



**REPUBLIC OF SOUTH AFRICA**

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**DISCUSSION DOCUMENT ON  
PROPOSED REFORMS FOR THE  
WHISTLEBLOWER PROTECTION  
REGIME IN SOUTH AFRICA**

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## EXECUTIVE SUMMARY

(i) The legal environment has a major influence on an individual's decision to blow or not to blow the whistle. This is because an individual's decision is likely based on the analysis of the potential retaliation and offered protection, among other factors. Protection for whistleblowers is provided by the Protected Disclosures Act, 2000 (Act No. 26 of 2000) (the PDA). The PDA was primarily enacted to provide for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers and most importantly to provide protection to employees who make a disclosure.

(ii) It has been highlighted that while the PDA is well intended, it is deficient in many important respects.<sup>1</sup> It was found that in the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud into the Public Sector Including Organs of State (the Zondo Commission), the PDA does not provide a clear-cut procedure for the whistleblower to follow when blowing the whistle and it does not sufficiently guarantee that the disclosures will be protected. Furthermore, it is not pro-active in providing physical protection, it offers no incentives to the whistleblower and it does not ensure that all such information finds its way to a destination with specialised skills in receiving, investigating, and utilising such information effectively.

(iii) Just Share,<sup>2</sup> on its report, supported the Zondo Commission observation on the fate of whistleblowers when it stated that the more important the disclosures a whistleblower makes, the more devastating the consequences such as financial and reputational ruin, losing homes and custody of children, harassment and intimidation, criminal prosecution and the institution of spurious civil cases. Further consequences could be the inability to find employment, personal threats and threats against family members, anxiety and depression. Without exception, this retaliation goes unpunished. It is with this background that this document is based.

(iv) This document looks at whistleblower protection from the point of view of the legal regime governing protected disclosures in South Africa and other Jurisdictions. The report sets out to identify gaps within South Africa's legislative framework and further proposes

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<sup>1</sup> Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud into the Public Sector Including Organs of State

<sup>2</sup> [https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report\\_may2022\\_final.pdf](https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report_may2022_final.pdf)

recommendations in closing the identified gaps. The report is divided into three parts: Part A, Part B and Part C.

(v) Part A focuses on the South African whistleblower legal regime holistically. The premise of Part A is to understand the framework surrounding the protection of whistleblowers in South Africa. Therefore, this Part focuses on relevant legislation that governs the protection of whistleblowers in South Africa and further analyses cases that have been taken to court under the PDA, to test the strength of the PDA and relevant legislation when applied in court. This Part further lays out the shortcomings of the legal regime identified by interested parties and it also looks at what are the recommendations suggested by the interested parties for the shortcomings.

(vi) Part B focuses on whistleblower protection regimes in international jurisdictions. Five countries outside of Africa were considered i.e., the United States of America, the United Kingdom, New Zealand, Canada and Australia. Five countries in the African continent were considered i.e., Uganda, Namibia, Kenya, Tanzania and Ghana. These countries were sampled to maximise diversity, to allow us to explore the universality of the phenomenon.

(vii) Part C concludes and recommends, after taking into consideration Part A and Part B, this is done with a view to provide potential interventions within the current legislative framework.

## PART A

### CHAPTER 1: WHISTLEBLOWER PROTECTION IN THE SOUTH AFRICAN CONTEXT

1.1 In order to understand the extent of the problem that is faced by whistleblowers, it is imperative that an inventory of the South African legislative framework regarding whistleblowers is done in order to identify the gaps and the reason behind the perceived and actual lack of protection of whistleblowers.

1.2 The Republic of South Africa (“South Africa”) has various laws that apply to different categories of whistleblowers such as employees or the public. These laws provide different levels of protection and duties to those who come forward with information on an alleged wrongdoing.

#### A Legislation applicable to whistleblower protection in South Africa<sup>3</sup>

No.	Legislation	Relevant Section/s
1.	The Constitution of the Republic of South Africa, 1996	Sections 9, 14, 16 and 23
2.	The Protected Disclosures Act 2000 (Act no. 26 of 2000)	All
3.	The Labour Relations Act, 1995(Act No.66 of 1995) (“LRA”)	Sections 185, 186(2)(d), 187(1)(h),188A(11) and 194
4.	The Companies Act, 2008 (Act No.71 of 2008)	Section 159
5.	Financial Intelligence Centre Act 2001 (Act No. 38 of 2001) (FICA)	Sections 28, 29, 37 and 38
6.	Pension Funds Act, 1956 (Act	Sections 9B, 13B(10) and

<sup>3</sup> [https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report\\_may2022\\_final.pdf](https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report_may2022_final.pdf)

	No. 24 of 1956)(PFA)	37(1)
7.	National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)	Section 31 and 34B
8.	National Forest Act, 1998 (Act No. 84 of 1998)	Section 60
9.	National Nuclear Regulatory Act 1999 (Act No. 47 of 1999)	Section 51(4)
10.	Marine Living Resources Act 1998 (Act, No. 18 of 1998)	Sections 57 and 61
11.	Municipal Finance Management Act, 56 (Act No.56 of 2003)	Sections 32(6), 32(7) and 102(2)
12.	Public Finance Management Act 1999 (Act No. 29 of 1999) (“PFMA”)	Section 38(1)(g)
13.	Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)	Sections 18 and 34
14.	Protection Against Harassment Act, 2011 (Act No. of 2011)	Sections 1 and 2
15.	Witness Protection, 1998 (Act No. 112 of 1998)	Section 7 and in general

## 1 The Constitution

1.3 An extract from the Preamble of the Constitution of the Republic of South Africa states that:

“We, the people of South Africa,  
 Recognise the injustices of our past;  
Honour those who suffered for justice and freedom in our land;  
Respect those who have worked to build and develop our country; and  
 Believe that South Africa belongs to all who live in it, united in our diversity.  
 We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and



establish a society based on democratic values, social justice, and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”. **(Our emphasis)**

1.4 It is imperative to bear in mind that the Constitution establishes the foundational basis for our laws, within which all laws must be in accordance in seeking the realisation of a society based on human dignity, equality and fundamental human rights and freedom.<sup>4</sup> The Constitution seeks to lay the foundation for a democratic and open society in which government is based on the will of people. Whistleblowing is fundamental to the realisation of the governing constitutional principles of transparency, accountability and a just society based on democratic principles.<sup>5</sup>

1.5 The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.<sup>6</sup> There are several rights contained in the Bill of Rights which are significant to the protection of whistleblowers:

<b>Section 9(1)</b>	Everyone is <b>equal before the law</b> and has the right to equal protection and benefit of the law.
<b>Section 10</b>	The right to <b>dignity</b> , and to have one’s dignity respected and protected.
<b>Section 11</b>	The right to <b>life</b> .
<b>Section 12</b>	The right to <b>freedom and security of the person</b> .
<b>Section 14</b>	The right to <b>privacy</b> .
<b>Section 16</b>	The right to <b>freedom of expression</b> , which includes freedom to receive or impart information.
<b>Section 23</b>	The right to <b>fair labour practices</b> .

<sup>4</sup> Constitution of the Republic of South Africa, 1996 section 1(a)

<sup>5</sup> Constitution of the Republic of South Africa, 1996section 1(d)

<sup>6</sup> Constitution of the Republic of South Africa, 1996 S7(1)

1.6 The Constitutional Court, in the case of *Tshishonga v Minister of Justice and Constitutional Development*<sup>7</sup> stated that:

“The PDA takes its cue from the Constitution of the Republic of South Africa Act No 108 of 1996. It affirms the “democratic values of human dignity, equality and freedom.” In this respect its constitutional underpinning is not confined to particular sections of the Constitution such as free speech or rights to personal security, privacy, and property. Although each of these rights can be invoked by whistle-blowers, the analysis in this case is from the perspective of the overarching objective of affirming values of democracy, of which the particular rights form a part. Democracy embraces accountability as one of its core values.”.

## 2 The Protected Disclosures Act

1.7 The framework for the protection of whistleblowers in South African is in the PDA which governs how and to whom “protected disclosures” should be made. A protected disclosure refers to a category of disclosures, which when disclosed according to the PDA, entitles a whistleblower to certain legal protection.

1.8 The purpose of the PDA is to protect the public and private sector employees or workers from being subjected to an “occupational detriment” because they made a protected disclosure; to provide for remedies where an occupational detriment does occur and to provide procedures in terms of which information can be disclosed “in a responsible manner”.<sup>8</sup>

1.9 Practically, this means that if a person discloses information which is classified as a protected disclosure and an occupational detriment occurs because of disclosing, an employee or worker can approach any court with jurisdiction, which includes the Labour Court, for “appropriate relief”. The courts are empowered to make any appropriate order which is “just and equitable in the circumstances” where an occupational detriment has occurred.

1.10 Any dismissal of an employee because of making a protected disclosure is automatically unfair<sup>9</sup> and any other occupational detriment is deemed to be an unfair labour practice.<sup>10</sup> The whistleblower may then follow the relevant procedures set out in the LRA.

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<sup>7</sup> *Tshishonga v Minister of Justice and Constitutional Development and Another* [2006] ZALC 104 (26 December 2006), at para. 106.

<sup>8</sup> Protected Disclosures Act, 2000 (Act no. 26 of 2000), Section 2

<sup>9</sup> Section 186(2)(d) of the LRA

<sup>10</sup> Section 187(1)(h) of the LRA

1.11 A disclosure in terms of the PDA means:<sup>11</sup>

Any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:

- “(a) That a criminal offence has been committed, is being committed or is likely to be committed.
- (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject.
- (c) That a miscarriage of justice has occurred, is occurring or is likely to occur.
- (d) That the health or safety of an individual has been, is being or is likely to be endangered.
- (e) That the environment has been, is being or is likely to be damaged.
- (f) Unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998, or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.
- (g) That any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.”.

1.12 Sections 5 to 9 of the PDA provide the requirements for a disclosure to be protected. A disclosure is protected depending on to whom the disclosure was made. The requirements vary according to the persons who receive the disclosure. For example, a disclosure to a legal advisor is protected if it is made “with the object of or in the course of obtaining legal advice.” Disclosures to employers must be made in good faith and in line with the employer’s whistleblowing procedures. Disclosures to certain persons and bodies included in section 8 of the PDA are protected if made in good faith with a “reasonable belief” that the information is “substantially true”. In accordance with section 9, an “external” disclosure which is not to the employer or a body prescribed by the Act is deemed protected only if it meets the conditions in the section.

1.13 In the case of *Radebe and another v Mashoff Premier of the Free State Province and Others*<sup>12</sup> the Court held that for the disclosure to be protected in terms of the PDA, the applicant must show that the disclosure exhibits all of the following elements. If one is absent, it is not a protected disclosure in terms of the PDA:

- “(a) There must be a disclosure of information.

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<sup>11</sup> Protected Disclosures Act, 2000 (Act no. 26 of 2000), section 1

<sup>12</sup> *Radebe and Another v Mashoff Premier of Free State Province and Others (JS140/08) [2009] ZALC 20*

- b) It must be information regarding any conduct of an employer or an employee of the employer.
- c) It must be made by an employee (or shop steward).
- d) The employee must have reason to believe that the information concerned shows or tends to show one or more of the improprieties listed under the definition for 'disclosure' (a-g) above.”.

1.14 Section 3B of the PDA sets out, in detail, the procedures and time frames to be followed once a disclosure has been made. In this respect, employers are required to, as soon as reasonably possible, but within a period of 21 days after receiving the protected disclosure, decide whether to investigate the matter or refer the disclosure to another person or body. The employer is also required to acknowledge receipt of the disclosure in writing by informing the employee or worker of its decision to investigate the matter or to refer it to another person or body. Should an employer be unable to decide within this period, the employer will be required to inform the employee or worker, in writing, that it is unable to do so and, thereafter, advise the employee or worker on a regular basis, at intervals of not more than two months at a time, that the decision is still pending. In such an instance, the employer is required to advise the employee or worker of its decision on whether to investigate the matter as soon as reasonably possible but within a period of six months after the protected disclosure has been made.

1.15 An employer need not comply with the duty to advise an employee or worker of its decision on whether to investigate the relevant matter if “it is necessary to avoid prejudice to the prevention, detection or investigation of a criminal offence”. An employer will also be required to inform the employee or worker of the outcome of any investigation undertaken at the conclusion of the investigation.<sup>13</sup>

1.16 The PDA imposes an obligation on employers in terms of section 6(2)(a)(i) and (ii), to authorise internal reporting procedures to handle the disclosure of information and to make employees aware of the existence of these procedures.

1.17 Section 9A(1)(a) and (b) provides immunity against civil and criminal liability flowing from a protected disclosure which shows that a criminal or other substantial legal offence has been committed, even where such disclosure is prohibited by any other law, contract or agreement requiring the individual to maintain confidentiality.

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<sup>13</sup> Section 3B of the PDA

1.18 The PDA is designed to safeguard whistleblowers from any form of retribution by their employers. The Act defines "occupational detriment" as any negative action taken against a whistleblower, other than dismissal. This includes disciplinary action, suspension, demotion, harassment or intimidation in the workplace. It also covers instances where a whistleblower is transferred against their will or refused transfer or promotion.<sup>14</sup>

1.19 Since the PDA is premised on the employer-employee relationship, it does not deal with harm which goes beyond work-related detriments. This means that issues such as blacklisting, bullying and harassment that occur outside of work incidents are not covered by the PDA. Additionally, threats that occur outside of the workplace and legal costs are also not addressed by the act. These economic impacts are often cited by whistleblowers as some of the most difficult consequences to overcome.<sup>15</sup>

1.20 Although the PDA and the LRA share some similarities in terms of employee protection, the PDA provides more comprehensive details on the types of occupational harm that will be prohibited. Moreover, it resolves any legal uncertainties that employees may have if they only had the LRA at their disposal. The PDA ensures that employees who disclose information about illegal or unethical practices are protected from retaliation by their employers. This protection is crucial as it encourages employees to report any misconduct without fear of negative consequences. Ultimately, the PDA plays a significant role in promoting transparency and accountability in the workplace, which is vital for maintaining trust and integrity within organisations. The adequacy of the PDA in providing this protection is another question altogether.

### **3 Labour Relations Act**

1.21 Any employee that has been subjected to "occupational detriment" in breach of section 3 of the PDA may approach any court with jurisdiction, including the Labour Court.

1.22 Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed or subjected to unfair labour practices. Section 186(2)(d) and section 187(1)(h) of the LRA infuses "occupational detriment" in terms of the PDA into the legal realm governing unfair dismissals and unfair labour practices.

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<sup>14</sup> Department of Justice and Constitutional Development (2011) "Practical guidelines for employees in terms of section 10(4)(a) of the Protected Disclosures Act, 2000 (Act No. 26 of 2000)"

<sup>15</sup> [https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report\\_may2022\\_final.pdf](https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report_may2022_final.pdf)

- 1.23 The LRA limits the amount of compensation that can be paid, as follows:
- (a) Sections 194(1) and (4): compensation for unfair dismissal and unfair labour practice may not be more than the equivalent of 12 months' remuneration.
  - (b) Section 194(3): compensation for automatically unfair dismissal may not be more than the equivalent of 24 months' remuneration.

#### **4 Companies Act**

1.24 Section 159 of the Companies Act is entirely dedicated to the protection of whistleblowers within the context of a company. The Companies Act, with regards to section 159 expands the protection for whistleblowers provided by the PDA. It is applicable to both profit and not-for-profit companies. Section 159(2) renders any section of a Memorandum of Incorporation or rules or an agreement, void if it is inconsistent with, limits or sets aside the effect of section 159.

1.25 The section applies to potential whistleblowers who are shareholders, directors and company secretaries who make a disclosure in good faith to the Companies and Intellectual Property Commission, the Companies Tribunal, a director, auditor or company secretary.

1.26 The person making the disclosure must reasonably believe at the time of making it that the information shows or tends to show that a company, director or prescribed officer has:

- (a) contravened the Companies Act;
- (b) contravened any other statutory obligation to which the company is subject;
- (c) engaged in conduct that endangers or threatens to endanger the health or safety of any individual or is likely to harm the environment;
- (d) unfairly discriminated against; or
- (e) contravened any other law in a way that could expose the company to liability or is prejudicial to the interests of the company.

1.27 If these requirements are met, the whistleblower has "qualified privilege" in respect of the disclosure and is immune from any civil, criminal or administrative liability for that disclosure. Furthermore, the whistleblower is entitled to compensation from any person who causes detriment or threatens to cause detriment.

1.28 Section 159(6) places the onus on the person who causes or threatens to cause the detriment to show that his or her behaviour was not the result of the whistleblowers disclosure.

## **5 Financial Intelligence Centre Act**

1.29 The Financial Intelligence Centre Act (FICA) intends to establish a Financial Intelligence Centre (FIC) to combat money laundering activities and to impose certain duties on institutions and other persons who might be used for money laundering purposes.

1.30 Section 29 of the FICA places a duty on people who carry on a business, manage a business or who are employed by a business and know or suspect unlawful activity in relation to, inter alia: money laundering, tax evasion and the financing of terrorist activities, to report such knowledge to the FIC.

1.31 Section 37 of FICA provides that these duties to report are not affected by any confidentiality laws or agreements and section 38 provides protection for people who report unlawful activity to the FIC. The section provides that no criminal or civil action can lie against any institution or person complying in good faith with the provisions of FICA. Neither can they be compelled to give evidence in criminal proceedings arising from their disclosure. The identity of the person making the disclosure is protected in criminal proceedings unless he or she gives evidence.

## **6 Environmental Acts**

### **(i) *The National Environmental Management Act***

1.32 Section 31(4) of the National Environmental Management Act (NEMA) provides statutory protection for a person who, in good faith, reasonably believes that he or she is disclosing evidence of an environmental risk, provided that disclosure is made in accordance with section 31(5).

1.33 Disclosures are protected if they are made:

- (i) to a committee of Parliament or of a provincial legislature; to an organ of state responsible for protecting the environment or emergency services; to the Public Protector, the Human Rights Commission or the Attorney-General;

- (iii) to the media if there are “clear and convincing grounds that the disclosure was necessary to avert an imminent and serious threat to the environment;” or if the public interest in disclosure clearly outweighed any need for non-disclosure;
- (iv) in accordance with any applicable external or internal procedure for reporting the matter concerned; or
- (v) where the information is available to the public.

1.34 A person who makes a disclosure under these circumstances is not civilly or criminally liable. That person may not be dismissed, disciplined, prejudiced or harassed on account of having disclosed.

1.35 Section 31(8) of NEMA provides protection to the whistleblower from threats arising because of expressing the intention to exercise or exercising the right to disclose information. A person who threatens a whistleblower is guilty of an offence, and the penalty on conviction is a fine not exceeding R5 million or imprisonment for a period not exceeding five years.<sup>16</sup>

1.36 Section 34B awards a part of the fine recovered to the informant and it states that:

- “(1) A court which imposes a fine for an offence in terms of this Act or a specific environmental management Act may order that a sum of not more than one-fourth of the fine be paid to the person whose evidence led to the conviction or who assisted in bringing the offender to justice.
- (2) A person in the service of an organ of state or engaged in the implementation of this Act or a specific environmental management Act is not entitled to such an award.”.

**(ii) *The Marine Living Resources Act***

1.37 Section 57 of the Marine Living Resources Act places a duty on a holder of a right, license or permit granted or issued in terms of the Act to report to the Minister any contravention of the provisions of the Act by any other person.

1.38 Section 61 provides for the Payment for information leading to a conviction and it provides that:

“The Minister may from money appropriated by Parliament for that purpose and in consultation with the Minister of Finance, pay to any person, excluding a person in the employment of the State or an organ of state who has furnished any information or

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<sup>16</sup> Section 49A(1)(j) and section 49B(2).



material of proof which leads to a conviction by a court, a remuneration in cash which, in the opinion of the Minister, is reasonable and fair in the circumstances.”.

**(iii) The National Forest Act**

1.39 Section 60 of the National Forest Act provides for an award of part of a fine recovered to an informant and it states that:

- “(1) A court which imposes a fine for an offence in terms of this Act, may order that a sum of not more than one-fourth of the fine, be paid to any person whose evidence led to the conviction or who helped bring the offender to justice.
- (2) An officer in the service of the State may not receive such an award.”.

1.40 The National Environmental Management Act, the Marine Living Act, the National Forest Act, (“the Environmental Acts”) applies to persons who have disclosed information which give rise to successful prosecutions. The sheer vastness of the physical areas that are regulated in terms of the Environmental Acts is a major consideration that gave rise to the introduction of reward systems in terms of these Acts.

1.41 The promise of a reward is aimed at inspiring citizens to report contraventions of the Acts which would otherwise have gone unnoticed due to the difficulty in policing geographical spaces. The introduction of a reward system was an attempt to increase the Government’s capacity to enforce the environmental legislation concerned more effectively.

The three sets of provisions—

- “(i) exclude employees and workers of state organs;
- (ii) only apply to persons who do not work for the state;
- (iii) are applicable to a limited category of offences, namely—
  - (aa) persons who undertake fishing or related activities in contravention of the provisions of the Marine Living Resources Act, 18 of 1998;
  - (bb) offences relating to sustainable forest management, protection of forests and trees, use of forests and offences in relation to enforcement as provided for in the National Forest Act, 84 of 1998; and
  - (cc) persons who contravene the provisions of the National Environmental Management Act, 107 of 1998.”.

## **7 National Nuclear Regulatory Act**

1.42 Section 51(4) of the National Nuclear Regulatory Act states that no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information if the person, in good faith, reasonably believed at the time of the disclosure that he or she was disclosing evidence of a health or safety risk or a failure

to comply with a duty imposed by this Act and the disclosures were made to the agencies<sup>17</sup> stipulated by the Act in terms of subsection (5).

## **8 Pension Funds Act**

1.43 Section 9B(1) of the Pension Funds Act (PFA) requires the Registrar of Pension Funds to “*provide a process for the submission of disclosures by a board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or an administrator, which ensures appropriate confidentiality and provides appropriate measures for the protection of disclosures*”. Section 9B(2) provides that in addition to what is provided in sections 8 and 9 of the PDA, such a disclosure is a protected disclosure. Section 9B(3)(b) provides that any person who suffers any detriment because of such disclosure, including occupational detriment as defined in the PDA, may:

- (i) seek the remedies provided for in section 4 of the Protected Disclosures Act, where occupational detriment has been suffered;
- (ii) approach any court having jurisdiction for appropriate relief; or
- (iii) pursue any other process and seek any remedy provided for in law.

1.44 When an administrator becomes aware of any material matter relating to the affairs of a fund, which in the opinion of the administrator may prejudice the fund or its members, the administrator must inform the registrar of that matter in writing without undue delay.<sup>18</sup>

## **9 The Prevention and Combating of Corrupt Activities Act**

1.45 The Prevention and Combating of Corrupt Activities Act domesticates the United Nations Convention against Corruption adopted by the UN General Assembly on 31 October 2003. Section 18 makes it an offence for any person to attempt to corrupt or intimidate a witness. This Act also amended the Witness Protection Act 112 of 1998 to ensure that witnesses to a crime of corruption are eligible to receive protection under the Witness Protection Act.

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<sup>17</sup> The agencies are the following:  
(i) a committee of Parliament or a provincial legislature;  
(ii) the Public Protector;  
(iii) the Human Rights Commission;  
(iv) the Auditor-General;  
(v) the National Director of or a Director of Public Prosecutions;  
(vi) the Minister;  
(vii) the Regulator.

<sup>18</sup> Section 13B(10) of the Pension Funds Act 24 of 1956

## 10 Protection from Harassment Act

1.46 The Harassment Act provides protection for whistleblowers that face harassment or threats as a result of making a protected disclosure. This legislation aims to give victims of harassment an effective remedy and to empower state organs to enforce its provisions. The Act serves an important role in safeguarding individuals who speak out against wrongdoing, ensuring that they are not subjected to further harm or intimidation. By affording legal recourse to those who experience harassment, the Harassment Act promotes a culture of transparency and accountability, which is essential for the proper functioning of any organization or society. It is important that individuals are aware of their rights under this legislation and that appropriate measures are taken to prevent and address any instances of harassment or victimization.

1.47 Harassment is defined to include directly or indirectly engaging in conduct that the respondent knows or ought to have known causes harm or inspires the reasonable belief that harm may be caused by, inter alia, following, watching, pursuing, accosting or engaging in any form of communication with the witness. The act defines “harm” as any mental, psychological, physical or economic harm.<sup>19</sup>

1.48 Section 10 of the Harassment Act provides for the protection that a court may afford to an applicant for such a protection order, whether an interim or final order. Thus, this is potentially also the protection which may be afforded to a whistleblower as provided for by section 4(1) of the PDA.

## 11 The Witness Protection Act

1.49 Witness Protection Act broadly defines a witness. The legislation was enacted to provide for the placement of witnesses and related persons under protection,<sup>20</sup> before, during and after a trial, by a specially formed Witness Protection Unit (“WPU”), an Office established under the Department of Justice and Constitutional Development but currently managed under the NPA.

1.50 The Witness Protection Act provides for witness protection officers and security officers. The procedures pertaining to the application for witness protection is provided for in

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<sup>19</sup> Section 1 of the 10 Protection from Harassment Act.

<sup>20</sup> According to the Witness Protection Act a “**witness**” means any person who is or may be required to give evidence or who has given evidence in any proceedings.

terms of section 7 of the Act. Temporary protection may be granted in relevant circumstances, whilst the application is being made, processed or considered and which may not exceed 14 days.

1.51 Section 15 of the Act provides for the circumstances in which a party or witness in civil proceedings may be protected. Employees in the WPU are required to take an oath pertaining to the confidentiality and disclosure of information within this context, further to which in terms of section 17(4) of the Act, no person may disclose information that he or she has acquired in the line of duty (within the context of this Act), except for the purpose of giving effect to the provisions of the Witness Protection Act, when required to do so by a competent court, when authorised to do so by the Minister of Justice or in terms of the provisions of section 17(5) of the Act.

1.52 Section 18 provides that the presiding officer in a matter, despite any other legislation that may be applicable, must make an order prohibiting the publication of any information that could disclose the place of safety where the witness is being kept or where the witness has been relocated to, the circumstances relating to his or her protection and/ or the identity or place of safety at which another protected person is located, the relocation or change of identity of a protected person; unless the Director of the WPU satisfies the presiding officer that exceptional circumstances exist, that would mean it would be in the interests of justice for such an order not to be made.

1.53 Section 22 provides for the various offences relating to the Act, including matters such as the disclosure of related information, interference with or hindrance of the duties of the WPU, its officials in their capacity and as such.

## **B Further Provisions Affecting Whistleblowers**

### **1 Code of Conduct for Public Service in South Africa**

1.54 The Code of Conduct places a duty on employees in the public service “to report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest”. The Code of

Conduct does not, however, place a reciprocal duty on those authorities to provide protection to an employee who has reported such wrongdoing.<sup>21</sup>

## **2 Practical guidelines for employees in terms of section 10(4)(a) of the PDA**

1.55 Section 10(4)(a) of the PDA provides that the Minister of Justice must issue practical guidelines, which explain the provisions of the PDA and all the procedures which may be available to employees in terms of legislation, to employees who are desirous of reporting or otherwise remedying an impropriety.

1.56 On 31 August 2011 the Practical Guidelines for Employees in terms of section 10(4)(a) of the PDA (“the guidelines”) were issued.<sup>22</sup> The introduction to the guidelines states that both employees and employers have a responsibility in respect of disclosing criminal and other irregular conduct in the workplace and further that, every employer is responsible for taking all the necessary steps to facilitate disclosures without fear of reprisal. Part I of the guidelines describes the purpose of the PDA, how it works, how to make a disclosure in order for it to be protected, against what a whistleblower is protected and what to do should he or she be victimised because of the fact that a protected disclosure has been made.

## **C Treaties on whistleblowing**

### **1 United Nations Convention against Corruption**

1.57 The United Nations Convention against Corruption (the “Convention”) was adopted by the UN General Assembly on 31 October 2003. South Africa ratified the Convention in 2004 and it came into force in December 2005.

1.58 In terms of Article 1 (a – c) the objectives of the Convention are to:

- “promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and
- promote integrity, accountability and proper management of public affairs and public property.”.

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<sup>21</sup> Code of Conduct for Public Servants:  
<https://www.psc.gov.za/documents/code.asp#:~:text=The%20Code%20should%20act%20as,confidence%20in%20the%20Public%20Service.>

<sup>22</sup> Published under GN 702 in GG 34572 of 31 August 2011

1.59 Article 32 of the Convention deals with the protection of witnesses, experts and victims. It provides that each State party to the Convention shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them. This includes physical protection and protection whilst testifying, pertaining to the manner in which evidence may be given and what personal information may be reflected.

1.60 Article 33 provides for the protection of the reporting persons (whistleblower); it provides that each party State shall consider incorporating appropriate measures into its domestic legal system, 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 the Convention.

## **2 African Union Convention on Preventing and Combating Corruption**

1.61 The African Union Convention on Preventing and Combating Corruption (“the AU Convention”) was adopted on 11 July 2003 by the Second Ordinary Session of the Union in Maputo in the Republic of Mozambique. South Africa is one of the 34 member states that ratified the AU Convention.

1.62 The objectives of the Convention are to:

- “Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.
- Promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa.
- Coordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent.
- Promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.
- Establish the necessary conditions to foster transparency and accountability in the management of public affairs.”

1.63 Regarding whistleblowing, Article 5 of the Convention requires the State Parties, which includes South Africa, to:

- “Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.”<sup>23</sup>
- Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.<sup>24</sup>
- Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.”<sup>25</sup>

### **3 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**

1.64 On 12 June 2007 South Africa became the 37th signatory and first African country to join the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, (“the OECD Anti-Bribery Convention”). Adopted in 1997 and ratified so far by 36 countries, the Convention outlaws the bribery of foreign public officials in international business transactions.

1.65 Article 12 provides for monitoring and following-up in respect of the provisions of the Convention, which provides for both self-assessment and mutual evaluation. The OECD Anti-Bribery Convention includes recommendations for further combating foreign bribery.

