

An Appraisal of The Contribution of Public Interest Disclosures In The  
Attainment of Governance In Zambia.



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**BY**

**FLORENCE KAFWIMBI**

A dissertation submitted to the University of Zambia Law Faculty in partial of the  
requirements for the Award of the Bachelor of Laws (LLB) Degree.

## DECLARATION

I FLORENCE KAFWIMBI COMPUTER NUMBER 26017717 hereby declare that the contents of this directed research are entirely based on my own findings and it has not previously been submitted for a degree at the University of Zambia or any other University. All other works referred to in this essay have been duly acknowledged. I bear absolute responsibility for all errors, defects or any omissions herein.



STUDENTS' NAME.....FLORENCE KAFWIMBI

SIGNATURE.....*Fl:*

DATE.....14/05/2012

THE UNIVERSITY OF ZAMBIA

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I recommend that the Directed Research prepared under my supervision by:

**FLORENCE KAFWIMBI**  
(Computer No. 26017717)

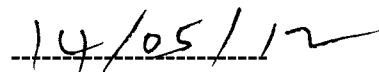


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## ABSTRACT

This paper is focused on understanding the contribution of public interest disclosures in the attainment of good governance and enforcement of the rule of law in Zambia. Good governance entails that public life should be conducted within institutions that are fair, judicious, transparent, accountable, participatory, responsive, well-managed, and efficient, while Public interest disclosure laws or whistle blower protection laws are essentially about protecting persons who disclose information about actions or inactions which are contrary to public interest be it in the private or public sectors. This research employed the legal qualitative approach. To this end, the research was mainly a desk research comprising of consultation from statutes, International instruments, articles, Journals, textbooks, periodicals, paper presentations, newspapers articles, as well as research via internet generated presentations on the subject matter. The research also included interviews with persons endowed with knowledge in area of research.

This research recognised and evaluated the contribution of whistle blowing and good governance to the attainment of sustainable development, it scrutinised the rationale behind whistleblower legislation, the precipitating factors behind such pieces of legislation, the common objectives of whistle blower legislation as well as the types of whistleblower legislation. The concept of good governance its principles as well as how these principles of good governance and whistle blowing are interconnected was analysed. This paper also evaluated the role of whistleblowing, good governance and freedom of information laws in the protection and preservation of human rights. The paper appreciates the role of whistleblowing, good governance and freedom of information laws in fostering the right to development, helping the public make informed decisions as regards how they exercise their democratic rights, enabling the public engage in informed dialog with their political and civic leaders and consequently helping them to form and express intelligent opinions on matters of governance thus ensuring civic leaders adhere to the rule of law. After considering the foregoing, this paper concludes that the role that public interest disclosures in fostering better accountability, transparency and public integrity in both the public and private sectors cannot be overemphasised.

The paper recommends that the current whistleblower Act needs to be realigned in order for it to achieve the intended purpose of providing a mechanism through which conduct adverse to the public interest in both the private and public sectors may be safely disclosed. It is thus recommended that the terms substantial and or serious be defined in the act to reduce the room of the wide discretionary powers granted to investigative wings, that the application of the Act be broadened to cover all employees including independent contractors, the Act must include in its ambit of entities that can receive disclosures to include the media, civil society and any investigative wings of government. Furthermore it has been recommended that a pecuniary reward be introduced for whistleblowers that enable the government recover or save any resources that would have been lost as a result of maladministration and wastage. It has also been recommended that government policies should also be subjects of the Act and that the enactment of freedom of information laws must be expedited because of the irrefutable relationship between the two areas of law.

## DEDICATION

To my parents Shadrick and Margret for being the wind beneath my wings and teaching me that with God all things are possible.

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First and foremost I would like to thank my God for helping me walk on the stormy seas, without Gods grace and faithfulness I would not have made it this far

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And to all who have contributed to my education, this dissertation and the degree it unlocks I am forever grateful

## TABLE OF INTERNATIONAL INSTRUMENTS

- African Union Convention on Preventing and Combating Corruption
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders).
- Protocol on Tribunal in the Southern African Development Community
- The Southern African Development Community Protocol against Corruption
- The Council of Europe's Criminal Law Convention on Corruption, 1999
- The Council of Europe's Civil Law Convention on Corruption, 1999
- The Council of Europe's Resolution On The protection of whistleblowers1729 (2010)
- Universal Declaration of Human Rights

## TABLE OF LEGISLATION

### ZAMBIAN STATUTES

The Anti Corruption Commission Act No. 47 of 1996

The Anti Corruption Commission Chapter 91 of the Laws of Zambia

The Constitution of Zambia chapter one of the laws of Zambia

The Corrupt Practices Act No.14 of 1980

The Parliamentary and Ministerial Code of Conduct Act Chapter 454 of the Laws of Zambia

The Public Interest disclosure Act No. 4 of 2010.

### ENGLISH STATUTES

The Public Interest Disclosure Act (PIDA) 1998

The Employment Rights Act of 1996

## TABLE OF CASES

Aspinall v MSI Mech Forge [2002] All ER (D) 80

ALM Medical service v Bladon [2002] IRLR 807

Darnton v University of Surrey [2003] IRLR 133

Guja v Moldova Application No 14277/04.2008

Lion Laboratories v Evans [1985] QB 526

Nkumbula v Attorney-General (1972) Z.R. 204

Street v Derbyshire Unemployed Workers' Centre [2005 ], ICR 97

Tillack v Belgium Application No 20477/05. 2007

Taplin v. C Shippam Ltd [1978] IRLR 450

## GLOSSARY OF ACRONYMS

AUCPCC	African Union Convention On Preventing And Combating Corruption
ILO	International Labour Organisation
OAS	Organization of American States
OECD	The Organisation for Economic Co-operation and Development
PIDA	the Public Interest Disclosure Act 1998
SADC	Southern African Development Community
UNCAC	United Nations Convention against Corruption
UN	United Nations

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## CHAPTER ONE

### **1.0 INTRODUCTORY CHAPTER**

#### **1.1 Introduction**

The Zambian constitution<sup>1</sup> in its preamble highlights the resolve of the Zambian people to uphold the values of democracy, transparency, accountability and good governance, uphold the laws of the State and conduct the affairs of the State in such manner as to preserve, develop, and utilise its resources for this and future generations. This paper is an analysis of the role of public interest disclosure and whistle blower protection as necessary tools in the drive towards good governance and enforcement of the rule of law in Zambia. This chapter focuses on defining the concepts of whistleblowing, public interest and good governance. The chapter also outlines the problem that obligated the research, the objectives of the research and the methodology employed in the research.

An increased number of countries are adopting public interest disclosure (whistle blower protection) legislation to protect whistle blowers in both the private and public sectors from occupational detriment such as: dismissal, suspension, demotion, forced, or refused transfers, ostracism, reprisals threats and petty harassment. The increase in the number of countries putting in place legislation that protects whistle blowers stems from the realisation that at the end of the day, it is the public that losses out when efforts by those who seek to bring to light practices or decisions that are contrary to public interest are hampered.

It has been argued that good practice public interest disclosure legislation includes provide adequate alternative channels of reporting both internally and externally, and protects as far as possible the whistle blowers confidentiality and provides for legal remedies and

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<sup>1</sup> Cap 1 of the laws of Zambia

compensation<sup>2</sup> Whistleblowing has many different facets. It can be seen as an act of free speech, an anti-corruption tool and an internal dispute mechanism. Consequently different definitions draw different boundaries in relation to the vision, scope and nature of the relevant whistleblowing frameworks.<sup>3</sup>

On one hand whistleblowing is viewed by some as an anti-corruption tool with the emphasis on disclosure of illegal, immoral or illegitimate practices. In this context it is defined as a public interest disclosure<sup>4</sup>, a protected disclosure<sup>5</sup>, or the disclosure of public interest information<sup>6</sup>. Some quarters view it in somewhat more restricted element as addressing corruption internally within an organisation. An example is the United Kingdom's committee on the standards of public life which views whistleblowing, as raising a concern about malpractice within an organisation.<sup>7</sup> Some definitions have focused on whistleblowing as a workplace trend the International Labour Organisation (ILO) for instance refers to it as "the reporting by employees of illegal, irregular dangerous or unethical practices by employees."<sup>8</sup> Others, such as the European Court of Human Rights<sup>9</sup>, see whistleblowing as an expression of dissent and as an element of free speech in the workplace.

The wide range of definitions illustrates the fact that whistleblowing means different things in different jurisdictions and to different commentators. However, the underlying vision of whistleblowing and the role it to plays in society is encompassed by the more inclusive and

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<sup>2</sup> Marie Chene, *Good Practice Whistle Blowing Protection Legislation* ( <http://www.u4.no.org> accessed on 13th December 2011) p1

<sup>3</sup> David Banisar, *Whistleblowing: International Standards and Developments*, (Berlin: Transparency International, 2006) P4

<sup>4</sup> The Public Servants Disclosure Act, SC 2005 C46, S 2 in Latimer P and Brown AJ, 2008

<sup>5</sup> Protected Disclosures Act 1994 (NSW) S2,

<sup>6</sup> Protected Disclosures Act 2000 (NZ) S6(2), in Latimer P and Brown AJ, 2008

<sup>7</sup> Calland and Dehn, *Whistleblowing around the World: The State of the Art: Whistleblowing Around the World: Law, Culture and Practice* ed Calland and Dehn, (Cape Town: Open Democracy Advice Centre, 2004)

<sup>8</sup> Banisar, p 4

<sup>9</sup> *Guja v Moldova*, European Court of Human Rights (14277/04), February 2008

expansive apparition articulated by Banisar as<sup>10</sup> “a means to promote accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms.”

Public interest may be said to be “What men would chose if they saw clearly, thought rationally, acted disinterestedly and benevolently”.<sup>11</sup>In the Zambian jurisdiction the description public interest can be found in *Nkumbula V Attorney-General*<sup>12</sup> were it was held as follows:

What is in the public interest or for the public benefit is a question of balance; the interests of the society at large must be balanced against the interests of the particular section of the society or of the individual whose rights or interests are in issue, and if the interests of the society at large are regarded as sufficiently important to override the individual interests then the action in question must be held to be in the public interest or for the public benefit.

