JUST SHARE

# Whistleblower protection in South Africa:

## where to from here?

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# **Whistleblower protection in South Africa:** where to from here?

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# 1. Executive summary

The experiences of whistleblowers in South Africa in the recent past suggest that whistleblower protection is an unknown concept in the country, and that the legal regime fails to cater for whistleblowers at all.

In fact, this is far from being the case. South Africa has an extensive legal regime governing so-called “protected disclosures”. While on paper the law stacks up well against the legal frameworks in many other jurisdictions, in practice, this legal framework has significant flaws and gaps, and for most whistleblowers it simply does not work.

This report sets out why this is the case and describes how the challenges faced by whistleblowers are not only attributable to shortcomings in the legislation. These challenges arise from a complex concatenation of state and private sector conflict and complicity, weak institutions, the absence of penalties for retaliation, and the frequently extreme imbalance of power and resources between whistleblowers and those whose misconduct they are trying to expose.

The problems encountered by whistleblowers are reflective of the problems with South African society more broadly, in particular the pervasive lack of accountability or consequences for malfeasance.

The South African legal framework is based on labour law remedies, which are extremely limited in scope. There are also serious gaps in protection, the most significant of which is that there are no consequences for those who fail to comply with their legal obligations to protect whistleblowers, and no consequences for those who retaliate against whistleblowers.

There is a plethora of national initiatives aiming to tackle these gaps, and which recommend a wide variety of measures to strengthen whistleblower protection, address the social stigma faced by whistleblowers, and encourage a culture of transparency and accountability in both the public and private sectors. Depressingly, however, these initiatives appear to be fragmented, ineffective, stalled, or stuck in a regulatory morass or bureaucratic limbo.

There is also a large cohort of civil society organisations and academic institutions which play a role in investigating whistleblower disclosures, providing financial, legal, practical, and psychological support to whistleblowers, and researching whistleblower experiences to make recommendations for strengthening protections **(see Appendix I)**. These actors are not particularly well coordinated, and in some instances are duplicating each other's work.

This report provides an overview of the legal framework for whistleblower protection in South Africa, and an analysis of its strengths and weaknesses. It sets out some examples of comparative international regimes, and lessons to be drawn from them. It then consolidates insights drawn from conversations with whistleblowers, those who support them, and experts in the field, about the reality of whistleblower protection in South Africa and what needs to change.

We present a range of potential interventions (based on suggestions collated from our research and interviews) to improve whistleblower protection in South Africa, some of which require State participation and support, and others which do not. The work that is required to rebuild our public institutions goes far beyond a campaign to improve whistleblower protection. Nevertheless, there are some interventions that we believe have the most potential, in the local context, to improve protection for whistleblowers.

It is tempting to focus on government interventions, the most obvious being legal reform to address the shortcomings of the current regime. Such reform would include protection for whistleblowers from retaliation; removing caps on compensation of whistleblowers; providing financial rewards and incentives for whistleblowing; reversing the burden of proof for employees seeking redress for retaliation; protecting whistleblowers' identities; and consolidating whistleblowers' legal protections.

However, we believe that the best chance for successful intervention lies in a public-private dynamic that has each reinforcing and driving the other's actions to protect whistleblowers, for example:

- setting up an independently administered legal fund to alleviate the most urgent and pressing burden on whistleblowers: accessing legal advice, protection, representation, and financial support;
- providing proactive legal support for whistleblowers to obtain damages and remedies that are not limited to loss of compensation; and
- creating an independently administered fund or foundation, capitalised by the private sector, to which civil society organisations supporting whistleblowers, or whistleblowers on their own, could apply for financial support for a wide range of interventions, from legal representation to relocation costs, to psychological support. Such an entity would build on and strengthen, rather than duplicate, existing capacity within civil society.

These ideas are not necessarily novel but rather a collation of research and the experiences and insights of whistleblowers and those who work with them. The National Anti-Corruption Strategy (NACS) could provide the foundation for an appropriate intervention (see section 4 of this report). The NACS is an initiative of the South African government (in accordance with the National Development Plan) to establish an overarching strategy to fight corruption in the country. It is intended to:

a. guide the anti-corruption approaches in the country;
b. support coordination across government, business, and civil society; and
c. provide a tool for monitoring progress.

It is clear from this report that while South Africa has a range of well-intentioned legal protections and remedies, there are still gaps and pitfalls, and prospective whistleblowers have precious little chance of interpreting the various rules, or accessing protections, without competent, speedy, confidential, and low- (or no-) cost legal advice. Too often company policies, the legal system and even public relations are "weaponised" against the whistleblower, who ends up isolated, impoverished and defeated. This is exacerbated by the lack of legal protection for a whistleblower's anonymity.

The protections and respect afforded to whistleblowers are reflective of a society's attitude to accountability and transparency. Building a society in which people feel safe and free to speak out about wrongdoing, especially wrongdoing by those in power, is a Herculean task. However, there is scope for a private sector initiative to start levelling the playing field for whistleblowers.

In addition, there is a need for a nationwide public awareness campaign to address the stigma of whistleblowing, and to raise the positive public profile of whistleblowing as a service to democracy, and of whistleblowers as champions of transparency and accountability.