1.66 The recommendation for the combating of bribery of foreign officials was originally adopted by the OECD Council on 26 November 2009. In order to address the challenges of the lack of good practices and cross-cutting issues that have emerged in the global anti-corruption landscape since 2009, the OECD Council adopted a revised Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions on 26 November 2021 (“2021 Anti-Bribery Recommendation”).<sup>26</sup> Recommendation XXI has regard to the reporting of foreign bribery and recommends that member countries should:

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<sup>23</sup> Article 5(5) of the Convention

<sup>24</sup> Article 5(5) of the Convention

<sup>25</sup> Article 5(5) of the Convention

<sup>26</sup> <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378>

- establish and publicise clear policies and procedures by which any natural person, including public officials, can report suspicions of bribery of foreign public officials and related offences to competent authorities, including by allowing for confidential and, where appropriate, anonymous reporting;
- provide easily accessible and diversified channels for the reporting of suspected acts of bribery of foreign public officials and related offences and raise awareness of these channels and of the importance of reporting such suspicions, including by providing guidance and follow-up to encourage and support reporting persons;
- ensure that appropriate measures are in place to allow public officials to report or bring to the attention of competent authorities suspected acts of foreign bribery and related offences detected in the course of their work, in particular for officials in public agencies that interact with or that are exposed to information regarding companies operating abroad, including foreign representations, financial intelligence units, tax authorities, trade promotion authorities, relevant securities and financial market regulators, anti-corruption agencies and procurement authorities;
- encourage proactive detection by public officials, in particular those that interact with or that are exposed to information regarding companies operating abroad, through appropriate means including media monitoring and alerts, as well as early reporting of suspicions of bribery of foreign public officials and related offences;
- periodically review the effectiveness of reporting policies, procedures, and channels and consider making publicly available the results of these periodical reviews;
- raise awareness through regular training and other means about the foreign bribery offence and reporting obligations to officials in government agencies that could play a role in preventing and/or detecting and reporting foreign bribery, including diplomatic missions, export credit agencies and official development aid agencies, with a view to informing their companies operating abroad on foreign bribery laws and the importance of effective compliance programmes.<sup>27</sup>

1.67 Recommendation xxii provides that in view of the essential role that reporting persons can play as a source of detection of foreign bribery cases, member countries establish, in accordance with their jurisdictional and other basic legal principles, strong and effective legal and institutional frameworks to protect and/or provide remedy against any retaliatory action to persons working in the private or public sector who report, on reasonable

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<sup>27</sup> 2021 Anti-Bribery Recommendation



grounds, suspected acts of bribery of foreign public officials in international business transactions and related offences in a work-related context and in particular:

- “ensure that sufficiently resourced and well-trained competent authorities implement the legal framework for the protection of reporting persons, and receive, investigate or otherwise process complaints of retaliation;
- afford protection to the broadest possible range of reporting persons in a work-related context, including as appropriate to those whose work-based relationship has ended, to persons who acquire information on suspected acts of foreign bribery during advanced stages of the recruitment process or the contractual negotiations, and who could suffer retaliation, for instance in the form of negative employment references or blacklisting and consider extending protection to third persons connected to the reporting person who could suffer retaliation in a work-related context;
- ensure appropriate measures are in place to provide for the confidentiality of the identity of the reporting person and the content of the report, in a manner consistent with national laws, in particular on investigations by competent authorities or judicial proceedings;
- consider allowing for anonymous reports, and ensure that all relevant protections are available to those who are subsequently identified and may suffer retaliation;
- ensure appropriate measures are in place to prohibit or render invalid any contractual provisions designed or intended to waive, terminate, diminish or modify the claims and legal protections of persons who make reports that qualify for protection to competent authorities;
- provide a broad definition of retaliation against reporting persons that is not limited to workplace retaliation and can also include actions that can result in reputational, professional, financial, social, psychological and physical harm;
- ensure appropriate remedies are available to reporting persons to compensate direct and indirect consequences of retaliatory action following a report that qualifies for protection, including financial compensation and interim relief pending the resolution of legal proceedings;
- provide for effective, proportionate and dissuasive sanctions for those who retaliate against reporting persons;
- in administrative, civil or labour proceedings, shift the burden of proof on retaliating natural and legal persons and entities to prove that such allegedly adverse action against a reporting person was not in retaliation for the report;
- ensure that reporting persons are not subject to disciplinary proceedings and liability based on the making of reports that qualify for protection;
- consider introducing incentives for making reports that qualify for protection;

- raise awareness and provide training on the design and implementation of the legal and institutional frameworks to protect reporting persons and protections and remedies available;
- periodically review the effectiveness of the legal and institutional frameworks for the protection of reporting persons and consider making publicly available the results of these periodical reviews;
- with due regard to data protection rules and privacy rights, ensure that such rules and laws that prohibit transmission of economic or commercial information do not unduly impede reports by and protection of reporting persons.”.<sup>28</sup>

## D Analysis of case law on whistleblowing<sup>29</sup>

1.68. In examining the extent of whistleblower protection in South Africa it is vital that analysis is done on the strength or weaknesses of the PDA and relevant legislation when applied in court. This is especially important given that one of the PDA’s stated objectives is to provide for certain remedies in connection with any “occupational detriment” suffered after making a protected disclosure.

1.69 According to Samantha Feinstein *et al* (2021) [30] there have been 33 whistleblower cases under the PDA, of the 33 cases seven were won by the applicants and 25 cases lost (21 on the merits and four on procedural grounds). One claimant was granted the relief sought, but the court did not render a decision on the merits of the claim because it determined that the decision-makers lacked legal authority over the whistleblower and thus the disciplinary proceedings.<sup>30</sup>[30]

1.70 Samantha Feinstein *et al* (2021)<sup>31</sup> further state that 13 of the cases analysed were from the public sector and 20 were from the private sector. Only two cases specified the compensation awarded. In the 33 cases, whistleblowers sought two types of compensation:

<sup>28</sup> 2021 Anti-Bribery Recommendation

<sup>29</sup> Decisions under the PDA:

- *City of Tshwane Metropolitan Municipality v. Engineering Council of South Africa and Adrianus Jacobus Weyers* [2010] (2) SA 333 (SCA) ('the City of Tshwane Case');
- *Radebe and another v. Premier, Free State and Others* [2012] (5) SA 100 (LAC);
- *Chowan v. Associated Motor Holdings (Pty) Ltd and Others* [2018] (4) SA 145 (GJ);
- *John v Afrox Oxygen Ltd* [2018] 5 BLLR 426 (LAC);
- *Baxter v Minister of Justice and Correctional Development & Others*;
- *Ward v. Oraclemed Health (Pty) Ltd* (JS955/2016) [2018] ZALCJHB; and
- *Tshishonga v. Minister of Justice and Constitutional Development* [2007] (4) SA 135 (LC).

<sup>30</sup> Litha v Madonsela and Others (12369/05) [2005] ZAGPHC 106 (6 October 2005)

<sup>31</sup> <https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55>

interim relief and financial relief. Interim relief includes court orders that bar an employer from firing or suspending an employee prior to a final ruling. Financial relief includes lost wages and other compensatory damages ordered in a final ruling.

1.71 In cases where temporary relief was requested, two out of six received it. It is noteworthy that in four instances, whistleblowers that lost their cases were ordered to pay the opposing party's costs, as well as their own.<sup>32</sup> Subsections 162(1) and (2) of the Labour Relations Act gives the court discretion to make cost orders, such as when the matter before the labour court should have been referred to arbitration first or based on their conduct during the proceedings.

1.72 Disclosures were made to a variety of audiences, primarily internal. Of the disclosures 13 cases made internal disclosures, nine made external disclosures and one made a public disclosure. Furthermore, six made both internal and external disclosures, one made both an internal and public disclosure, one made both an external and public disclosure and in one case, the disclosure audience was unknown. The research conducted also found 14 cases that were decisions on requests for interim relief (also known as injunctive or temporary relief), which were not included in the above win/loss rate because there was no final decision on the merits. For decisions on interim relief alone, the court granted the whistleblowers' requests in nine cases. Frequently, interim relief starts successful settlement negotiations without the necessity for final decisions on the merits.<sup>33</sup>

1.73 On average it takes two to four years to finalise a labour court matter taken on review and it takes 18 to 24 months to finalise a case in the labour court. Passing a case through the LRA is unfortunately protracted with huge backlogs.

## CONCLUDING REMARKS

1.74 The desire in the South African government to protect whistleblowers is evident in their commitment both at a national and international level. From the above paragraphs, it is indisputable that South Africa has a legal framework with regards to the protection of whistleblowers. However, the question of whether whistleblowers in South Africa are appropriately and adequately protected in terms of the provisions of the relevant legislation

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<sup>32</sup> Damane v Central Energy Fund (A5048/2012) [2013] ZAGPJHC 71 (15 March 2013)  
<sup>33</sup> <https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55>

should remain. It appears that different legislation has different levels of protection towards whistleblowers. It further appears that different legislation targets certain types of information to be disclosed. The PDA, which is the primary legislation on whistleblower protection, is centred around the employer/employee relationship which triggers the LRA. Beyond the protection from the PDA, we have further legislation that protects different types of whistleblowers.

1.75 The Companies Act is perceived to go further than the PDA when it comes to the protection of whistleblowers; however, it is noteworthy that no court decisions have been found under section 159 of the Companies Act or section 31 of the NEMA.<sup>34</sup>

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<sup>34</sup> GIZ 'Comparison of International Whistleblowing Legislation' 4 April 2023

## CHAPTER 2: SHORTCOMINGS IN WHISTLEBLOWER LEGISLATION IN SOUTH AFRICA

2.1 Whistleblower protection in South Africa has been criticised as deficient. These views are crucial to identify gaps and understand the perceived or real lack of legislative protection.

2.2 The Zondo Commission observed that *“the body of legislation although well intended is deficient in important aspects”*. The Commission found that the PDA does not provide a clear-cut procedure for the whistleblower to follow, it does not sufficiently guarantee that the disclosures will be protected, it is not pro-active in providing physical protection, it offers no incentives to the whistleblower and it does not ensure that all such information finds its way to a destination with specialised skills in receiving, investigating and utilising such information effectively.

2.3 The Deputy Public Protector Advocate Kholeka Gcaleka on her paper prepared for the International summit on the protection of whistleblowers in South Africa, held on the 9 - 11 March 2022 stated that:

“in the experience of the Public Protector and judging from other critiques in the public sphere, including the Zondo Commission and organisations which directly deals with and supports whistle-blowers, such as the Platform to Protect Whistle-blowers in Africa (PPLAAF) and the Active Citizens Movement (ACM), it will probably be an understatement to observe that the reporting procedures and mechanisms envisaged in the current body of legislation are not operating close to an optimal level.”

2.4 The Deputy Public Protector highlighted the following challenges with the PDA:

- (a) The PDA is quiet on the minimum undertakings which the institutions are obliged to offer in terms of article 32(2) of the United Nations Convention Against Corruption as well as domestic legislation.
- b) There is no common understanding or co-ordination amongst the institutions concerned on how best to align their internal processes and procedures to the minimum UN obligations as well as amongst the institutions as a collective in order to foster an understanding on the expectations on the part of both whistleblowers as the corresponding duties on the part of organs of state against whom disclosures are made.
- c) In terms of finances and budget, the government has not invested sufficient funding to ensure that the whistleblower functions and responsibilities of the institutions listed in the PDA are properly funded as envisaged in the NDP to ensure that they are able to avail sufficient resources for the whistleblower complaints to be effectively and timeously investigated and render effective protection for the whistleblowers involved.

- d) Resultant inordinate delays in the ability of the institutions concerned, including the Public Protector, as evidenced by the time that it took them to finalise the investigations listed above to deal with both the disclosures as well as the effective protection of its sources, in an expeditious manner.
- e) Multiple disclosure/ reports to various institutions – leading to duplication of efforts as well as possible conflicting approaches and directives to the institutions concerned.”<sup>35</sup>

2.5 She further highlighted that the challenge for the Public Protector and presumably other institutions listed in the PDA is that the legal capacity to investigate disclosures and provide effective protection is derived from their own individual operational and functional regulatory framework, which may not provide for or be aligned to the minimum obligations and duties which the institutions are supposed to offer in terms of article 32(2) of the United Nations Convention Against Corruption as well as domestic legislation. She indicated that the Public Protector has on a number of occasions, with a mixed degree of success, endeavoured to intervene where retaliation for whistleblowing presents itself in the form of disciplinary actions or harassment in the workplace. Most commonly, institutions would deny or dispute any link between the action taken against the employee and a disclosure of any form by the employee concerned or even that the disclosure is protected by the PDA. In other instances, the institution would simply just ignore the Public Protector’s request for the suspension of any action against the employee pending its investigation into the matter and proceed unabated.

2.6 Professor Richard Calland in his submission to the Commission of Inquiry into Allegations of State Capture highlighted some short-comings and key issues in the legislation governing the protection of whistleblowers. He states that in reviewing the legal protection afforded to whistleblowers in South Africa, three sets of inter-locking questions need to be considered i.e., who should be protected; what should be protected; to whom the information should be disclosed.

2.7 As indicated above the PDA defines who is considered a Whistleblower, it indicates within which parameters the information is protected and it further reveals to whom the information should be disclosed. Thus, one can argue that the PDA is well vested in addressing the questions.

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<sup>35</sup> Paper prepared for the International summit on the protection of whistleblowers in South Africa, held on the 9 - 11 March 2022

2.8 Professor Richard Calland further states that the major structural flaw that needs to be addressed head-on is the requirement that the whistleblower should, in the first instance, disclose the information to his or her employer. He states that:

“It was a well-intended idea. But it does not appear to have stood up well to the ruggedness of the South African terrain. The underlying premise is that the employee and employer share a common interest in combatting corruption and wrong-doing. This may make sense theoretically, but the evidence would suggest that not only is this not always the case, but that when the stakes are highest in terms of the wrong-doing, then there will be fiercely-held vested interests within the employer organisation intent on keeping a lid on the information and with a real interest in silencing the message and the messenger.”<sup>36</sup>

2.9 He argues that practically a potential whistleblower only has three avenues for disclosure with reference to the PDA i.e., the Employer, the Chapter 9 Bodies and external institutions. He highlights that the standard which is required for a disclosure to be protected when disclosing to the Employer is lower than the standard (of in good faith and reasonable belief) required to disclose to the Chapter 9 bodies and the external institutions and thus disclosing to the Employer is made to be more inviting than the other avenues that require a higher standard. He suggests that what is needed is a more flexible approach to where and to whom the disclosure is made. The whistleblower needs to be able to choose the safest option in the context of the facts of their situation.

2.10 Just Share, on its report,<sup>37</sup> observed that the PDA:

- “(a) Does not provide for any protection relating to whistleblowers who disclose information relating to national security or state secrets. This kind of disclosure is governed by the Protection of Information, 1982 (Act No. 84 of 1982) (PIA), which prohibits disclosure of certain information relating to state secrets, unless it is authorised and lawful, in the interests of the Republic or it is the duty of the whistleblower to disclose the information. The PIA does not contain any provisions relating to protection of whistleblowers.
- “(b) The PDA only prohibits “occupational detriment” against persons who make protected disclosures, however, it does not prohibit the institution of criminal or civil proceedings against a person for making a protected disclosure, nor does it provide for any penalties or consequences for retaliatory measures beyond the limited labour law remedies already discussed.

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<sup>36</sup> R Calland “Combatting Corruption and the Legal Protection of Whistleblowing” Submission to the Commission of Inquiry into Allegations of State Capture, December 2021.

<sup>37</sup> [https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report\\_may2022\\_final.pdf](https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report_may2022_final.pdf)

- (c) The PDA does not provide for protected disclosures to be made anonymously, i.e. in such a way that no-one, including the recipient of the disclosure, knows the identity of the whistleblower. It also does not require those to whom a protected disclosure is made to maintain the confidentiality of the whistleblower's identity. There is no mechanism provided to protect whistleblowers when their identities are leaked or become public, which can result in their experiencing harm in and out of their work environment and endanger their health or safety, or that of people around them.
- (d) Burden of proof is placed on the whistleblower to prove that the disclosure was protected in terms of the PDA and that he or she has suffered an occupational detriment.
- (e) There is no provision for any kind of reward or incentive for whistleblowing in South Africa, even though section 9 of the PDA refers to "any reward payable in terms of any law". Section 9 of the PDA, "General protected disclosure", disqualifies disclosures from being protected if the whistleblower makes them "for purposes of personal gain, excluding any reward payable in terms of any law". It has been suggested that a more robust protection would be to place an express obligation on employers to protect whistleblowers against retaliatory actions, with a provision made for compensation if this is not done adequately.
- (f) Section 6(2)(a) of the PDA places an obligation on every employer to "authorise appropriate internal procedures for receiving and dealing with information about improprieties" and "take reasonable steps to bring the internal procedures to the attention of every employer and worker". This provision is, however, not subject to any monitoring and enforcement and there are no consequences for non-compliance.
- (g) Section 3B of the PDA deals with the duty to inform an employee or worker about progress in the investigation of the reported conduct. Again, there is no enforcement mechanism or sanction or recourse for the whistleblower should the investigating body fail to comply with the PDA.
- (h) There is no provision for a dedicated independent whistleblowing agency responsible for, among other things, the gathering, analysis and publication of data, training, public education, receiving and investigating complaints, following up on cases, monitoring local and international developments and driving reforms.
- (i) There is no provision for any form of financial or legal support for whistleblowers, many of whom are bankrupted by the need to protect themselves from retaliatory measures taken against them.
- (j) The PDA provides a closed list of categories of protected information relating to corrupt, illegal, fraudulent or hazardous activities. The list is broad, but some are



of the view that it should also include a general catch-all provision for information relating to a threat of harm to the public interest.

- (k) The PDA does not protect job applicants who can be – and are often – regarded as “tainted” due to prior disclosures.
- (l) There is an overall lack of clarity and unity to the regime.”.

2.11 The Active Citizens Movement (‘ACM’)<sup>38</sup> contends that the PDAs dependence on the LRA and the focus of the PDA on “occupational detriment” is rendered ineffective as it exposes a whistleblower to prejudice by reporting to the perpetrator of wrongdoing. They maintain that the test ought to be “*whether or not malfeasance is being exposed.*” They state that:

“[They] find it onerous that we are subjected to a minefield of legal minutiae, such as whether you are an “employee,” did you report through the correct channels and did you exhaust the appropriate reporting channels in the correct order. Furthermore, it defeats the objects that a whistleblower is obliged to “blow her cover” and expose her to financial, physical, and other prejudice by reporting to the perpetrator, who then becomes, judge, jury, and executioner by utilising the internal disciplinary procedures. The imbalance of power and resources is stacked heavily in favour of the oppressor. The result is that in practice our legislation affords little protection or encouragement to whistleblowing.”.

2.12 PPLAAF<sup>39</sup> has observed that the PDA lacks the necessary enforcement provisions, particularly punitive provisions for the enforcement of breaches of its provisions, which then means that, whistleblowers have to resort to other legislation or to civil society organisations to seek redress for the transgressions suffered by them. In addition, protections are not comprehensive enough, resulting in various forms of reprisals against whistleblowers.

2.13 PPLAAF further observed that the PDA falls short of international standards in several key aspects, including:

- “There is no single standard for whistleblowing. Employees are entitled to different levels of protection, depending on the type of organisation for which the discloser works.
- Only those in current formal relationships with an employer are eligible for protection and disclosures must relate to misconduct by the employer or others

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<sup>38</sup> “The Active Citizens’ Movement (ACM) was established in July 2017 as a civil society organisation striving to attain a socially-cohesive society based on the Constitution of South Africa. The membership comprises academics, activists, professionals, legal practitioners, and ordinary citizens, and exists, among others, to promote transparency and provide a network to strengthen citizen activism against corruption.”

<sup>39</sup> South Africa Relevant Legislation (2021): <https://www.pplaaf.org/country/southafrica.html>

connected to the employer. Citizen whistleblowers are not protected and few protections available to those wishing to make anonymous disclosures.

- Disclosures may only be made to a select group of people and offices. Disclosures to the media fall under the umbrella of “general disclosures” and can only be made under exceptional circumstances.
- The PDA (5/2017) does now offer immunity from criminal or civil suits provided that the disclosure is made in good faith and the reporter is not complicit in the misconduct reported.
- Prohibited retaliation is limited to “occupational detriment” in the PDA. Whistleblowers remain vulnerable to reprisal through defamation.
- Victimised whistleblowers seeking justice must go through lengthy and expensive court proceedings and they often do not have the financial means to sustain the costs of these cases.”<sup>40</sup>

## CONCLUDING REMARKS

2.14 The first two chapters of this papers’ main purpose is to determine whether the protection provided to the whistleblower under the protection of the relevant South African legislation, namely the PDA, enjoys appropriate protection. There are clearly some deficiencies that have been identified and pointed out by civil society interest groups.

2.15 The next hurdle is to determine the appropriate protection that should be provided by legislation. In order to attempt to determine what such appropriate protection would be attention has been devoted to the lived experience of the whistleblowers and the recommendations of the interested parties.

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<sup>40</sup> South Africa Relevant Legislation (2021): <https://www.pplaaf.org/country/southafrica.html>

## CHAPTER 3: RECOMMENDATIONS BY INTERESTED PARTIES

3.1 There is a strong drive for legislative reform from both civil society and policy makers. Below are some of the recommendations that have been collated for consideration in improving the current legislative framework.

3.2 The Zondo Commission makes the following recommendations in relation to the protection of whistle blowers:

“The Government should introduce legislation or amend existing legislation:

- to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption;
- identifying the inspectorate of the Agency as the correct channel for the making of such disclosure;
- authorising the Litigation Unit of the Agency to incentivise such disclosures by entering into agreements to reward the giving of such information by way of a percentage of the proceeds recovered on the strength of such information;
- authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure of the information which might otherwise render the informant liable to prosecution or litigation.”.

3.3 The National Development Plan 2030<sup>41</sup> recommends the following:

- “A review of the Protected Disclosures Act. This review should consider expanding the scope of whistleblower protection outside the limits of “occupational detriment,” permit disclosure to bodies other than the Public Protector and the Auditor-General and strengthen measures to ensure the security of whistleblowers.
- Regulations to the Protected Disclosures Act should be developed as soon as possible and government departments must develop policies to implement the Act.”.

3.4 The ACM<sup>42</sup> is proposing several amendments to the PDA which includes:

- “Broadening the definition of a whistleblower, as the current definition is too narrow and leaves many other categories of witnesses vulnerable to reprisals.
- Making provision for a specialised Court for whistleblowing cases, preferably to function within the ambit of the Equality Court.

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<sup>41</sup> The National Development Plan 2030 is an important policy document of the South African government drafted in August 2012 by the National Planning Commission, a special ministerial body first constituted in 2009 by President Jacob Zuma.

<sup>42</sup> Mosala I. Amendments to Legislation regarding the Protection of Whistleblowers: Commission of Enquiry into State Capture

- Expanding the remit of the above-mentioned specialised court to unethical conduct and the abuse of power by legal professionals in the context of whistleblowing.
- Introducing fines and penalties for employers who are found guilty of harassment and intimidation of whistleblowers, to be paid personally.
- Providing a mechanism whereby superiors are removed from any positions of authority that can be abused in order to influence investigations or intimidate witnesses.
- Making provision for witness protection mechanisms for whistleblowers.
- Creating an appropriate funding mechanism to cover the legal costs of whistleblowers.
- Providing incentives for whistleblowers to come forward, through the creation of a fund derived from the recovery of stolen monies.
- Formulating a Code of Conduct for companies and state departments to standardise and regulate the processing of whistleblower complaints and the fair treatment of whistleblowers.”.

### 3.5 PPLAAF recommends the following regarding improvements to the PDA:

- “The establishment of a Whistleblower Regulatory Authority which would act as a database for both private and public sector disclosures, independent from the reporting agencies already established in terms of the PDA.
- Establishment of strict and obligatory timetables for processing and acting on protected disclosures.
- Creation of a positive duty to regularly inform whistleblowers of the status of his/her disclosure.
- Amendments which address the lack of punitive sanctions and any transgressions thereof should have a minimum prison sentence of at least five (5) years and /or minimum fine of R50 000.00 for the Directors/CEO and Director Generals.
- Similarly to the EU Directive on the protection of whistleblowers, it is proposed that under the PDA, a whistleblower shall not incur liability of any kind in respect to reasonable acts necessary to revelations of a disclosure and to protection of his anonymity as long as they had reasonable reasons to believe that the disclosure fell under the conditions of the PDA.
- In proceedings before a court relating to a detriment suffered by the whistleblower, assuming that detriment followed a protect disclosure under the PDA, it shall be presumed that the detriment was made in retaliation for a disclosure. The burden of proof shall be on the person who has caused the detriment to prove that that measure that led to the detriment was justified.
- The Whistleblower Regulatory Authority, together with the Directorate of Priority Crimes, should in meritorious cases, where significant asset recoveries have

occurred by virtue of the protected disclosures, consider awards of at least 10% of the value of the asset recovered.”<sup>43</sup>

- The Whistleblower Regulatory Authority must be enabled to keep the information of whistleblowers confidential in matters of extreme sensitivity, as is the case in terms of section 17 of the Witness Protection Act. The Witness Protection Act in section 22 makes it an offence for any person who wilfully or negligently allows an unauthorised person to gain access to a protected person, discloses the identity of a protected person, discloses the location of a protected person, compromises the safety of such protected person and furthermore renders such offender upon conviction liable to a fine or direct imprisonment not exceeding thirty (30) years.
- The PDA should also extend the measures for the protection of whistleblowers, if relevant, to third persons who assisted the whistleblowers and could suffer from retaliation such as colleagues, family members or legal entities that assisted the whistleblowers or made the disclosure public such as media outlets and civil society organisations.
- The PDA should expressly state that it is to be read with the relevant legislation that impacts its practical enforcement: Labour Relations Act; Witness Protection Act; Companies Act and so on.”

## CONCLUDING REMARKS

3.6 The Department of Justice and Constitutional Development recognises that in order to embark on a successful legislative reform process, wide consultation is imperative and this chapter has illustrated the wide views that has been expressed, which enhances the process being undertaken.

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<sup>43</sup> South Africa Relevant Legislation (2021): <https://www.pplaa.org/country/southafrica.html>

## **PART B**

### **CHAPTER 4: WHISTLEBLOWER PROTECTION REGIMES INTERNATIONAL JURISDICTIONS**

#### **A The Position of whistleblowers in United States of America**

4.1 The United States of America has taken a proactive stance in promoting the importance of whistleblowers and enacting laws that provide them with key protections and incentives. These measures include confidential handling of disclosures, financial rewards, and independent reporting channels. At present, there are numerous laws at the federal, state, and local levels that are designed to encourage whistleblowers to come forward and report any wrongdoing they may have witnessed. Annexure 'A' contains a comprehensive list of the different legislation within the United States of America that provides whistleblower protection. By empowering whistleblowers and ensuring their safety, the United States of America is sending a clear message that it values transparency and accountability in all sectors of society.

#### **B Employee Whistleblower Protection in the United States of America**

4.2 Legislation that specifically protects employees which are whistleblowers is administered by the Department of Labor ("DOL"). There are five agencies within the DOL which enforce whistleblowing and anti-retaliation laws i.e.:

- [Occupational Safety and Health Administration \(OSHA\)](#)
- [Mine Safety and Health Administration \(MSHA\)](#)
- [Office of Federal Contract Compliance Programs \(OFCCP\)](#)
- [Wage and Hour Division \(WHD\)](#)
- [Veterans' Employment and Training Service \(VETS\)](#)

4.3 OSHA's Whistleblower Protection Program enforces protections for employees who suffer retaliation for engaging in protected activities under more than 20 federal laws. Employees are protected from retaliation for reporting issues relating to employee safety, consumer product and food safety, environmental protection, fraud and financial issues, health insurance, and transportation services.

## CHAPTER 5: THE POSITION OF WHISTLEBLOWERS IN THE UNITED KINGDOM

5.1 The United Kingdom has two key pieces of legislation with regards to the protection of whistle blowers: the Public Interest Disclosure Act of 1998 (“PIDA”), and the Employment Rights Act of 1996 (“ERA”), as well as rules established by the Financial Conduct Authority and the Prudential Regulation Authority.

### A The Public Interest Disclosure Act 1998

5.2 The purpose of the Public Interest Disclosure Act 1998 (PIDA) is to protect people who make certain disclosures of information in the public interest, in order to allow for such individuals to bring action in respect of victimisation and for related purposes.

5.3 “The protected disclosures include disclosures in relation to the following circumstances:

- (a) a criminal offence has been committed, is being committed or is likely to be committed;
- (b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject;
- (c) a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) the health or safety of any individual has been, is being or is likely to be endangered;
- (e) the environment has been, is being or is likely to be damaged; or
- (f) information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.”<sup>44</sup>

5.4 For the purposes of making a qualifying disclosure, it is immaterial whether the relevant failure took place in the United Kingdom or elsewhere and whether the applicable law is that of the United Kingdom or another country.<sup>45</sup>

5.5 However, the disclosure of information does not amount to a protected disclosure if the person making the disclosure commits an offence by doing so.<sup>46</sup>

5.6 A qualifying disclosure that is made in accordance with section 43C, qualifies as such if the worker makes the disclosure in good faith—

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<sup>44</sup> Section 43B(1)

<sup>45</sup> Section 43B(2)

<sup>46</sup> Section 43B(3)

- To his employer; or
- In circumstances in which the employee believes reasonably that the relevant failure relates either solely or mainly to—
  - ✓ a person other than his employer; or
  - ✓ to any issue or matter for which a person other than his employer bears a legal burden to that other person.

5.7 In terms of section 47B of the PIDA a worker has the right not to be subjected to any detriment by an act or deliberate omission by the employer, which is imposed as a result of having made a protected disclosure.

5.8 A worker who is subjected to a detriment in contravention of section 47B may present the complaint to an employment tribunal. If such a complaint is to be made and thereafter considered by the employment tribunal, it must be presented before the end of the period of three (3) months, which calculation begins with the date of the act or failure (omission) to which the complaint in question relates or where there has been a series of acts or failures, from the date of the last of them.<sup>47</sup> However, the tribunal may hear such complaint outside the time limits set out above if the tribunal considers such further period to be reasonable; where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three-month period. Where such a tribunal finds that such complaint is well founded, the tribunal must make a declaration to that effect and may thereafter make an award for compensation, which is to be paid by the employer to the complainant.