Public interest disclosure laws or whistle blower protection laws are essentially about disclosing information about actions or inactions which are contrary to public interest and not for personal gratification, a love of information or amusement.<sup>13</sup> Given the effect that protection of whistle blowing has on administration and governance is self evident, it can therefore be inferred that there is a very strong co relation between protection of whistle blowers and good governance. It is important to note that the concept of good governance may be usefully applied in different contexts for instance at global, national, institutional and community levels. This paper looks at the concept in relation to its relevance at the national and communal and institutional levels and not at the global scale<sup>14</sup>. Governance is widely

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<sup>10</sup> OECD, *whistleblower protection frameworks, compendium of :Best practices and guiding principles for legislation* presented by the OECD at the Bali meeting of the AWG on 12-13 May. (Accessed at <http://www.oecd.org/dataoecd/42/43/48972967.pdf> on 13th April 2012) p23

<sup>11</sup> Evelyn Brown, *Idaho media coverage of whistleblowers educates readers on public interest disclosures.* (<http://www.whistlewatch.org>, accessed on 20<sup>th</sup> December 2011)

<sup>12</sup> (1972) Z.R. 204

<sup>13</sup> OECD,

<sup>14</sup> Graham et al : *Principles for Good Governance in the 21st Century Policy Brief No. 15* ( Ottawa, Institute On Governance)P 8

understood, when used with regard to government or the public sector, to refer to the institutional underpinnings of public authority and decision making. In this way, governance encompasses the institutions, systems, rules of the game and other factors that determine how political and economic interactions are structured and how decisions are made and resources allocated.<sup>15</sup>

When holistically considered good governance entails that public life should be conducted within institutions that are fair, judicious, transparent, accountable, participatory, responsive, well-managed, and efficient. The United Nations Development Programme (UNDP) which has taken a strong interest in the promotion of good governance, singles out characteristics like participation, transparency, accountability, effectiveness, and equity as the most important characteristics of good governance and these appear in most literature with slight variations and therefore have a claim to universal recognition.<sup>16</sup> The said characteristics have been grouped under five broad themes by the UNDP which are legitimacy and voice, direction, performance, accountability and fairness

## **1.2 STATEMENT OF THE PROBLEM**

Forty eight years after independence the majority of Zambians are still wallowing in poverty. Corruption in public offices can almost be said to be endemic and the attainment of high levels of good governance continue to evade the nation. Further, there has been an attitude in most government institutions and organisations where the messenger rather than the message is attacked, thereby creating a perfect breeding ground for corruption, maladministration and consequently resulting in poor levels of good governance and consequently minimal

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<sup>15</sup> Janet Near and Marcia Miceli, Organisational Dissidence: The Case of Whistleblowing 1985 4  
*Journal of Business Ethics* 1, p 4

<sup>16</sup>Graham et al : P35

economic, social and political development.<sup>17</sup> On the other hand, it has been recognised that adherence to good governance plays an essential role in the development of any given economy. The laudable idea of good governance has become associated with the capacity to generate growth, alleviate poverty, and bring effective democracy to peoples.<sup>18</sup> Thus it is quite obvious that if Zambia intends to move forward and develop, governance issues ought to be put right. Hence there is a need for critical evaluation of our legal regime to ascertain what is lacking or needs to be fine tuned in the drive towards good governance.

In addition there is also a need to ascertain why in spite of significant efforts by both politicians and civil society and cooperating partners in the recent past towards the attainment of tolerable levels of good governance practices the country is still lagging behind in terms of good governance. It is against this back drop that this research address the foregoing concerns in relation to the linkage between public interest disclosure laws and good governance. Further more the paper considers whether the measures put in place through the Public Interest Disclosure (Whistleblower) Act No 4 of 2010 provides adequate curtail maladministration corruption and protect whistle blowers from harassment and discrimination

### **1.3 OBJECTIVES OF THE STUDY**

The general objective of this study is to highlight and consider the efficacy of the public interest disclosure protection. The paper further aims explore the strengths and weaknesses of the public interest disclosure Act (whistle blower) Act no of 2010 and suggest possible modification. In addition the paper explores the impact and effect public interest disclosure protection (whistle blower protection) on the attainment of good governance and the rule of law in Zambia. The specific objectives of the research were:

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<sup>17</sup> U4Anti corruption resource centre, Overview of Corruption in Zambia  
<http://www.u4.no/helpdesk/helpdesk/query>.(accessed on 30<sup>th</sup> April 2012)

<sup>18</sup> Merilee Grindle, p3

- (a) To highlight the importance of public interest disclosure protection and the role it plays in ensuring the realization of good governance practices and adherence to the rule of law.
- (b) To analyse the role that whistle blower protection has on other fields of law in particular freedom of information laws and human rights.
- (c) To ascertain if the new Act meets international standards of whistle blower protection that are necessary for attainment of good governance practices.
- (d) To propose appropriate measures to be taken to ensure that the new Act accomplishes the intended purpose of its enactment.

#### **1.4 JUSTIFICATION OF THE RESEARCH**

This research comes at a time when Zambia has just recently enacted legislation on public interest disclosure protection. The research highlights the importance of guaranteeing and protecting whistle blowers and the role this plays in the attainment of good governance. Further the research looks into whether Zambia through the new Act has adequately provided for protection of whistle blowers. The paper further evaluates whether the new Act will help in fostering transparency, accountability, efficiency and adherence to the rule of law. The research is also an addition to the ever growing valuable discourse on the need to ensure the attainment of good governance practices in Zambia.

Further the recent revelations by Commissions of inquiry appointed following the change in governments in the recent past, such as the enquiry on the sell of Zamtel<sup>19</sup> and the enquiry on the procurement of petroleum products at the then ministry of energy and water resources. That several persons knew or might have known of a number instances of maladministration, wastage, and non adherence to tender procedures as well as other laws but made no effort to report the said incidents lends further impertance to the research so as to consider mechanisms

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<sup>19</sup>The times of Zambia, at <http://allafrica.com/stories/201201250478.html> (accssesd on 5th april 2012)

that can be put in place to ensure that this is a thing of the past. This work will endeavour to contextualise the problem stated above against certain pertinent provisions of the law in a bid to fill the existing research gap between works on public interest disclosure protection and good governance.

## **1.6 METHODOLOGY**

This research employed the legal qualitative approach which by its nature concentrates on Black letter law. To this end, as is typically the case with legal research, the research mainly consisted of desk research namely: consultation from statutes, International instruments, articles, Journals, textbooks, periodicals, paper presentations, newspapers articles, as well as research via internet generated presentations on the subject matter. The research also includes interviews with persons endowed with knowledge in area of research and also included traces of information gathered by unobstructive measures,

## **1.7 CONCLUSION**

This introductory chapter explored the definitions of whistle blowing, public interest, disclosure, governance and good governance. The chapter also looked at the objectives and the justification of the research as well as the methodology to be employed. The next chapter will explore the concept of public interest disclosure (whistleblowing), analyses the rationale behind whistle blower legislation, the precipitating factors behind such pieces of legislation as well as the common objectives of whistle blower legislation. The chapter also analyse the concept of good governance, its tenets as well as how the said tenets and whistle blowing are linked.

## CHAPTER TWO

### **2.0 AN OVERVIEW OF PUBLIC INTEREST (WHISLEBLOWER) DISCLOSURE LAWS AND THE CONCEPT OF GOOD GOVERNANCE**

#### **2.1 Introduction**

In recent years there has been a growing realisation in Zambia and the world over that in order for true development to be seen and for it to trickle down to the ordinary people the scourge of corruption has been enthusiastically fought. Thus there is a need to move with zeal towards ensuring that transparency, accountability and public integrity are enshrined in the conduct of public affairs. In this chapter the paper analyses the rationale behind whistleblower legislation, the precipitating factors behind such pieces of legislation, the common objectives of whistleblower legislation and the types of whistleblower legislation. The concept of good governance its principles as well as how the principles of good governance and whistle blowing are interconnected is also analysed.

#### **2.2 Who Then Is A Whistleblower?**

The term whistleblower originates from the actions of British police officers, who would blow their whistles when they noticed the commission of a crime.<sup>1</sup> Whistleblowers have been responsible for exposing abuse, corruption and unethical wrongdoing. Due to the recent increase in the number of corporate and political scandals the importance of whistleblowers cannot be over emphasised.<sup>2</sup> In spite of the acknowledged importance of whistleblowing, the term whistle blowing has seemingly entered the lexicon of politics, corporate world, governance and law with little attention paid to its definition.<sup>3</sup> one of the earliest attempts at

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<sup>1</sup> Public Concern at Work. *Public Interest Disclosure Act 1998 Annotated guide*(London: public concern at work 1999) p4

<sup>2</sup> Matthews and Lemieux *Whistle blowing Employee Loyalty and the Right to Criticize -- The Employee's Perspective*", W. Kaplan, J. Sack and M. Gunderson, ed, Labour Arbitration Yearbook (1991) 211 - 212

<sup>3</sup> Public Concern at Work. *Public Interest Disclosure Act Guide To Law And Practice*(London: public concern at work 2007) p4

defining it was at a conference organized in the 1970s by the American consumer advocate Ralph Nader, initially defined whistle blowing as:

an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity<sup>4</sup>.

Although as seen from the preceding chapter and the forgoing definition whistleblowing was invariably seen as privilege of employees because they are persons who are most likely to come into contact with information about maladministration and corruption in their work places or see such wrongs being committed.<sup>5</sup> It must be noted that whistle blowing has now moved to cover not just employees to include any person who has information about any illegal or harmful activities going on in a company, an organisation, institution, government or government agency.<sup>6</sup> Hence whistle blowers can now be said to be those persons who disclose information about something they believe to be harmful to the public's interest whether this is occurring in private or government institutions. It includes disclosures to authorities within the organization as well as to outside agencies for instance the to the media<sup>7</sup>

### **2.3 Precipitating Factors Behind Public Interest Disclosure (Whistleblower) Laws.**

One of the major precipitating factors behind whistle bower legislation usually lies in the analysis by Public Concern at work of a spate of scandals and disasters as well as intolerable levels of maladministration and graft.<sup>8</sup> In the United Kingdom, for instance whistleblower legislation was enacted because during the 1980s and early 1990s, almost every public inquiry found that workers had been aware of the danger but had either been too scared to

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<sup>4</sup> Myers, and Lemieux, P 212

<sup>5</sup> Public Concern at Work. p4

<sup>6</sup> Terry Morehead Dworkin, *Whistleblowing, MNCs, and Peace* (<http://law.vanderbilt.edu/publications/journal-of-transnational-law/archives/volume-35-number-2/download.aspx?id=1797.>)

<sup>7</sup> Canadian Law News , *Canadian whistleblower laws*, (<http://www.canadianlawsite.ca/whistle-blower.htm> accessed on 10<sup>th</sup> January 2010)

<sup>8</sup> Public Concern at Work,p4

sound the alarm, had raised the matter in the wrong way or with the wrong person.<sup>9</sup> An example of the former includes the Clapham Rail crash where the Hidden Inquiry heard that an inspector had seen the loose wiring but had said nothing because he did not want to rock the boat.<sup>10</sup> The United States experience is also similar, while initially discussed in the early 1970s it still took significant disasters such as the explosion of the Challenger, mass accidental food poisoning and publicity about extensive contractor fraud for whistleblowing to become a common tool of control.<sup>11</sup>

Further it has been realised that issues of drug trafficking, money laundering, corruption and general illegal practices are hidden activities.<sup>12</sup> Law enforcement authorities therefore find investigating and the gathering of evidence extremely difficult with the result that there are hardly any prosecutions against those who engage in such activities. Investigations therefore to a large extent rely on third parties coming forward with vital information or blowing the whistle in order for law enforcement agencies to effectively investigate and prosecute individuals, corporate entities and institutions involved in such vices.<sup>13</sup>

In the employment context, the people likely to come forward with information about corruption by or within an organisation are the workers. Not unnaturally, those who provide such information will require assurances that they will not suffer reprisals at the work place such as dismissals, demotions, and forced transferees and consequently end up as victims and not upholders of justice and integrity<sup>14</sup>. In addition, there has been a move in the entire global community and the international legal framework calling for the protection of persons who

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<sup>9</sup> Morehead

<sup>10</sup> Myers and Lemieux, p221

<sup>11</sup> Public Concern at Work, p3

<sup>12</sup> Morehead

<sup>13</sup> United Nations, <http://www.un.org/News/Press/docs/2009/gashc3948.doc.htm> (accessed on 10<sup>th</sup> January 2010)

<sup>14</sup> Shipley, Jason Kovacs, "Good governance principles for the cultural heritage sector: lessons from international experience", *Corporate Governance*, Vol. 8 Iss: 2, pp.214 - 228(2008)

make disclosures in public interest for instance Article 33 of the United Nations convention against corruption (UNCAC) provides that:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention<sup>15</sup>.

