Agency	<i>No</i>	<i>No</i>
Establishes whistleblower reward mechanism	<i>No</i>	<i>No</i>
States the duties/responsibilities of those engaged in the wrongdoing	<i>No</i>	<i>No</i>
States the duties/responsibilities of whistleblower	<i>Yes</i>	<i>Yes</i>
States the duties/responsibilities of the recipient of the disclosure	<i>Yes</i>	<i>Yes</i>
States the duties/responsibilities of investigating authority	<i>Yes- to an extent</i>	<i>No</i>
There is penalty for false or misleading disclosure	<i>Yes – but not express</i>	<i>No</i>

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