5.9 Whistleblowers bringing a claim under the PIDA before an Employment Tribunal may receive an uncapped award as a financial remedy for damage to their career, loss of job or the mental or emotional toll of raising the concerns. The Employment Tribunal process provides a remedy for damages suffered, rather than an amount of money equivalent to impact of the wrongdoing raised.<sup>48</sup>

5.10 Section 5 of the PIDA provides for the insertion of section 103A into the Employment Rights Act 1996, pertaining to protected disclosures and providing that an employee who has been dismissed shall be regarded as having been unfairly dismissed for the purposes of

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<sup>47</sup> Section 48(2) of the Employment Rights Act 1996

<sup>48</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)



the relevant part of the Employment Rights Act 1996, if the reason or more than one reason or the principal reason for the said dismissal is that the employee had made a protected disclosure. This provision is comparable to the provisions of section 4(2)(a) of the PDA.

## **B Employment Rights Act, 1996 (ERA)**

5.11 The Employment Rights Act, 1996 (ERA) covers employees, contractors, temporary employees, consultants and suppliers. It protects whistleblowers against unfair dismissal for any disclosures made under PIDA. It also applies to disclosures by third parties.

5.12 The ERA provides that “[a]n employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure”.<sup>49</sup>

5.13 Workers who are not employees, such as independent contractors and agency workers, cannot claim unfair dismissal, but can claim compensation for detrimental treatment.

5.14 Besides remedies for unfair dismissal, whistleblowers are protected against retaliatory action by virtue of the right to file a complaint and a claim for compensatory damages (which are not limited to pure economic loss) with the Employment Tribunal.

## **C Financial Conduct Authority and Prudential Regulation Authority<sup>50</sup>**

5.15 The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) issued a set of rules protecting the confidentiality of whistleblowers.<sup>51</sup> The rules apply to the following firms:

- (a) United Kingdom deposit-takers with assets of £250 million or more, including banks, building societies, and credit unions;
- (b) PRA-designated investment firms; and

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<sup>49</sup> Section 103A

<sup>50</sup> <https://www.fca.org.uk/publications/policy-statements/ps15-24-whistleblowing-deposit-takers-pra-designated-investment-firms>

<sup>51</sup> <https://www.fca.org.uk/publications/policy-statements/ps15-24-whistleblowing-deposit-takers-pra-designated-investment-firms>

- (c) Certain insurance and reinsurance firms and the Society of Lloyd's and managing agents.

5.16 These firms are required to take the following measures:

- (a) appoint a "whistle blower champion" who is responsible for ensuring and overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing;
- (b) establish, implement and maintain appropriate and effective internal arrangements for the disclosure of "reportable concerns" by whistleblowers;
- (c) provide appropriate training on whistle-blowing arrangements to employees, managers and those responsible for operating internal whistle-blowing mechanisms;
- (d) publish a report at least annually to the firm's governing body on the effectiveness of its systems in relation to whistleblowing; and
- (e) include a term in any settlement agreement with a worker that workers have a legal right to whistleblowing.<sup>52</sup>

5.17 The rules define a whistle blower as any person who has disclosed or intends to disclose a reportable concern to a firm, the FCA or the PRA or in accordance with the ERA. The protected disclosure must be "made in the public interest".<sup>53</sup>

5.18 "Good faith" is not relevant to determining whether a disclosure qualifies for protection, but it is relevant in deciding the remedial compensation or reimbursement.

## D Qui tam Action

117. In 2007, the idea of *qui tam*<sup>54</sup> actions was introduced in the United Kingdom, but it did not gain traction. Subsequently, the United Kingdom Home Office engaged in discussions on

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<sup>52</sup> <https://www.fca.org.uk/publications/policy-statements/ps15-24-whistleblowing-deposit-takers-pra-designated-investment-firms>

<sup>53</sup> <https://www.fca.org.uk/publications/policy-statements/ps15-24-whistleblowing-deposit-takers-pra-designated-investment-firms>

<sup>54</sup> See Annexure A for contextualization.

how to recover £250 million annually by 2010.<sup>55</sup> One proposal that was extensively debated was to incentivize whistle-blowers by offering them a percentage of the damages paid by the wrongdoer.<sup>56</sup> However, this proposal did not receive approval. While *qui tam* actions and whistle-blower incentives are widely used in the United States, their implementation in the United Kingdom has been met with resistance.<sup>57</sup>

118. The FCA and PRA rejected rewarding whistle-blowers: and

- “(i) argued that incentives in the United States of America do nothing for most whistle-blowers, but only benefit a small number where reporting led to successful penalties imposed;
- (ii) maintained there is no empirical research indicating that incentivising whistle-blowers would increase the rate of reporting or the quality thereof; and
- (iii) stressed they should rather encourage strengthening the current whistleblowing procedures and focus on its transparency.”<sup>58</sup>

119. The decision not to adopt reward principles in whistleblowing cases was attributed to several factors. Firstly, the legal cost associated with implementing such a system was found to be massive, and this alone can deter organizations from pursuing this route. Additionally, the systems required to implement such a scheme were found to be complex and costly, adding further disincentive to their adoption.<sup>59</sup>

120. Research conducted by PricewaterhouseCoopers in the United Kingdom also shed light on the issue. The study found that over half of the organizations surveyed felt that incentivizing whistleblowers would not encourage an open culture of reporting.<sup>60</sup> This is a significant finding, as it suggests that the use of rewards may not be an effective way to promote transparency and accountability within organizations.

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<sup>55</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

<sup>56</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

<sup>57</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

<sup>58</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

<sup>59</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

<sup>60</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

121. Furthermore, the report indicated that incentives may require reporting to external regulators, which can lead to unintended consequences. For instance, whistleblowers may be incentivized to report minor or trivial issues to receive rewards, which could distract from more serious matters that require attention. Additionally, the use of incentives on its own can lead to roguish acts, and whistleblowers themselves could potentially become perpetrators of fraudulent activities.<sup>61</sup>

5.24 In the past, findings by the 'Public Concern at Work' on its quest to consider the False Claims Act<sup>62</sup> provisions revealed that:

- (i) the reward system offered in the United Kingdom from the 13<sup>th</sup> Century until 1951 was prone to abuse (e.g. wrongdoers defrauded the system in order to uncover minimal fraud);
- (ii) relying on the reward route has its difficulties as it is only after the fact, whereas the Public Interest Disclosures Act aims at preventing known fraud and fraud that is likely to happen;
- (iii) with the False Claims Act, expression of deterrence is outweighed by greed, where greed is used to suppress greed – which is regarded as dangerous, counter-productive and introducing more risks;
- (iv) the United Kingdom encourages the reporting of fraud internally and acknowledge it to external regulators, although it is not the only way; and
- (v) rewards undermine supportive cultural values.

5.25. After careful consideration, the principles of the False Claims Act were deemed unsuitable for implementation in the United Kingdom. Alternative measures, such as the Public Interest Disclosures Act and government contracts, were deemed more appropriate for achieving the same goals while also encouraging reporting.<sup>63</sup> The Public Concern at Work, a leading organisation in this field, observed that False Claims Act recoveries continue

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<sup>61</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol

<sup>62</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

<sup>63</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

to rise each year. This suggested that the deterrent effect of such legislation is outweighed by greed, making it unsuitable for the United Kingdom.<sup>64</sup>

5.26 There are currently two reward schemes in the United Kingdom. One is run by the Competition and Markets Authority (“CMA”) and was introduced in 2017 as part of their “Cracking Down on Cartels” campaign. Whistleblowers can be given up to a maximum of £100,000 rewards for reporting on illegal cartel activity. HMRC also runs a reward scheme for individuals and in 2020/2021, paid out nearly £400,000 on rewards for individuals who reported tax fraud, including fraud related to the COVID-19 relief schemes. These rewards are discretionary awards based on factors including the amount of tax recovered and the time saved in investigations.

## **CONCLUDING REMARKS**

5.27 The similarities between the PIDA and the PDA are of the utmost importance and provide valuable lessons. As highlighted in Annexure B, the legislation shares several commonalities.

5.28 The similarities between the PIDA and the PDA cannot be ignored, and it is important to consider the potential challenges that South Africa may face as a result. Drawing lessons from the United Kingdom can be incredibly valuable in navigating the implementation of such legislation. As we work to establish a culture of transparency and accountability, it is essential to draw insights from the United Kingdom's experience.

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<sup>64</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

# CHAPTER 6: THE POSITION OF WHISTLEBLOWER'S IN CANADA

## A Public Servants Disclosure Protection Act 2007 (PSDPA)

6.1 The Public Servants Disclosure Protection Act 2007 (PSDPA) is a Canadian legislation that aims to promote public confidence in the integrity of public institutions by providing a framework for the disclosure of wrongdoing within the federal public sector. The Act provides protection to public servants who disclose wrongdoings and ensures that they are not subject to reprisal for doing so.

6.2 The PSDPA recognises the duty of loyalty that public servants owe to their employer while also acknowledging their right to freedom of expression as protected by the Canadian Charter of Rights and Freedoms. The Act seeks to balance these competing interests with the public interest by establishing a process for the disclosure of wrongdoing that is fair, accessible and efficient.

6.3 Under the PSDPA, public servants who believe that a wrongdoing has occurred or is about to occur can report it to their supervisor, a designated senior officer or the Public Sector Integrity Commissioner (PSIC). The PSIC is an independent officer of Parliament who is responsible for receiving and investigating disclosures of wrongdoing.

6.4 Public servants who make disclosures in good faith are protected from reprisal, including disciplinary action, demotion, termination or any other form of retaliation. If a public servant experiences reprisal for making a disclosure, they can file a complaint with the PSIC.

6.5 Section 8 of the Act, defines wrongdoing in or relating to the public sector as:

- (a) A contravention of any Canadian or provincial law and related regulation;
- (b) a misuse of public funds or a public asset;
- (c) a gross mismanagement in the public sector;
- (d) an act or omission that creates a substantial and specific danger to a person or the environment (other than a danger inherent in the performance of the duties or functions of a public servant);
- (e) a serious breach of a code of conduct; and
- (f) knowingly directing or counselling a person to commit a previously mentioned wrongdoing.

6.6 Sections 10 and 12 of the PSDPA establish the first of two channels for the disclosure of wrongdoings in the federal public sector: the internal disclosure procedures. Chief executives must, in their respective area of responsibility of the public sector, designate a senior office responsible for receiving any information a public servant believes may reveal a wrongdoing has been committed or that the public servant has been asked to commit a wrongdoing. A public servant may also provide such information to his or her supervisor.

6.7 The PSDPA requires the Treasury Board to establish a code of conduct applicable to the federal public sector. It also provides that every chief executive of a department or federal body must establish internal procedures, including designating a senior officer to be responsible for receiving and dealing with disclosures of wrongdoing. This procedure should protect the identity of the persons involved and the confidentiality of the information collected in relation to disclosures and investigations.<sup>65</sup>

6.8 Chief executives of federal departments and agencies are responsible for ensuring that the Values and Ethics Code for the Public Sector, a code of conduct and internal disclosure procedures are effectively implemented in their organisation. They must also ensure that their code of conduct and internal disclosure procedures are regularly monitored and evaluated.<sup>66</sup>

6.9 Section 39 of the PSDPA establishes the Public Sector Integrity Commissioner (the Commissioner), the second of two channels for the disclosure of wrongdoings in the federal public sector. The Commissioner is appointed by the Governor in Council with the approval of Parliament. Under section 13(1) of the PSDPA, a public servant can disclose wrongdoings directly to the Commissioner, without having to go through his supervisor or the senior officer designated by his chief executive. In addition, under section 33(1) of the Act, the Commissioner may begin a new investigation if a previous investigation or a person that is not a public servant provides information indicating that a wrongdoing has been committed.

6.10 The Commissioner conducts investigations in order to bring “the existence of wrongdoings to the attention of chief executives and makes recommendations concerning corrective measures to be taken by them.”<sup>67</sup> The Commissioner holds all the powers of a commissioner under Part II of the Inquiries Act, in addition to those specifically granted by

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<sup>65</sup> Section 5  
<sup>66</sup> Section 6  
<sup>67</sup> PSDPA, Section 26(1)

the PSDPA.<sup>68</sup> The Commissioner reports the results of investigations and provides information about the disclosures to chief executives, ministers, the Treasury Board, Parliament or other relevant authorities depending on the circumstances and the nature of the information.<sup>69</sup>

6.11 The Commissioner reports directly to Parliament and has the power to receive and investigate allegations of wrongdoing and reprisal complaints, to make recommendations to chief executives concerning corrective measures to be taken and to review reports from chief executives following up on his or her recommendations.

6.12 Under sections 38(3.1)–38(4) of the PSDPA, when an investigation leads to a finding of wrongdoing, the Commissioner must report it to the speakers of the Senate and the House of Commons within 60 days. This case report must include the finding of wrongdoing, any recommendations of the Commissioner to the chief executive concerned and the comments of the chief executive.

6.13 If reprisal actions are taken against the public servant whistleblower, he or she may file a complaint with the Commissioner’s Office, which must decide whether to investigate within 15 days.<sup>70</sup> The case is referred to the Public Servants Disclosure Protection Tribunal if the Commissioner “has reasonable grounds to believe that reprisals occurred.

6.14 Section 16(1) allows a public servant to make a disclosure to the public under certain conditions. First the public servant must have the right to make a disclosure either externally to the Commissioner’s Office or internally to his or her supervisor or senior officer. Second, there must also be no sufficient time to make a disclosure through the aforementioned disclosure mechanisms. Lastly, the public servant must believe on reasonable grounds that the subject matter of the disclosure is an act or omission that either constitutes a serious offence under Canadian law or constitutes an imminent risk of a substantial and specific danger to people or the environment.

6.15 Section 16(1.1) creates an exception to section 16(1) and prohibits the disclosure to the public of information subject to any restriction created by an Act of Parliament. However, section 16(2) stipulates that if a different legislation provides a public servant the right to make a disclosure, that disclosure will not be limited by conditions under section 16(1).

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<sup>68</sup> PSDPA. Section 29  
<sup>69</sup> PSDPA. Section 36-38  
<sup>70</sup> PSDPA. Section 19.4(1)



6.16 Section 11 of the PSDPA includes confidentiality requirements to ensure the protection of whistleblowers. Chief executives must take measures necessary to protect the identity of persons involved in the disclosure process – including witnesses and alleged wrongdoers – and the confidentiality of the information collected. Under section 22 of the PSDPA, the Commissioner holds the same responsibility towards the persons involved in the disclosure.

6.17 In terms of section 22(a) of the PSDPA, it is the Commissioner's duty to provide information and advice regarding the making of a disclosure of wrongdoing. However, the Commissioner has the power to authorise free access to legal advice of \$1,500 and in exceptional circumstances of \$3,000 for public sector employees who are considering making a disclosure of wrongdoing, serving as a witness or alleging a reprisal.

6.18 Section 26 of the PSDPA identifies the purpose of investigations under the Act as that to bring the existence of wrongdoing to the attention of chief executives and to make recommendations concerning corrective measures to be taken by them. Investigations are also to be conducted as informally and expeditiously as possible.

6.19 The Commissioner, according to section 22 must:

- “(a) Provide information and advice regarding the making of disclosures under the Act and the conduct of investigations by the Commissioner;
- b) Receive, record and review disclosures of wrongdoings in order to establish whether there is sufficient ground for further action;
- c) Conduct investigations of disclosures or appoint persons to conduct the investigations on his or her behalf;
- d) Ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected;
- e) Protect, to the extent possible, the identity of persons involved in the disclosure process;
- f) Establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations;
- g) Review the results of investigations into disclosures and report his or her findings to the persons who made the disclosures and to the appropriate chief executives;
- h) Make recommendations to chief executives concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in response to those recommendations; and

- i) Receive, review, investigate and otherwise deal with complaints made in respect of reprisals.”.

6.20 In terms of section 23, the Commissioner cannot deal with a disclosure or begin an investigation when a person or body – acting under federal legislation other than the PSDPA – is dealing with the subject matter of the disclosure or the investigation, provided that this person or body does not do so as a law enforcement authority. Moreover, according to section 30(1) of the Act, the investigation powers of the Commissioner do not extend to information that is subject to solicitor-client privilege. Lastly, the Commissioner cannot use a confidence of the Queen’s Privy Council for Canada disclosed in violation of section 13(2) of the Act.

6.21 The Commissioner can issue a subpoena or summon an individual in the exercise of his or her powers. However, the Commissioner must, under subsection 29(3), before entering the premises of any portion of the public sector in the exercise of his aforementioned powers, notify the chief executive concerned. Under the Act, chief executives must provide public access to some information related to the wrongdoing in the course of an investigation, subject to restrictions created by other federal legislation.

6.22 According to Section 34 of the Act, if the Commissioner is of the opinion that a matter under investigation that would involve obtaining information that is outside the public sector, he or she must cease that part of the investigation.

6.23 Various sections under the Act provide the Commissioner with the discretionary power to refuse to investigate a disclosure of wrongdoing. According to section 24(1), the Commissioner may refuse to commence or continue an investigation if he or she is of the opinion that:

- “a) The disclosure has been or could be more appropriately dealt through a different legal procedure;
- b) The disclosure is not sufficiently important;
- c) The disclosure was not made in good faith;
- d) The length of time that has elapsed is such that dealing with the disclosure would serve no useful purpose;
- e) The subject matter of the disclosure results from a balanced and informed decision-making process on a public policy issue; or
- f) There is a valid reason for not dealing with the disclosure.”.

6.24 Section 23(1) precludes the Commissioner from investigating a disclosure of wrongdoing (under section 33) if a person or body acting under another Act of Parliament is

dealing with the subject matter of the disclosure or the investigation other than a law enforcement authority.

6.25 In terms of section 14 of the PSDPA, federal public servants may disclose wrongdoings that concern the Commissioner's Office to the Office to the Auditor General of Canada. The latter has the same powers and immunities as the Commissioner for dealing with disclosures. Under section 9 of the PSDPA, a public servant is subject to appropriate disciplinary action in addition to, any penalty provided for by law, including termination of employment, if he or she commits a wrongdoing.

## CONCLUDING REMARKS

6.26 The PSDPA came into force in 2007 but in 2016, a comprehensive review was conducted. A report was produced which features a holistic presentation of the main procedural challenges and successes of the Act in protecting whistleblowers and strengthening accountability and the integrity of the public service.<sup>71</sup>

6.27 In the opinion of the Committee, the six main challenges in the Act are the following:

- “ The lack of clarity around the public interest purposes of the Act;
- The disclosure mechanisms under the Act do not necessarily ensure the protection of the public interest;
- The Act does not sufficiently protect whistleblowers from reprisals as most of them face significant financial, professional and health-related consequences;
- The commonly held perception that the federal organisational culture towards the disclosure of wrongdoing seems to discourage it;
- The mandatory annual reporting as prescribed under the Act is inadequate to provide a meaningful evaluation of the effectiveness of the disclosure mechanisms; and
- Public servants and external experts lack confidence in the adequate protection of whistleblowers under the Act, notably due to the potential conflicts of interest of those administering the internal disclosure process.”.

6.28 The recommendations of the committee sought to address the challenges by:

- “Expanding the definitions of the terms “wrongdoing” and “reprisal,” and modifying the definition of the term “protected disclosure” under the Act;
- Amending the legislation to protect and support the whistleblowers and to prevent retaliation against them;

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<sup>71</sup> Strengthening The Protection of The Public Interest Within The Public Servants Disclosure Protection Act: <https://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/page-21>

- Reversing the burden of proof from the whistleblower onto the employer in cases of reprisals;
- Providing legal and procedural advice, as necessary, to public servants seeking to make a protected disclosure of wrongdoing or file a reprisal complaint;
- Embedding in the legislation confidentiality provisions of witnesses' identities;
- Making the Office of the Public Sector Integrity Commissioner responsible for training, education and oversight responsibilities to standardise the internal disclosure process; and
- Implementing mandatory and timely reporting of disclosure activities.”.

6.29 It suffices to say that the challenges experienced by Canada with the PSDPA a strikingly similar to what is experienced by South Africa with the PDA. Both countries have faced similar challenges in implementing these laws, which are designed to protect whistleblowers who report wrongdoing in the workplace. Despite the importance of these laws, there have been concerns about their effectiveness, particularly in terms of protecting whistleblowers from retaliation. In both countries, there have been cases where whistleblowers have suffered negative consequences, such as losing their jobs or facing harassment from colleagues. These challenges highlight the need for ongoing efforts to improve the implementation and enforcement of these laws, and to ensure that whistleblowers are adequately protected.

# CHAPTER 7: THE POSITION OF WHISTLEBLOWER'S IN NEW ZEALAND

## A Protected Disclosures (Protection of Whistleblowers) Act 2022

7.1 The Protected Disclosures Act 2022 replaces the Protected Disclosures Act 2000. Its purpose is to facilitate the disclosure and investigation of serious wrongdoing in the workplace and to provide protection for employees and other workers who report concerns.

7.2 In terms of section 9 of the Act a disclosure of information is protected if the discloser:

- (a) “believes on reasonable grounds that there is, or has been, serious wrongdoing in or by the discloser’s organisation;
- (b) discloses information in accordance with the Act; and
- (c) does not disclose it in bad faith.”.

7.3 In terms of section 10 of the Act serious wrongdoing includes an act, omission or course of conduct that is:

- (a) “An offence;
- (b) a serious risk to public health, or public safety, or the health or safety of any individual, or to the environment;
- (c) a serious risk to the maintenance of the law including the prevention, investigation and detection of offences or the right to a fair trial;
- (d) an unlawful, corrupt or irregular use of public funds or public resources; and
- (e) oppressive, unlawfully discriminatory, or grossly negligent or that is gross mismanagement by a public sector employee or a person performing a function or duty or exercising a power on behalf of a public sector organisation or the Government.”.

7.4 In terms of section 8 a discloser, in relation to an organisation, means an individual who is (or was formerly):

- (a) an employee
- (b) a homemaker within the meaning given in section 5 of the Employment Relations Act 2000
- (c) a secondee to the organisation
- (d) engaged or contracted under a contract for services to do work for the organisation
- (e) concerned in the management of the organisation (including, for example, a person who is or was a member of the board or governing body of the organisation)
- (f) a member of the Armed Forces (in relation to the New Zealand Defence Force)
- (g) a volunteer working for the organisation without reward or expectation of reward for that work.

7.5 A discloser may make a protected disclosure to their organisation or to an appropriate authority. A disclosure made to the discloser's organisation should be in accordance with any internal procedures, or to the head or deputy head of the organisation.<sup>72</sup>

7.6 A discloser may make a disclosure to an appropriate authority at any time. An appropriate authority is a trusted external party who can be approached if a discloser is not confident about making the disclosure within their own organisation. An appropriate authority includes:<sup>73</sup>

- (a) "the head of any public sector organisation
- (b) any officer of Parliament (an Ombudsman, the Controller and Auditor-General or the Parliamentary Commissioner for the Environment)
- (c) the persons or bodies listed in Schedule 2 of the Act
- (d) the membership body of a particular profession, trade, or calling with the power to discipline its members."

7.7 An appropriate authority does not include a Minister or Member of Parliament. A discloser may also make the disclosure to another person if they do it on a confidential basis and for the purposes of seeking advice about how to make a protected disclosure in accordance with the Act. Disclosures to the media are not protected under the Act.<sup>74</sup>

7.8 The Ombudsman is the only appropriate authority who can receive a protected disclosure that includes international relations information. The Inspector-General of Intelligence and Security is the only appropriate authority who can receive a protected disclosure that includes intelligence and security information.<sup>75</sup>

7.9 A discloser is entitled to protection for a disclosure made in accordance with an organisation's internal procedures to the head or deputy head of the organisation or to an appropriate authority. A discloser is entitled to protection even if:

- (a) "they are mistaken and there is no serious wrongdoing,
- (b) they do not refer to the name of the Act when making the disclosure, or
- (c) they technically fail to comply with some of the Act's requirements (as long as they have substantially complied with the Act), or

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<sup>72</sup> Section 28  
<sup>73</sup> Section 25  
<sup>74</sup> Section 11  
<sup>75</sup> defined in section 4 of the Act

- (d) they also make the disclosure to another person (as long as they do so on a confidential basis, to seek advice about whether or how to make a protected disclosure).”<sup>76</sup>

7.10 Another discloser who discloses further information in support of a disclosure is also entitled to protection if they do not disclose in bad faith and they disclose to their organisation or to an appropriate authority in accordance with the Act.<sup>77</sup>

7.11 The Act cannot be contracted out of so its rights and protections apply even if the discloser has agreed, for example, in an employment agreement, confidential settlement or non-disclosure agreement that the information cannot be disclosed.<sup>78</sup>

7.12 A disclosure is not protected if the discloser knows the allegations are false; the discloser acts in bad faith and the information being disclosed is protected by legal professional privilege.<sup>79</sup>

7.13 The protections a discloser is entitled to are confidentiality, not retaliated against or treated less favourably and immunity from civil, criminal and disciplinary proceedings.

7.14 Receivers of a protected disclosure must use their best endeavours not to reveal confidential information that might identify the discloser. The exceptions are if the discloser consents to the release of the identifying information or if there are reasonable grounds to believe that the release of the identifying information is essential for the effective investigation of the disclosure or to prevent a serious risk to public health, public safety, the health and safety of any individual or the environment or to comply with the principles of natural justice or to an investigation by a law enforcement or regulatory agency for the purposes of law enforcement.<sup>80</sup>

7.15 The Act provides that disclosers must be consulted in these cases (if practicable in respect of serious risk to public health, public safety, the health and safety of any individual, or the environment or to an investigation by a law enforcement or regulatory agency for the purposes of law enforcement). The Ombudsman can provide advice to disclosers

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<sup>76</sup> Section 11  
<sup>77</sup> Section 12  
<sup>78</sup> Section 24  
<sup>79</sup> Section 39  
<sup>80</sup> Section 17-19

considering making an anonymous disclosure.<sup>81</sup> The release of information that might identify a discloser in breach of these provisions means a complaint may be made under the Privacy Act 2020 for interference with privacy. As a result, the Privacy Commissioner may undertake an investigation. A receiver must refuse a request for information if that information might identify the discloser of a protected disclosure.<sup>82</sup>

7.16 An employer must not retaliate or threaten to retaliate against an employee because the employee intends to make or has made a protected disclosure.<sup>83</sup> If this occurs, the employee has a personal grievance under the Employment Relations Act 2000 (ERA NZ). Retaliate means to dismiss the employee, treat the employee less favourably than other similar employees or subject them to any detriment or disadvantage. A discloser or someone who supports the discloser, who is treated less favourably than others in the same or similar circumstances may be able to access the anti-victimisation protections in the Human Rights Act 1993 (HRA). This applies to all types of disclosers, including persons not covered by the Employment Relations Act.<sup>84</sup>

7.17 Neither a discloser who makes a protected disclosure, nor a receiver who refers the disclosure under the Act is liable to any civil, criminal or disciplinary proceeding because of making or referring the disclosure.<sup>85</sup> This applies even if there is a prohibition or restriction on disclosing the information such as in any contract, agreement, procedure or practice (except where the information is covered by legal professional privilege).<sup>86</sup> These protections only apply to making the disclosure. Action can still be taken against a discloser if they were involved in the wrongdoing.

7.18 According to section 13 of the Act, within 20 working days of receiving a protected disclosure, the receiver should:

- acknowledge to the discloser the receipt of the disclosure
- consider the disclosure and whether it warrants investigation
- check with the discloser whether the disclosure has been made elsewhere (and any outcome)
- deal with the matter by doing one or more of the following:
  - ✓ investigating the disclosure

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<sup>81</sup> [www.ridgeview.school.nz, https://www.ridgeview.school.nz/wp-content/uploads/sites/24/2022/10/Protected-Disclosures-Policy-1.pdf](https://www.ridgeview.school.nz/wp-content/uploads/sites/24/2022/10/Protected-Disclosures-Policy-1.pdf).

<sup>82</sup> [Rārangi Upoko | Contents, https://publicservice.govt.nz/assets/DirectoryFile/Protected-Disclosures-Act-2022-Guidance.pdf](https://publicservice.govt.nz/assets/DirectoryFile/Protected-Disclosures-Act-2022-Guidance.pdf).

<sup>83</sup> [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 - Legislation, https://legislation.govt.nz/act/public/2022/0020/latest/whole.html](https://legislation.govt.nz/act/public/2022/0020/latest/whole.html).

<sup>84</sup> Section 20-23

<sup>85</sup> Section 23

<sup>86</sup> Section 24



- ✓ addressing any serious wrongdoing by acting or recommending action
- ✓ referring the disclosure (see below)
- ✓ deciding that no action is required; and
- inform the discloser (with reasons) about what the receiver has done or is doing to deal with the matter.

7.19 However, when it is impracticable to complete these actions within 20 working days, the receiver should undertake the first three steps and inform the discloser how long the receiver expects to take to deal with the matter. The receiver should then keep the discloser updated about progress.

7.20 A receiver must inform the discloser, with reasons, if the receiver decides no action is required on the disclosure. Reasons may include that the requirements of the Act in relation to disclosers and disclosures are not met, that the length of time since the alleged wrongdoing makes an investigation impractical or undesirable or that the matter is better addressed by other means.<sup>87</sup>

7.21 If a discloser believes, on reasonable grounds, that the receiver of a protected disclosure has not acted as it should or has not dealt with the matter, the discloser may make the disclosure to:

- “an appropriate authority, including an Ombudsman (which the discloser can do at any time)
- a Minister
- the Speaker (if the disclosure relates to serious wrongdoing in or by the office of an officer of Parliament, the office of the Clerk of the House of Representatives, or the Parliamentary Service).”

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<sup>87</sup> Section 15 of the Act

## CONCLUDING REMARKS

7.22 The PDA NZ legislation shares similarities with the PDA in that it focuses on the employment relationship, the employee as the whistleblower and compensation and relief in relation to the employment relationship. However, it is important to note that the protection provided by the PDA NZ is more extensive than that of the PDA. The scope of protection under the PDA NZ includes former employees, homeworkers, seconded employees, contract employees, management employees, members of the defence force and armed forces and volunteer workers, who are employed by public and private organisations with one or more employees. As such, the PDA NZ offers a wider range of protection to a broader section of the workforce.

7.23 As mentioned above, the Act cannot be contracted out of so its rights and protections apply even if the discloser has agreed, for example, in an employment agreement, confidential settlement or non-disclosure agreement that the information cannot be disclosed. This provision is very interesting with regards to the PDA when consideration is taken regarding section 41(1)(c) of the Constitution which provides that: “*All spheres of government and all organs of state within each sphere must provide effective, transparent, accountable and coherent government for the Republic as a whole*”. It has been argued that the practise of signing non-disclosure agreements is incongruent with the Constitution because the NDAs deny transparency and obscure accountability in many state-owned enterprises.<sup>88</sup>

7.24 The PDA NZ makes it compulsory for a receiver of information to give reasons to the discloser if the receiver decides not to action about the disclosure and if the discloser is not satisfied with reasons, the PDA NZ allows the discloser to take the matter forward to other forums.