Article 33 protects all types of people and is not restricted to those who speak out in the public interest from within the organisation as the phrase ‘unjustified treatment’ is sufficiently wide to include discrimination any other context.<sup>16</sup> Whistleblower protection requirements have also been introduced in African Union Convention on Preventing and Combating Corruption<sup>17</sup> and the Southern African Development Community (SADC) protocol on corruption. Moreover since the 1970s, there has been a realisation that the willingness of public officials to voice concerns on matters of public interest is instrumental in upholding a democratic society, ensuring accountability, transparency and public integrity in the running of government and public institutions.<sup>18</sup> However even though most, if not all public officials are under a professional duty to report illegal, immoral and illegitimate practices many would only be willing to fulfil these duties if there was protection given to them against reprisals.<sup>19</sup>

## 2.4 Objectives of Public Interest Disclosure (Whistleblower) Laws

The principle objective of public interest disclosure laws is easily deduced from the titles of such legislation, which are usually a constant reminder that whistleblower protection is being

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<sup>15</sup> United nations, United Nations convention against corruption ([//www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)(accessed on 3<sup>rd</sup> January 2012)

<sup>16</sup> Carr Indira and David Lewis Combating Corruption through Employment Law and Whistleblower Protection *Industrial Law Journal*, Vol. 39, No. 1( March 2010)

<sup>17</sup> African Union Convention on Combating Corruption, Article 5(6)

<sup>18</sup> A J, Brown, *Public Interest Disclosure Legislation in Australia: Towards the Next Generation ‘Whistling While They Work’* An Issues Paper 2006

<sup>19</sup> Morehead ,

pursued not just for the individuals concerned, but because of its wider public importance.<sup>20</sup>

The principle objective of public interest disclosure laws is therefore largely to facilitate mechanisms for public interest disclosures to be made as and when the need arises. This done establishing processes by which such disclosures can be made, ensuring that when disclosures are made they are properly dealt with, and protecting the whistleblowers.<sup>21</sup> In addition another important object of protecting whistleblowers is to encourage institutions including those in the private sector to have a personal investment in the enforcement of laws and in the integrity of their organizations thereby enhancing their good corporate governance.<sup>22</sup> This is because whistleblowers are an important aid in enforcing statutes and in furthering public policy.<sup>23</sup> It is conceivable that the very existence of whistleblower protections is an incentive that encourages employers to comply with laws, rules, and other standards of conduct because they know that if they do not comply, alert employees will blow the whistle on their activities and the said employees cannot be threatened with retaliation and reprisals.<sup>24</sup>

Thus the formal objects of most legislation on whistle blowing are usually three fold;<sup>25</sup> that is firstly to facilitate public interest disclosures, to encourage whistle blowing thereby encouraging and facilitating accountability transparency and public integrity in both the public and private spheres. Secondly to ensure that disclosures by whistleblowers are properly dealt with, this means that all disclosures are properly assessed, investigated and auctioned depending on the case at hand. Thirdly to ensure the protection of whistleblowers from reprisals taken against them as a result of their having made the disclosure that was in public interest.

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<sup>20</sup> Brown, p19

<sup>21</sup> NSW Ombudsman, *The Adequacy of the Protected Disclosures Act [NSW] to Achieve Its Objectives*, Issues Paper, June 2005, p.8.

<sup>22</sup> John L Howard "Current Developments in Whistleblower Protection," *Labour Law Journal* Vol. 39, No. 2, (February, 1988) p. 80

<sup>23</sup> NSW Ombudsman, p.8.

<sup>24</sup> Howard

<sup>25</sup> Brown,p19

## 2.5 Types of Public Interest Disclosure Laws

It must be noted that public interest disclosure laws can be sector-blind meaning that both public and private sector whistle blowing are covered in the same laws as has proved possible in some countries such as the United Kingdom<sup>26</sup> and in Zambia through the recent enactment of the Public Interest (Whistleblower) Protection Act<sup>27</sup>. In other jurisdictions private sector whistleblower protection is provided for under different sets of laws from those that cover the public sector as is the case in Australia and The United States of America. Despite this distinction, an important objective of this legislation does remain the protection of whistleblowers that make disclosures in public interest.<sup>28</sup>

## 2.6 Universal Elements of Public Interest Disclosure (Whistleblower) Laws

It has been argued that there are certain almost universal pre-requisites that need to be fulfilled before most persons will be willing to make disclosures about cases of maladministration, and corruption whether it be in the public or private sectors. These pre-requisites include, firstly that the persons making the disclosures are aware that they can make a disclosure, and are also aware of how to make the disclosure. The foregoing includes among other things knowledge as to whom the disclosure should be made, how it should be made and what information should be provided. Secondly they must believe that making a disclosure will serve some good purpose including the belief that appropriate action will be taken by the recipient of the said disclosure. Furthermore they must be confident that they will be protected from suffering reprisals or from being punished for having made the disclosure<sup>29</sup>.

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<sup>26</sup> Brown, p18

<sup>27</sup> Brown, p18

<sup>28</sup> Ombudsman, NSW *.The Adequacy of the Protected Disclosures Act [NSW] to Achieve Its Objectives*, p.8.

<sup>29</sup> Council of Europe Parliamentary assembly Committee on Legal Affairs and Human Rights *The protection of whistle-blowers* (<http://www.coe.int> : Doc. 11269, html accessed on 12<sup>th</sup> February 2012)

Additionally downside risk to retaliation should be created, by ensuring that there are consequences for organisations and persons committing acts of retaliation by exposing them to counter-claims from the victimised whistle-blower with the intention of having them removed from office, penalised or otherwise sanctioned.<sup>30</sup> Good whistle blowing legislations should also provide for appropriate protection against accusations made in bad faith and without basis by providing for sanctions were a person seeks to use whistleblower laws as a tool for personal vendettas.<sup>31</sup> As regards the burden of proof, it must be up to the persons or institutions accused of wrongful acts to establish beyond reasonable doubt that any measures taken to the detriment of a whistle blower were motivated by reasons other than the action of the whistle-blower.<sup>32</sup>

It is also essential to provide for the regular monitoring and evaluation by independent bodies of the implementation and impact of relevant legislation on protection of whistle blowers. The AU Convention and the SADC Protocol also call on government and civil society to be proactive in the development and implementation of education and awareness-raising initiatives related to anti-corruption mechanisms, such as whistleblowing laws, adopted to further the Convention objectives.<sup>33</sup> In addition whistleblower laws should include provisions to protect the identity of whistle-blowers who fear retaliation.<sup>34</sup>

## **2.7 Good Governance.**

It has been said that the care of human life and happiness and not their destruction is the only object of good government.<sup>35</sup> The concept of good governance is centred on the notions of the

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<sup>30</sup> AJ Brown et al, *Speaking up: creating positive reporting climates in the Queensland public sector*, Crime & Misconduct Commission (Brisbane: Building Capacity 2004) p6

<sup>31</sup> Morehead

<sup>32</sup> Ombudsman, NSW, p.8.

<sup>33</sup> OECD; *whistleblower protection frameworks, compendium of: Best practices and guiding principles for legislation* (<http://www.oecd.org/dataoecd/42/43/48972967.pdf>, accessed on 13th April 2012)

<sup>34</sup> Council of Europe Parliamentary assembly Committee on Legal Affairs and Human Rights,

<sup>35</sup> Thomas Jefferson (1743-1826), co-author of the Declaration of Independence, 3rd President of the United States of America.

rule of law and democratic necessity.<sup>36</sup> Hence Good governance is about demonstrating legitimate leadership, respecting the democratic process and the purpose of public bodies. It is also about making proper and timely decisions, managing risk and allocating resources for valid reasons. Therefore good governance impacts on all activities of organisations, leadership and the delivery of service. It stems from the simple fact that the public expects public institutions to be well run, open, accountable, and transparent and uphold integrity.<sup>37</sup> The United Nations Development Program (UNDP) enunciates a set of principles that, with slight variations, appear in much of the literature<sup>38</sup>. These principles grouped in five broad themes which are Legitimacy and Voice, Direction, performance, accountability and fairness<sup>39</sup>

## 2.8 Legitimacy and Voice

The principle of Legitimacy and voice has six criteria. The first criterion refers to the existence of a supportive democratic and human rights context The second criterion is about decentralization in decision making and necessitates that any devolution is through local bodies accountable to local people.<sup>40</sup> The third criterion involves collaborative management in decision making processes.<sup>41</sup> The fourth criterion enshrines citizen participation at all local levels of involvement and equal gender participation. The fifth criterion demands existence of vibrant civil society groups and an independent media. The sixth and final criterion entails that there be high levels of trust and confidence among all key stakeholders<sup>42</sup>.

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<sup>36</sup> Landell-Mills and Serageldin, *Governance and the external factor* (Washington, DC: World Bank Annual Conference on Development Economics 1991)p 13

<sup>37</sup> UNDP, *Governance for Sustainable Human Development: A Policy document* (New York: UNDP, 1997) p8

<sup>38</sup>UNDP, p8

<sup>39</sup> Graham et al,p12

<sup>40</sup> Grindle ,p12

<sup>41</sup> UNDP,p8

<sup>42</sup> Shipley

## 2.9 Fairness

The principle of fairness is about the rule of law and equity among that all men and women and entails that all should have equal opportunities to improve or maintain their wellbeing.<sup>43</sup>

This necessitates an independent judiciary, equality of citizens before the law, the requirement for governments and institutions to base their actions on legal authorities and citizens having the right to seek legal remedies against their governments<sup>44</sup>

## 2.10 Performance.

Performance encompasses the criteria of responsiveness which alludes to the fact operations of institutions and all processes of the public sector should try to serve all stakeholders.<sup>45</sup> Performance is also about effectiveness and efficiency which entails that the aforementioned processes and institutions of the public sector must produce results that meet needs while making the best use of resources.<sup>46</sup>

## 2.11 Direction

The principle of direction comprises five criteria. The first is consistency with international direction which requires compliance with international conventions and other guidance documents.<sup>47</sup> Second is legislative direction which necessitates that regulations and laws set out clear objectives, establish clear authority, provide viable administration, include citizen participation and are available in written form. The third criterion is system wide plans and it entails the presence of quantified objectives for the management, established priorities for planning periods, and citizen participation in their implementation.<sup>48</sup> Fourth is existence of management plans and it requires that goals have formal approval by appropriate authorities, clear objectives consistent with legislation, and measurable results within given timeframes.

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<sup>43</sup> Graham et al,p12

<sup>44</sup> Dr. P. Geeta, V. K. Parigi and Rameesh Kailasam ,*Ushering in Transparency for Good Governance*  
[http://www.cgg.gov.in/workingpapers/Ushering\\_in\\_Transparency.pdf](http://www.cgg.gov.in/workingpapers/Ushering_in_Transparency.pdf)

<sup>45</sup>Centre for International Crime Prevention

<sup>46</sup> Grindle ,p10

<sup>47</sup> Centre for International Crime Prevention,

<sup>48</sup> Graham et al ,p12

The final criterion requires demonstration of effective leadership and it requires that politicians and managers provide consistent vision for the development<sup>49</sup>.

## **2.12 Accountability**

Accountability has two main streams one being accountability itself which entails that decision makers in government, the private sector and civil society organizations are accountable to the public, as well as to institutional stakeholders for their actions and decisions. The second is transparency and entails that institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.<sup>50</sup>

## **2.13 Relationship Between Good Governance And Public Interest Disclosure**

### **(Whistleblowing)**

The ultimate goal of good governance is promote sustainable development,<sup>51</sup> whistleblower laws become indispensable tools in the drive towards good governance because whistleblowing is a procedural as well as a substantive way of reinforcing the principles of good governance by strengthening accountability, transparency and public integrity<sup>52</sup>. Whistleblowing also encourages responsiveness and responsibility because individuals and institutions know that if they do not abide by the laws and policies that are supposed to govern them someone will speak up and thereby seek to hold them accountable.