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<sup>88</sup> Jaichand, V (2021). Non-disclosure agreements for whistleblowers not in line with constitution: <https://mg.co.za/thoughtleader/opinion/2021-12-09-non-disclosure-agreements-for-whistleblowers-not-in-line-with-constitution/> ( Accessed 11/05/2023)

## CHAPTER 8: The Position of Whistleblower's IN AUSTRALIA

8.1 In Australia, the protection afforded to whistleblowers is dependent on where, geographically speaking, the whistleblower finds himself or herself. Australia has separate whistleblowing legislation for each of its states. The following whistleblower legislation is currently available in Australia:

### A AUSTRALIAN WHISTLEBLOWER LEGISLATION

Legislation	Region
Whistleblowers Protection Act 1993	South Australia
Whistleblowers Protection Act 1994	Queensland
Protected Disclosures Act 1994	New South Wales
Public Interest Disclosure Act 2013	Commonwealth
Public Interest Disclosure Act 2012	Australian Capital Territory
Protected Disclosure Act 2012	Victoria
Public Interest Disclosure Act 2002	Tasmania
Public Interest Disclosure Act 2003	Western Australia
Public Interest Disclosure Act 2008	Northern Australia

8.2 This document does not analyse all the different pieces of Australian whistleblower legislation but focuses on the Protected Disclosure Act 2012 (Vic) (PDA Vic) as it is more comprehensive than the other legislation identified above. The Whistleblowers Protection Act 2012 (Vic) commenced on 10 February 2013, repealing the Whistleblowers Protection Act 2001 (Vic).

8.3 The repeal of the 2001 PDA Vic and the introduction of the PDA Vic 2012 marked a significant step towards integrity reforms in Victoria. The reforms included the establishment of the Independent Broad-based Anti-corruption Commission (IBAC) as the head of the new integrity regime. IBAC is responsible for overseeing the Victorian Inspectorate and the Ombudsman, while the IBAC Committee is tasked with monitoring IBAC's activities and examining its reports. Additionally, the Accountability and Oversight Parliamentary Committee has been set up to oversee the Freedom of Information Commissioner and the Victorian Ombudsman. These measures are aimed at promoting transparency and

accountability in government operations, which is crucial for fostering public trust and confidence.<sup>89</sup>

## 1 Protected Disclosure Act 2012 (Vic)

8.4 The purpose of the PDA Vic is to:

- “encourage and facilitate disclosures of improper conduct by public officers and/or public bodies;
- encourage and facilitate disclosures of detrimental action taken in reprisal of a person making a protected disclosure;
- provide protections to ensure that those making disclosures are not subject to detrimental action taken in reprisal against them; and
- provide for the confidentiality of protected disclosures and the identity of persons making disclosures.”<sup>90</sup>

8.5 The information that may be disclosed in accordance with the PDA Vic in order to qualify as a protected disclosure is the following:

- (a) “Information that shows or tends to show a person, public officer or public body has engaged, is engaging or proposes to engage in improper conduct;
- (b) a public officer or public body has taken, is taking or proposes to take detrimental action against a person;
- (c) information that the person believes, on reasonable grounds, shows or tends to show a person, public officer or public body has engaged, is engaging or proposes to engage in improper conduct; or
- (d) a public officer or public body has taken, is taking or proposes to take detrimental action against a person in contravention.”<sup>91</sup>

8.6 A disclosure may be about conduct that has occurred before the commencement of a section but may not relate to a Public Interest Monitor, the Office of the Special Investigations Monitor, the Special Investigations Monitor, the Victorian Inspectorate, a Victorian Inspectorate Officer; a court.<sup>92</sup>

8.7 Section 3 of the PDA Vic defines detrimental action as action causing injury, loss or damage, intimidation or harassment, discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action.

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<sup>89</sup> LD Isparta “The Position of the Whistle-Blower in South African Law” submitted in accordance with the requirements for the degree of Doctor of Laws at the University of South Africa October 2014.

<sup>90</sup> Section 1 of the PDA Vic

<sup>91</sup> Section 9 of the PDA Vic

<sup>92</sup> Section 9(2) of the PDA Vic

8.8 A disclosure may be made even if the person making the disclosure cannot identify the person or the body to whom or to which the disclosure relates.<sup>93</sup> A disclosure must be made in accordance with the prescribed procedure<sup>94</sup> and despite any provision contrary to that of the PDA Vic, with the exclusion of the Charter of Human Rights and Responsibilities Act 2006, a disclosure may be made orally, in writing and anonymously.<sup>95</sup> Disclosures, within the prescribed circumstances, may be made to IBAC,<sup>96</sup> the Victorian Inspectorate,<sup>97</sup> the Ombudsman<sup>98</sup> and a member of police personnel other than the Chief Commissioner of the Police or IBAC,<sup>99</sup> where it concerns a member of the police. Furthermore, disclosures relating to a member of Parliament or Ministers of the Crown are to be made to the Speaker of the Legislative Assembly or IBAC, depending on the standing of the Minister in question.<sup>100</sup>

8.9 Section 20(1) of the PDA Vic outlines the conditions under which a disclosure can be considered a protected disclosure. It states that if the person making the disclosure explicitly states in writing that it is not intended as a protected disclosure, then it will not be protected. Additionally, disclosures made by officers or employees of an investigative entity will not be considered protected unless they explicitly state in writing that the disclosure is intended as a protected disclosure and is made in accordance with Division 2 of the PDA Vic.

8.10 A person who makes the protected disclosure is not subject to any civil or criminal liability or any liability arising by way of an administrative process, including disciplinary action, for having made the protected disclosure. However, a person making a disclosure will not enjoy immunity if the person, in making the disclosure, contravenes section 72(1) or (2) in relation to the information disclosed.<sup>101</sup>

8.11 Section 72 states that it is an offence to make a false disclosure or to provide false further information. Should a person provide false or misleading information in a material manner, intending that the information so provided be acted on as a protected disclosure, 120 penalty units or 12 months imprisonment or both, may be imposed. If a person provides further information relating to a protected disclosure made by him or her, knowing that

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<sup>93</sup> Section 10 of the PDA Vic

<sup>94</sup> Section 12(1)

<sup>95</sup> Section 13

<sup>96</sup> Section 14

<sup>97</sup> Section 15

<sup>98</sup> Section 16

<sup>99</sup> Section 18

<sup>100</sup> Section 19

<sup>101</sup> Section 39

further information to be false or misleading in a material manner provided, 120 penalty units or 12 months imprisonment or both, may be imposed.

8.12 When an individual makes a protected disclosure, they are not committing an offense under section 95 of the Constitution Act 1975 or any other Act that mandates confidentiality. This includes any restrictions on the disclosure of confidential information or any breach of an oath, rule of law, practice, or agreement that requires confidentiality.<sup>102</sup>

8.13 Should a person who has made a protected disclosure be summoned regarding a case of defamation, in respect of the information which forms part of the protected disclosure, there is a defence of absolute privilege in respect of having made a protected disclosure which has been created. The afore-mentioned protection afforded does not apply in circumstances in which the person discloses false information or further information and thereby contravenes section 72(1) and (2) of the PDA Vic.<sup>103</sup>

8.14 It is crucial for any individual considering blowing the whistle within this particular context to understand that their liability for their own actions will not be affected by disclosing such conduct under Part 6 of the PDA Vic. It is important to note that the PDA Vic does not provide immunity for any unlawful conduct, and therefore, it is still possible for a whistleblower to be held accountable for any illegal actions they may have committed.<sup>104</sup>

8.15 A person takes detrimental action against another in reprisal for a protected disclosure, in the following circumstances:<sup>105</sup>

- Where the person takes or threatens to take detrimental action against the other because of, or in the belief that the other person or anyone else –
  - ✓ has made or intends to make the disclosure in question; or
  - ✓ has cooperated or intends to cooperate with any investigation pertaining to the disclosure.
- For any of the above-mentioned reasons, the person incites or allows someone else to take or threaten to take detrimental action against the person.

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<sup>102</sup> Section 40

<sup>103</sup> Section 41

<sup>104</sup> Section 42

<sup>105</sup> Section 43

8.16 The person does not take detrimental action against another in reprisal for a protected disclosure, if in so making the disclosure the person has contravened section 72(1) or (2) of the PDA. A person, who takes detrimental action against another person, does not take detrimental action in respect of a protected disclosure, if there is a substantial reason for the person taking the relevant action, excluding for the purposes of section 45<sup>106</sup> of the PDA Vic.

8.17 The PDA Vic is in place to safeguard individuals who disclose information that is in the public interest. However, this protection does not prevent managers from taking necessary management action against an employee who has made such a disclosure. The only exception to this is if the fact that the employee making a protected disclosure is not a substantial reason for the manager's actions. This means that managers are still able to take necessary disciplinary or corrective action against employees who have made protected disclosures, as long as the reason for such action is not solely based on the fact that the employee made a disclosure.<sup>107</sup>

8.18 Where action is taken against a person that is regarded as detrimental action for making a protected disclosure, the penalty for such action is 240 penalty units or two years imprisonment or both.<sup>108</sup> If a person is convicted or found guilty of an offence in respect of section 45 the court may, in addition to the imposition of the prescribed penalty, order that within a specified time, the offender pay to the person against whom the detrimental action in question was taken, damages that the court considers appropriate, in order to compensate the person for any injury, loss or damage which has been suffered. In this regard, and without limiting the court's discretion when making an order in respect of compensation for injury, loss or damage, the court may also consider any remedy that has already been granted under section 47 which refers to damages or section 49 which refers to an injunction or order, in relation to the same conduct.

8.19 If the employer of a person or someone within the course of employment or while acting as an agent for the employer is convicted or found guilty of contravening section 45, in relation to detrimental action taken against the employee the court may, in addition to imposing the penalty provided for under section 45, and in addition to any damages ordered

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<sup>106</sup> Section 45 of the PDA Vic relates to protection from reprisal and provides that a person is not permitted to take detrimental action against another person in reprisal for a protected disclosure which has been made. The penalty for doing so is 240 penalty units or 2 years imprisonment or both.

<sup>107</sup> Section 44

<sup>108</sup> Section 45

in terms of section 46(1), also order that the employer reinstate or re-employ the person in his former position or a similar position.

8.20 An employee of a public service body or a public entity who has made a protected disclosure and who, on reasonable grounds, believes that detrimental action will be taken, is being taken or has been taken against him in contravention of the provisions of section 45, may request a transfer in accordance with the provisions of section 51. Should such an employee request such a transfer, a public service body Head may transfer such employee to duties within another public service body, public entity or a different area of the same public service body on such terms and conditions of employment that considered overall, are not less favourable.

8.21 An employee may only be transferred:

- (a) “if the employee requests or consents to the transfer;
- (b) the public service body or entity Head has reasonable grounds to suspect that detrimental action will be, is being or has been taken against the relevant employee in contravention of section 45 of the PDA Vic;
- (c) the public service body or entity Head considers that the transfer of the relevant employee will avoid, reduce or eliminate the risk of detrimental action being taken against the relevant employee; and
- (d) the public service body or entity Head to which the proposed transfer is to be made consent thereto.”.

8.22 It is strictly prohibited for any individual or organisation to reveal information that may potentially lead to the identification of a person who has made an assessable disclosure. The consequences of such action are severe and can result in a penalty of 120 penalty units or 12 months imprisonment or both, in the case of a natural person. In the case of a body corporate, the penalty is even more severe, with 600 penalty units being imposed.<sup>109</sup>

8.23 In terms of section 54(2) of the PDA Vic, a person or body may disclose the content or information pertaining to the content of an assessable disclosure or information likely to lead to the identification of the person who made the said assessable disclosure. Such disclosure may be made in the following circumstances:

- where it is necessary for the purpose of the exercise of functions under the PDA Vic;
- by an investigating entity or an officer of the investigating entity, where it is necessary for the exercising of its functions in terms of the provisions of the IBAC Act, the VIA, the Ombudsman Act 1973 or Part IVB of the Police Regulation Act 1958;

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<sup>109</sup> Section 52(3)



- for the purpose of proceeding in respect of an offence against a relevant Act or section 19 of the Evidence (Miscellaneous Provisions) Act 1958, arising from an investigation by the Ombudsman;
- for the purpose of a disciplinary process or action that has been instituted in respect of conduct that could constitute an offence against the relevant Act or section 19 of the Evidence (Miscellaneous Provisions) Act 1958, arising from an investigation by the Ombudsman;
- for the purposes of obtaining legal advice or representation in relation to a witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice or in relation to the person's rights, liabilities, obligations and privileges under the relevant Act and by an Australian legal practitioner and an interpreter that may, in this regard, be involved.

#### 8.24 In terms of section 74 the PDA Vic:

- A person who is advised by an entity under section 24(2),<sup>110</sup> 25(2)<sup>111</sup> or 37(1)<sup>112</sup> that a disclosure or related disclosure made by the relevant person to the entity has been notified to the IBAC for the purposes of assessment, may not disclose this, except in circumstances provided for in terms of section 74(5).
- A person who has been advised by the IBAC or the Victorian Inspectorate under section 28(1) that a disclosure made by the person has been determined to be a protected disclosure complaint, may not disclose this, except in circumstances provided for in terms of section 74(5).
- A person who receives information as referred to above in respect of notification or determination may not disclose this, except in circumstances provided for in terms of section 74(5).

8.25 A Contravention of the provisions of section 74 carries a penalty of 60 penalty units or 6 months imprisonment or both.

8.26 Section 74(5) specifies the circumstances in which such information may be imparted as being the following:

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<sup>110</sup> Section 24(2) provides that – If the entity notifies the disclosure to the IBAC under section 21(2) or 22(2), the entity must advise the person who made the disclosure that the disclosure has been notified to the IBAC for assessment under this Act.

<sup>111</sup> Section 25(2) provides that – If the Presiding Officer notifies the disclosure to the IBAC under section 21(3), the Presiding Officer may advise the person who made the disclosure that the disclosure has been notified to the IBAC for assessment under this Act.

<sup>112</sup> Section 37(1) provides that –If a related disclosure is notified to the IBAC by an investigating entity under section 36 (2), the investigating entity must advise the person who made the related disclosure that the related disclosure has been notified to the IBAC for assessment under this Act.

- Disclosure, where it is necessary for the purpose of obtaining any relevant information, a document or a thing to comply with a witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice or in order to comply with section 74(5) of the PDA A, including circumstances in which the person involved –
  - ✓ Does not have sufficient knowledge of the English language to understand the nature of a witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice. Here it extends to the interpreter used.
  - ✓ If the person is under 18 years of age, it extends to his parent, guardian or independent person;
  - ✓ If the person is illiterate or has a mental, physical or other type of impairment which prevents him from understanding the nature of a witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice. Here it extends to the independent person who assists.

8.27 An exception in this regard also applies to circumstances of disclosure for the purposes of obtaining legal advice or representation in relation to:

- A witness summons, a confidentiality notice, a notice cancelling a confidentiality notice or an order extending a confidentiality notice or compliance with section 74(5);
- the person's liabilities, privileges and obligations within the context of the PDA Vic.

8.28 Further exceptions in this regard relate to the following:

- disclosure by an Australian legal practitioner who receives a disclosure in circumstances as described above, and provided for in terms of section 74(5)(b), for the purposes of complying with a legal duty of disclosure or a professional obligation which arises as a result of his professional relationship with his client;
- disclosure for the purpose of making a complaint to the IBAC121 or the Victorian Inspectorate;
- disclosure for the purposes of complying with a witness summons served on the person by either IBAC or the Victorian Inspectorate;

- disclosure of information that has already been published in a report by IBAC or has otherwise been made public;
- disclosure to a person's spouse or domestic partner;
- disclosure to a person's employer, manager or both the employer and manager;
- disclosure that is otherwise authorised or required to be made by or under a relevant Act or the PDA Vic.

8.29 In terms of section 57 of the PDA Vic the IBAC is responsible for issuing guidelines consistent with the PDA Vic and related regulations in respect of the-

- facilitation of the making of disclosures to entities, the handling of disclosures and related notifications and for the protection of persons from detrimental action in contravention of section 45; and
- management of the welfare of any person who has made a protected disclosure, and any person affected by a protected disclosure whether as a witness or the person who is the subject of the investigation.

8.30 The IBAC must ensure that its guidelines are readily available to the public and relevant entities and their members, officers and employees and each member of the police. Section 60 provides for structured review of the procedures to be developed, by IBAC. So too, with reference to the procedures developed in terms of section 58, IBAC is empowered to make recommendations as it deems fit and should the IBAC deem that insufficient steps have been taken by the entity in this respect, may after considering any comments in this regard by the entity, send a copy of the recommendations so made to the relevant Minister.

## **CONCLUDING REMARKS**

8.31 PDA Vic is a comprehensive legislation that aims to encourage and protect individuals who make disclosures about improper conduct within public sector organisations. The fact that the body of the PDA consists of 185 pages indicates that the legislation covers various aspects of the protected disclosure process in detail.

8.32 The PDA Vic embodies a three-phase process for the making of a protected disclosure.<sup>113</sup> The first phase is the receipt of the disclosure, where the organisation receiving the disclosure must have appropriate mechanisms in place to receive disclosures from individuals who wish to make a disclosure. The second phase involves the assessment of the disclosure to determine whether it meets the requirements of a protected disclosure, which includes criteria such as whether the disclosure is about improper conduct and whether the individual making the disclosure has reasonable grounds to believe the information is true. If the disclosure is found to meet the criteria, it will be deemed a protected disclosure.

8.33 The third and final phase of the process is the investigation of the allegations contained in the protected disclosure. Once a disclosure has been deemed protected, the organisation must investigate the allegations raised in the disclosure. The investigation must be conducted in a manner that is fair, impartial and transparent and must adhere to the relevant standards of evidence and procedural fairness.

8.34 The PDA in Victoria provides a robust framework for the making and handling of protected disclosures. The legislation aims to protect individuals who make disclosures about improper conduct within public sector organisations and provides clear guidelines for the receipt, assessment and investigation of protected disclosures.

8.35 The PDA and the PDA Vic are both laws that provide protection to individuals who report corruption or other types of wrongdoing. However, there are some significant differences between these two laws.

8.36 One of the most significant differences between the PDA and the PDA Vic is the scope of the legislation. While the PDA focuses primarily on protecting employees who report wrongdoing by their employers or colleagues, the PDA Vic has a much broader focus on eradicating corruption and related activities across all sectors of society. This means that the PDA Vic provides protection to a much wider range of individuals who report corruption, including those who are not necessarily in an employee/employer relationship.

8.37 Another important difference between the two laws is the requirement for good faith in making a disclosure. Under the PDA, individuals are required to make their disclosure in

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<sup>113</sup> LD Isparta “The Position of the Whistle-Blower in South African Law” submitted in accordance with the requirements for the degree of Doctor of Laws at the University of South Africa October 2014.

good faith, meaning that they must genuinely believe that the information they are providing is true and accurate. In contrast, the PDA Vic does not have a specific good faith requirement. However, individuals who provide false information or who provide false information with the intention of misleading investigators can be charged with an offence.

8.38 Overall, while the PDA and the PDA Vic share some similarities in their aim of protecting individuals who report corruption, there are significant differences in their scope and requirements for making a disclosure. An important lesson that South Africa should not miss from the PDA Vic is the level of protection afforded to the whistleblowers under the Act. Acts of retaliation undertaken against a whistleblower, on account of having blown the whistle, are taken very seriously. The PDA Vic affords varied methods of protection in this respect including, for example, immunity from liability in respect of civil, criminal and disciplinary action, confidentiality in respect of the information contained in the disclosure and the name of the whistleblower, protection from defamation action, damages, reinstatement and imposition of penalties.

# CHAPTER 9: LEGAL PROTECTION OF WHISTLEBLOWERS IN THE AFRICAN CONTINENT

## A The Position of Whistleblower's in Namibia

### 1 Whistleblower Protection Act 10 of 2017

9.1 In terms of the Namibian Whistleblower Protection Act 10 of 2017, whistleblower means any person who makes a disclosure of improper conduct in terms of the Act. "Improper conduct" includes:

- criminal activities;
- violation of the fundamental rights and freedoms protected by the Namibian Constitution;
- a miscarriage of justice;
- any action that could be the subject of a disciplinary proceeding in an organisation;
- failure to comply with any law;
- waste, misappropriation, or mismanagement of resources that affects the public interest;
- damage to the environment;
- endangering the health and safety of an individual or a community; and
- deliberate concealment of any of these kinds of wrongdoing.

9.2 The protection of whistleblowers is wider than in South Africa where protection is limited to employees. A whistleblower is protected against victimisation only if disclosure was made to a proper authority in good faith and if the whistleblower had reasonable grounds for believing that the information was true. There is no protection for whistleblowers if:

- they are continuing to participate in the improper conduct themselves;
- they knowingly made a false statement in their disclosure;
- their disclosure was not serious or was made just to annoy;
- their main motive for the disclosure was to avoid being disciplined or dismissed;
- and
- making the disclosure constitutes a crime on the part of the whistleblower.

9.3 Protection that was initially provided to a whistleblower can be taken away if any of the above-mentioned issues come to light. Anonymous disclosures are permissible, however, whistleblowers can only be protected after they have identified themselves.

9.4 The Act establishes a whistleblower office to investigate disclosures of improper conduct and to investigate complaints of retaliation against the persons making the disclosures. It is a serious crime for anyone to use force or other coercion to try to stop a person from disclosing information about improper conduct. The penalty is a fine of up to N\$50 000 or prison for up to 10 years or both.<sup>114</sup>

9.5 When a disclosure is made, whether orally or in writing, it is important for the recipient to record the information along with the time and place it was given. It is also necessary to provide the whistleblower with a written acknowledgement that their disclosure has been received. In the event that an employee discloses information about a fellow employee or the employer, an authorised person will typically investigate and compile a report for the CEO. This report will either recommend corrective action or conclude that the disclosure did not expose any improper conduct. The CEO will then either take the recommended action, provide reasons for disagreeing with the conclusions and recommendations, or dismiss the matter altogether

9.6 According to the Act, in order to protect whistleblowers, there are certain steps that must be taken. If the disclosure involves an employment situation, the CEO must inform the whistleblower in writing of their decision and report to the Commissioner of Whistleblower Protection. However, if the disclosure does not involve employment, the authorized person will communicate directly with the Commissioner, who will assign someone to investigate and report back. The Commissioner is responsible for determining whether the whistleblower is entitled to protection under the law and must notify them of their decision. If the whistleblower is not satisfied with the decision, they have the option to appeal to the Whistleblower Protection Review Tribunal.<sup>115</sup>

9.7 Whistleblowers are protected by the law from any detrimental action that may be taken against them or persons related to them. This includes intimidation, harassment, harm to persons or property, or negative employment consequences. Retaliation in the employment context can take various forms, such as dismissal, suspension, demotion, transfer, or changed working conditions. If a whistleblower experiences any detrimental

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<sup>114</sup> Section 55

<sup>115</sup> The Whistleblower Protection Review Tribunal consists of a magistrate, or a judge assisted by two other persons with appropriate expertise. They are appointed by the President on the recommendation of the Minister of Justice for five-year terms. The Tribunal convenes only when it is needed.

action, they can file a complaint with the Commissioner who will investigate and either dismiss the complaint or refer it to the Whistleblower Protection Review Tribunal. The Tribunal has the power to award damages or compensation, issue court orders, and correct any negative employment consequences. It may order an employer to take disciplinary action against the person responsible for the retaliation against the whistleblower.

9.8 As a form of protection, whistleblowers cannot be subjected to civil or criminal action for making disclosures that they believed to be true. For example, the whistleblower cannot be sued for defamation for a good faith disclosure. It is a crime for anyone to reveal confidential information about a whistleblower.<sup>116</sup>

9.9 In Namibia, whistleblowers are protected by law and may be rewarded for their disclosures. If a whistleblower's information leads to an arrest and prosecution, or the recovery of money or property, they may be entitled to a percentage of the proceeds. It's important to note that the provisions of the law on whistleblowing take precedence over any contracts or employment conditions that require secrecy. However, there are limitations to this protection. The law does not override national security interests, national defense, crime prevention or detection, administration of justice, or the sovereignty and integrity of Namibia.

9.10 Whistleblowers fall under the definition of "witness" in the Witness Protection Act 11 of 2017, whether or not the whistleblower gives information in court. This means that a whistleblower is also entitled to the protections provided by the Witness Protection Act.<sup>117</sup>

9.11 Some extracts from the Namibian legislation:

**Establishment of Whistleblower Office**

6. (1) There is established in the public service, an independent and impartial office to be known as the Whistleblower Protection Office to perform the functions and duties as provided for in this Act or in any other law.
- (2) The Whistleblower Office consists of -
  - (a) the Commissioner;
  - (b) one or more Deputy Commissioners; and
  - (c) other staff members appointed in terms of section 14 or seconded in terms of the law governing secondments in the public service from staff members in the public service.
- (3) The Public Service Act, 1995 applies to the Commissioner, Deputy Commissioner and the other staff members of the Whistleblower Office,

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<sup>116</sup> Section 45

<sup>117</sup> Section 49



except to the extent as provided otherwise by this Act or as is inconsistent with this Act.

- (4) The Whistleblower Office is an office in the public service as contemplated in the Public Service Act, 1995.

### **Functions and powers of Whistleblower Office**

7. (1) The Whistleblower Office, under the overall supervision and direction of the Commissioner, must perform the functions and exercise the powers entrusted to it by or under this Act including the following -
- (a) investigation of disclosures of improper conduct made under this Act and consideration of the validity of such disclosures and the determination of appropriate action to be taken in relation to such disclosures;
  - (b) consideration of reports and other matters referred to it in terms of this Act and to take appropriate action;
  - (c) investigation of complaints of detrimental action, and where appropriate reference of complaints to the Tribunal for remedial action;
  - (d) appearing before the Tribunal as a public interest party in proceedings relating to complaints of detrimental action before the Tribunal;
  - (e) initiating and laying criminal charges against any person who has committed or is alleged to have committed a criminal offence under this Act;
  - (f) issuing temporary prohibition notices and applying for confirmation of such notices before the Tribunal as contemplated in section 46;
  - (g) establishing programmes to educate the public concerning the provisions of this Act and the necessity for disclosures of improper conduct;
  - (h) giving policy directions to employers, authorised persons, investigation agencies and other persons involved in the implementation of this Act on best practices to ensure effective implementation of this Act;
  - (i) generally overseeing the effective implementation of this Act;
  - (j) exercising any powers and performing any functions conferred or imposed on it by this Act, and any powers that are necessary or expedient for or incidental to the achievement of its objects; and
  - (k) exercising any powers and performing any functions as may be prescribed.
- (2) When performing the investigative functions of the Whistleblower Office under this Act, the Commissioner, a staff member of the Whistleblower Office or an investigator authorised thereto in writing by the Commissioner has, subject to such necessary changes as may be required by context, the same powers, privileges and immunities as those conferred on the Ombudsman by section 4 of the Ombudsman Act, 1990 (Act No. 7 of 1990) and the provisions of that section do apply to an investigation under this Act as if it were an inquiry or investigation conducted by the Ombudsman under that Act.
- (3) All other matters in connection with the Whistleblower Office or arising from this Act may be prescribed.

9.12 The Namibian model for whistleblowing provides for a decentralized approach to the powers of the bodies to which disclosures may be made. Unlike some other countries, where a single institution is responsible for receiving and handling disclosures, the Namibian system allows for the creation of various structures. This ensures that disclosures can be made to the most appropriate body, depending on the nature of the disclosure and the sector in which it occurs.

9.13 The Act is an important piece of legislation, but it has not yet been fully implemented. This means that there may still be some uncertainty around how the system will work in practice. However, the Act provides a clear framework for how disclosures should be handled, and sets out the rights and protections that whistleblowers are entitled to.

9.14 One of the key features of the Namibian model is the emphasis on protecting whistleblowers from retaliation. The Act provides for a range of measures to ensure that whistleblowers are not victimized or punished for coming forward with information. These include protections against dismissal, demotion, or other forms of retaliation, as well as the right to seek compensation if they are harmed as a result of making a disclosure.

9.15 Another important aspect of the Namibian model is the role of civil society organizations and other stakeholders in promoting transparency and accountability. The Act encourages the establishment of independent bodies to receive and investigate disclosures, and provides for the participation of civil society organizations in this process. This helps to ensure that disclosures are handled in a fair and impartial manner, and that there is public oversight of the whistleblowing system.

9.16 Overall, the Namibian model for whistleblowing represents an important step forward in promoting transparency and accountability in both the public and private sectors. While there may still be challenges in implementing the system effectively, the Act provides a strong foundation for protecting whistleblowers and ensuring that disclosures are handled appropriately.

## **B Other laws that protect whistleblowers and witnesses in Namibia**

9.17 Some limited protections for whistleblowers and witnesses are also contained in the following pieces of legislation:

- **Anti-Corruption Act 8 of 2003:** This law protects the identity of informants who assisted in a corruption investigation. Other witnesses are not required to identify the informer or provide information that could reveal the informer's identity, except where the informer has given false information on purpose, or where justice cannot be done without revealing the informer's identity. Even if the court decides that the informer's identity must be revealed, the informer can be protected by closing the court to the public or prohibiting the publication of any information about the informer's identity. This law protects informers who act in good faith against disciplinary proceedings and civil or criminal lawsuits related to their reporting.<sup>118</sup>
- **Financial Intelligence Act 13 of 2012:** This law protects persons who make or contribute to reports to the Financial Intelligence Centre. Their identity will be kept secret unless they are required to give evidence in criminal proceedings.<sup>119</sup>
- **Prevention of Organised Crime Act 29 of 2004:** This law allows the court to hold proceedings behind closed doors and to limit the publication of information that might put people at risk.<sup>120</sup>
- **Labour Act 11 of 2007:** This law makes it unfair to dismiss or discipline an employee for disclosing information that the employee is legally entitled or legally required to disclose. But it does not provide any protection against other kinds of victimisation for speaking out about wrongdoing.<sup>121</sup>

## **C The Position of Whistleblower's in Uganda**

### **1 The Whistleblowers Protection Act, 2010**

9.18 The Whistleblowers Protection Act provides for the procedure by which individuals in both the private and public sector may, in the public interest, disclose information that relates

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<sup>118</sup> Anti-Corruption Act 8 of 2003, section 52

<sup>119</sup> Financial Intelligence Act 13 of 2012, section 45

<sup>120</sup> Prevention of Organised Crime Act 29 of 2004, section 98

<sup>121</sup> Labour Act 11 of 2007, sections 33(2(a) and 48

to irregular, illegal or corrupt practices, as well as for the protection against the victimisation of persons who make disclosures.