By giving individuals a standardized way to speak and be heard whistleblowing helps to reinforce democratic ideals thereby encompassing the principles of good governance of legitimacy fairness performance and direction.<sup>53</sup> Furthermore there has been a growing realisation that for unaccountability and corruption to be tackled there must be consented

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<sup>49</sup> Shipley

<sup>50</sup> Centre for International Crime Prevention

<sup>51</sup> Centre for International Crime Prevention

<sup>52</sup> Centre for International Crime Prevention

<sup>53</sup> Council of Europe Parliamentary assembly Committee on Legal Affairs and Human Rights,p17

effort generated by a combination of political will from the top and public pressure from the base. This is because even if leaders are successful in changing attitudes within the government bureaucracy, more work will still need to be done because less than two percent of the population in most developing countries works for the government.

Hence there is a need to bring the rest of the ninety eight percent on board in the drive towards better accountability.<sup>54</sup> Additionally both governmental and civil organisations are growing in size and complexity. Individual jobs have also grown in complexity and technology revolutions have increased the opportunities for significant fraud and other harmful and illegal activities. This, in turn, makes the detection of wrongful conduct more difficult due to both lack of knowledge and access to information.<sup>55</sup> Whistle blowing is one sure way to obtain or regain societal control over specialised individuals and large complex organizations to ensure that there is accountability, transparency, equity and responsibility across all sectors<sup>56</sup>

## **2.14 Conclusion**

This chapter examined precipitating factors behind public interest disclosure laws, the objectives of public interest disclosure laws, types of public interest disclosure laws and the universal elements of public interest disclosure laws. The chapter also examined the concept of good governance its principles. The chapter finally analysed the relationship between good governance and public interest disclosure laws. The next chapter outlines the importance of public interest disclosure laws and good governance with regards to freedom of information laws and the protection of human rights.

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<sup>54</sup> George C.S. Benson, *Codes of Ethics and Whistle blowing, in whistle blowing-Subversion or Corporate Citizenship?* ed Gerald Vinten .(New York 1994)

<sup>55</sup> Council of Europe Parliamentary assembly Committee on Legal Affairs and Human Rights.

<sup>56</sup> Benson, p 53

## CHAPTER THREE

### **3.0 THE RELATIONSHIP BETWEEN PUBLIC INTEREST DISCLOSURE GOOD GOVERNANCE AND FREEDOM OF INFORMATION LAWS**

#### **3.1 Introduction**

It is increasingly recognized that governments hold information not for themselves but, rather, for and on behalf of the public.<sup>1</sup> It follows therefore that public bodies should be able to provide to society mechanisms through which they can access the said information which governments merely hold on their behalf. In this chapter the paper aims at analysing how the concepts of good governance, public interest disclosure are intertwined and relate to the right to information and freedom of information laws. The role of freedom of information laws, good governance and whistle blowing in the promotion and protection of human rights is also analysed.

#### **3.2 What Are Freedom of Information Laws**

In the recent past there has been an explosive growth in the number of information laws that have been adopted around the world, as well as the numerous authoritative international statements on the issue.<sup>2</sup> Currently more than ninety countries have laws granting individuals a general right to access information held by public bodies, and imposing an obligation on public bodies to proactively disclose key types of information were as in 1990, only thirteen countries had such laws<sup>3</sup>.

Freedom of information or right to information as it is sometimes referred to denotes free access the information contained in government records or access at a minimal cost.<sup>4</sup> The said information can be about government activities or the activities of private enterprise. It is a fundamental right and a necessity as people have a right to know about issues that affect their

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<sup>1</sup> Toby Mendel, *Freedom of Information as an Internationally Protected Human Right*(<http://www.article19.org/pdfs/publications/foi-as-an-international-right.pdf>.accessed 3<sup>rd</sup> February 2012)

<sup>2</sup> UNDP, *Access to Information', Practice Note*, , (Oslo, Governance Centre, 2003)p5

<sup>3</sup> Mendel

<sup>4</sup> L.Neuman, *Enforcement Models: Content and Context', Communication for Governance and Accountability Program*,( Washington DC: World Bank 2009)P18

daily lives; in this regard legislation is enacted so as to ensure that such information is readily available and easily accessible.<sup>5</sup> In practice, an effective freedom of information law legally enshrines the public's right to request information from the government and even private bodies. In some cases, it also includes a duty on the part of government to supply the requested information, unless defined exemptions apply; and the duty on the government to disclose proactively information that is of general public interest without the need for requests from its citizens<sup>6</sup>.

Freedom of information is often thought about as more of an issue for the media, and it is indeed essential for effective democracy that the media as a window of reason in society are able to access solid data and reliable information from governments, so that their stories are fact based and thorough then they are able to impart useful information to the public.<sup>7</sup> through the information imparted by the media office bearers, private and public institutions are then made accountable to society.<sup>8</sup> However, it is also important to recognize that the right to information is a tool which can be used by all members of society. This is because information empowers ordinary members of the community to better participate in their own governance and development.<sup>9</sup>

When well informed about what governments are doing, what services they provide and what programmes they are implementing, members of the public can better engage with the development activities around them at their own pace and in their own way<sup>10</sup>. However it must be noted that access to information rights are only meaningful if they are both enforceable and enforced and in this regard whistle blowing begins to play a critical role.<sup>11</sup>

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<sup>5</sup> The post 22 November 2011 p26.

<sup>6</sup> ARTICLE 19, *Freedom-Of-Information*, <http://www.article19.org/pages/en/freedom-of-information-more.html> (accessed on 12th February 2012)

<sup>7</sup> Dr M.E.M. Bwalya, Lecturer Mass Communications Department University of Zambia, Interview carried out on 3<sup>rd</sup> May 2012

<sup>8</sup> Dr M.E.M. Bwalya

<sup>9</sup> Dr M.E.M. Bwalya

<sup>10</sup> UNDP, *Access to Information*, p2

<sup>11</sup> Neuman, p 12

### 3.3 Central features of freedom of information laws

Although freedom of information laws vary considerably in their content and approach, the more progressive laws do have a number of common features which reflect international standards of freedom of information legislations elaborated by a number of authoritative sources, including the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression and the Council of Europe's Group of Specialists on access to official information. The content can also be derived from the Aarhus Convention policies and guidelines.<sup>12</sup> ARTICLE 19 has combined and set out the international standards and best practice for access to information regimes. These standards were endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, in his 2000 Annual Report<sup>13</sup> and Organization of American States (OAS) Special Rapporteur has also endorsed them, describing them as “the fundamental basis and criteria to secure effective access to information.” The said standards can be summed up in nine principles or features of freedom of information laws.<sup>14</sup> The first is that Freedom of information legislation should be guided by the principle of maximum disclosure. This means that all information held by public bodies should presumptively be accessible, and that this presumption may be overcome only in very limited circumstances.<sup>15</sup> The second is the obligation to publish, this entails that Public bodies should be under an obligation to regularly or as the need arises publish key information, through for instance government gazettes, local media and any other means of effective communication.<sup>16</sup> The third feature that freedom of information laws must encompass is that of promotion of open government. Open government entails that public bodies must be active promotion of an open government, by informing the public of their rights and the governments’ obligations as well as

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Article 19, *Global Trends On The Right To Information: A Survey Of South Asia*  
London: Article 19, 2001) p 37

Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para.43

Article 19, *Global Trends On The Right To Information*, p 37

Article 19, *Global Trends On The Right To Information*, p 37

M.E.M. Bwalya

promoting a culture of openness within government itself. Fourth is that exceptions to the right to access information should be clearly and narrowly drawn and subject only to strict harm and public interest tests<sup>17</sup>.

The fifth feature is that requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.<sup>18</sup> The sixth feature is that individuals should not be deterred from making requests for information by excessive costs as exorbitant cost would defeat the very purpose of freedom of information laws.<sup>19</sup> The seventh feature has to do with the fact that laws which are inconsistent with the principle of maximum disclosure should be amended or repealed. The eighth one is that of open meetings, this means that meetings of public bodies should where possible be open to the public.<sup>20</sup>

The ninth and most important feature as regards this paper is that of protection for whistleblowers and entails that individuals who release information on wrongdoing must be protected.<sup>21</sup> Thus a freedom of information law or in conjunction with another law should be able to protect individuals against any legal, administrative or employment-related sanctions for releasing information on wrongdoing. Protection of whistleblowers provides an important information safety valve for the whistleblower and the rest of the public by ensuring that key information does indeed reach the public.<sup>22</sup> It is of paramount importance that such protection should apply to disclosures made in public interest even where the disclosure would otherwise be in breach of a legal or employment requirement.<sup>23</sup>

Protection from liability should also be provided to individuals who, reasonably and in good faith, disclose information in the exercise of any power or duty under freedom of information

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<sup>17</sup> Article 19, *Global Trends On The Right To Information*, p 37

<sup>18</sup> Article 19, *Global Trends On The Right To Information*, p38

<sup>19</sup> Article 19, *Global Trends On The Right To Information*, p38

<sup>20</sup> Emmanuel Saffa Abdulai, *Freedom of Information: Promoting Good Governance and Stability in Sierra Leone*. at <http://www.carl-sl.org/home/commentaries/195-freedom-of-information-promoting-good-governance-and-stability-in-sierra-leone>(accessed on 8<sup>th</sup> march 2012)

<sup>21</sup> ARTICLE 19

<sup>22</sup> UNDP, Access to Information, p10

<sup>23</sup> Mendel

legislation. This would effectively protect civil servants who have mistakenly, but in good faith, release information.<sup>24</sup> This protection is vital necessity in order to change the culture of secrecy, civil servants should not have to fear sanctions for disclosing information or they will end up making mistakes in favor of secrecy<sup>25</sup>. Linked to the preceding is the protection of sources of journalists were a whistle blower uses the media as an avenue of disclosure.<sup>26</sup> On the one hand, it is up to the whistle blower to disclose reliable and reasonable information to the media so that due attention may be given to the issue. Resort to the media should be available when the matter has failed to be properly addressed after the use of appropriate internal channels, were one reasonably fears that he/she would be sanctioned internally if the disclosure is made internally, were it is believed that the internal disclosure would not have the desired effect and in cases were an avenue for internal disclosure is not available. On the other hand, once the disclosure is made to the media, the journalist should have the right to protect his or her sources.<sup>27</sup>

However the protection of journalistic sources must also not be exaggerated to the point where it becomes a cover for ill rather protection should be granted as a matter of expediency were the media is used as the external voice of the whistle blower.<sup>28</sup> With respect to the protection of journalistic sources, the judgment of the European Court of Human Rights in the case of *Tillack v Belgium*<sup>29</sup> is of particular importance. The Court's ruling upheld the right of a German journalist, working for Stern magazine, to protect his sources concerning the articles he had published on alleged irregularities in Eurostat and in the European Union's anti-fraud office. The Court found Belgium in violation of Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR) because of searches and seizures carried out at the home and office of the journalist by the Belgian police. The Court stressed that the right

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<sup>24</sup> UNDP, *Access to Information*, p10

<sup>25</sup> Dr M.E.M. Bwalya

<sup>26</sup> ARTICLE 19.

<sup>27</sup> Dr M.E.M. Bwalya

<sup>28</sup> Abdulai,

<sup>29</sup> Application No 20477/05. 2007

of journalists to protect their sources is not a "mere privilege to be granted or taken away" but that it is a fundamental component of the freedom of the press. This judgment although not binding on the Zambia jurisdiction, it should incite Zambian lawmakers throughout the world to also to reflect on the importance of the media as an external voice for whistle-blowers

### **3.4 The Importance of Freedom of Information Laws**

There has been growing recognition that access to information is not only a practical shortcut to achieving the goals of good governance but a tool for poverty eradication.<sup>30</sup> The foregoing is because human beings need information in order to realise their full social, political and economic potential. Furthermore it is a proved fact that access to information supports people centred development.<sup>31</sup> Access to information also strengthens the rule of law as it is an essential tool in the fight against corruption.<sup>32</sup> Corruption undermines democracy, creates a culture of impunity and a class of overlords who need secrecy to keep their deeds hidden in dark places<sup>33</sup>. In addition research shows that countries with access to information laws are also perceived to be less corrupt. In 2002 for instance the transparency international's annual corruption index showed that of the ten countries perceived to be the worst when it comes to corruption none had a functioning access to information regime.<sup>34</sup> Hence it can be inferred that access to information is an antidote to corruption.

The right to information is also essential to accountability and good governance.<sup>35</sup> In Africa for instance in recent years freedom of information has gained increasing recognition under the general objective of good governance<sup>36</sup> for its potential to help tackle poverty, by for example ensuring the proper expenditure of public funds, the effective implementation of development

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<sup>30</sup> UNDP, *Access to Information*,p10

<sup>31</sup> UNDP,*Access to Information*,p11

<sup>32</sup> Dr M.E.M. Bwalya,

<sup>33</sup> Abdulai,

<sup>34</sup>Transparency international press release at [http://www.transparencyinternational.org/pressreleases\\_archive/1998/1998.12.03.ford.html](http://www.transparencyinternational.org/pressreleases_archive/1998/1998.12.03.ford.html)(accessed on 8<sup>th</sup> march 2012)

<sup>35</sup> Article 19, *Global Trends On The Right To Information: A Survey Of South Asia* (London: Article 19, 2001)5

<sup>36</sup> Abdulai,

programmes and the monitoring of the millennium development goals.<sup>37</sup> The potential contribution to good governance of access to information lies in both the willingness of government to be transparent, as well as the ability of citizens to demand and use the information once obtained to blow the whistle on corruption wastage maladministration and any other illegal activities<sup>38</sup> thereby promote transparency and accountability which are associated with better socio economic and human development indicators, as well as higher competitiveness and lower corruption.<sup>39</sup>

Further access to information ensures that all willing persons are able to effectively participate in the governance of their country. Additionally access to information ensures that there is effective participation by all stakeholders in decision making process thus ensuring that resources and attention are directed to areas that they are most needed.<sup>40</sup> In addition when everyone is well informed different interests in society are easier to reconcile in order to reach a broad consensus on what is in the best interest of society as a whole. Effective participation by all stakeholders and reconciliation of different interests in society ensures that the best laws, policies and procedures are adopted in a bid to foster the right to development<sup>41</sup>

The foundation of a democratic state is the existence of an informed population that is able to hold its government accountable<sup>42</sup>. The underlying principle that all power ultimately rests with the people and must be exercised with their consent lies at the heart of democracy. Democracy therefore is premised on the recognition and protection of people's right to have a say in all decision making processes which is itself based on the central principle of equality of

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<sup>37</sup> UNDP, 'Access to Information', *Practice Note, United Nations Development Programme*, (Oslo: Governance Centre, 2003)

<sup>38</sup> Dr. P. Geeta, V. K. Parigi & Rameesh Kailasam, *Ushering in Transparency for Good Governance* [http://www.cgg.gov.in/workingpapers/Ushering\\_in\\_Transparency.pdf](http://www.cgg.gov.in/workingpapers/Ushering_in_Transparency.pdf) (accessed on 5th march 2012)

<sup>39</sup> Bellver and Kaufmann, '*Transplanting Transparency: Initial Empirics and Policy Applications*', *Draft discussion paper presented at the IMF conference on transparency and integrity* (Washington :World Bank 2005)

<sup>40</sup> Dominic Liche, *Freedom of Information and Governance*

<http://www.jctr.org.zm/publications/POST%20Articles/postFO111.pdf> (accessed on 6th April 2012)

<sup>41</sup> Enoch mulembe, Director, Human Rights Commission. Interview Carried Out On 7<sup>th</sup> December 2012

<sup>42</sup> Commonwealth Human Rights Initiative, *Open Sesame Looking For The Right To Information In The Common Wealth* ed Maja Daruwala (New Deli: Commonwealth Human Rights Indicative 2003)p6

all human beings.<sup>43</sup> The exercise of this fundamental political right requires a guarantee of crucial freedoms and in this regard the right to express one's thoughts and opinion without fear as well as to seek the right receive information<sup>44</sup>. Therefore access to information is critical for enabling citizens to exercise their voice, to effectively monitor and hold government to account, and to enter into informed dialogue about decisions which affect their lives through the ballot or otherwise.<sup>45</sup>

### **3.5 The Role of Freedom of Information Laws, Good Governance and Whistleblowing In the Promotion Of Human Rights**

The principle of universality of human rights is the cornerstone of international human rights law.<sup>46</sup> This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions.<sup>47</sup> It should be noted that the recognition of right to information is not new, as far back as 1946, the United Nations General Assembly recognised and stated that: "Freedom of Information is a fundamental human right and the touchstone to all freedoms to which the United National is consecrated"<sup>48</sup>.

There have been moves within the international community to recognise a special aspect of the right to freedom of information in relation to human rights. In 1998, the UN General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders). Article 6 of the declaration specifically provides for access to information about human rights, recognises that the right to

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<sup>43</sup> Mulembe.

<sup>44</sup> Commonwealth Human Rights Initiative, p6

<sup>45</sup> Abdulai

<sup>46</sup> OHCHR, *What are Human Rights* [http://www.ohchr.org/en/issues/Pages/What are HumanRights.aspx](http://www.ohchr.org/en/issues/Pages/What%20are%20HumanRights.aspx)(accessed on 3rd March 2012)

<sup>47</sup> Alexander Downer, *Promoting Good Governance and Human Rights through the Aid Program* (Text of the address at the Human Rights Consultations conference in Canberra August 1997)

<sup>48</sup> *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: public concern at work, 1999)p5

seek, obtain and receive information on human rights is fundamental to the effective promotion and protection of human rights.<sup>49</sup> Hence the right to information is recognised as underpinning all other human rights because without information people cannot effectively protect and promote theirs as well as other people's rights<sup>50</sup>.

In order to ascertain what the roles good governance, freedom of information and whistleblowing can play in the promotion of human rights. One must look at three factors which are necessary to ensure the adequate protection of human rights.<sup>51</sup> In the first place, governments need to be accountable for their actions because without such accountability, governments face no pressure to meet reasonable standards of governance and to ensure that an acceptable standard of human rights is maintained. In this regard whistleblowing and access to information becomes a vital tool in ensuring this accountability.<sup>52</sup>

The government can only effectively be held accountable when access to information is guaranteed and persons can blow the whistle on wrong doing by the government or inaction where the government fails to stop private hands from abusing people's rights.<sup>53</sup> Whistleblowing also plays a critical role as regards maintaining accountability by the government on the issue of human rights as it can and usually does involve warnings on various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or private enterprise.<sup>54</sup> Secondly, there needs to be an effectively functioning civil society, with genuine participation in democratic processes and broader economic and social development, including the involvement and protection of the most

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<sup>49</sup> Article 19, *Global Trends On The Right To Information*, p23

<sup>50</sup> OHCHR,

<sup>51</sup> Lanre Arogundade, *Freedom of Information Act and Civil Society* (Lagos: International Press Centre) p3

<sup>52</sup> UNDP, *Access to Information*, P12

<sup>53</sup> Downer ,P2

<sup>54</sup> UNDP, *Access to Information*, P12

vulnerable.<sup>55</sup> Civil society is made more effective were persons can access information and when those who come into contact with information about or see illegal and wrong activities are able to blow the whistle to relevant agencies or civil society without fear of reprisals.<sup>56</sup>

Furthermore civil society can only be effective in its role as a watch dog of government activities and partner in development when they can have access to information about government programs, policies and actions. It is only when civil societies are well informed that they fulfil their mandate as a government watchdog as well as a partner in the developmental process of a country. Thirdly, governments need the institutional capacity to provide effective services and maintain a sound enabling environment for the protection of human rights.<sup>57</sup> Institutional capacity includes the legal regime necessary for protection of human rights and it is in that regard that public interest disclosure laws and freedom of information laws play a vital role.

### **3.6 Conclusion**

From the preceding chapter it can be concluded that right to information, protection of whistleblowers and good governance play critical roles in the promotion and protection of human rights, especially in the rights of persons to hold their governments accountable, participate in the governance of their nations and the right to development. As regards the relationship between freedoms of information, good governance and whistleblowing, the same cannot be overemphasized as they all play vital roles in the promotion of democratic environments, accountability, transparency as well as providing citizens with the ability to enter into informed dialogue about decisions which affect their lives.

The next chapter takes an in depth look at the public interest disclosure (whistleblower) Act no 4 of 2010 to ascertain whether the Act took on board recommendations of key stake holders and international modern trends in whistleblower protection laws

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<sup>55</sup> Commonwealth human rights initiative, p6

<sup>56</sup> UNDP, *Access to Information*, p11

<sup>57</sup> Commonwealth human rights initiative, p6

## CHAPTER FOUR

### **4.0 ANALYSIS OF THE LEGISLATION GOVERNING PUBLIC INTEREST DISCLOSURES IN ZAMBIA**

#### **4.1 Introduction**

The Court of Appeal England has amply noted in *ALM Medical service v Bladon*<sup>1</sup> that there are obvious tensions, public and private, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong. The enactment, implementation and application of the whistleblowing measures and the need for properly thought out policies in the workplace, have over the last three years received considerable publicity from various quarters. This chapter will look at the history behind the enactment of the Public Interest Disclosure Act<sup>2</sup>. The chapter will also review some its substantive provisions. Further, the chapter will analyse the legislative framework governing public interest disclosures in the United Kingdom and in an effort to contrast it to that which governs the Zambian jurisdiction and finally a conclusion will be drawn.

#### **4.2 History Behind The Enactment of The Public Interest Disclosure (Whistle Blower)**

##### **Act No 4 Act of 2010**

There cannot be any misgivings that the return to multi party democracy in 1991 signalled the liberalization not only of the political and economic landscape but also introduced a new culture of corruption that encouraged political leaders and government officials to accumulate personal wealth irrespective of the method obtained.<sup>3</sup> The majority of cases of grand political corruption were between the periods 1991 -2003.<sup>4</sup> This was in spite of passing legislation's such as the Parliamentary and Ministerial Code Of Conduct Act<sup>5</sup> and the Anti Corruption

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<sup>1</sup> [2002] IRLR 807

<sup>2</sup> Act No 4 of 2010

<sup>3</sup> Burnell and Randall, *Politics In The Developing World 2de:Case Study Two :Politics In Zambia*( London: Oxford university press 2008)p14

<sup>4</sup> Ranker et.al reaction to national integrity system study :Zambia( NORAD.2004)P1

<sup>5</sup> Cap 454 of the laws of Zambia

Commission Act<sup>6</sup> which replaced the Corrupt Practices Act.<sup>7</sup> The Anti Corruption Commission Act sought to remove the Anti Corruption Commission from the executives (presidents) control there by making it more independent and free of any political interference in its operations.