9.19 The Whistleblowers Protection Act provides that, subject to any other law to the contrary, any disclosure of an impropriety made by a whistleblower is protected where they:

- make the disclosure in good faith;
- reasonably believe that the disclosure and any allegation of impropriety contained in it are substantially true;
- make the disclosure to an authorised officer;
- maintain the confidentiality of their identity as whistleblower and take reasonable steps to avoid discovery; and
- maintain the confidentiality of the information contained in the disclosure.<sup>122</sup>

9.20 The Whistleblowers Protection Act provides further protection for whistleblowers, namely:

- **protection from victimisation:** in the case of any employee, victimisation includes being dismissed or suspended, denial of a promotion, demotion, being made redundant, harassment, intimidation, threats with any of these preceding actions, and being subjected to a discriminatory or other adverse measures by the employer or fellow employees;<sup>123</sup>
- **protection against court action:** a whistleblower should not be liable to civil or criminal proceedings in respect of a disclosure that contravenes any duty of confidentiality or official secrecy where the whistleblower acts in good faith;<sup>124</sup> and
- **State protection is available,** upon request, to a whistleblower who makes a disclosure and who has reasonable cause to believe that their life or property, or the life or property of a member of their family, is endangered or likely to be endangered as a result of the disclosure<sup>125</sup>.

9.21 Protection is conferred to any person who makes a disclosure of impropriety under the Whistleblowers Protection Act. Specifically, disclosures of impropriety may be made:

- by an employee in the public or private sector in respect of their employer;
- by an employee in respect of another employee;
- by a person in respect of another person; or
- by a person in respect of a private or public institution.

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<sup>122</sup> Section 3

<sup>123</sup> Section 9

<sup>124</sup> Section 10

<sup>125</sup> Section 11

9.22 Protection is limited to disclosures of impropriety. Impropriety is broadly defined under the Whistleblowers Protection Act and covers criminal and other unlawful acts. A person may make disclosure of information that they reasonably believe tends to show:

- that a corrupt, criminal, or other unlawful act has been committed, is being committed, or is likely to be committed;
- that a public officer or employee has failed, refused, or neglected to comply with any legal obligation to which that officer or employee is subject;
- that a miscarriage of justice has occurred or is occurring or is likely to occur; and
- that any matter referred to above has been, is being, or is likely to be deliberately concealed.

9.23 The Whistleblowers Protection Act criminalises the victimisation of a whistleblower. It provides that a person who either by themselves or through another person victimises a whistleblower commits an offence. An authorised officer, who does not act upon receipt of a disclosure made to him or her, commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine not exceeding one hundred and twenty currency points or both.<sup>126</sup>

9.24 A person who knowingly makes a disclosure containing information he or she knows to be false and intending that information to be acted upon as a disclosed matter, commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine not exceeding one hundred and twenty currency points or both.<sup>127</sup>

9.25 The Whistleblowers Protection Act provides that a whistleblower should be rewarded for their disclosure by 5% of the net liquidated sum of money recovered consequent upon the recovery of the money based on that disclosure. The payment is to be made within six months after the recovery of the money.<sup>128</sup>

## **D The Position of Whistleblower's in Kenya**

9.26 In Kenya, there is currently no specific legislation that addresses the protection of whistleblowers or the legal rights relating to the operation of whistleblowing activities. However, various pieces of legislation have been enacted to reduce corruption and

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<sup>126</sup> Section 16

<sup>127</sup> Section 17

<sup>128</sup> Section 19

encourage good governance within both public and private systems. These laws provide some aspects of whistleblowing, but a dedicated bill known as the Whistleblower Protection Bill, 2021 has been introduced to the Parliament of Kenya.<sup>129</sup>

9.27 The Whistleblower Protection Bill is a proposed legislation in Kenya that aims to strengthen the protection of whistleblowers and promote a culture of whistleblowing. The bill seeks to provide safeguards against retaliation, victimization, and harassment of whistleblowers who report misconduct, fraud, or corruption. It is designed to create an environment where individuals can come forward and report wrongdoing without fear of repercussions. The bill consolidates all provisions relating to whistleblowing, providing a comprehensive framework for the protection of whistleblowers.<sup>130</sup>

9.28 The bill provides for the establishment of a Whistleblower Protection Authority that will be responsible for receiving and investigating complaints from whistleblowers. The Authority will also be tasked with ensuring the protection of whistleblowers and enforcing the provisions of the bill. Additionally, the bill proposes the creation of a Whistleblower Fund that will provide financial support to whistleblowers who may suffer financial losses as a result of their disclosures.<sup>131</sup>

9.29 The introduction of the Whistleblower Protection Bill is a significant step towards promoting transparency, accountability and good governance in Kenya. The bill will not only protect whistleblowers but also encourage more people to come forward and report any form of wrongdoing. This will ultimately lead to the reduction of corruption and other forms of misconduct in both public and private sectors.

9.30 Kenya has implemented various laws to protect whistleblowers and promote transparency in governance. The objective of these laws is to safeguard individuals who

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<sup>129</sup> Wagacha N *et al* (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya  
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in>. (accessed 22/05/2023)

<sup>130</sup> Wagacha N *et al* (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya  
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in>. (accessed 22/05/2023)

<sup>131</sup> Wagacha N *et al* (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya  
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in>. (accessed 22/05/2023)

report criminal activities from any form of retaliation. The legislation encompasses a broad range of information and the details are available in Annexure C due to the extensive material. By providing protection to those who come forward with information, these laws encourage accountability and contribute to creating a culture of transparency. Whistleblowers play a crucial role in exposing corruption and other illegal activities that may otherwise go unnoticed. The laws in place aim to ensure that these individuals are protected from any form of harm or discrimination. By promoting transparency, the government can build trust with its citizens and create an environment where everyone is held accountable for their actions.

## **E The Position of Whistleblower's in Tanzania**

### **1 The Whistleblower and Witness Protection Act, 2015**

9.31 Section 4 of the Whistleblower and Witness Protection Act, 2015 allows for public interest disclosures where a person believes that a violation of the law or a crime has been committed or is likely to be committed, that a public institution is wasting, mismanaging or misappropriating resources or otherwise abusing their office, or if there are threats to the health or safety of an individual or community or the environment. According to this section, disclosures should be made to a Competent Authority, defined in the case of disclosures within the whistleblower's institution as a superior person of that institution who has the authority to investigate the wrongdoing or if the matter is beyond his powers, to forward the same to another institution responsible for investigation.

9.32 In the case of disclosures outside of the whistleblower's institution, the Competent Authority is a superior person who has the authority to investigate the wrongdoing. Section 4(2) also allows the whistleblower the alternative of disclosing the information to "a person who has authority in a locality or a person in whom he has trust, and that person shall transmit the disclosure to a Competent Authority".

9.33 In terms of section 6, disclosures of wrongdoing are not permitted if they would be likely to cause prejudice to the "sovereignty and integrity of the United Republic of Tanzania, the security of the State, friendly relations with a foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to commit an offence and the disclosure of proceedings of the Cabinet".

9.34 Section 9 of the Act, which establishes the protection regime, only applies where a whistleblower makes a disclosure in good faith. If a whistleblower exposes wrongdoing and believes that their disclosures are true, their motivations should not be relevant.

9.35 According to sections 10 and 11, primary responsibility for providing protection to the whistleblower is delegated to the Competent Authority, who is directed to either protect them or issue appropriate directions to institutions which are capable of rendering protection. Currently, sections 10 and 11 prohibit a whistleblower from being subjected to threats against his life or property or the life or property of persons close to him or her, as well as against “dismissal, suspension, harassment, discrimination or intimidation by his employer”.

9.36 Section 16(1) makes it an offence for the competent authority or anyone under their authority to disclose the identity of a whistleblower. Section 16(2) makes it an offence if the Competent Authority fails to act as a result of a whistleblower complaint if that failure leads to a loss to a public institution.

9.37 Section 17(1) of the Act also makes it an offence for persons who knowingly disclose information relating to a wrongdoing which is false.

## **F The Position of Whistleblower’s in Ghana**

### **1 The Whistleblower Act, 2006**

9.38 Parliament of Ghana passed the Whistleblower Act (Act 720) in 2006 as an important anti-corruption tool. The purpose of the Act is to provide the way individuals may in the public interest disclose information that relates to unlawful or other illegal conduct or corrupt practices of others; to provide for the protection against victimisation of persons who make these disclosures; to provide for a Fund to reward individuals who make the disclosures.

9.39 A person may make a disclosure of information where that person has reasonable cause to believe that the information tends to show;

- (a) an economic crime has been committed, is about to be committed or is likely to be committed;
- (b) another person has not complied with a law or is in the process of breaking a law or is likely to break a law which imposes an obligation on that person;
- (c) a miscarriage of justice has occurred, is occurring or is likely to occur;



- (d) in a public institution there has been, there is or there is likely to be waste, misappropriation or mismanagement of public resources;
- (e) the environment has been degraded, is being degraded or is likely to be degraded; or
- (f) the health or safety of an individual or a community is endangered, has been endangered or is likely to be endangered.<sup>132</sup>

9.40 A disclosure of an impropriety is protected if the disclosure is made in good faith, the whistleblower has reasonable cause to believe that the information disclosed and an allegation of impropriety contained in it are substantially true and the disclosure is made to one or more of the persons or institutions specified in the Act.<sup>133</sup>

9.41 Where a disclosure is made the person to whom the disclosure is made will investigate the matter.<sup>134</sup> A person who undertakes an investigation and in the cause of that investigation conceals or suppresses evidence, commits an offence and is liable on summary conviction to a term of imprisonment of not less than two years and not more than five years.

9.42 During the course of an investigation, if it appears to the investigator that evidence or documents relevant to the investigation are at risk of being destroyed, concealed or tampered with, the investigator may approach the court. Additionally, individuals who possess valuable information may be subjected to pressure, inducement or intimidation to withhold that information. In such cases, the investigator may seek an order from the court to

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<sup>132</sup> Section 1(1)

<sup>133</sup> Section 1(4)

<sup>134</sup> 3. (1) Disclosure of impropriety may be made to anyone or more of the following:

- (a) an employer of the whistleblower;
- (b) a police officer;
- (c) the Attorney-General;
- (d) the Auditor-General;
- (e) a staff of the Intelligence Agencies;
- (f) a member of Parliament;
- (g) the Serious Fraud Office;
- (h) the Commission on Human Rights and Administrative Justice;
- (i) the National Media Commission;
- (j) OJ the Narcotic Control Board;
- (k) a chief;
- (l) the head or an elder of the family of the whistleblower;
- (m) a head of a recognised religious body;
- (n) a member of a District Assembly;
- (o) a Minister of State;
- (p) the Office of the President;
- (q) the Revenue Agencies Governing Board; or
- (r) a District Chief Executive.

preserve the evidence or documents in question or to restrain any attempts to intimidate or pressure individuals with information.<sup>135</sup>

9.43 A whistleblower will be considered as having been subjected to victimisation if: because of making the disclosure, the whistleblower, being an employee, is dismissed, suspended, declared redundant, denied promotion, transferred against the whistleblower's will, harassed, intimidated, subjected to a discriminatory or other adverse measure by the employer or a fellow employee. If the whistleblower is not an employee, the whistleblower is subjected to discrimination, intimidation or harassment by a person or an institution. A whistleblower will not be considered as having been subjected to victimisation if the person against whom the complaint is directed has the right in law to take the action complained of and the action taken is shown to be unrelated to the disclosure made.<sup>136</sup>

9.44 A whistleblower who honestly and reasonably believes that he has been subjected to victimisation because a disclosure has been made may in the first instance make a complaint to the Commission. The Commission will, on receipt of a complaint, conduct an enquiry into the complaint at which the whistleblower and the person against whom the complaint is made, shall be heard. The Commission while conducting an enquiry may make an interim order that it considers fit. Furthermore, a whistleblower may bring an action in the High Court to claim damages for breach of contract or for another relief or remedy to which the whistleblower may be entitled.<sup>137</sup>

9.45 Where the Commission, during an inquiry or hearing before it, is of the opinion that the whistleblower needs legal assistance, the Commission shall issue a certificate to the whistleblower to obtain legal aid from the Legal Aid Board or another institution that the Commission may specify in the certificate. A whistleblower is not liable to civil or criminal proceedings in respect of the disclosure unless it is proven that that whistleblower knew that the information contained in the disclosure is false and the disclosure was made with malicious intent.<sup>138</sup>

9.46 A whistleblower who makes a disclosure and who has reasonable cause to believe that their life or property or the life or property of a member of the whistleblower's family is

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<sup>135</sup> Section 9  
<sup>136</sup> Section 12  
<sup>137</sup> Section 13  
<sup>138</sup> Section 14

endangered or likely to be endangered because of the disclosure, may request police protection and the police shall provide the protection considered adequate.<sup>139</sup>

9.47 The object of the Fund is to provide funds for payment of monetary rewards to whistleblowers.<sup>140</sup>

## **CONCLUDING REMARKS**

9.48 The legislation in Africa is known for its progressive provisions, which are designed to promote social and economic development. However, the implementation of these provisions has been a challenge in many countries. One such country is Namibia, where the legislation has not been implemented at all.

9.49 In Ghana, the legislation has been implemented, but there are still challenges with its implementation. One of the main challenges is the lack of resources and capacity to effectively enforce the provisions of the legislation. This has led to a situation where many people continue to face discrimination and other forms of injustice, despite the existence of laws that are designed to protect them.

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<sup>139</sup> Section 17

<sup>140</sup> Section 22

## **PART C**

### **CHAPTER 10: CONCLUSION AND RECOMMENDATIONS**

10.1 In Part A, it was observed that measuring the position of whistleblowers in South Africa solely within the context of the PDA would not be sufficient due to the presence of other legislative influences. It is evident that South Africa has a legislative framework in place for the protection of whistleblowers, albeit fragmented with instances where some comparative legislation offers more protection than the PDA.

10.2 After conducting the exercise in Part A and Part B, it has become evident that certain provisions in the PDA and other related legislation may require strengthening. To better understand the discrepancies between countries, we have included a table as Annexure D. This will allow for a clearer comparison and identification of areas where improvements can be made.

10.3 It is crucial to ensure that whistleblowers are provided with adequate protection to encourage them to come forward and report wrongdoing without fear of retaliation. Strengthening the legislative framework will go a long way in achieving this goal, it is recommended that the following aspects thereof needs to be addressed:

## A Table of Specific Amendments to the PDA for Consideration and Comment

10.4 The Table of Proposed Amendments serves as an initial step towards identifying potential changes to current legislation governing the PDA and WPA. Through research and comparative analysis, this table highlights areas where current laws fall short and where best practices have been identified elsewhere. It is important to note that these proposals are still in the early stages and will require further development before being drafted into an Amendment Bill. Additionally, a costing exercise must be conducted to determine the financial implications of these proposed changes.

10.5 Overall, this process is critical in ensuring that the PDA and WPA are effective in meeting their intended goals and addressing any gaps or weaknesses in the current legislation. The proposed amendments will be carefully considered and evaluated to ensure that they align with the overall objectives of these acts.

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
Section 1 <b>Definitions</b>	<b>'occupational detriment'</b> , in relation to an <i>employee</i> or a <i>worker</i> , means (a) being subjected to any disciplinary action; (b) being dismissed, suspended, demoted, harassed or intimidated; (c) being transferred against his or her will; (d) being refused transfer or promotion; (e) being subjected to a term or	<b>'detrimental action'</b> , not in relation to an <i>employee</i> or a <i>worker</i> , means (a) being subjected to discrimination; (b) being intimidated, harassed; (c) any action causing personal harm or injury; (d) any loss or damage to property; or (e) any interference with his or her business or livelihood by any person or an institution.	It is proposed that the definition of <b>occupational detriment</b> is expanded to include persons which are not employees but who have disclosed in terms of the PDA. It is important to point out that should this proposal be approved the phrase <b>'occupational detriment'</b> should be changed to <b>'detrimental action' or improper conduct</b> to remove any confusion the word	The protection offered by the PDA would be widened to included people that are not in the employer and employee relationship only.

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
	<p>condition of employment or retirement which is altered or kept altered to his or her disadvantage;  <i>(f)</i> being refused a reference, or being provided with an adverse reference, from his or her <i>employer</i>;  <i>(g)</i> being denied appointment to any employment, profession or office;  <i>(h)</i> being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the <i>disclosure</i> of  <i>(i)</i> a criminal offence; or  <i>(ii)</i> information which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur;  <i>(j)</i> being threatened with any of the actions referred to in paragraphs <i>(a)</i> to <i>(h)</i> above; or  <i>(j)</i> being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services</p>	<p>“<b>qualifying disclosure</b>” means any disclosure of information which, in the reasonable belief of the discloser making the disclosure, tends to show one or more of the following—  <i>(a)</i> that a criminal offence has been committed, is being committed, or is likely to be committed,  <i>(b)</i> that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,  <i>(c)</i> that a miscarriage of justice has occurred, is occurring or is likely to occur,  <i>(d)</i> that the health or safety of any individual has been, is being or is likely to be endangered,  <i>(e)</i> that the environment has been, is being or is likely to be damaged, or  <i>(f)</i> that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.’  <b>(UK PIDA)</b></p> <p>Improper conduct  2. (1) For the purposes of this Act, improper conduct is conduct which if disclosed and proved shows or tends to show that -  <i>(a)</i> a criminal offence has been</p>	<p>‘occupational’ might bring. Consideration should also be given to inclusion of detrimental action by fellow employees.  Incidental to this there will be a need for an additional definition of who is a ‘<b>discloser</b>’ which must not be limited to employee and worker. This will also require provisions that will exclude certain disclosures, such as those relating to national security etc....</p>	

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		<p>committed, is about to be committed or is likely to be committed;</p> <p>(b) a person has -</p> <p>(i) violated any of the rights and freedoms protected by Chapter 2 of the Constitution or is in the process of violating any of those rights or is likely to violate any of those rights; or</p> <p>(ii) not complied with a provision of any law or is in the process of contravening a provision of any law or is likely to contravene a provision of any law which provision imposes an obligation on that person;</p> <p>(c) a miscarriage of justice has occurred, is occurring or is likely to occur;</p> <p>(d) a disciplinary offence has been committed, is about to be committed or is likely to be committed;</p> <p>(e) in any institution, organisation or entity there has been, there is or there is likely to be waste, misappropriation or mismanagement of resources in such a manner that the public interest has been, is being or is likely to be affected;</p> <p>(f) the environment has been degraded, is being degraded or is likely to be degraded;</p> <p>(g) the health or safety of an individual or a community is endangered, has been</p>		

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		<p>endangered or is likely to be endangered; or  (h) information showing or tending to show that any of the matters falling within paragraphs (a) to (g) has been, is being or is likely to be deliberately concealed.</p> <p><b>(Whistleblower Protection Act, 2017: Namibia)</b></p>		
New section		<p>(1) Every receiver of a protected disclosure must use their best endeavours to keep confidential information that might identify the discloser.</p> <p>(2) a receiver of a disclosure need not keep a discloser's identity confidential if—</p> <p>(a) the discloser consents to the release of the identifying information;</p> <p>(b) there are reasonable grounds to believe that the release of the identifying information is essential—</p> <p>(i) for the effective investigation of the disclosure;</p> <p>(ii) to prevent a serious risk to public health, public safety, the health or safety of any individual, or the environment;</p> <p>(iii) to comply with the principles of natural justice; or</p> <p>(iv) to an investigation by a law</p>	It is proposed that a section that requires those to whom a protected disclosure is made to maintain confidentiality of the whistleblower's identity.	The inclusion of this section will provide a mechanism to protect the whistleblower's identity.



SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		enforcement or regulatory agency for the purpose of law enforcement. (4) After releasing identifying information the receiver must inform the discloser.		
Section 3	<b>Employee or worker making protected disclosure not to be subjected to occupational detriment</b> No <i>employee</i> or <i>worker</i> may be subjected to any <i>occupational detriment</i> by his or her <i>employer</i> on account, or partly on account, of having made a <i>protected disclosure</i> .	(2) Any conduct or threat contemplated in subsection (1) is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat.	It is proposed that a section that places the burden of proof on the person who caused a detrimental action must be added.	The reverse onus will assist whistleblowers who must deal with harm already caused to them because of the disclosure.
New section		A person who uses force, coercion, threats, intimidation, or any other coercive means against another person with intent to prevent that person from, or influence that person to refrain from, making a disclosure commits an offence and is liable on conviction to a fine not exceeding 5 million or to imprisonment for a period not exceeding 5 years, or to both the fine and imprisonment.	It is proposed that this clause be added in the PDA to provide increased protection to a discloser, and to act as a deterrent against those who may prevent a disclosure. This is found in s31(8) of the NEMA.	The inclusion of this provision widens the scope of protection to persons other than employees. The addition of this provision will enable the enforcers to be proactive rather than being reactive.
New section		A provision in any agreement, contract, or internal procedure		This affords further protection to whistleblowers where contractual

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		<p>has no effect if it apparently requires a person to do any of the following;</p> <ul style="list-style-type: none"> <li>(a) not to disclose serious wrongdoing that is or could be a protected disclosure;</li> <li>(b) not to disclose information that could support, or relate to, a protected disclosure;</li> <li>(c) to withdraw a protected disclosure;</li> <li>(d) to abandon a protected disclosure;</li> <li>(e) to make a disclosure of serious wrongdoing in a way that is inconsistent with this Act.</li> </ul>		<p>obligations in employment may count against whistleblowers</p>
New section		<p><b>Anonymous disclosures</b> A disclosure may be made orally or in writing; and may be made anonymously.</p>	<p>It is proposed that the procedure of how to disclose anonymously is included in the guidelines as envisioned by s10(4)(a)</p>	<p>The rationale is to make disclosure processes simpler</p>
Section 3B(3)	<p>as soon as reasonably possible, but in any event within six months after the protected disclosure has been made or after the referral has been made, as the case may be, in writing inform the employee or worker of the decision—</p> <ul style="list-style-type: none"> <li>(i) to investigate the matter, and where possible, the time-frame within which the investigation will be completed; or</li> <li>(ii) not to investigate the matter</li> </ul>	<p>Shorten period to 3 months</p>	<p>Taking six months to decide whether to investigate a matter or not is far too long. Should an investigation become necessary, the time period for that lengthens the investigation possibly even longer</p>	<p>Shortened timeframes will give whistleblowers confidence in the system where feedback and decisions are expedited. Faster investigation also facilitates quicker action against wrongdoing iro police investigation, prosecution, etc...</p>

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
	and the reasons for such decision.			
Section 4 (1B)(d) (new provision added)	<p>(1B) If the court or tribunal, including the Labour Court is satisfied that an employee or worker has been subjected to or will be subjected to an occupational detriment on account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances, including—</p> <p>(a) payment of compensation by the employer or client, as the case may be, to that employee or worker;</p> <p>(b) payment by the employer or client, as the case may be, of actual damages suffered by the employee or worker; or</p> <p>(c) an order directing the employer or client, as the case may be, to take steps to remedy the occupational detriment.</p>		Add a new provision after (c ) (d)payment of interim legal costs by the employer or client where the employee seeks recourse through the courts to adjudicate their rights, where the prospects of success are in favour of the employee or worker.	
Section 8 <b>Protected disclosure to certain persons or bodies</b>	<p>(1) Any <i>disclosure</i> made in good faith to</p> <p>(a) the Public Protector;</p> <p>(aA) the South African Human Rights Commission;</p> <p>(aB) the Commission for Gender Equality;</p> <p>(aC) the Commission for the Promotion and Protection of the</p>	<p>(3) A person or body referred to in, or <i>prescribed</i> in terms of, subsection (1), who does not act upon receipt of a disclosure made to him or her, commits an offence and is liable on conviction to imprisonment not exceeding 2 years or a fine not exceeding 2 million.</p>		There is a need to hold institutions and individuals to account where they don't act on protected disclosures

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
	<p>Rights of Cultural, Religious and Linguistic Communities;  (aD) the Public Service Commission;  (b) the AuditorGeneral; or  (c) a person or body <i>prescribed</i> for purposes of this section; and in respect of which the <i>employee</i> or <i>worker</i> concerned reasonably believes that  (i) the relevant <i>impropriety</i> falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and  (ii) the information disclosed, and any allegation contained in it, are substantially true, is a <i>protected disclosure</i>.</p>	<p>(4) A person against whom any action is taken for committing an occupational detrimental against a discloser in retaliation for a disclosure of improper conduct may be sued and is liable for damages or to pay compensation in his or her personal capacity.</p>		
New Provision		<p>(1) A discloser who has reasonable grounds for believing that a detrimental action has been taken against him or her may file a complaint in a prescribed form.  (a)The complaint may also be filed by a person designated by the discloser for the purpose.  (b)The complaint must be filed not later than 60 days after the day on which the complainant knew, or in the Commissions opinion ought to have known, that the detrimental action was taken.</p> <p>(2) The South African Human Rights Commission must decide</p>		

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		<p>whether to deal with the complaint or not within the prescribed period after the date on which the complaint is received.</p> <p>(3) If the Commission decides-</p> <p>(a) to deal with the complaint it must send a written notice of its decision to the complainant and to the person or entity that has the authority to take disciplinary action against each person who participated in the taking of the measure alleged by the complainant to constitute detrimental action; or</p> <p>(b) not to deal with a complaint, it must send a written notice of its decision to the complainant and set out the reasons for the decision.</p> <p>(4) The Commission may refuse to deal with a complaint if it is of the opinion that-</p> <p>(a) the subject matter of the complaint has been adequately dealt with or could more appropriately be dealt with by other bodies such as the Commission for Conciliation, Mediation and Arbitration (CCMA);</p> <p>(b) the complaint is beyond the jurisdiction of the Commission; or</p> <p>(c) the complaint was not made in good faith</p> <p>(4) A person who is aggrieved</p>		

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		<p>by the decision of the Commission made under subsection (2) may in the prescribed manner and within the prescribed period apply for the decision to be reviewed by a High Court.</p> <p><b>Investigation of detrimental action</b></p> <p>(1) If the Commission decides to deal with a complaint it must assign an investigator/duly qualified staff member to investigate the complaint.</p> <p>(2) An investigator must conduct an investigation into the complaint as informally and expeditiously as possible and in the prescribed manner.</p> <p>(3) Before commencing an investigation under this section an investigator must-</p> <p>(a) notify the Director-General concerned or any other person against whom a complaint of detrimental action has been made and inform that Director-General or that other person of the substance of the complaint to which the investigation relates; and</p> <p>(b) notify any other appropriate person, including every person whose conduct is called into question by the complainant, and inform that person of the substance of the complaint.</p>		

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		<p>(4) If the investigator so request, employers and other persons who have information that is relevant to an investigation must provide the investigator with any facilities, assistance, information and access to their respective premises that the investigator may require for the purpose of the investigation.</p> <p>(5) If the investigator concludes that he or she is unable to complete an investigation because of insufficient cooperation on the part of the employer or other person, the investigator must make a report to the Commission to that effect.</p> <p>(6) A person who contravenes or fails to comply with subsection (4) or with a request made by an investigator under that subsection commits an offence and is liable on conviction to a fine not exceeding R50 000 or to imprisonment for a period not exceeding 10 years, or to both the fine and imprisonment.</p> <p><b>Commission's decision after the investigation</b></p> <p>19. (1) As soon as possible after the completion of an investigation, the investigator must submit a report of his or her findings to the Commission.</p> <p>(2) If, after receipt of the report, the Commission is of the opinion that a reference of the matter to</p>		

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		<p>a court in relation to the complaint is-</p> <p>(a) warranted, the Commission must refer the matter to a court or another appropriate forum for a determination of whether or not detrimental action was taken against the complainant; or</p> <p>(b) is not warranted in the circumstances, the Commission must dismiss the complaint.</p> <p>(3) In considering whether referring the matter to a court or another appropriate forum, the Commission must take into account whether-</p> <p>(a) there are reasonable grounds for believing that detrimental action was taken against the complainant;</p> <p>(b) having regard to all the circumstances relating to the complaint, it is in the public interest to refer the matter to a court or another appropriate forum.</p> <p>(4). The Commission must in writing notify each of the following of the action under subsection (1)-</p> <p>(a) the complainant;</p> <p>(b) if the complainant is an employee, the complainant's employer;</p> <p>(c) if the complainant is a former employee, the person or entity who was the complainant's employer at the time the alleged</p>		



SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		<p>detrimental action was taken;  (d) if the complainant is against any other person that is not an employer, that other person;  (e) the person or persons identified in the investigation report as being the person or persons who may have taken the alleged detrimental action;  and  (f) the person or entity with the authority to take disciplinary action against any person referred to in paragraph ( e );  (5) A person who is aggrieved by the decision of the Commission made under subsection 2 may, within the prescribed period, apply for the decision to be reviewed by a court.</p> <p><b>(Provision from Canada PSDPA)</b></p>		
New provision		<p>During any legal proceedings instituted against a discloser concerning a matter arising from a disclosure made by a discloser, if the Minister is of the opinion that the discloser needs legal assistance, the Minister must issue a certificate to the discloser recommending that the Legal Aid Board in terms of the Legal Aid South Africa Act, 2014 (Act No. 29 of 2014) considers granting legal aid to that</p>		<p>Legal fees for representation are one of the issues that have been pointed out as lacking for whistleblowers who are targeted for making disclosures.</p>

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		discloser.		
		A discloser who makes a disclosure and who has reasonable cause to believe that his or her life or property; or the life or property of a member of his or her family is endangered or likely to be endangered because of the disclosure, may request state protection and the state shall provide the protection considered adequate.		
New provision	No provision for proactive measures by employers	appoint a “whistle blower champion” who is responsible for ensuring and overseeing the integrity, independence and effectiveness of the firm’s policies and procedures on whistleblowing; establish, implement, and maintain appropriate and effective internal arrangements for the disclosure of “reportable concerns” by whistle-blowers; provide appropriate training on whistle-blowing arrangements to employees, managers and those responsible for operating internal whistle-blowing mechanisms; publish a report at least annually to the firm’s governing body on the effectiveness of its systems in relation to whistleblowing; and include a term in any settlement agreement with a worker that workers have a legal right to	The PDA has been criticised for its lack of proactive measures for employers to protect its employees. These are some measures that can be considered.	The impact is a strengthened PDA with proactive measures taken by employers who are encouraged to become vested in whistleblower protection, rather than against.