Not long after the movement for multiparty democracy (MMD) assumed office, scandals after scandals of corruption began to surface. Shortly after the MMD took office, two cabinet ministers namely Akashabatwa Mbikusita Lewanika and Baldwin Nkumbula who were close associates of the president vacated their portfolios citing corruption in the new government<sup>8</sup>. Allegations of drug trafficking also became common place for instance; some cabinet ministers in the new government namely Ronald Penza, Boniface Kawimbe and Dean Mungomba accused some of their colleagues of being involved in corruption and drug trafficking which subsequently lead to some of them resigning.<sup>9</sup>

The rampant scourge of corruption coupled with maladministration has left the average Zambian severely impoverished by robbing the populace of the benefits of their natural resources and opportunities to better their lives.<sup>10</sup> It has also left the minimal existing infrastructure such as roads, schools, bridges, roads and hospitals in a deplorable state.<sup>11</sup> In spite of a number of highly publicised and dramatic corruption trials involving the former president and some of his close associates as well as other high profile individuals including former service chiefs and senior civil servants. Zambia has continued to be plagued by corruption with the government appearing to be more concerned with political patronage and

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<sup>6</sup>Act No. 47 of 1996

<sup>7</sup> Act No.14 of 1980

<sup>8</sup> African business ,September 1992 p17

<sup>9</sup> African business ,February 1994 p19

<sup>10</sup> U4Anti corruption resource centre, Overview of Corruption in Zambia  
<http://www.u4.no/helpdesk/helpdesk/query>.(accessed on 30<sup>th</sup> April

<sup>11</sup>U4Anti corruption resource centre

driven by undisguised self interest rather than the desperate need on the part of the Zambian citizenry for improved public service delivery.<sup>12</sup>

The enthusiasm with which the late president Mwanawasa tried to fight corruption is a matter of public record, he launched the biggest crack down on corruption mere months after being elected into office and some significant strides were made. At the time when the country witnessed significant successes in the corruption fight with a number of convictions scored president Mwanawasa died.<sup>13</sup> A new administration took over amid serious public allegations that the new administration was involved in numerous grand corruption scandals such as the Zamtel RP capitol deal involving the privatisation of the country's telecommunications company, the purchase of radar equipment for the nations airports and the loss of huge sums of money in the procurement process of the country's petroleum products.<sup>14</sup>

Further the new administration was accused of compromising the fight against corruption following the disbanding of the task force, embracing persons accused of corruption and the subsequent removal of the offence of abuse of office from the list of corruption offences created by the then Anti Corruption Commission Act. The removal of the abuse of office clause was done in spite of the fact that several government officials and some former service chiefs had just previously been convicted and imprisoned for abuse of authority in the previous administration based on the abuse of office clause, hence lending credence to the effectiveness of the clause in combating graft.<sup>15</sup> The new administration managed to achieve this by repealing and replacing the then existing Anti Corruption Commission Act with a new Act.<sup>16</sup>

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<sup>12</sup>U4Anti corruption resource centre

<sup>13</sup> African capacity building foundation, "*A review of institutional for addressing public sector corruption in Africa*"2004

<sup>14</sup> Burnell and Randall,p4

<sup>15</sup> U4Anti corruption resource centre

<sup>16</sup> Cap 91 of the Laws of Zambia

In addition it was argued that there was also need to amend and introduce new laws in order to ensure that Zambia's domestic laws were aligned with a number of international treaties to which the country was a party to in accordance with the principle of '*Pacta sunt servanda*'. The treaties to be domesticated included, the United Nations Convention Against Corruption, the United Nations Declaration Against Corruption And Bribery In International Commercial Transactions<sup>17</sup>, the International Code Of Conduct For Public Officials<sup>18</sup>, the African Union Convention On Preventing And Combating Corruption<sup>19</sup>(AUCPCC) and the Southern Africa Development Community Protocol Against Corruption. It is against this back ground that the government initiated legal reforms in the area of criminal law by amending some laws and introducing new ones in an effort to beef up the country's legal framework in criminal law and strengthen the laws dealing with corruption. One of the pieces of legislation thus introduced for the first time on the Zambian statute books was the Public Interest Disclosure Act No4 of 2010.

### **4.3 The Legislative Framework Governing Public Interest Disclosures in Zambia**

The objective of public Interest Disclosure (whistleblower protection) Act is to;

provide for the disclosure of conduct adverse to the public interest in the public and private sectors; provide for a framework within which public interest disclosures shall be independently and rigorously dealt with; provide for procedures in terms of which employees in both the private and the public sectors may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; safeguard the rights, including employment rights, of persons who make public interest disclosures; provide a framework within which persons who make a public interest disclosure shall be protected; and provide for matters connected with, or incidental to, the foregoing.<sup>20</sup>

The Public Interest Disclosure (Protection of Whistleblowers) Act was assented to on 12th April 2010 and is the legislation that currently governs public interest disclosures in Zambia.<sup>21</sup>

The Act applies to any disclosure made after the date of application on which the Act came

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<sup>17</sup>The Public Interest Disclosure(Protection Of Whistleblowers) Act No 4 of 2010

<sup>18</sup> United Nations Code For Public Officials <http://www.un.org/documents/ga/res/51/a51ro59.htm>(accessed 10<sup>th</sup> march 2012)

<sup>19</sup> Adopted by the 2<sup>nd</sup> ordinary session of the assembly of the union Maputo,11 July 2003

<sup>20</sup> Public Interest Disclosure(Protection Of Whistleblowers) Act No 4 of 2010 ,Preamble

<sup>21</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 .(S) 2 of

into operation, irrespective of whether or not the impropriety occurred before or after that date,<sup>22</sup> the disclosure however must be made voluntarily. The Act applies irrespective of whether or not the impropriety occurs or occurred in Zambia or elsewhere or the law applying to the impropriety is that of the Republic of Zambia or of that another country.<sup>23</sup>

The Act applies to any government agency, any private or public company, institution, organisation, body or organ registered, established or incorporated under any law.<sup>24</sup> It further provides that any provision in a contract of employment or other agreement between an employer and an employee is void in so far it purports to exclude any provision of the Act this includes agreements to refrain from instituting or continuing any proceedings under the Act or the bringing of any proceedings for breach of contract.<sup>25</sup> Disclosures covered by the Act are those that relate to, disclosable conduct, public wastage, conduct involving substantial risk or danger to the environment, an unlawful reprisal, conduct that amounts to a substantial and specific danger to the health or safety of the public, criminal offences, failure to comply with any legal obligations, miscarriage of justice, or that any of the forgoing has been concealed.<sup>26</sup>

The disclosure must be made in good faith by an employee who reasonably believes that the information disclosed and any allegation contained in it, are substantially true, as regards all the circumstances of the case, it should be reasonable to make the disclosure.<sup>27</sup> However a disclosure is only protected if it is not made for purposes of personal or pecuniary gain, the forgoing nonetheless excludes any reward payable in terms of any law.<sup>28</sup> Disclosures are protected whether or not the person or investigative wing to which it was made was appropriate, were there is a reasonable belief that the investigative wing was the one suitable

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<sup>22</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010. (SS) 3 and 24 (2)

<sup>23</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S)2

<sup>24</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S) 2

<sup>25</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S) 4

<sup>26</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S)2

<sup>27</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S)22

<sup>28</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 ( SS)13 and 34

to receive the disclosure.<sup>29</sup>The Act is meant to cover employees whether their employer is incorporated or not or is a government agency, it however excludes independent contractors from its application.<sup>30</sup>The Act on the other hand does not protect disclosures based on the merits of government policies,<sup>31</sup> those that are considered to be malicious, frivolous, vexatious or made in bad faith, misconceived, lacking in substance, trivial, made for any illegal purpose or motivated by the avoidance of disciplinary action.<sup>32</sup> Disclosures which have an appropriate method of dealing with the disclosure reasonably available and disclosure have already been adequately dealt with are also not covered.<sup>33</sup>

Section 23 of the Act restricts persons or institutions that may receive a public interest disclosure where the disclosure concerns a government agency's conduct, the conduct of a public officer in relation to a government agency, or a public interest disclosure that a person has engaged, is engaging, or intends to engage, in an unlawful reprisal to the head of the government agency, the Anti-Corruption Commission, the Police Public Complaints Authority, the Judicial Complaints Authority, the Drug Enforcement Commission, the Investigator General, and the Auditor-General. Section 38 provides for protected disclosures by employees to employers. The Act further provides that employers are to establish procedures to protect their employees from against reprisals that are, or likely to be taken against them.<sup>34</sup>

The Act provides for requests by persons making disclosures or investigative agencies that have made referrals to obtain progress reports as regards the investigations on the disclosure.<sup>35</sup>The Act also provides for interim relief and states that where a public interest disclosure is made and the person is suspended or any other administrative action is taken

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<sup>29</sup>Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 ( S)39

<sup>30</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S)2

<sup>31</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S)35

<sup>32</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010( SS)13 and 34

<sup>33</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(SS)13 and 34

<sup>34</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S)45

<sup>35</sup>Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010( S)19(1)

against that person by the employer pending investigation into the matter.<sup>36</sup> The whistleblower may then be entitled to reinstatement by the employer; compensation for any detriment suffered as a result of the disclosure; re-location to another position of equivalent level of salary and duties, in the employing agency; or any other action to remedy to any the situation.<sup>37</sup>

As regards protection against reprisals, the Act provides that persons who take any detrimental action that is in reprisal against a person who makes a protected disclosure commits an offence, and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding two years, or to both.<sup>38</sup> Further the Act provides for civil proceedings against persons who take detrimental action against whistle blowers<sup>39</sup> and provides that persons who engage in unlawful reprisals are liable in damages to any person who suffers detriment as a result of the unlawful reprisal.<sup>40</sup> The defence of absolute privilege is also provided to the whistleblower in cases where actions for defamation are brought against the whistleblower following a disclosure that falls within the confines of the Act.<sup>41</sup>

In addition, the Act also provides for the withholding of the identity of the whistleblower and the same can only be revealed in two instances that is, where consent is given by the whistleblower, if it is in the interest of natural justice and if it is expedient as regards the investigations that the identity of the whistleblower be revealed.<sup>42</sup> In section 49 the Act provides that where a whistle blower has been subjected, is subject or may be subjected, to any occupational detriment in breach of section ten, he or she may apply to any court having jurisdiction, including the Industrial and Labour Relations Court for appropriate relief or pursue any other process allowed or prescribed by any law. Furthermore, a person who

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<sup>36</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S)13(4)

<sup>37</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S)13(4)

<sup>38</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S)42 (1)

<sup>39</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S) 42(2)

<sup>40</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S)50(1)

<sup>41</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S)56

<sup>42</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S)44

engages in an unlawful reprisal is liable in damages to any person who suffers detriment as a result of the unlawful reprisal.<sup>43</sup>

#### 4.4 The Legislative Framework Governing Public Interest Disclosures in England

The English Parliament enacted the Public Interest Disclosure Act (PIDA) of 1998 which inserted new sections and amended the existing sections in the Employment Rights Act of 1996 to introduce whistleblower protection in England.<sup>44</sup> PIDA came into effect on 2 July 1999.<sup>45</sup> PIDA applies to people at work raising genuine concerns about crimes, civil offences including negligence, breach of contract, breach of administrative law, miscarriages of justice, dangers to health and safety or the environment and the cover up of any of these.<sup>46</sup> Miscarriage of justice would include matters likely to lead to a wrongful conviction, such as reliance on unsound forensic techniques, failure to disclose evidence to the defence, or perjury (although this would come both under this heading and that covering crimes). Disclosures may also be made under the common law principles for instance negligence, nuisance and defamation.<sup>47</sup> Reference may be made to the case of *Lion Laboratories v Evans*<sup>48</sup> where employees of the applicant had disclosed confidential information that the breathalyser testing equipment manufactured by applicant and predominantly used by the police in England were actually faulty.