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	IMPACT
		whistleblowing.  <b>The above is from the UK Financial Conduct Authority Rules and creates proactive steps to be taken by the certain financial institutions in protecting whistleblowers</b>		
New provision	No current provision	Creation of a fund for whistleblowers	Should this be in the Witness Protection Act or the PDA? Creation of fund through CARA.	This will assist whistleblowers who have been dismissed, and who face severe financial hardship in meeting their basic needs and that of their dependents.
New provision		Witness Protection Act: consideration to be given to amendments to change who a witness and whistleblower is	The WPA does not talk of whistleblowers, even though the definition of a witness is broad enough to cater for whistleblowers being entitled to protection	The clarity will inspire confidence in potential whistleblowers who require security where their lives and that of their families is under threat.

## CONCLUDING REMARKS

Drawing from the research conducted, both in South Africa and comparatively, the following proposals for possible amendments are made:

- (a) The definition of occupational detriment should be expanded to include persons who are not employees but who have disclosed in terms of the PDA. 'Occupational detriment' should be changed to 'detrimental action' or improper conduct to avoid a narrow interpretation of who may make a disclosure.
- (b) Consideration should also be given to inclusion of detrimental action by fellow employees.
- (c) Improved measures to keep a protected disclosure confidential where information might identify the discloser, except in circumstances where, among others, the discloser consents to the release of the identifying information; there are reasonable grounds to believe that the release of the identifying information is essential for the effective investigation of the disclosure; to prevent a serious risk to public health, public safety, the health or safety of any individual, or the environment.
- (d) The creation of a reverse onus where any conduct or threat against a whistleblower is presumed to have occurred as a result of a possible or actual disclosure that a person makes, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat.
- (e) The creation of an offence where a person uses force, coercion, threats, intimidation, or any other coercive means against another person with intent to prevent that person from, or influence that person to refrain from, making a disclosure.
- (f) Enhancing the powers of the South African Human Rights Commission to deal with protected disclosures.
- (g) Creation of a mechanism for the provision of legal assistance to whistleblowers.
- (h) Proactive measure by appointing a "whistle blower champion" who is responsible for ensuring and overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing; and to establish, implement, and maintain appropriate and effective internal arrangements.
- (i) The creation of a fund for whistleblowers. This will assist whistleblowers who have been dismissed, and who face severe financial hardship in meeting their basic needs and that of their dependents.
- (j) A provision that will make any clause in any agreement or contract that aims to contract out of the PDA unlawful.

- (k) Make it an offence if a person or body does not act upon a protected disclosure after a disclosure has been made.
- (l) Protection by the state to whistleblowers and their immediate family members in instances where their lives or property is endangered
- (m) Inclusion of whistleblower in the definition of witness in terms of the Witness Protection Act.

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## **I Case law**

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*City of Tshwane Metropolitan Municipality v. Engineering Council of South Africa and Adrianus Jacobus Weyers* [2010] (2) SA 333 (SCA) ('the City of Tshwane Case');<sub>i</sub>

*Radebe and another v. Premier, Free State and Others* [2012] (5) SA 100 (LAC);<sub>i</sub>

*Chowan v. Associated Motor Holdings (Pty) Ltd and Others* [2018] (4) SA 145 (GJ);<sub>i</sub>

*John v Afrox Oxygen Ltd* [2018] 5 BLLR 426 (LAC);

*Baxter v Minister of Justice and Correctional Development & Others*;

*Ward v. Oraclemed Health (Pty) Ltd (JS955/2016)* [2018] ZALC JHB;



## J Websites

Whistleblower protection in South Africa: where to from here?(May 2022):

[https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report\\_may2022\\_final.pdf](https://www.futuregrowth.co.za/media/7022/just-share-whistleblower-report_may2022_final.pdf) (Accessed 08/02/2023)

South Africa Relevant Legislation (2021):

<https://www.pplaaf.org/country/southafrica.html>(Accessed 08/02/2023)

Bank of England:

<https://www.bankofengland.co.uk/whistleblowing>;<https://www.handbook.fca.org.uk/handbook/SYSC/18.pdf> (Accessed 08/02/2023)

Whistleblowing in deposit-takers, PRA-designated investment firms and insurers (26/05/2016):

<https://www.fca.org.uk/publications/policy-statements/ps15-24-whistleblowing-deposit-takers-pra-designated-investment-firms>(Accessed 08/02/2023)

[www.ridgeview.school.nz](http://www.ridgeview.school.nz),

<https://www.ridgeview.school.nz/wpcontent/uploads/sites/24/2022/10/Protected-Disclosures-Policy-1.pdf>. (Accessed 08/02/2023)

*Rārangi Upoko Contents*

<https://publicservice.govt.nz/assets/DirectoryFile/ProtectedDisclosures-Act-2022-Guidance.pdf>. (Accessed 08/02/2023)

*Protected Disclosures (Protection of Whistleblowers) Act 2022 - Legislation,*

<https://legislation.govt.nz/act/public/2022/0020/latest/whole.html>. (Accessed 23/01/2023)

Wagacha N.Kashero-Ondego R. & Munsiro D (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in>. (Accessed 22/05/2023)

## K Policy documents

The National Development Plan 2030 is an important policy document of the South African government drafted in August 2012 by the National Planning Commission; a special ministerial body first constituted in 2009 by President Jacob Zuma.

# Annexure A

## The Position of Whistleblowers in U.S.

### The False Claims Act

1. The False Claims Act (“FCA”) is America’s first whistleblower law, originally enacted in 1863 but later amended in 1943 and 1986. It has been further strengthened by recent amendments in 2009 and 2010.<sup>1</sup>

2. Under the FCA, *qui tam* allows persons and entities with evidence of fraud against federal programs or contracts to sue the wrongdoer on behalf of the United States Government. In *qui tam* actions, the government has the right to intervene and join the action. If the government declines, the private plaintiff may proceed on his or her own.<sup>2</sup>

3. Under Section 3730(h) of the FCA, any employee who is discharged, demoted, harassed or otherwise discriminated against because of lawful acts by the employee in furtherance of an action under the Act is entitled to all relief necessary to make the employee whole. Such relief may include:

- Reinstatement;
- Double back pay; or
- Compensation for any special damages including litigation costs and reasonable attorneys' fees.

4. Some actions that would be considered violations of the FCA are as follows:

- Charging the government for more than was provided;
- Fraudulently seeking a government contract;
- Submitting a false application for a government loan;
- Submitting a fraudulent application for a grant of government funds;
- Demanding payment for goods or services that do not conform to contractual or regulatory requirements;

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<sup>1</sup> Medicare and Medicaid Fraud Whistleblower FAQ, <https://www.whistleblowers.org/faq/medicare-and-medicaid-fraud/>.

<sup>2</sup> Medicare and Medicaid Fraud Whistleblower FAQ, <https://www.whistleblowers.org/faq/medicare-and-medicaid-fraud/>.

- Requesting payment for goods or services that are defective or of lesser quality than were contracted for;
- Submitting a claim that falsely certifies that the defendant has complied with a law, contract term, or regulation; and
- Attempting to pay the government less than is owed.

5. Section 3730(4A) of the FCA states that the case must be filed by a person with an original source of information. Section 3730(4B) of the False Claims Act defines an original source as:

*“an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing a False Claims Act action under this section which is based on the information.”*

6. The whistleblower needs to provide specific information on the alleged transgression and therefore fabricating information may not be easy, thereby potentially limiting false allegations. There is generally no reward for failed cases. For successful cases, the government will recover monies and taxpayers will benefit.<sup>3</sup>

7. Section 3730 “(d)” (2) of the FCA stipulates the minimum and maximum percentages for whistleblower rewards – to be 15% to 30% of recovered monies. Where the US Department of Justice does not join the prosecution, the whistleblower may receive 25% to 30% of recoveries and 15% to 25% where the Department of Justice does join the prosecution. The reward is made to the whistleblower by the court only when the case is successful and prosecuted. Only the information reported is considered and not the motive for blowing the whistle.<sup>4</sup>

8. The FCA is designed to meet the requirements that the reward is:

- (i) Sufficiently “large” and “certain” to justify the whistle-blower’s effort; and

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<sup>3</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

<sup>4</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

- (ii) timely in relation to doing the anticipated activity, which further indicates that rewarding the whistle-blower is different from purchasing information relating to fraud cases.<sup>5</sup>

9. Section 3730 “(d)” (2) of the FCA states that in addition to the reward, the whistle-blower “*shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs*”.

### **The Dodd-Frank Act**

9. The [Dodd-Frank Act](#) was passed in 2010 following the fiscal crisis of 2008-09.<sup>6</sup> It created two whistleblower programs in the U.S. Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), as well as enhanced whistleblower provisions under the Foreign Corrupt Practices Act (FCPA).<sup>7</sup> The Dodd-Frank Act has transnational application and can be applied to violations of the FCPA. The FCPA is an anti-bribery law that prohibits illicit payments to foreign officials and requires companies whose securities are listed in the U.S. to meet its accounting provisions.<sup>8</sup>

10. In 2014, the SEC reported to Congress that they had received tips and awarded applications from countries ranging from the UK, Brazil, South Africa, and India.<sup>9</sup> In 2018, the US National Whistleblower Center released a report analysing FCPA cases since 1977, claiming that prosecutions have been increasing, in part thanks to tip-offs from whistleblowers.<sup>10</sup> The report also claims strong monetary incentives motivate people to come forward.<sup>11</sup>

11. Section 922 of the act states that: the U.S. Securities and Exchange Commission will pay whistleblowers who voluntarily provide original information that leads to the recovery of funds over \$1 million. Whistleblowers are awarded between 10% and 30% of the total funds recovered and employers are prohibited from retaliating against them. Whistleblowers have

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<sup>5</sup> Lubisi S & Bezuidenhout H Blowing (2016) the whistle for personal gain in the Republic of South Africa: An option for consideration in the fight against fraud? Southern African Journal of Accountability and Auditing Research Vol 18: 2016 (49-62)

<sup>6</sup> <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf>

<sup>7</sup> <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf>

<sup>8</sup> <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf>

<sup>9</sup> <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf>

<sup>10</sup> <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf>

<sup>11</sup> <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf>

the option to first report through internal mechanisms and will still be eligible for reward if they report the same information to the SEC within 120 days.<sup>12</sup>

12. The Act includes key whistleblower protection. Whistleblowers are allowed to file anonymously with the SEC and CFTC through counsel. Retaliation by employers against employees for whistleblowing is prohibited. Whistleblowers that are fired or otherwise punished by employers have a private cause of action, meaning they can bring a suit to enforce the statute.<sup>13</sup>

### **The Lacey Act**

13. Enacted in 1900, the Lacey Act is one of the United States' oldest wildlife protection laws. In 1981, a whistleblower reward provision was added to the Lacey Act.<sup>14</sup> The whistleblower provision authorises the Departments of Interior, Commerce, Treasury and Agriculture to pay monetary rewards to persons who disclose original information concerning wildlife crimes that result in successful enforcement actions. The Department of Agriculture is also authorized for provide rewards for whistleblowers under the plants provision.<sup>15</sup>

14. U.S. citizenship is not a requirement to be a whistleblower and whistleblowers may collect rewards for both civil and criminal penalties. However, the Lacey Act does not legislate on minimum or maximum percentages of the collected proceeds that whistleblowers can be awarded.<sup>16</sup>

### **The Act to Prevent Pollution from Ships**

15. Following the world's first major oil tanker disaster, the United Nations agency, known as the International Maritime Organization, developed the International Convention for the Prevention of Pollution from Ships (MARPOL).<sup>17</sup>

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<sup>12</sup> <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf>

<sup>13</sup> <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Whistleblower-Reward-Programmes-2018.pdf>

<sup>14</sup> *What is the Lacey Act?* - National Whistleblower Center, <https://www.whistleblowers.org/what-is-the-lacey-act/>.

<sup>15</sup> *What is the Lacey Act?* - National Whistleblower Center, <https://www.whistleblowers.org/what-is-the-lacey-act/>.

<sup>16</sup> *What is the Lacey Act?* - National Whistleblower Center, <https://www.whistleblowers.org/what-is-the-lacey-act/>.

<sup>17</sup> *The Act to Prevent Pollution from Ships* - National Whistleblower Center, <https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

16. In order to implement the provisions of MARPOL, the Act to Prevent Pollution from Ships (APPS) was enacted in 1980.<sup>18</sup> APPS applies to U.S. commercial vessels, as well as non-U.S. commercial vessels operating in U.S. waters or ports of U.S. jurisdiction. APPS make it a crime to<sup>19</sup> knowingly violate certain provisions of MARPOL and other oil pollution laws.

17. The United States Coast Guard and the U.S. Environmental Protection Agency are the main enforcers of MARPOL and APPS within the U.S. Additionally, APPS includes whistleblower provisions to help combat illegal pollution and empower and incentivize workers to expose any known information about pollution from ships.<sup>20</sup>

18. The U.S. is the number one enforcer of MARPOL in the world because of the whistleblower provision included in APPS.<sup>21</sup> Activities like dumping illegal discharge into the ocean often happen away from observers; as such, the best persons to uncover violations of APPS and MARPOL are crew members aboard these ships. Whistleblowers are essential to alerting authorities of APPS violations and providing information that leads to successful prosecutions of APPS violations.<sup>22</sup>

19. The introduction of whistleblower reward provisions to APPS can be found under 33 U.S. Code § 1908 which states:

*“a person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations issued thereunder commits a class D felony. In the discretion of the Court, an amount equal to not more than ½ of such fine may be paid to the person giving information leading to conviction.”*

20. Those that come forward with violations of APPS or MARPOL may therefore be compensated up to 50% of the monetary penalties that the U.S. Government receives from the guilty parties.<sup>23</sup>

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<sup>18</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

<sup>19</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

<sup>20</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

<sup>21</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

<sup>22</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

<sup>23</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

21. In an analysis of 100 Act to Prevent Pollution from Ships (APPS) prosecutions available on Public Access to Court Electronic Records (PACER), court records reveal that whistleblowers were responsible for 76% of all successful cases from 1993 – 2017.<sup>24</sup> The average reward granted to whistleblowers as a result of successful APPS prosecutions was 28.8% of the total amount of funds collected by the government. Between 1993 – 2017, the U.S. courts awarded 205 whistleblowers a sum of approximately \$33 million in 100 prosecutions under APPS.<sup>25</sup>

22. The largest amount ever paid to an individual whistleblower was \$2,100,000 (USA v. Omi Corporation), while \$5,250,000 is the largest amount ever paid to a group of APPS whistleblowers from the Philippines (USA v. Overseas Shipping).<sup>26</sup>

23. Whistleblowers do not need to be U.S. citizens to receive a reward. In fact, of the 100 prosecutions reviewed, 70% of cases came from other countries including the Philippines, Greece and Venezuela. APPS applies to U.S. commercial vessels, as well as non-U.S. commercial vessels operating in U.S. waters or ports of U.S. jurisdiction to receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs”.

### **Sarbanes-Oxley Act**

24. The 2002 [Sarbanes-Oxley Act \(SOX\)](#) is a piece of corporate reform legislation intended to protect investors from corporate accounting fraud by strengthening the accuracy and reliability of financial disclosures.<sup>27</sup>

25. The SOX covers private, listed companies and their subsidiaries. It provides for a number of remedies for the whistleblower, including reinstatement, back pay and special damages. Special damages can be awarded for reputational harm, harm to career and emotional distress.<sup>28</sup>

### **Concluding Remarks**

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<sup>24</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

<sup>25</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

<sup>26</sup> *The Act to Prevent Pollution from Ships - National Whistleblower Center,*  
<https://www.whistleblowers.org/what-is-the-act-to-prevent-pollution-from-ships/>.

<sup>27</sup> <https://www.whistleblowers.org/faq/sarbanes-oxley-sox-faq/>

<sup>28</sup> <https://www.whistleblowers.org/faq/sarbanes-oxley-sox-faq/>

26. The concept of whistleblower protection has a long history in the United States. The Country has the most widely known whistleblower reward programme. As mentioned above, incentives are facilitated through the Dodd-Frank Act of 2010. Alternatively, a whistleblower can file a claim under the False Claims Act through a *qui tam* lawsuit if fraud against a government programme is alleged. The U.S. Supreme Court highlighted that the False Claims Act was intended to reach all types of fraud, without any qualification, that might result in financial loss to the Government'.<sup>29</sup> However, Opponents of the Dodd-Frank Act argue that the quality and/or quantity of disclosures have not increased since the introduction of rewards and that they require a complex and costly governance structure.<sup>30</sup> Others have concluded that it creates moral hazards such as malicious reporting, conflict of interest in court and entrapment.<sup>31</sup>

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<sup>29</sup> Faunce, Tom, Kim Crow, Tony Nikolic and Frederick M. Morgan. 2014. Chapter 16: Because they have Evidence: Globalizing Financial Incentives for Corporate Fraud Whistleblowers. <https://www.elgaronline.com/view/9781781006788.00025.xml>

<sup>30</sup> Bank of England. 2014. Financial Incentives for Whistleblowers. <https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf> Berg and Adrophy. 2012. The Intersection of the Dodd-Frank Act and the FCPA.

<sup>31</sup> Adesiyan, Ade, Nick Wright and Kim Everitt. 2014. UK: FCA and PRA Publish Conclusions on the Impact of Financial Incentives for Whistleblowers. <http://www.lexology.com/library/detail.aspx?q=3890b38a-4faa-494b-8743-7a92a632c8fe>



## Annexure B

PDA Provisions	Similar PIDA Provisions
<p><b>Section 1, definition of ‘disclosure’ paragraphs (a) to (e)</b></p> <p><i>‘disclosure’</i> means any disclosure of information regarding any conduct of an <i>employer</i>, or of an <i>employee</i> or of a <i>worker</i> of that <i>employer</i>, made by any <i>employee</i> or <i>worker</i> who has reason to believe that the information concerned shows or tends to show one employer, made by any employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:</p> <p>(a) That a criminal offence has been committed, is being committed or is likely to be committed;</p> <p>(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;</p> <p>(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;</p> <p>(d) that the health or safety of an individual has been, is being or is likely to be endangered;</p> <p>(e) that the environment has been, is being or is likely to be damaged;</p> <p>(f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1998 (Act 55 of 1998), or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or</p>	<p><b>Section 43B(1)(a) to (e)</b></p> <p>(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—</p> <p>(a) that a criminal offence has been committed, is being committed or is likely to be committed,</p> <p>(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,</p> <p>(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,</p> <p>(d) that the health or safety of any individual has been, is being or is likely to be endangered,</p> <p>(e) that the environment has been, is being or is likely to be damaged</p>
<p><b>Section 1, definition of ‘disclosure’ paragraph (g)</b></p> <p><i>‘disclosure’</i> means any disclosure of information regarding any conduct of an <i>employer</i>, or of an <i>employee</i> or of a <i>worker</i> of that <i>employer</i>, made by any <i>employee</i> or <i>worker</i> who has reason to believe that the information concerned shows or tends to show one employer, made by any employee</p>	<p><b>Section 43B(1)(f)</b></p> <p>(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—</p> <p>(a) .....</p> <p>(f) that information tending to show any matter</p>

<p>or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:</p> <p>(a) .....</p> <p>(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.</p>	<p>falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.</p>
<p><b>Section 1, definition of 'protected disclosure' paragraphs (e) (i) and (ii)</b></p> <p>'protected disclosure' means a disclosure made to</p> <p>(a).....</p> <p>(e) any other person or body in accordance with section 9, but does not, subject to section 9A, include a disclosure-</p> <p>(i) in respect of which the employee or worker concerned commits a criminal offence by making that disclosure; or</p> <p>(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;</p>	<p><b>Sections 43B(3) and (4)</b></p> <p>(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.</p> <p>(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.</p>
<p><b>Section 2(3)</b></p> <p>(3) Any provision in a contract of employment or other agreement between an employer and an employee or worker is void in so far as it-</p> <p>(a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or</p> <p>(b) (i) purports to preclude the employee or worker; or</p> <p>(ii) has the effect of discouraging the employee or worker, from making a protected disclosure.</p>	<p><b>Section 43J</b></p> <p>(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.</p> <p>(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.</p>
<p><b>Section 3</b></p> <p>No employee or worker may be subjected to any occupational detriment by his or her employer on account, or</p>	<p><b>Section 47B(1)</b></p> <p>(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected</p>

<p>partly on account, of having made a protected disclosure.</p>	<p>disclosure.</p>
<p><b>Section 5</b> Any disclosure made-</p> <p>(a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and</p> <p>(b) with the object of and in the course of obtaining legal advice,</p> <p>is a protected disclosure.</p>	<p><b>Section 43D</b> A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.</p>
<p><b>Section 6(2)</b> (2) (a) Every employer must</p> <p>(i) authorise appropriate internal procedures for receiving and dealing with information about improprieties; and</p> <p>(ii) take reasonable steps to bring the internal procedures to the attention of every employee and worker.</p> <p>(b) Any employee or worker who, in accordance with a procedure authorised by his or her employer, makes a disclosure to a person other than his or her employer, is deemed, for the purposes of this Act, to be making the disclosure to his or her employer</p>	<p><b>Section 43C(2)</b> (2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.</p>
<p><b>Section 7</b> Any disclosure made in good faith to a member of Cabinet or of the Executive Council of a province is a protected disclosure if the employee's or worker's employer is-</p> <p>(a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;</p> <p>(b) a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;</p> <p>or</p> <p>(c) an organ of state falling within the area of responsibility of the member concerned.</p>	<p><b>Section 43E</b> A qualifying disclosure is made in accordance with this section if—</p> <p>(a) the worker's employer is—</p> <p>(i) an individual appointed under any enactment by a Minister of the Crown, or</p> <p>(ii) a body any of whose members are so appointed, and</p> <p>(b) the disclosure is made in good faith to a Minister of the Crown.</p>
<p><b>Section 8</b> (1) Any disclosure made in good faith to-</p> <p>(a) the Public Protector;</p> <p>(aA) the South African Human Rights</p>	<p><b>Section 43F</b> (1) A qualifying disclosure is made in accordance with this section if the worker—</p> <p>(a) makes the disclosure in good faith to a</p>

<p>Commission;</p> <p>(aB) the Commission for Gender Equality;</p> <p>(aC) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;</p> <p>(aD) the Public Service Commission;</p> <p>(b) the Auditor General;</p> <p>or</p> <p>(c) a person or body prescribed for purposes of this section; and in respect of which the employee or worker concerned reasonably believes that-</p> <p>(i) the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and</p> <p>(ii) the information disclosed, and any allegation contained in it, are substantially true,</p> <p>is a protected disclosure.</p> <p>(2) A person or body referred to in, or prescribed in terms of, subsection (1) who is of the opinion that the matter would be more appropriately dealt with by another person or body referred to in, or prescribed in terms of, that subsection, must render such assistance to the employee or worker as is necessary to enable that employee or worker to comply with this section.</p>	<p>person prescribed by an order made by the Secretary of State for the purposes of this section, and</p> <p>(b) reasonably believes—</p> <p>(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and</p> <p>(ii) that the information disclosed, and any allegation contained in it, are substantially true.</p> <p>(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of</p>
<p><b>Section 9</b></p> <p>(1) Any disclosure made in good faith by an employee or worker</p> <p>(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and</p> <p>(b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;</p> <p>is a protected disclosure if-</p> <p>(i) one or more of the conditions referred to in subsection (2) apply; and</p> <p>(ii) in all the circumstances of the case, it is reasonable to make the disclosure.</p>	<p><b>Section 43G</b></p> <p>(1) A qualifying disclosure is made in accordance with this section if—</p> <p>(a) the worker makes the disclosure in good faith,</p> <p>(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,</p> <p>(c) he does not make the disclosure for purposes of personal gain,</p> <p>(d) any of the conditions in subsection (2) is met, and</p> <p>(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.</p>

<p>(2) The conditions referred to in subsection (1) (i) are</p> <p>(a) that at the time the employee or worker who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;</p> <p>(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee or worker making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;</p> <p>(c) that the employee or worker making the disclosure has previously made a disclosure of substantially the same information to</p> <p>(i) his or her employer; or</p> <p>(ii) a person or body referred to in section 8, in respect of which no action was taken within a reasonable period after the disclosure; or</p> <p>(d) that the impropriety is of an exceptionally serious nature.</p>	
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## ANNEXURE C

### The Position of Whistleblowers in Kenya

#### Anti-Corruption and Economic Crimes Act

1. The Anti-Corruption and Economic Crimes Act, No. 3 of 2003, was enacted to address the growing concern of corruption and economic crime in society. The Act aims to prevent, investigate and punish such activities and related offences. The legislation provides protection to assistants, informants, witnesses and investigators involved in these cases. However, it does not specifically define whistleblowers. Despite this, whistleblowers are afforded some level of protection under the Act as informers and witnesses. It is important to note that the Act does not discriminate against any individual or group and applies to all those involved in corrupt activities.<sup>1</sup>

#### Access to Information Act

2. The Access to Information Act, No. 31 of 2016, serves as a vital framework for both public entities and private bodies to disclose information they hold and fulfill requests for information. This act also ensures that potential whistleblowers are protected from any form of retaliation or penalty in relation to their employment or office due to the disclosure of confidential information. However, it is important to note that any such disclosure must be in the public interest and made to a law enforcement agency. This provision allows for the sharing of information and provides a safeguard for whistleblowers who may need to share such information in certain circumstances.<sup>2</sup>

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<sup>1</sup> Wagacha N *et al* (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya  
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in>.  
(accessed 22/05/2023)

<sup>2</sup> Wagacha N *et al* (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya  
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in>.  
(accessed 22/05/2023)

3. Under Section 16(6) of the Access to Information Act, whistleblowers are protected against penalisation for making disclosures to law enforcement agencies, including penalties such as:

- dismissal;
- discrimination;
- being subjected to reprisal;
- generally, any form of adverse treatment;
- denied appointment, promotion, or advantage that they otherwise would have been provided; and
- any other personnel action.

### **Bribery Act**

4. The Bribery Act, No. 47 of 2016, (the Bribery Act) is a crucial piece of legislation in Kenya that establishes the framework for whistleblowing protection. This act mandates both public and private entities to implement appropriate procedures to prevent bribery and corruption, including those related to whistleblowing activities. Specifically, Section 9(1) of the Bribery Act requires all organizations to develop procedures that are suitable for their size and nature of operations. While the Bribery Act focuses on the prevention, investigation, and punishment of bribery practices, it is one of the few laws in Kenya that provides for whistleblowing protections. As such, it plays a crucial role in promoting transparency and accountability in both public and private sectors. Overall, the Bribery Act is an important tool for combating corruption and promoting ethical behaviour in Kenya.<sup>3</sup>

5. The Bribery Act protects a whistleblower in making disclosures specifically in the context of bribery practices. Section 21 of the Bribery Act provides protection to whistleblowers and envisions that they are in an employer-employee relationship given Section 16(2) on the actions that amount to punishable retaliation against whistleblowers.<sup>4</sup>

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<sup>3</sup> Wagacha N *et al* (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya  
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in>. (accessed 22/05/2023)

<sup>4</sup> Wagacha N *et al* (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya  
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and->

6. Section 2 of the Bribery Act defines a whistleblower as a person who makes a report to the Ethics and Anti-Corruption Commission or law enforcement agencies on acts of bribery or other forms of bribery, thereby providing mechanisms for their protection for such disclosure and reports made.

7. Section 21(2) of the Bribery Act makes any actions towards a whistleblower, including unfair dismissal, an unlawful detriment, an offence attracting penalties of KES 1 million (approx. €8,074) or one-year imprisonment or both for a person who takes any form of retaliation against a whistleblower connected to matters.

### **Data Protection Act**

8. The Data Protection Act of 2019 ('the Data Protection Act') outlines specific exceptions for processing personal data, one of which is the matter of public interest. This exception can be applied in situations such as whistleblowing, where sharing information on individuals is necessary for reporting corruption involving public entities. It is crucial to note that this exception should only be used when the matter at hand is truly in the public interest. Misuse of personal data can lead to severe consequences, including legal action and reputational damage. Therefore, it is essential to exercise caution and adhere to the guidelines outlined in the Data Protection Act to ensure that personal data is processed lawfully and ethically. Overall, the exception for public interest serves as a necessary tool for promoting transparency and accountability in public entities while safeguarding individuals' privacy rights.<sup>5</sup>

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<sup>5</sup> [commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in](https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in). (accessed 22/05/2023)

Wagacha N *et al* (March 2022). The Whistleblower Protection Bill 2021: An attempt to cure the cycle of corruption in Kenya

<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-16-march-2022-the-whistleblower-protection-bill-2021-an-attempt-to-cure-the-cycle-of-corruption-in>. (accessed 22/05/2023)



## ANNEXURE D

### INTERNATIONAL JURISDICTIONS

DESCRIPTION	COUNTRIES				
ASPECTS	SOUTH AFRICA: PDA	UK: PIDA	CANADA: PSDPA	NEW ZEALAND: PDA NZ	AUSTRALIA: PDA VIC NZ
<p><b>ASPECT 1</b></p> <p><b>BROAD DEFINITION OF RETALIATION THAT IS NOT LIMITED TO WORKPLACE RETALIATION AND CAN INCLUDE ACTIONS THAT CAN RESULT IN REPUTATIONAL, PROFESSIONAL, FINANCIAL, SOCIAL, PSYCHOLOGICAL AND PHYSICAL HARM.</b></p>	<p><b>Section 1</b></p> <p>Occupational detriment in relation to <b>an employee or a worker</b>, means:</p> <p>(a) being subjected to any disciplinary action;</p> <p>(b) being dismissed, suspended, demoted, harassed, or intimidated;</p> <p>(c) being transferred against his or her will;</p> <p>(d) being refused transfer or promotion;</p> <p>(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;</p> <p>(f) being refused a reference, or being provided with an adverse reference, from his or her <i>employer</i>;</p>	<p>Occupational detriment is only limited in relation to the working environment</p>	<p><b>Section 2</b></p> <p>Reprisal means—</p> <p>(a) a disciplinary measure;</p> <p>(b) the demotion of the public servant; (c) the termination of employment of the public servant,;</p> <p>(d) any measure that adversely affects the employment or working conditions of the public servant; and</p> <p>(e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).</p> <p>Similarly to the PDA retaliation is only limited in relation to the working environment.</p>	<p><b>Section 21</b></p> <p>Retaliate means—</p> <p>(i) dismissing the employee;</p> <p>(ii) refusing or omitting to offer or afford to the employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available to other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances;</p> <p>(iii) subjecting the employee to any detriment or disadvantage (including any detrimental or disadvantageous effect on the employee's employment, job</p>	<p><b>Section 3</b></p> <p>Detrimental action includes—</p> <p>(a) action causing injury, loss or damage;</p> <p>(b) intimidation or harassment;</p> <p>(c) discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action;</p>

	<p>(g) being denied appointment to any employment, profession or office;</p> <p>(h) being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure</p> <p>(i) being threatened with any of the actions referred to in paragraphs (a) to (h) above; or</p> <p>(j) being adversely affected in respect of his or her employment, profession, or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services;</p>			<p>performance, or job satisfaction) in circumstances in which other employees employed by the employer in work of that description are not or would not be subjected to such detriment or disadvantage:</p> <p>(iv) retiring the employee, or requiring or causing the employee to retire or resign:</p> <p>Similarly, to the PDA retaliation is only limited in relation to the working environment.</p>	
<p><b>ASPECT 2</b></p> <p><b>APPROPRIATE REMEDIES ARE AVAILABLE TO WHISTLEBLOWERS TO COMPENSATE DIRECT AND INDIRECT CONSEQUENCES OF RETALIATORY ACTION FOLLOWING A REPORT THAT QUALIFIES FOR PROTECTION, INCLUDING</b></p>	<p><b>Section 4</b></p> <p>An employee who has been subjected, to occupational detriment, may approach any court having jurisdiction, including the Labour Court for appropriate relief; or pursue any</p>	<p>The tribunal may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.</p>	<p>The Tribunal may make an order respecting a remedy in favour of the complainant; or an order respecting a remedy in favour of the complainant and an order respecting disciplinary action</p>	<p><b>Section 21: Part 9 of the Employment Relations Act 2000 applies.</b></p> <p>The Authority or the court may, in settling the grievance, provide for any 1 or more of the following remedies:</p> <p>(a) reinstatement of the</p>	<p><b>Section 46-51</b></p> <p>If a person is convicted or found guilty for retaliation against a whistleblower, the court may, in addition to imposing a penalty, order that, within a specified time, the offender pay to the person against whom the</p>

<p><b>FINANCIAL COMPENSATION, AND INTERIM RELIEF PENDING THE RESOLUTION OF LEGAL PROCEEDINGS.</b></p>	<p>other process allowed or prescribed by any law.</p> <p>If the court or tribunal, including the Labour Court is satisfied that an employee or worker has been subjected to or will be subjected to an occupational detriment on account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances, including:</p> <p>(a) payment of compensation by the employer or client, as the case may be, to that employee or worker;</p> <p>(b) payment by the employer or client of actual damages suffered by the employee or worker; or</p> <p>(c) an order directing the employer or client to take steps to remedy the occupational detriment.</p> <p>Any employee who has made a protected disclosure and who reasonably believes that he or she may be</p>	<p>The amount of compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—</p> <p>(a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.</p> <p>The loss shall be taken to include—</p> <p>(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and</p>	<p>against any person or persons identified by the Commissioner in the application as being the person or persons who took the reprisal.</p> <p>The Tribunal may, by order, require the employer or the appropriate chief executive, or any person acting on their behalf, to take all necessary measures to</p> <p>(a) permit the complainant to return to his or her duties;</p> <p>(b) reinstate the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored;</p> <p>(c) pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent</p>	<p>employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;</p> <p>(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;</p> <p>(c) the payment to the employee of compensation by the employee's employer, including compensation for—</p> <p>(i) humiliation, loss of dignity, and injury to the feelings of the employee; and</p> <p>(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:</p> <p>The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer,</p>	<p>detrimental action was taken damages that the court considers appropriate to compensate the person for any injury, loss or damage.</p> <p>If the employer of a person; is convicted or found guilty of an offence in relation to detrimental action taken against that person, the court may, in addition to imposing a penalty and in addition to any damages ordered order that the employer reinstate or re-employ the person in his or her former position or, if that position is not available, in a similar position.</p> <p>A person who takes detrimental action against another person in reprisal for a protected disclosure is liable in damages for any injury, loss or damage to that other person.</p> <p>The damages may be recovered in proceedings as for a tort in any court of competent jurisdiction.</p>
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	<p>adversely affected on account of having made that disclosure, can request to be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position.</p>	<p>(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.</p> <p>The tribunal may order reinstatement which entails that the employer shall treat the complainant in all respects as if he had not been dismissed.</p> <p>If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which</p>	<p>to the remuneration that would, but for the reprisal, have been paid to the complainant;</p> <p>(d) rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant;</p> <p>(e) pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal; or</p> <p>(f) compensate the complainant, by an amount of not more than \$10,000, for any pain and suffering that the complainant experienced because of the reprisal.</p>	<p>make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.</p> <p>The Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.</p>	<p>The right of a person to bring proceedings for damages does not affect any other right or remedy available to the person arising from the detrimental action.</p> <p>An employee of a public service body or a public entity who has made a protected disclosure and who believes on reasonable grounds that detrimental action will be, is being or has been taken against him or her may request a transfer of employment.</p> <p>If upon an application for an order or an injunction the Supreme Court is satisfied that a person has taken or intends to take detrimental action against another in reprisal for a protected disclosure made, the court may order the person who took the detrimental action, to remedy that action, or grant an injunction in any terms that the court considers appropriate.</p>
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		he would have done so but for being dismissed.			
<p><b>ASPECT 3</b></p> <p><b>PROVIDES FOR VARIOUS LEGAL ISSUES AS SET OUT BELOW:</b></p> <ul style="list-style-type: none"> <li>✓ <b>CRIMINAL OR CIVIL PROCEEDINGS AGAINST A WHISTLEBLOWER</b></li> <li>✓ <b>NON-DISCLOSURE AGREEMENTS (MEASURES IN PLACE TO PROHIBIT OR RENDER INVALID ANY CONTRACTUAL PROVISIONS INTENDED TO DIMINISH THE ACT)</b></li> <li>✓ <b>REPRISALS THROUGH DEFAMATION</b></li> </ul>	<p><b>Section 9A</b></p> <p>A court may find that an employee or worker who made a protected disclosure is not be liable to any civil, criminal or disciplinary proceedings by reason of having made the disclosure if such disclosure is prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter.</p> <p>Exclusion of liability does not extend to the civil or criminal liability of the employee or worker for his or her participation in the disclosed impropriety.</p>	<p><b>Section 43J</b></p> <p>(1) Any provision in an agreement to which purports to preclude the worker from making a protected is void</p> <p>(2) any agreement between a worker and his employer to refrain from instituting or continuing any proceedings under the Act or any proceedings for breach of contract is void.</p>	<p>No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf of or under the direction of the Commissioner, for anything done or omitted to be done, or reported or said, in good faith in the course of the exercise or performance, or purported exercise or performance, of any power or duty of the Commissioner.</p> <p>anything said, any information supplied or any document or thing produced in the course of an investigation under the Act by or on behalf of the Commissioner is privileged if it was said, supplied or produced in good</p>	<p><b>Section 23-24</b></p> <p>Neither a discloser who makes a protected disclosure nor a receiver who refers a protected disclosure is liable to any civil, criminal, or disciplinary proceeding because of making or referring the disclosure. This applies despite any prohibition of or restriction on the disclosure of information under any legislation, rule of law, agreement, contract, internal procedure, oath, or practice.</p> <p>The Act applies despite any agreement, contract, or internal procedure.</p> <p>A provision in any agreement, contract, or internal procedure has no effect if it apparently requires a person to do any of the following:</p> <p>(a) not to disclose serious wrongdoing that is or could be a protected disclosure:</p>	<p><b>Section 39 - 42</b></p> <p>A person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the disclosure.</p> <p>A person who makes a protected disclosure does not by doing so—</p> <p>(a) commit an offence under section 95 of the Constitution Act 1975 or a provision of any other Act that imposes a duty to maintain confidentiality with respect to a matter or any other restriction on the disclosure of information; or</p> <p>(b) breach an obligation by way of oath or rule of law or practice or under an agreement requiring him or her to maintain</p>

			<p>faith; and</p> <p>any report under the Act made in good faith by the Commissioner is privileged, and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privilege.</p> <p>If, during the course of an investigation or as a result of any information provided to the Commissioner by a person who is not a public servant, the Commissioner has reason to believe that another wrongdoing, or a wrongdoing, as the case may be, has been committed, he or she may, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation.</p> <p>No public servant shall</p>	<p>(b) not to disclose information that could support, or relate to, a protected disclosure:</p> <p>(c) to withdraw a protected disclosure:</p> <p>(d) to abandon a protected disclosure:</p> <p>(e) to make a disclosure of serious wrongdoing in a way that is inconsistent with the Act.</p>	<p>confidentiality or otherwise restricting the disclosure of information with respect to a matter.</p> <p>In any proceeding for defamation there is a defence of absolute privilege in respect of the making of a protected disclosure.</p> <p>A person's liability for his or her own conduct is not affected by the person's disclosure of that conduct</p> <p>A manager may take management action that is detrimental action in relation to an employee who has made a protected disclosure only if the fact that the person has made the protected disclosure is not a substantial reason for the manager taking the action.</p>
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			be excused from cooperating with the Commissioner, or with a person conducting an investigation, on the grounds that any information given by the public servant may tend to incriminate the public servant or subject him or her to any proceeding or penalty, but the information, or any evidence derived from it, may not be used or received to incriminate the public servant in any criminal proceeding against him or her, other than a prosecution under section 132 or 136 of the Criminal Code		
<b>ASPECT 4</b>  <b>APPROPRIATE REWARDS OR INCENTIVES OFFERED FOR WHISTLEBLOWING</b>	No rewards or incentives offered by the PDA.	No rewards or incentives offered by PIDA	No rewards or incentives offered by PSDPA	No incentives offered by the PDA NZ.	No incentives offered by the PDA Vic.
<b>ASPECT 5</b>  <b>INDEPENDENT OVERSIGHT BODY</b>  <b>ALTERNATIVELY,</b>	No independent oversight body established by the Act.  <b>Section 8</b>	<b>Section 3</b>  A worker may present a complaint to an employment	<b>Section 20.7</b>  The Act established a tribunal to be known as the Public Servants Disclosure Protection	No oversight body established by the Act.  <b>Section 30</b>	The main functions of the IBAC are (a) to receive, whether directly or by notification from other

<p><b>SUFFICIENTLY RESOURCED AND WELL-TRAINED COMPETENT AUTHORITIES IMPLEMENT THE FRAMEWORK</b></p>	<p>A disclosure may be made in good faith to:</p> <ul style="list-style-type: none"> <li>• the Public Protector;</li> <li>• the South African Human Rights Commission;</li> <li>• the Commission for Gender Equality;</li> <li>• the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;</li> <li>• the Public Service Commission;</li> <li>• the Auditor General;</li> <li>or</li> <li>• a person or body <i>prescribed</i> for purposes of this section</li> </ul> <p>No evidence that the listed bodies are sufficiently resourced and well-trained competent authorities to implement the framework.</p>	<p>tribunal that he has been subjected to a detriment.</p> <p>No independent oversight body.</p>	<p>Tribunal.</p> <p>The Tribunal has powers similar to the superior court, it can:</p> <p>(a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that are considered necessary for the full hearing and consideration of the application;</p> <p>(b) administer oaths;</p> <p>(c) receive and accept any evidence and other information, whether on oath or by affidavit, whether that evidence or information is or would be admissible in a court of law;</p> <p>(d) lengthen or shorten any time limit established by the rules of procedure; and</p> <p>(e) decide any procedural or evidentiary question</p>	<p>An Ombudsman may provide information and guidance to any person on any matter about the Act. If a discloser notifies an Ombudsman that he or she has made, or is considering making, a protected disclosure, an Ombudsman must provide information and guidance to the discloser.</p> <p>An Ombudsman may request information about whether the organisation has established and published internal procedures; a copy of those procedures; and information about how those procedures operate.</p> <p>An Ombudsman may, with the consent of a discloser who has made a protected disclosure refer the disclosure to a Minister if the Ombudsman considers, after consulting that Minister, that the receiver of the disclosure—</p> <p>(i) has not acted as it should;</p> <p>(ii) has not dealt with the</p>	<p>entities, assessable disclosures; and (b) to assess those disclosures; and (c) to determine whether those disclosures are protected disclosure complaints.</p> <p>In addition, the IBAC has</p> <p>(a) to issue guidelines for procedures—</p> <p>(i) to facilitate the making of disclosures</p> <p>(ii) for the handling of those disclosures and, where appropriate, their notification to the IBAC;</p> <p>(iii) for the protection of persons from detrimental action;</p> <p>(b) to issue guidelines for the management of the welfare of persons who make protected disclosures or who are otherwise affected by protected disclosures;</p> <p>(c) to provide advice to the public sector on any matter included in the guidelines;</p> <p>(d) to review the</p>
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			<p><b>Section 22</b></p> <p>The duties of the Commissioner are to:</p> <p>(a) provide information and advice regarding the making of disclosures and the conduct of investigations by the Commissioner;</p> <p>(b) receive, record and review disclosures of wrongdoings in order to establish whether there are sufficient grounds for further action;</p> <p>(c) conduct investigations of disclosures including to appoint persons to conduct the investigations;</p> <p>(d) ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures, witnesses and persons alleged to be responsible for</p>	<p>matter so as to address the serious wrongdoing; or</p> <p>(b) investigate the disclosure if the disclosure relates to serious wrongdoing in or by a public sector organisation and the Ombudsman considers that the receiver of the disclosure has not acted as it should; has not dealt with the matter so as to address the serious wrongdoing.</p> <p>An Ombudsman may take over an investigation of a disclosure from a public sector organisation, or investigate a disclosure together with a public sector organisation. An Ombudsman may review and guide an investigation of a protected disclosure by a public sector organisation (either at the organisation's request or at the Ombudsman's discretion).</p> <p>The Ombudsmen has the same powers and functions under the PDA NZ as under the Ombudsmen Act 1975, including the function of each Ombudsman to investigate a matter of their</p>	<p>procedures established by the public sector and the implementation of those procedures;</p> <p>(e) to provide information and education about the protected disclosure scheme;</p> <p>(f) to assist the public sector to increase its capacity to comply with the protected disclosure scheme;</p> <p>(g) to provide information to, consult with and make recommendations to the public sector on matters relevant to the operation of the protected disclosure scheme;</p> <p>(h) to undertake research and collect, analyse and report on data and statistics relating to the protected disclosure scheme;</p> <p>(i) to report to Parliament at any time on matters arising from the performance of any of its research and education functions;</p>
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			<p>wrongdoings;  (e) protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;  (f) establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations;  (g) review the results of investigations into disclosures and report findings to the persons who made the disclosures and to the appropriate chief executives;  (h) make recommendations to chief executives concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in</p>	<p>own motion under</p> <p>The Ombudsmen has the same powers in relation to investigating a protected disclosure as he or she has in relation to a complaint under the Ombudsmen Act 1975, but are not bound to investigate a protected disclosure.</p> <p>The Ombudsman has power to obtain information, documents, papers, or things that would in the Ombudsman's opinion assist the Ombudsmen to act under the Act in relation to a public sector organisation.</p>	<p>All disclosures in respect of the IBAC are sent for determination to the Victorian Inspectorate.</p>
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			response to those recommendations; and (i) receive, review, investigate and otherwise deal with complaints made in respect of reprisals.		
<b>ASPECT 6</b>  <b>ENSURING THAT DISCLOSURES ARE TIMEOUSLY AND PROPERLY INVESTIGATED</b>	<b>Section 3B</b>  Any person or body to whom a protected disclosure has been made as soon as reasonably possible, but within 21 days after the protected disclosure has been made decide whether to investigate, not investigate or to refer the matter to another body the body referred to also has 21 days to decide investigate or not to investigate.  If the decision to investigate is not reached by the end of the 21 days there is duty to inform the whistleblower on intervals of not more than 2 months that the decision is still pending. Within 6 months after the disclosure has been	No provision in the PIDA.	Sections 26 to 35 of the Act provides for process of investigation into disclosures.	<b>Section 13</b>  Within 20 working days of receiving a protected disclosure, the receiver of the disclosure should: (a) acknowledge discloser the date the disclosure and (b) consider the disclosure and whether it warrants investigation; and (c) check with the discloser whether the disclosure has been made elsewhere (and any outcome); and (d) deal with the matter by doing 1 or more of the following: (i) investigating the disclosure; (ii) addressing any serious wrongdoing by acting or recommending action; (iii) referring the disclosure; (iv) deciding that no action is required; and (e) inform the discloser (with reasons) about what	Part 3 of the PDA Vic: Notification and assessment of disclosures.

	<p>made or after the referral has been the whistleblower must be informed the time-frame within which the investigation will be completed or reasons not to investigate.</p> <p>The whistleblower must be informed of the outcome of the investigation.</p> <p>The provision does not have penalties for none compliance of the body or person tasked with investigation.</p>			<p>the receiver has done or is doing to deal with the matter.</p> <p>(2) However, when it is impracticable to complete these actions within 20 working days and then the receiver should inform the discloser how long the receiver expects to take to deal with the matter, appropriately update the discloser about progress, inform the discloser (with reasons) about what the receiver has done or is doing to deal with the matter.</p>	
<p><b>ASPECT 7</b></p> <p><b>APPROPRIATE MEASURES IN PLACE TO PROVIDE FOR THE CONFIDENTIALITY OF THE REPORTING PERSON AND THE CONTENT OF THE REPORT</b></p>	<p>No provision in PDA to protect the confidentiality of the reporting person and the content of the report.</p>	<p>No provision in PIDA to protect the confidentiality of the reporting person and the content of the report.</p>	<p>Unless the disclosure is required by law or permitted by the Act, the Commissioner and every person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties under the</p>	<p><b>Section 17</b></p> <p>Every receiver of a protected disclosure must use their best endeavours to keep confidential information that might identify the discloser.</p> <p>However, a receiver need not keep a discloser's identity confidential if—</p> <p>(a) the discloser consents to the release of the identifying information;</p> <p>(b) there are reasonable</p>	<p><b>Section 52</b></p> <p>The person or body must not disclose the content, or information about the content, of an assessable disclosure. Penalty for contravening the provision in the case of a natural person, 120 penalty units or 12 months imprisonment or both. In the case of a body corporate, 600 penalty units.</p>

			<p>Act.</p> <p>Each chief executive must establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings</p> <p>Any information received in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed except with the consent of the person who gave the information.</p>	<p>grounds to believe that the release of the identifying information is essential—</p> <ul style="list-style-type: none"> <li>(i) for the effective investigation of the disclosure;</li> <li>(ii) to prevent a serious risk to public health, public safety, the health or safety of any individual, or the environment;</li> <li>(iii) to comply with the principles of natural justice; or</li> <li>(iv) to an investigation by a law enforcement or regulatory agency for the purpose of law enforcement.</li> </ul> <p>After releasing identifying information the receiver must inform the discloser.</p> <p>A receiver must refuse a request for information under the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 as contrary to the Act if the information might identify the discloser of a protected disclosure.</p>	<p><b>Section 53</b></p> <p>A person or body must not disclose information likely to lead to the identification of a person who has made an assessable disclosure. Penalty for contravention in the case of a natural person, 120 penalty units or 12 months imprisonment or both. In the case of a body 600 penalty units.</p>
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<p><b>ASPECT 8</b></p> <p><b>PROTECTION TO THE BROADEST POSSIBLE RANGE, INCLUDING FORMER EMPLOYEES, POTENTIAL EMPLOYEES DURING THE STAGES OF RECRUITMENT, THIRD PERSONS CONNECTED TO THE WHISTLEBLOWER WHO CAN SUFFER RETALIATION</b></p>	<p><b>Section 3</b></p> <p>PDA protects Employee or worker only.</p> <p><b>'employee'</b> means:  (a) any person, excluding an independent contractor, who works or worked for another person or for the State, and who receives or received, or is entitled to receive, any remuneration; and</p> <p>(b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer;</p> <p><b>'worker'</b> means:  (a) any person who works or worked for another person or for the State; or  (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer or client, as an independent contractor, consultant, agent; or  (c) any person who</p>	<p><b>Section 43A</b></p> <p>protected disclosure means a qualifying disclosure which is made by a worker</p>	<p>Protection is limited to a public servant or a former public servant.</p>	<p><b>Section 9</b></p> <p>A discloser, in relation to an organisation, means an individual who is (or was formerly)—</p> <p>(a) an employee;  (b) a homemaker;  (c) a secondee to the organisation;  (d) a person engaged or contracted under a contract for services to do work for the organisation;  (e) someone in the management of the organisation (including, for example, a person who is or was a member of the board or governing body of the organisation);  (f) a member of the Armed Forces (in relation to the New Zealand Defence Force);  (g) a volunteer working for the organisation without reward or expectation of reward for that work.</p>	<p>The protection is not limited to the employment relationship, and protected disclosures may be made by any natural person.</p>
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	renders services to a client while being employed by a temporary employment service.				
<p><b>ASPECT 9</b></p> <p><b>PROVIDE FOR EFFECTIVE, PROPORTIONATE, AND DISSUASIVE SANCTIONS FOR THOSE WHO RETALIATE AGAINST WHISTLEBLOWERS</b></p>	<p><b>Section 3</b></p> <p>No employee or worker may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.</p> <p>No sanctions included if the section is contravened.</p>	<p><b>Section 47B</b></p> <p>A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.</p> <p>There are no sanctions in place.</p>	<p><b>Section 19</b></p> <p>No person shall take any reprisal against a public servant or direct that one be taken against a public servant.</p> <p>A person which take reprisal action against a public servant is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years, or to both that fine and that imprisonment; or (b) an offence punishable on summary conviction and liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months, or to both that fine and that imprisonment.</p>	<p><b>Section 21</b></p> <p>An employer must not retaliate, or threaten to retaliate, against an employee because the employee intends to make or has made a protected disclosure.</p> <p>If an employer retaliates, or threatens to retaliate, against an employee the employee has a personal grievance under section 103(1)(k) of the Employment Relations Act 2000.</p> <p>A person (A) must not treat, or threaten to treat, another person (B) less favourably than A would treat other persons in the same or substantially similar circumstances because:</p> <p>(a) B (or a relative or associate of B) intends to make, or has made, a</p>	<p><b>Section 26H</b></p> <p>A person must not take detrimental action against another person in reprisal for a protected disclosure. 240 penalty units or 2 years imprisonment or both</p>

				<p>protected disclosure, has encouraged another person to make a protected disclosure, or has given information in support of, or relating to, a protected disclosure;</p> <p>or</p> <p>(b) A believes or suspects that B (or a relative or associate of B) intends to do, or has done, anything described in paragraph (a).</p> <p>This does not apply if B knowingly made a false allegation or otherwise acted in bad faith.</p>	
<p><b>ASPECT 10</b></p> <p><b>GENERAL PROTECTION TO THE WHISTLEBLOWER.</b></p>	No provision in the PDA.	No provision in the PIDA.	<p><b>Section 25.1</b></p> <p>The Commissioner may provide access to legal advice to:</p> <p>(a) any public servant who is considering making a disclosure of wrongdoing</p> <p>(b) any person who is not a public servant who is considering providing information to the Commissioner in relation to any act or omission that may</p>	<p><b>Section 11</b></p> <p>A discloser is entitled to protection even if—</p> <p>(a) they are mistaken and there is no serious wrongdoing; or</p> <p>(b) they do not refer to the name of the Act when making the disclosure; or</p> <p>(c) they technically fail to comply with provisions of the Act(as long as they have substantially</p>	<p><b>Section 10</b></p> <p>A disclosure may be made even if the person making the disclosure cannot identify the person or the body to whom or to which the disclosure relates.</p>



			<p>constitute a wrongdoing;</p> <p>(c) any public servant who has made a disclosure;</p> <p>(d) any person who is or has been involved in any investigation conducted by a senior officer or by or on behalf of the Commissioner</p> <p>(e) any public servant who is considering making a complaint regarding an alleged reprisal taken against him or her; or</p> <p>(f) any person who is or has been involved in a proceeding under this Act regarding an alleged reprisal.</p> <p>The Commissioner may provide the access to legal advice only if the public servant or person satisfies the Commissioner that they do not have other access to legal advice at no cost to them.</p>	<p>complied); or</p> <p>(d) they also make the disclosure to another person, as long as they do so (i) on a confidential basis and (ii) for the purposes of seeking advice about whether or how to make a protected disclosure in accordance with this Act.</p>	
<p><b>ASPECT 11</b></p> <p><b>WHISTLEBLOWERS AND</b></p>	No provision in the PDA	No provision in	No provision in the	No provision in the PDA NZ	The PDA Vic provides

<p><b>THEIR FAMILIES ARE PROTECTED FROM PHYSICAL HARM.</b></p>	<p>relating to the protection of whistleblowers and their families from physical harm.</p>	<p>the PIDA relating to the protection of whistleblowers and their families from physical harm.</p>	<p>PSDPA relating to the protection of whistleblowers and their families from physical harm</p>	<p>relating to the protection of whistleblowers from physical harm.</p>	<p>that <u>a natural person may disclose information that shows or tends to show that a person, a public officer or a public body has, is or will engage in improper conduct or that a public officer or a public body has, is or <u>will take detrimental action against a person.</u></u></p> <p>Detrimental action includes action causing injury, loss or damage; intimidation or harassment</p>
<p><b>Aspect 12</b> <b>GOOD FAITH REQUIREMENT</b></p>	<p>Good faith is a requirement for disclosure.</p>	<p>Good faith is a requirement for disclosure.</p>	<p>Good faith is a requirement for disclosure.</p>	<p>Good faith is a requirement for disclosure.</p>	<p>Good faith is a requirement for disclosure.</p>
<p><b>ASPECT 13</b> <b>APPROPRIATE PROTECTION PROVIDED FOR ACCUSATIONS MADE IN BAD FAITH</b></p>	<p><b>Section 9B</b> A whistleblower who intentionally discloses false information knowing that information is false or who ought reasonably to have known that the information is false with the intention to cause harm to the affected party and where the affected party has</p>	<p>No provision in the PIDA that specifically deal with bad faith disclosure.  A disclosure of information is not a qualifying disclosure if the person making the disclosure</p>	<p><b>Section 40</b> No person shall, in a disclosure of a wrongdoing or during any investigation under the Act, knowingly make a false or misleading statement, either orally or in writing, to a supervisor, a senior officer, the</p>	<p>A disclosure is not protected if made in bad faith.  A disclosure on information protected by legal professional privilege is not a protected disclosure.</p>	<p><b>Section 72</b> A person who provides information that they know is false or misleading in a material particular, intending that the information be acted on as a protected disclosure may get a penalty of 120 penalty units or 12 months imprisonment or both.</p>

	<p>suffered harm as a result of such <i>disclosure</i>, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.</p>	<p>commits an offence by making it.</p> <p>A disclosure on information protected by legal professional privilege is not a protected disclosure</p>	<p>Commissioner or a person acting on behalf of or under the direction of any of them. Every person who knowingly contravenes this section commits</p> <p>(a) an indictable offence and liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years, or to both that fine and that imprisonment; or</p> <p>(b) an offence punishable on summary conviction and liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months, or to both that fine and that imprisonment.</p>		<p>A person must not claim that a matter is the subject of a protected disclosure knowing that claim to be false.</p> <p>Penalty: 120 penalty units or 12 months imprisonment or both.</p>
<p><b>Aspect 14</b></p> <p><b>BURDEN OF PROOF SHOULD REST WITH THE EMPLOYER TO PROVE THAT THE ALLEGED ACTION/ OMISSION WASN'T IN REPRISAL DUE TO PROTECTED DISCLOSURE MADE</b></p>	<p>Not specifically provided for in the PDA. However, if the reprisal referred to is in relation to dismissal (as occupational detriment), the provisions of section 192 relating to</p>	<p>Not provided for in the PIDA.</p>	<p>Not expressly provided for in the Act.</p>	<p>Not expressly provided for in the Act.</p>	<p>Not provided in the PDA Vic.</p>

	<p>the onus in respect of dismissal disputes comes into play, in respect of which the employee must prove the dismissal, and the employer must prove that the dismissal in question was fair (substantially and procedurally).</p> <p>The onus is on the whistleblower to prove that he has made a disclosure that is protected.</p>				
<p><b>ASPECT 15</b></p> <p><b>PERIODICAL REVIEW OF THE EFFECTIVENESS OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS AND MAKE PUBLIC THE RESULTS OF THESE PERIODICAL REVIEWS</b></p>	<p>No provision in the PDA.</p>	<p>No Legal requirement within the PIDA.</p>	<p><b>Section 54</b></p> <p>Five years after the Act comes into force, the President of the Treasury Board must conduct an independent review of the Act, and its administration and operation, and must report on the review to each House of Parliament.</p> <p>Within three months after the end of each financial year, the Commissioner must prepare an annual</p>	<p>No Legal requirement within the Act.</p>	<p>The IBAC may at any time review the procedures established by an entity to ensure the procedures are consistent with the Act and regulations and the guidelines issued by the IBAC.</p> <p>The IBAC may review the implementation of the procedures established by an entity to ensure their implementation is consistent with the Act and regulations and the guidelines issued by the</p>