PIDA applies whether or not the information is confidential. Thus in its provisions, the Act adopts and develops many of the signposts from the common law on whether particular information may, notwithstanding the fact it is confidential, lawfully be disclosed in the

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<sup>43</sup>Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010(S)49

<sup>44</sup> Peter Bowden, *A comparative analysis of whistleblower protection* (Adelaide: Australian Association for Professional and Applied Ethics 2005), p9

<sup>45</sup> Tan Pei Meng and Ong Seng Fook, Comparative analysis of whistleblower protection legislations in England, USA and Malaysia, *African Journal of Business Management* Vol. 5(27), 11246-11255, (November, 2011) p2

<sup>46</sup> Public Concern at Work, *Public Interest Disclosure Act Guide To Law And Practice* (London: public concern at work 2007) p4

<sup>47</sup> Public Concern at Work, p3

<sup>48</sup> [1985] QB 526

public interest.<sup>49</sup> while it draws on the common law, it differs from the common law whose cases focused on whether the confidential information might itself be published usually by a newspaper or disclosed to a regulator, rather than whether the whistleblower who made that public interest disclosure should be protected from reprisal or sanction.<sup>50</sup> However the fact that the Act covers both confidential and non confidential information does not mean that trade secrets can be disclosed lightly, as is clear from *Aspinall v MSI Mech Forge*.<sup>51</sup> In that case the Employment Appeal Tribunal held that, while a disclosure about health and safety had been protected, the employer's consequent inquiry into a perceived breach of its highly secret manufacturing process had not caused Aspinall's resignation.

Further the Act applies regardless of the geographical location of the malpractice and whether the offence or breach of a legal obligation arises under law in the United Kingdom or the applicable law of another country. However it does not apply where the disclosure of the information is itself a crime.<sup>52</sup> In addition to general employees, the Act covers workers, contractors, trainees, agency staff, home workers, police officers and every professional employed by the crown except those in the intelligence services or the armed forces and the genuinely self-employed.<sup>53</sup>

The usual employment law restrictions on minimum qualifying period and upper age limits do not apply to claims under;<sup>54</sup> neither do the limitations on claims for unfair dismissal or unfair selection for redundancy.<sup>55</sup> Moreover the rights in respect of dismissal for making a protected disclosure arise on the first day of employment. The effect is that the rights against unfair

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<sup>49</sup> Public Concern at Work,p3

<sup>50</sup>Public Concern at Work,p4

<sup>51</sup> [2002] All ER (D) 80

<sup>52</sup> Public Concern at Work. Public.p4

<sup>53</sup> Bowden p9

<sup>54</sup> Tan Pei Meng and Ong Seng Fook,p2

<sup>55</sup> Public Interest Disclosure chapter Act 28( S) 7

dismissal are not lost where the employee makes a protected disclosure after he has reached normal retirement age or, where there is none, the age of sixty five.<sup>56</sup>

To be protected, most disclosures must be made in good faith. Essentially this means the disclosure is made honestly so that the concern can be addressed. Good faith can be vitiated where the disclosure is made for some other dominant improper motive.<sup>57</sup> In *Street v Derbyshire Unemployed Workers' Centre*<sup>58</sup> the Court of Appeal held that a disclosure of information is made in good faith if it is made honestly and with no ulterior motive. A disclosure made in good faith to the employer will be protected if the whistleblower has a reasonable belief the information tends to show that the malpractice has occurred, is occurring or is likely to occur. In *Darnton v University of Surrey*<sup>59</sup> the Employment Appeal Tribunal observed that a qualifying disclosure might include what a worker had seen or heard or what had been reported to him by others. It also held that an assessment of the factual accuracy of the concern would be no more than an important tool in determining whether the belief was reasonable.

In addition if some malpractice was occurring which did not involve a breach of a legal obligation, the disclosure would still qualify if the worker reasonably believed it was such a breach. Where a third party or person is responsible for the malpractice, this same test applies to disclosures made to him. The same test also applies where someone in a public body whose leaders are appointed by ministers blows the whistle directly to the sponsoring Department.<sup>60</sup> The Act makes special provision for disclosures to prescribed persons. These are regulators such as the Health and Safety Executive, the Inland Revenue and the Financial Services Authority. Such disclosures are protected where the whistleblower meets the tests for internal disclosures and, additionally, reasonably believes that the information and any

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<sup>56</sup> Public Concern at Work.p4

<sup>57</sup> Tan Pei Meng and Ong Seng Fook.p2

<sup>58</sup>[2005 ], ICR 97

<sup>59</sup> [2003] IRLR 133

<sup>60</sup> Public Concern at Work.p5

allegation in it are substantially true and is relevant to that regulator.<sup>61</sup> Wider disclosures for example to the police, the media, Members of parliament, consumers and non-prescribed regulators are protected if, in addition to the tests for regulatory disclosures, they are reasonable under the circumstances and are not made for personal gain.<sup>62</sup>

For a wider disclosure to be protected it must also fall within one of four broad circumstances which are;<sup>63</sup> firstly that the whistleblower reasonably believed he would be victimised if he had raised the matter internally or with a prescribed regulator, secondly if there was no prescribed regulator and he reasonably believed the evidence was likely to be concealed or destroyed, thirdly the concern had already been raised with the employer or a prescribed regulator and lastly the concern was of an exceptionally serious nature.

Furthermore for these public disclosures to be protected, the tribunal has to be satisfied that the particular disclosure was reasonable.<sup>64</sup> As regards the burden of proof if the worker has been employed for one year or more, the burden of proof rests with the employer to show the reason, or principal reason, for the dismissal was an admissible reason within s.98(1)(b) or (2) of the Employment Rights Act.<sup>65</sup> However Where an employee has been employed for less than one year, he needs to establish the jurisdiction of the tribunal to hear the complaint. This means the burden rests with the employee to establish, on a balance of probabilities that the reason or principle reason for dismissal was because he or she made a protected disclosure.<sup>66</sup> In cases where there is more than one reason for the dismissal, what matters is what the real reason for the dismissal was and this will be a question of fact.<sup>67</sup> But it is still automatically unfair if the protected disclosure was the principal or core reason for the dismissal or reprisal

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<sup>61</sup> Public Concern at Work.p4.

<sup>62</sup> Bowden ,P9

<sup>63</sup> Public Concern at Work.p4

<sup>64</sup> Public Concern at Work. P4

<sup>65</sup> The Employment Rights Act chapter 20

<sup>66</sup> Bowden P8

<sup>67</sup> Tan Pei Meng and Ong Seng Fook,P2

as established in *Aspinall v MSI Mech Forge*<sup>68</sup> where the Employment Appeal Tribunal adopted the causation approach from discrimination law and said that for Public Interest Disclosure Act to apply the protected disclosure must be the real reason or the core reason.

Where a whistleblower is victimised or dismissed in breach of the Act he can bring a claim to an employment tribunal for compensation<sup>69</sup>. Awards are not limited and but are based on the losses suffered. The losses specifically include expenses reasonably incurred by the complainant and the loss of any benefit he might otherwise have expected. The worker though is under a duty to mitigate his losses.<sup>70</sup> Finally the tribunal has to reduce the award by such sum as it considers just and equitable where it finds the worker himself had contributed to or caused the detriment.<sup>71</sup> An element of aggravated damages can also be awarded.<sup>72</sup>

Where the whistleblower is an employee and he is sacked, he may within seven days seek interim relief so that his employment continues or is deemed to continue until the full hearing.<sup>73</sup> This is a potentially significant provision because, if the tribunal finds that the employee is likely to win at the full hearing, it will order that, the employee is re-employed or that his employment is deemed to continue until completion of the trial. However the practical value of this provision is somewhat limited in the light of the Court of Appeal's decision in *Taplin v. C Shippam Ltd*<sup>74</sup> where on the application of this section the court ruled that to meet the section's test of likelihood; there must be more than a reasonable chance of success. Restrictive clauses in employment contracts and severance agreements are void insofar as

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<sup>68</sup> [2002] All ER (D) 80

<sup>69</sup> Public Interest Disclosure Act (S) 8

<sup>70</sup> The Employment Rights Act .SS49(4),(3)

<sup>71</sup> The Employment Rights Act S.49(5)

<sup>72</sup> Public Concern at Work. Public Interest Disclosure Act 1998 Annotated guide.

<sup>73</sup> *Public Interest Disclosure Act (S) 9*

<sup>74</sup> [1978] IRLR 450

they conflict with the Act's protection. Although the Act does not require organisations to set up or promote any particular whistleblowing policies, they are strongly recommended.<sup>75</sup>

#### **4.5 Comparison Between The Zambian Legislation And The English Legislation**

The English legislation fully supports whistleblowers, by using public funds to help compensate them if they suffer any reprisals or discrimination. It is because of the forgoing that it has been argued that in practice it is better described as a whistleblower compensation Act, for it fails to ensure that the whistleblower's complaint is investigated, and that action is taken to rectify any problems that have or may emerge.<sup>76</sup> Rather the Act provides for compensation to the whistleblower for any reprisals. Whistleblowers may make their complaints to their employers, to a prescribed regulator or an industry regulating body. Whistleblowers can also go to the police, the media, Members Parliament and non prescribed regulators if they are acting in good faith.<sup>77</sup> The most important aspect of PIDA, however, is that the emphasis is on workplace grievances. This stress raises the issue of the distinction between personal workplace complaints and whistleblowing. PIDA is applicable to the private and public sectors alike.<sup>78</sup>

The Zambian public interest disclosure Act provides for the disclosure of conduct adverse to the public interest in both the public and private sectors. It seems to provide for a framework within which public interest disclosure should independently and rigorously dealt with. It also provides procedures and terms on which employees in both private and public sectors may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers. The Act also put in place measures to safeguard the rights, including employment rights of persons who make public interest disclosures

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<sup>75</sup> Public Concern at Work,p2

<sup>76</sup> Bowden P 9

<sup>77</sup> Tan Pei Meng and Ong Seng Fook, P2

<sup>78</sup> Bowden, P.9

and attempts to provide a framework within which persons that makes public interest disclosure should be protected.

The main differences between the two pieces of legislation is that unlike the English Act, the Zambian Act is not built around compensation of whistleblowers using public resources but rather focuses on investigations of disclosures as well as protection of the whistleblower from reprisals. The Zambian legislation is also different from the PIDA in that it provides to the whistleblower the right to obtain progress reports on the investigation following the disclosure. Further the Zambian legislation does not provide for a tribunal to deal with complaints of retaliation but provides for appeals to the Courts. The Zambian Act also differs from PIDA in that it does not provide for disclosure to external entities such as the media and members of parliament but limits the entities that are allowed to receive protected disclosures. Additionally the two legislations differ in that while PIDA does not compel employers to put in place procedures and mechanisms for public interest disclosures to be made but merely recommends that employers do so. The Zambian Act on the other hand compels employers to do so.

#### **4.6 Conclusion**

This chapter examined the history behind the enactment of the Public Interest Disclosure Act No 4 of 2010 as well as some of its substantive provisions. Further the chapter also analysed the legislative framework governing public interest disclosures in the United Kingdom and contrasted it to the legislation in the Zambian jurisdiction. The final chapter of this paper draws conclusions from the preceding chapters and provides list of recommendations following the conclusion of the research.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### **Introduction**

In chapter one, the paper outlined the problem that obligated the research. The objectives of the research were delineated as, to highlight the importance of public interest disclosure protection and the role it plays in ensuring the realization of good governance practices and adherence to the rule of law, to analyse the role that whistle blower protection has on other fields of law in particular freedom of information laws and human rights, to ascertain if the new Act meets international standards of whistle blower protection that are necessary for attainment of good governance practices, to propose appropriate measures to be taken to ensure that the new Act accomplishes the intended purpose of its enactment. The justification of the research was to verify whether the new Act will help in fostering transparency, accountability, efficiency and adherence to the rule of law. The research is also an addition to the ever growing valuable discourse on the need to ensure the attainment of good governance practices in Zambia. Chapter one also laid down the methodology that had been employed research.

The paper in chapter two gave an overview of the purpose of whistleblower laws. The aforementioned chapter also defined who a whistleblower is. It further outlined the efforts advanced through the international legal framework to protect whistleblowers and laid down the position in favour of the protection of whistleblower against discrimination and reprisals. Chapter two also evaluated the precipitating factors behind whistleblower legislations and outlined the universal features whistleblower legislations as well as the reasons why such legislations are important. Additionally the chapter reviewed the concept and tenets of good governance and how they relate to whistleblowing.