			<p>report in respect of the activities of the Commissioner during that financial year.</p> <p>The annual report must set out:</p> <p>(a) the number of general inquiries relating to the Act;</p> <p>(b) the number of disclosures received and complaints made in relation to reprisals, and the number of them that were acted on and those that were not acted on;</p> <p>(c) the number of investigations commenced under the Act;</p> <p>(d) the number of recommendations that the Commissioner has made and their status; in relation to complaints made in relation to reprisals, the number of settlements, applications to the Tribunal and decisions to dismiss them;</p> <p>(e) whether there are any systemic</p>		<p>IBAC.</p> <p>The IBAC may make any recommendation to an entity that the IBAC thinks fit arising from a review of the procedures of the entity or the implementation of those procedures by the entity.</p> <p>If it appears to the IBAC that insufficient steps have been taken by an entity within a reasonable time after making a recommendation the IBAC may, after considering any comments of the entity, send a copy of the recommendation to the relevant Minister.</p> <p>The Victorian Inspectorate may at any time review the procedures established by the IBAC or the Ombudsman and the Victorian Inspectorate may review the implementation of the procedures established by the IBAC or the Ombudsman.</p>
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			<p>problems that give rise to wrongdoings;</p> <p>(f) any recommendations for improvement that the Commissioner considers appropriate; and</p> <p>(g) any other matter that the Commissioner considers necessary. The Commissioner must submit the report to the Speaker of the Senate and the Speaker of the House of Commons, who will each table the report in the House over which he or she presides</p>		
<p><b>ASPECT 16</b></p> <p><b>ESTABLISH AND PUBLICISE CLEAR POLICIES AND PROCEDURES BY WHICH A WHISTLEBLOWER CAN REPORT, INCLUDING ALLOWING FOR CONFIDENTIAL AND, WHERE APPROPRIATE, ANONYMOUS REPORTING.</b></p>	<p><b>Section 10</b></p> <p>The Minister must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of the PDA and all procedures which are available in terms of any law to employees or workers who wish to report or otherwise</p>	<p>No Legal requirement within the PIDA.</p>	<p>Each chief executive must establish internal procedures to manage disclosures made under the Act by public servants.</p> <p>Each chief executive must designate a senior officer to be responsible for receiving and dealing with, in accordance</p>	<p>Every public sector organisation must have appropriate internal procedures.</p> <p>The internal procedures must—</p> <p>(a) comply with the principles of natural justice; and</p> <p>(b) set out a process; and</p> <p>(c) identify who in the organisation a protected</p>	<p><b>Section 57</b></p> <p>The IBAC must issue guidelines for procedures—</p> <p>(a) to facilitate the making of disclosures to entities; and</p> <p>(b) for the handling of those disclosures and, where appropriate, the notification of those disclosures to the IBAC</p>

	<p>remedy an impropriety.</p> <p>The guidelines must be approved by Parliament before publication in the Gazette. All organs of state must give to every employee or worker a copy of the guidelines referred to in paragraph or must take reasonable steps to bring the relevant notice to the attention of every employee or worker.</p>		<p>with the duties and powers of senior officers set out in the code of conduct established by the Treasury Board, disclosures of wrongdoings made by public servants.</p> <p>Each chief executive must:</p> <p>(a) protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;</p> <p>(b) establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoings; and</p> <p>(c) if wrongdoing is found as a result of a disclosure made, promptly provide public access to information that</p>	<p>disclosure of serious wrongdoing in or by that organisation may be made to; and</p> <p>(d) include, in relation to a protected disclosure of serious wrongdoing in or by that organisation,—</p> <p>(i) a reference to the requirement that the organisation not retaliate, or threaten to retaliate, against a discloser; and</p> <p>(ii) a reference to the requirement that the organisation not treat, or threaten to treat, a discloser less favourably than others; and</p> <p>(iii) a description of the circumstances in which the disclosure may be referred under section 16; and</p> <p>(iv) a description of how the organisation will provide practical assistance and advice to disclosers (for example, by having a support person assess any risks to a discloser); and</p> <p>(v) a description of how the organisation will meet the duty of confidentiality in section 17.</p> <p>The organisation must publish widely (and</p>	<p>(c) for the protection of persons from detrimental action</p> <p>(2) The IBAC must issue guidelines for the management of the welfare of—</p> <p>(a) any person who makes a protected disclosure; and</p> <p>(b) any person affected by a protected disclosure whether as a witness in the investigation of the disclosure or as a person who is a subject of that investigation.</p> <p>(3) The IBAC must ensure its guidelines are readily available to—</p> <p>(a) the public; and</p> <p>(b) each entity required to establish procedures; and</p> <p>(c) each member, officer and employee of an entity; and</p> <p>(d) each member of police personnel.</p>
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			<p>(i) describes the wrongdoing, including information that could identify the person found to have committed it if it is necessary to identify the person to adequately describe the wrongdoing, and</p> <p>(ii) sets out the recommendations, if any, set out in any report made to the chief executive in relation to the wrongdoing and the corrective action, if any, taken by the chief executive in relation to the wrongdoing or the reasons why no corrective action was taken.</p>	<p>republish at regular intervals)—</p> <p>(a) information about the existence of the internal procedures; and</p> <p>(b) adequate information about how to use the procedures.</p>	
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### AFRICAN CONTINENT COUNTRIES

DESCRIPTION	COUNTRIES			
ASPECTS	NAMIBIA: WPA 2017	UGANDA: WPA 2010	TANZANIA: WWPA	GHANA: WHISTLEBLOWER ACT (Act 720)
<p><b>ASPECT 1</b></p> <p><b>BROAD DEFINITION OF RETALIATION THAT IS NOT LIMITED TO WORKPLACE RETALIATION AND CAN INCLUDE ACTIONS THAT CAN RESULT IN REPUTATIONAL, PROFESSIONAL, FINANCIAL, SOCIAL, PSYCHOLOGICAL AND PHYSICAL HARM.</b></p>	<p>A person is subjected to detrimental action if that person:</p> <p>(a) being an employee, is subjected to intimidation, harassment or any action causing personal harm or injury or loss or damage to property or any interference with his or her lawful employment by the employer or a fellow employee or by any other person or an institution; or</p> <p>(b) not being an employee, is subjected to discrimination, intimidation, harassment, or any action causing personal harm or injury or loss or damage to property or any interference with his or her business or livelihood by any person or</p>	<p>“victimisation” means and includes:</p> <p>(a) the whistleblower being an employee is dismissed; suspended; denied promotion; demoted; made redundant; harassed; intimidated; threatened with any of the matters set out above; subjected to a discriminatory or other adverse measure by the employer or a fellow employee; or</p> <p>(b) not being an employee, the whistleblower is subjected to discrimination or intimidation by a person, or an establishment affected by the disclosure.</p>	<p>A whistleblower is subjected to detrimental action if he may be subjected to dismissal, suspension, harassment, discrimination, or intimidation by his employer; or</p> <p>(b) his life or property or the life or property of a person of close or interpersonal relationship is endangered or is likely to be endangered.</p>	<p>A whistleblower is subjected to victimisation if because of making the disclosure, the whistleblower, being an employee, is dismissed, suspended, declared redundant, denied promotion, transferred against the whistleblower's will, harassed, intimidated, threatened with any of the matters set out above, or subjected to a discriminatory or other adverse measure by the employer or a fellow employee, or</p> <p>(b) not being an employee, the whistleblower is subjected to discrimination, intimidation or harassment by a person or an institution</p>

	an institution.			
<p><b>ASPECT 2</b></p> <p><b>APPROPRIATE REMEDIES ARE AVAILABLE TO WHISTLEBLOWERS TO COMPENSATE DIRECT AND INDIRECT CONSEQUENCES OF RETALIATORY ACTION FOLLOWING A REPORT THAT QUALIFIES FOR PROTECTION, INCLUDING FINANCIAL COMPENSATION, AND INTERIM RELIEF PENDING THE RESOLUTION OF LEGAL PROCEEDINGS.</b></p>	<p>The Tribunal may grant any of the following remedies -</p> <p>(a) in the case of an employee complainant, an order for -</p> <p>(i) reinstatement;</p> <p>(ii) reversal of transfer;</p> <p>(iii) transfer of the complainant to another branch or establishment of the employer;</p> <p>(iv) back pay for lost remuneration together with interest; or</p> <p>(v) any other relief that is necessary to eliminate the effects of the detrimental action;</p> <p>(b) an order for payment of damages, compensation, costs, interest or any other form of pecuniary relief to the complainant;</p> <p>(c) payment to the complainant of an amount equal to any expenses and any other financial losses incurred by the complainant as a result of the detrimental action;</p> <p>(d) an interdict restraining the person who has taken or intends to take detrimental action from continuing, repeating, threatening to</p>	<p>A whistleblower who honestly and reasonably believes that he or she has been victimised as a result of his or her disclosure may make a complaint to either the Inspectorate of Government or the Uganda Human Rights Commission for redress.</p> <p>A whistleblower may also seek redress for victimisation by bringing a civil action in a court of law.</p>	<p>A Competent Authority may cause the whistleblower or witness to be transferred to another employment or relocated to another place of residence</p>	<p>The Commission in the course of conducting an enquiry may make an interim order that it considers fit. After hearing the parties and other persons considered necessary by the Commission, the Commission shall make an order considered just in the circumstances including an order for reinstatement, reversal of a transfer, or transfer of the whistleblower to another establishment where applicable.</p> <p><b>Section 15.</b></p> <p>A whistleblower who has been subjected to victimisation may bring an action in the High Court to claim damages for breach of contract or for another relief or remedy to which the whistleblower may be entitled, except that an action shall not be commenced in a court unless the complaint has first been submitted to the Commission.</p>

	<p>continue or repeat, taking, causing or inflicting the detrimental action against the complainant in any manner;</p> <p>The Tribunal may, by order, require an employer or any person acting on the employer's behalf, to take all necessary measures to take the disciplinary action, including termination of employment or revocation of appointment, specified by the Tribunal against any person named in the application who was determined by it to have taken the detrimental action. Any employee whistleblower or a person related to or associated with the whistleblower who has been subjected to or is likely to be subjected to detrimental action in retaliation for disclosing improper conduct, may instead of making a complaint under the WPA 2017, refer the matter to the Labour Commissioner as a dispute pursuant to Part C of Chapter 8 of the Labour Act, 2007.</p> <p>If, in a dispute referred to the Labour Commissioner, it</p>			
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	<p>is proved that detrimental action was taken in retaliation for a disclosure of improper conduct, the employee is, in addition to any remedy which is available under the Labour Act, 2007 entitled to any remedy which may be granted to an employee complainant under the WPA 2017.</p>			
<p><b>ASPECT 3 PROVIDES FOR VARIOUS LEGAL ISSUES AS SET OUT BELOW:</b></p> <ul style="list-style-type: none"> <li>✓ <b>CRIMINAL OR CIVIL PROCEEDINGS AGAINST A WHISTLEBLOWER</b></li> <li>✓ <b>NON-DISCLOSURE AGREEMENTS (MEASURES IN PLACE TO PROHIBIT OR RENDER INVALID ANY CONTRACTUAL PROVISIONS INTENDED TO DIMINISH THE ACT)</b></li> <li>✓ <b>REPRISALS THROUGH DEFAMATION</b></li> </ul>	<p>A whistleblower is not liable to civil or criminal proceedings or to disciplinary action for making a disclosure that is protected, unless it is proved that the whistleblower knew that the information contained in the disclosure was false and that the disclosure was made in bad faith.</p> <p>A person against whom any action is taken for committing a detrimental action against a whistleblower or any person related to or associated with the whistleblower in retaliation for a disclosure of improper conduct may be sued and is liable for</p>	<p>A whistleblower shall not be liable to civil or criminal proceedings in respect of a disclosure that contravenes any duty of confidentiality or official secrecy law where the whistleblower acts in good faith.</p> <p>A provision in a contract of employment or other agreement between an employer and an employee is void if it—</p> <ul style="list-style-type: none"> <li>(a) seeks to prevent the employee from making a disclosure;</li> <li>(b) has the effect of discouraging an employee from making a disclosure;</li> <li>(c) precludes the employee from making a complaint in respect of victimisation;</li> </ul>	<p><b>Section 14</b></p> <p>A provision in a contract of employment or other agreement between an employer and an employee is void if it seeks to prevent the employee from making a disclosure, has the effect of discouraging an employee from making a disclosure, precludes the employee from making a complaint in respect of retaliation and victimization, or prevents an employee from bringing an action in court or before an institution to claim relief or remedy in respect of retaliation and victimization.</p>	<p>A whistleblower is not liable to civil or criminal proceedings in respect of the disclosure unless it is proved that that whistleblower knew that the information contained in the disclosure is false and the disclosure was made with malicious intent.</p> <p>A provision in a contract of employment or other agreement between an employer and an employee is void if it seeks to prevent the employee from making a disclosure, has the effect of discouraging an employee from making a disclosure, precludes the employee from making a complaint in respect of victimisation, or prevents an employee from bringing an action in court or before an institution to</p>

	damages or to pay compensation in his or her personal capacity.	(d) prevents an employee from bringing an action in court or before an institution to claim relief or remedy in respect of victimisation; or (e) if it has the effect of creating fear or discouraging the employee from making a disclosure.		claim relief or remedy in respect of victimisation
<b>ASPECT 4</b> <b>APPROPRIATE REWARD OR INCENTIVES OFFERED FOR WHISTLEBLOWING</b>	<p>The Commissioner may request the Criminal Assets Recovery Committee established by section 77 of the Prevention of Organised Crime Act, 2004, to recommend to the Cabinet that a whistleblower who makes a disclosure of improper conduct that leads to the arrest and prosecution of an accused person be rewarded with a prescribed amount of money from the Criminal Assets Recovery Fund established by section 74 of that Act.</p> <p>The Commissioner may request the Criminal Assets Recovery Committee established by section 77 of the Prevention of Organised Crime Act, 2004, to recommend to the Cabinet that a whistleblower whose disclosure results in the</p>	<p><b>Section 19</b></p> <p>A whistleblower shall be rewarded for his or her disclosure five percent of the net liquidated sum of money recovered consequent upon the recovery of the money, based on that disclosure. Payment must be made within 6 months after the recovery of the money.</p>	<p><b>Section 13</b></p> <p>The Minister, in consultation with Ministers responsible for law enforcement agencies, by regulations, provide the procedure and how rewarding, and compensation of whistleblowers and witnesses shall be made.</p>	<p>Section 20 established a Whistleblower Reward Fund. The money for the Fund consists of voluntary contributions to the Fund, and other moneys that may be allocated by Parliament to the Fund.</p> <p>A whistleblower who makes a disclosure that leads to the arrest and conviction of an accused person shall be rewarded with money from the Fund.</p> <p>A whistleblower whose disclosure results in the recovery of an amount of money shall be rewarded from the Fund with (a) ten percent of the amount of money recovered, or (b) the amount of money that the Attorney-General shall, in consultation with the Inspector-General of Police, determine</p>

	<p>recovery of an amount of money or other property be rewarded from the Criminal Assets Recovery Fund established by section 74 of that Act with -</p> <p>(a) the prescribed percentage of the amount of money or value of property recovered; or</p> <p>(b) any amount of money that the Commissioner, after consultation with the Minister, determines.</p>			
<p><b>ASPECT 5 INDEPENDENT OVERSIGHT BODY/ALTERNATIVELY, SUFFICIENTLY RESOURCED AND WELL-TRAINED COMPETENT AUTHORITIES TO IMPLEMENT THE FRAMEWORK</b></p>	<p><b>Section 6</b></p> <p>Established an independent and impartial office to be known as the Whistleblower Protection Office, which consists of a commissioner and deputy commissioner and must perform the following:</p> <p>(a) investigation of disclosures of improper conduct and consideration of the validity of such disclosures and the determination of appropriate action to be taken in relation to such disclosures;</p> <p>(b) consideration of reports and other matters and to take appropriate action;</p>	<p>No independent body</p>	<p>No independent body</p>	<p><b>Report to Commission on Human Rights and Administrative Justice</b></p> <p>A whistleblower who honestly and reasonably believes that that he has been subjected to victimisation or learns of a likely subjection to victimisation because a disclosure has been made, may in the first instance make a complaint to the Commission.</p> <p>The Commission shall, on receipt of a complaint, conduct an enquiry into the complaint at which the whistleblower and the person against whom the complaint is made shall be heard.</p> <p>An order of the Commission is of</p>

	<p>(c) investigation of complaints of detrimental action, and where appropriate reference of complaints to the Tribunal for remedial action;</p> <p>(d) appearing before the Tribunal as a public interest party in proceedings relating to complaints of detrimental action before the Tribunal;</p> <p>(e) initiating and laying criminal charges against any person who has committed or is alleged to have committed a criminal offence in terms of the Act;</p> <p>(f) issuing temporary prohibition notices and applying for confirmation of such notices before the Tribunal;</p> <p>(g) establishing programmes to educate the public concerning the provisions of the Act and the necessity for disclosures of improper conduct;</p> <p>(h) giving policy directions to employers, authorised persons, investigation agencies and other persons involved in the implementation of the Act on best practices to ensure effective implementation of</p>			<p>the same effect as a judgment or an order of the High Court and is enforceable in the same manner as a judgment or an order of the High Court.</p>
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	<p>the Act;  (i) generally overseeing the effective implementation of the Act;  <b>Section 57</b></p> <p>The Act further establishes a tribunal to be known as the Whistleblower Protection Review Tribunal.</p>			
<p><b>ASPECT 6</b></p> <p><b>ENSURING THAT DISCLOSURES ARE TIMEOUSLY AND PROPERLY INVESTIGATED</b></p>	<p>Section 40 states that an investigation undertaken in respect of improper conduct must be carried out as expeditiously as possible and must in any event be completed within the prescribed period after receipt of the disclosure or directives to undertake the investigation.</p>	<p>Section 8 provides that where a disclosure of impropriety is made to a specified person, the authorised person shall investigate and take appropriate action. The investigation must be carried out expeditiously. Where the authorised person to whom the disclosure is made determines that he or she does not have the capability to undertake the investigation, he or she shall, within seven working days, refer the disclosure to a competent authority.</p>	<p>Section 8 provides that Investigation undertaken in respect of wrongdoing shall be carried out as expeditiously as possible.</p>	<p>Section 8(3) provides that Investigation undertaken in respect of impropriety must be carried out as expeditiously as possible and must be completed within sixty days of receipt of the disclosure or directives to undertake the investigation.</p>
<p><b>ASPECT 7</b></p> <p><b>APPROPRIATE MEASURES IN PLACE TO PROVIDE FOR THE CONFIDENTIALITY OF THE REPORTING PERSON AND THE CONTENT OF THE REPORT</b></p>	<p><b>Section 46</b></p> <p>A person who makes or receives a disclosure of improper conduct; obtains confidential information during an investigation, may not, disclose the confidential information to any other</p>	<p><b>Section 14 and 15</b></p> <p>A person who unlawfully discloses, directly or indirectly, the identity of a whistleblower, commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine not</p>	<p><b>Section 16 and 17(2)</b></p> <p>Any Competent Authority or any person under his authority who divulges any information relating to the identity of a whistleblower, commits an offence and shall, upon conviction, be</p>	<p><b>Section 6</b></p> <p>Where a person to whom the disclosure is made fails to keep confidential the disclosure, the person commits an offence and is liable on summary conviction to a fine of not less than five hundred penalty units and not more than</p>



	<p>person or to the public, except in accordance with the provisions of the Act or any other law.</p> <p>A person discloses confidential information commits an offence and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding 10 years, or to both the fine and imprisonment.</p> <p>Where a whistleblower is a witness, the court, tribunal may, on application made to it by the whistleblower order that the whistleblower give his or her evidence <i>in camera</i>.</p>	<p>exceeding one hundred and twenty currency points or both.</p> <p>Where a person to whom the disclosure is made fails to keep confidential the disclosure, the person commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine not exceeding one hundred and twenty currency points or both.</p>	<p>liable to imprisonment for a term of not less than three years or to a fine of not less than five million shillings or to both.</p> <p>A whistleblower or a person to whom the disclosure of a wrongdoing is made shall not disclose any information relating to the disclosure to a person against whom or in respect of whom the disclosure is made. A person who contravenes this commits an offence and shall on conviction be liable to a fine of not less than three million shillings or to imprisonment for a term of not less than one year to both.</p>	<p>one thousand penalty units or to a term of imprisonment of not less than two years and not more than four years or to both.</p>
<p><b>ASPECT 8</b></p> <p><b>PROTECTION TO THE BROADEST POSSIBLE RANGE, INCLUDING FORMER EMPLOYEES, POTENTIAL EMPLOYEES DURING THE STAGES OF RECRUITMENT, THIRD PERSONS CONNECTED TO THE WHISTLEBLOWER WHO CAN SUFFER RETALIATION</b></p>	<p>The protection is not limited to the employment relationship, and protected disclosures may be made by any person.</p>	<p>The protection is not limited to the employment relationship, and protected disclosures may be made by any person.</p>	<p>“whistleblower” means any person who makes disclosure of wrongdoing in accordance with the provisions of the Act</p>	<p>A person who makes a disclosure of impropriety is referred to as a “whistleblower”.</p>

<p><b>ASPECT 9</b></p> <p><b>PROVIDE FOR EFFECTIVE, PROPORTIONATE, AND DISSUASIVE SANCTIONS FOR THOSE WHO RETALIATE AGAINST WHISTLEBLOWERS</b></p>	<p><b>Section 30</b></p> <p>A person who uses force, coercion, threats, intimidation, or any other coercive means against another person with intent to prevent that person from, or influence that person to refrain from, making a disclosure commits an offence and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding 20 years, or to both the fine and imprisonment.</p> <p>A person may not take detrimental action against a whistleblower, or any person related to or associated with the whistleblower in retaliation for a disclosure of improper conduct. A person who fails to comply commits an offence and is liable on conviction to a fine not exceeding N\$75 000 or to imprisonment for a period not exceeding 15 years, or to both the fine and imprisonment.</p>	<p><b>Section 16</b></p> <p>A person who either by himself or herself or through another person victimises a whistleblower for making a disclosure commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine not exceeding one hundred and twenty currency points or both.</p>	<p>No provision in the Act</p>	<p><b>Section 12</b></p> <p>A whistleblower shall not be subjected to victimisation by the employer of the whistleblower or by a fellow employee or by another person because a disclosure has been made.</p> <p>No sanctions provided in the Act if this provision is contravened.</p>

<p><b>ASPECT 10</b></p> <p><b>GENERAL PROTECTION TO THE WHISTLEBLOWER.</b></p>	<p><b>Section 20</b></p> <p>Established Whistleblower Protection Advisory Committee. The main object of the Committee is to advise -</p> <p>(a) the Minister on high level policy matters relating to whistleblower protection in Namibia; and</p> <p>(b) the Whistleblower Office generally on the exercise of its powers and performance of its functions under the Act.</p> <p><b>Legal assistance section 51</b></p> <p>During any legal proceedings instituted against a whistleblower concerning a matter arising from a disclosure made by a whistleblower if the Commissioner is of the opinion that the whistleblower is in need of legal assistance, the Commissioner must issue a certificate to the whistleblower recommending that the Director of Legal Aid</p>	<p><b>Section 18</b></p> <p>An authorised officer, who does not act upon receipt of a disclosure made to him or her, commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine not exceeding one hundred and twenty currency points or both.</p>	<p><b>Section 16(2)</b></p> <p>Any Competent Authority who fails to take an action in relation to the wrongdoing reported by a whistleblower and because of that failure he occasions loss to a public institution, commits an offence and shall, upon conviction, be liable to imprisonment for a term of not less than eighteen months or to a fine of not less than three million shillings or to both.</p>	<p><b>Section 8(4)</b></p> <p>A person who undertakes an investigation in respect of an impropriety and in the cause of that investigation conceals or suppresses evidence, commits an offence and is liable on summary conviction to a term of imprisonment of not less than two years and not more than five years.</p> <p><b>Legal assistance section 16</b></p> <p>Where the Commission in the course of an inquiry or hearing before it is of the opinion that the whistleblower is in need of legal assistance, the Commission shall issue a certificate to the whistleblower to obtain legal aid from the Legal Aid Board or another institution that the Commission may specify in the certificate.</p>

	<p>appointed in terms of section 3 of the Legal Aid Act, 1990 (Act No. 29 of 1990) considers granting legal aid to that whistleblower pursuant to section 10(2) or 11 of that Act.</p>			
<p><b>ASPECT 11</b></p> <p><b>WHISTLEBLOWERS AND THEIR FAMILIES ARE PROTECTED FROM PHYSICAL HARM.</b></p>	<p>A whistleblower is, from the date of receipt of the disclosure of improper conduct by an authorised person, entitled to whistleblower protection under the Act as follows:</p> <p>(a) protection of confidential information;</p> <p>(b) immunity from civil or criminal action;</p> <p>(c) protection against detrimental action; and</p> <p>(d) where applicable, protection under the Witness Protection Act, 2017, protection is extended to any person related to or associated with the whistleblower.</p> <p>The protection is not limited or affected in the event that the disclosure does not lead to any disciplinary action or</p>	<p>A whistleblower who makes a disclosure and who has reasonable cause to believe that his or her life or property; or the life or property of a member of the whistleblower's family is endangered or likely to be endangered because of the disclosure, may request state protection and the state shall provide the protection considered adequate.</p>	<p>A Competent Authority shall, upon application by a whistleblower or based on the information gathered, protect him if there is a reasonable belief or fear on the part of the whistleblower because of disclosure that:</p> <p>(a) he may be subjected to dismissal, suspension, harassment, discrimination, or intimidation by his employer; or</p> <p>(b) his life or property or the life or property of a person of close or interpersonal relationship is endangered or is likely to be endangered.</p> <p>Where the Competent Authority is satisfied that due to the severity of the threat the whistleblower needs protection that is not within his powers, he shall direct</p>	<p>A whistleblower who makes a disclosure and who has reasonable cause to believe that his life or property, or the life or property of a member of his family is endangered or likely to be endangered as a result of the disclosure, may request police protection and the police shall provide the protection considered adequate. the Commission or the Attorney-General as appropriate may in relation to a disclosure of impropriety made or about to be made direct that the person who has made or is about to make the disclosure and the person's family be given police protection.</p>

	prosecution of the person; and is not affected in the event that disciplinary action is taken or a prosecution is instituted against the person in respect of whom the disclosure of improper conduct has been made.		other institutions that are capable of providing protection to provide the protection accordingly.	
<b>Aspect 12 GOOD FAITH REQUIREMENT</b>	A disclosure of improper conduct may be protected only if the disclosure is made in good faith in relation to the information disclosed	A disclosure of improper conduct may be protected only if the disclosure is made in good faith in relation to the information disclosed	A whistleblower is protected if the disclosure is made in good faith	A disclosure of an impropriety is protected if the disclosure is made in good faith
<b>ASPECT 13 APPROPRIATE PROTECTION PROVIDED FOR ACCUSATIONS MADE IN BAD FAITH</b>	<p><b>Section 30</b></p> <p>A person who -</p> <p>(a) intentionally makes a disclosure knowing or believing that the information contained in the disclosure is false or untrue commits an offence and is liable on conviction to a fine not exceeding N\$30 000 or to imprisonment for a period not exceeding 10 years, or to both the fine and imprisonment.</p> <p>Where a person has been convicted for intentionally making a false disclosure and the offence caused</p>	<p><b>Section 17</b></p> <p>A person who knowingly makes a disclosure containing information he or she knows to be false and intending that information to be acted upon as a disclosed matter, commits an offence and is liable on conviction to imprisonment not exceeding five years or a fine not exceeding one hundred and twenty currency points or both.</p>	<p><b>Section 17</b></p> <p>Any person who knowingly discloses information relating to a wrongdoing which is false commits an offence and upon conviction shall be liable to imprisonment for a term of not less than one year or to a fine of not less one million shillings or to both.</p>	A whistleblower will be liable to civil or criminal proceedings in respect of the disclosure if it is proved that that whistleblower knew that the information contained in the disclosure is false and the disclosure was made with malicious intent

	injury, damage or loss, whether patrimonial or otherwise, to the person against whom the disclosure was made for the court must, award the victim compensation for that injury, damage or loss.			
<b>Aspect 14</b>  <b>BURDEN OF PROOF SHOULD REST WITH THE EMPLOYER TO PROVE THAT THE ALLEGED ACTION/ OMISSION WASN'T IN REPRISAL DUE TO PROTECTED DISCLOSURE MADE</b>	<b>Section 48</b>  Any proceedings under the Act concerning an allegation or a complaint of detrimental action the burden of proving that the detrimental action taken against a whistleblower, or any person related to or associated with the whistleblower is not in retaliation for a disclosure of improper conduct lies on the person who has or is alleged to have taken the detrimental action.	No provision on burden of proof.	No provision on burden of proof.	No provision on burden of proof.
<b>ASPECT 15</b>  <b>PERIODICAL REVIEW OF THE EFFECTIVENESS OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS AND MAKE PUBLIC THE RESULTS OF THESE PERIODICAL REVIEWS</b>	The Commissioner must, within three months after 31 March of each year, submit to the Committee a report on the activities of the Whistleblower Office during	No provision in the Act that speaks to periodical review.	No provision in the Act that speaks to periodical review.	No provision in the Act that speaks to periodical review.

	<p>the previous year. the annual report must set out -</p> <ul style="list-style-type: none"><li>(a) the number of general inquiries relating to the Act;</li><li>(b) the number of disclosures received, and complaints made in relation to detrimental action, and the number of those that were acted on and those that were not acted on;</li><li>(c) the number of investigations commenced;</li><li>(d) the number of recommendations that the Commissioner has made and their status;</li><li>(e) in relation to complaints made in relation to detrimental action, the number of referrals to the Tribunal and decisions to dismiss them;</li><li>(f) whether there are any systemic problems that give rise to improper conduct;</li><li>(g) any recommendations for improvement that the Commissioner considers appropriate; and</li><li>(h) any other matter that the Commissioner considers necessary.</li></ul> <p>The Minister must submit the report to the National</p>			
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	<p>Assembly within 30 days after receipt, if the National Assembly is not then in session, within 30 days after commencement of its next session.</p>			
<p><b>ASPECT 16</b></p> <p><b>ESTABLISH AND PUBLICISE CLEAR POLICIES AND PROCEDURES BY WHICH A WHISTLEBLOWER CAN REPORT, INCLUDING ALLOWING FOR CONFIDENTIAL AND, WHERE APPROPRIATE, ANONYMOUS REPORTING.</b></p>	<p>(1) The Commissioner, after consultation with the Committee, may issue practical guidelines, which explain the provisions of the Act and all procedures which are available in terms of any law to employees and other persons who wish to disclose improper conduct or otherwise obtain a remedy for disclosing improper conduct.</p> <p>(2) The guidelines must publish the in the <i>Gazette</i>.</p> <p>(3) All employers, including the State, must take reasonable steps to ensure that every employee gets a copy of the guidelines.</p> <p>(4) The Commissioner, authorised persons and investigation agencies must take reasonable steps to ensure that the guidelines are made available to members of the public.</p>	<p>A person who makes an anonymous disclosure is not entitled to whistleblower protection under the WPA 2017.</p>	<p>No provision in the Act.</p>	<p>No provision in the Act.</p>



	A person who makes an anonymous disclosure is not entitled to whistleblower protection under the WPA 2017.			
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