Chapter three attempted to establish the relationship between good governance, public interest disclosures (whistleblowing) and freedom of information laws. The chapter also identified what

freedom of information laws are as well as what the rationale behind them is. The Central features of freedom of information laws were also outlined. The significance of freedom of information laws were also laid out. Chapter three further defined the role of the whistleblowing, good governance and freedom of information laws in the protection and preservation of human rights.

In chapter four the paper outlined the history behind the enactment of the Public Interest Disclosure Act No.4 of 2012. The paper further carried out a comparative analysis of the legislation governing public interest disclosures in Zambia and the United Kingdom and noted the differences between the two legislations. Having done the foregoing, this chapter shall therefore draw conclusions from the preceding chapters as well as make recommendations on overarching changes that need to be done in order to strengthen the legal framework that governs public interest disclosures in Zambia.

## 5.2 General Conclusions

From chapter one it can be noted that whistleblowing has many different facets. It can be seen as an act of free speech, an anti-corruption tool and an internal dispute resolution mechanism.<sup>1</sup> The different definitions draw different boundaries in relation to the vision, scope and nature of the relevant whistleblowing frameworks.<sup>2</sup> On one hand whistleblowing is seen by some as an anti-corruption tool with the emphasis on disclosure of illegal, immoral or illegitimate practices. On the other hand, others have focused on whistleblowing as a workplace trend thus defining it as a disclosure made by an employee about employer organisations. Nevertheless others such as the European Court of Human Rights<sup>3</sup>, view whistleblowing as an expression of dissent and as an element of free speech in the workplace. However from the preceding chapters, it can be concluded that whistleblower protection is essential to encourage the general reporting of misconduct, fraud, maladministration, wastage, breaches of legal obligations and corruption and

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<sup>1</sup> Patricia, Martin, *The Status of Whistleblowing in South Africa: taking stock*. (Cape town open democracy advice centre 2010 ) p31

<sup>2</sup> D Banisar, *Whistleblowing: International Standards and Developments*( Transparency International 2006)P 4

<sup>3</sup> *Guja v Moldova*, European Court of Human Rights (14277/04), February 2008

therefore has a more inclusive and expansive role<sup>4</sup> as a means of promoting accountability by allowing for the disclosure by any person of information about misconduct. Chapter two noted that the risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected.<sup>5</sup> Notable also in chapter two was the fact that whistleblowing relates to internal and external disclosures and must apply to all organisations whether they be public or private. The disclosure can be internal to higher-ranking officials in the organisation but also to external bodies such as regulatory bodies, ombudsmen, anti-corruption commissioners, elected officials and the media.<sup>6</sup>

The paper further established in chapter two that by promoting responsible and accountable use of public resources and property, whistleblowing and good governance are causally linked to socio-economic development, especially in developing countries. Whistleblowing and good governance are also of great public value because they reduce the risk of harm to others. It was further shown in Chapter two that whistleblowing often reveals information that is critically important for public life.

Moreover whistleblowing and good governance play critical roles in the promotion and protection of human rights. Additionally from chapter two it can be concluded that whistleblowing is of essential value to all types of institutions because it promotes good organisational governance and is an effective cooperate governance and internal risk management tool. Chapter two has also noted that protecting of public sector whistleblowers facilitates the reporting of passive bribery, as well as the misuse of public funds, waste, fraud and other forms of corruption. On the other hand protecting private sector whistleblowers facilitates the reporting of active bribery and other corrupt acts committed by companies and

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<sup>4</sup> Martin, p31

<sup>5</sup> OECD; *whistleblower protection frameworks, compendium of: Best practices and guiding principles for legislation* (<http://www.oecd.org/dataoecd/42/43/48972967.pdf> ,accessed on 13th April 2012)

<sup>6</sup> Banisar, P 4

private organisations.<sup>7</sup> It was further established in chapter two that by encouraging and facilitating whistleblowing generally, in particular by providing efficient and effective legal protection and clear guidance on reporting procedures, can also help authorities monitor compliance with laws and detect violations of anti-corruption laws.<sup>8</sup> Moreover by providing effective protection for whistleblowing supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures.

In chapter two it was additionally established that the protection whistleblowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is paramount in efforts to combat corruption, promote public sector integrity and accountability, and uphold a clean business environment.<sup>9</sup> The United Kingdom Committee on Public Life elaborates further in its statement that whistleblowing is “both an instrument in support of good governance and a manifestation of a more open organisational culture”.<sup>10</sup>

The paper further noted in chapter two that international instruments aimed at combating corruption have also recognised the importance of having whistleblower protection laws in place as part of an effective anti-corruption framework. Whistleblower protection requirements have been introduced in the United Nations Convention against Corruption,<sup>11</sup> African Union Convention on Preventing and Combating Corruption<sup>12</sup> and the SADC protocol on corruption. Such provisions have strengthened the calls under the international legal framework for countries to establish effective whistleblower protection laws.<sup>13</sup> From the discussions on the importance and universal elements of whistleblower legislation in chapter two, it has been

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<sup>7</sup> OECD; *whistleblower protection frameworks, compendium of: Best practices and guiding principles for legislation* ,

<sup>8</sup> Devine and Walden, p3

<sup>9</sup> OECD; *Recommendation on Improving Ethical Conduct in the Public Service* (<http://www.oecd.org> ,accessed on 13th April 2012)

<sup>10</sup> Devine and Walden, P 3

<sup>11</sup>UNCAC Articles 8, 13 and 33

<sup>12</sup> African Union Convention on Combating Corruption, Article 5(6)

<sup>13</sup> OECD; *whistleblower protection frameworks, compendium of: Best practices and guiding principles for legislation*

covered that there are certain guiding principles that an effective whistleblower legislation must encompass, these have been identified as a reference point for countries intending to establish, modify or complement whistleblower protection frameworks. In this sense, they are prescriptive and offer guidance for future legislation and can provide a benchmark against which current legislation should be tested. These guiding principles are broadly framed and can apply to both public and private sector whistleblower protection.<sup>14</sup> From the foregoing it can be seen that through chapter two the importance of public interest disclosure protection and the role it plays in ensuring the realization of good governance practices and adherence to the rule of law are highlighted.

The paper in chapter two has recognised that the focal point of whistleblower legislation is free speech right, an ethical release, and an administrative mechanism.<sup>15</sup> It was also noted in chapter three that there is an undisputed relationship between good governance, whistle blowing and the right to information. Moreover it was also noted that each of the concepts standing on their own would not achieve their objectives, but when they united implemented together they ensure that individuals have the ability to speak out in their conscience and that all organisations are more open and accountable to their employees, shareholders and the greater public in their activities.<sup>16</sup>

In chapter four the paper noted that there has been an introduction of a new Act on the Zambian statute books to govern public interest disclosures called the Public Interest and Whistle Blower Protection Act No 4 of 2010. The Act was enacted as a direct reaction on calls to beef up the legal framework governing criminal law generally and corruption following the intolerable corruption levels that have engulfed the nation. The enactment was also necessary because Zambia needed to bring her legislative framework in line with international standards following

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Devine and Walden, p3

Banisar, p 4

OECD, *whistleblower protection frameworks, compendium of: Best practices and guiding principles for legislation*

the ratification of a number of international treaties and instruments that needed to be domesticated.

### **5.3 Recommendations**

Following the analysis of the Zambia's public interest disclosure Act in chapter four, a number of weaknesses in the Act emerged. It is these weaknesses that ought to be dealt with in order to make the framework governing public interest disclosures more effective. The following recommendations are consequently about policy and implementation changes that must be made to Zambia's whistleblowing framework in order to make it more effective and bring it up to date with modern international trends.

The first recommendation is that the Act should define the words substantial and/or serious as used in the definition of disclosable conduct under subsection (f)<sup>17</sup> Further the terms is used throughout the Act in different other sections and subsections. Thus a whistleblower might not be protected by the law if in the discretion of the institution to which the disclosure is made the conduct complained of is not viewed as serious and or substantial. It is therefore recommended that the Act define the words to reduce the room of wide discretionary powers which may be easily abused

The business, labour and civil society must exercise their collective rights, as contained in the various international and continental Conventions to participate in the review, monitoring and awareness-raising initiatives around the Act and related laws. In addition, a uniform Code of Good Practice for implementation by government and private institutions, organisations and companies must be developed under the Act. The code ought to be developed through a consultative process which draws in all the affected role-players, including those represented trade unions, the federation of employers and the entire civil society. Moreover the Act must require all organisations to submit annual reports on their policies, procedures, disclosures

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<sup>17</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S) 2

received and their responses thereto, as well as details of the number and nature of any reprisal against whistleblowers as a way of ensuring adherence to the Act.

It is further recommended that the definition of an employee under the Act be expanded.<sup>18</sup> It is proposed that an independent contractor for the sake of this legislation should be deemed to be an employee as independent contractors too can come across information or witness actions that ought to be disclosed and are therefore potential whistleblowers. There is also need to expand the ambit of the law so that all potential whistleblowers are drawn into its protective field. The preceding is vital because it increasingly recognised that potential whistleblowers are not limited to employment context but cut across all sectors of society and play a critical role in improving accountability, transparency integrity consequently propelling the country towards better governance practices.

Additionally there is a need to include in the definition of an investigation act in section two of the Act<sup>19</sup> other bodies that might be involved in investigations of abuse of office such as taskforces, committees on corruption, and tribunals investigating acts of corruption and maladministration. Furthermore, the provision that disclosures on the merits of government policy shall not be protected needs to be amended because certain government policies might broader on corruption and there is therefore a need for citizens to be on the look out and report such manoeuvres before the policies are made.

Given that there is an irrefutable relationship between freedom of information laws and whistleblower legislation.<sup>20</sup> There is for that reason a major setback in the framework governing whistleblowing due to the fact that in defining protected disclosures, the Act does not propose to protect disclosures in respect of the disclosure amounts to an offence. It is therefore recommended that the process of enacting the freedom of information bill is expedited thus

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<sup>18</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010 (S) 2

<sup>19</sup> Public Interest Disclosure (Protection of Whistleblowers) Act No. 4 of 2010

<sup>20</sup> Martin, p4

rowing down the application of the provision and thereby to leading more efficiency in the whistleblower protection framework.

ere is also a need to widen the scope of persons and entities that can receive disclosures to include the media and members of parliament because they are important partners in the promotion of good governance and play critical roles as watchdogs of government actions or actions and are windows of reason. As regards the media it is common knowledge that the media is often the only door open to the whistleblower determined to expose wrongdoing and governments often only move on allegations once they have been aired in the media.<sup>21</sup>

ditionally monetary incentives or financial rewards for whistleblowing on misconduct that leads to the recovery money should be introduced as an added tool in the fight against corruption. As has been seen in Liberia where President Ellen Johnson-Sirleaf recently issued a decree to pay and protect whistleblowers as part of her campaign to tackle corruption. Under the new measures, anyone giving information leading to money being recovered will get 5% of the recovered or saved sum.<sup>22</sup>

#### **4 Conclusion**

his concluding chapter attempted to draw conclusions from the preceding chapters on the importance of public interest disclosures and good governance as well as the relationship between whistleblowing, good governance outlined in chapter two. The chapter also summarised the modern or best practice trends in whistleblower legislation laid down there in chapter two. The importance of relationship between whistleblowing, good governance, freedom of information laws and their role in the protection of human rights as outlined in chapter three were also drawn. Following analysis of the framework governing public interest disclosures in Zambia in chapter four, the chapter outlined a number of recommendations of what ought to be done in order to strengthen the legal frame work that governing public interest disclosures.

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