This report includes an analysis of the local legal framework and landscape of whistleblower protection, and of regional and international frameworks and best practices. It ends with recommendations which are aimed particularly at the South African corporate sector, with a view to potential interventions within the current legislative frameworks.

# 2. Introduction

The National Development Plan's (NDP's) "Vision for 2030" is of "a South Africa that has zero tolerance for corruption":

In 2030, South Africa will be a society in which citizens do not offer bribes and have the confidence and knowledge to hold public and private officials to account, and in which leaders have integrity and high ethical standards.[1]

Whistleblower protection is embedded in South African legislation and championed in government policy and corporate materials. But the reality of being a whistleblower is strikingly different, and the vision of the NDP far from being realised.

In the past decade, a number of high-profile whistleblowers, as well as an indeterminate number of less high-profile ones, have suffered devastating personal consequences after exposing fraud, corruption, and illegality in both the public and private sectors in South Africa.

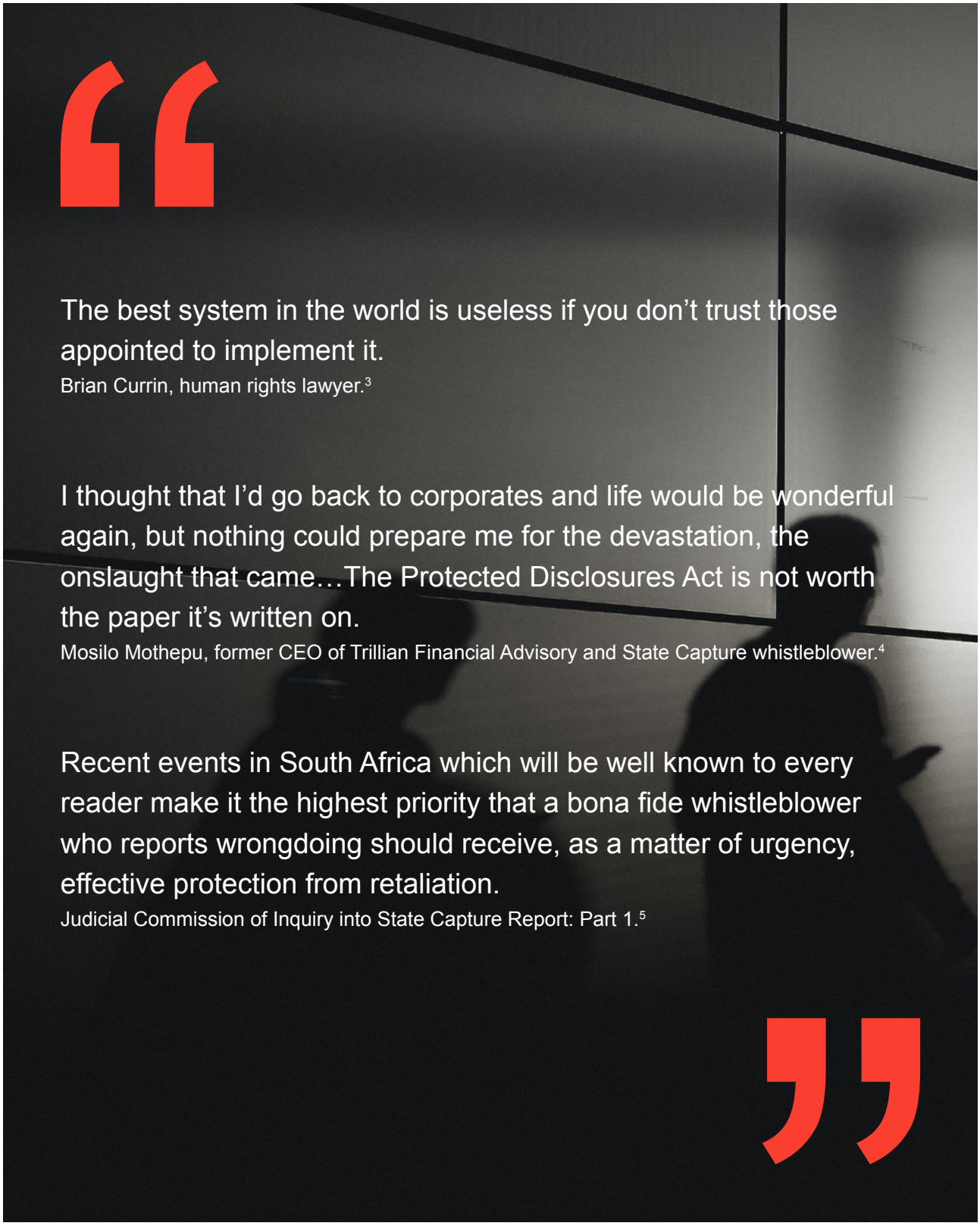
Ironically, even though most people would agree that the end of the Zuma regime was largely due to disclosures by whistleblowers, the people who risked everything to bring about that change do not appear to be very highly regarded by South African society.

In theory, the protections afforded to whistleblowers in South Africa are strong. The Constitutional Court, in the case of Tshishonga v Minister of Justice and Constitutional Development, found that:

The PDA [Protected Disclosures Act] 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 whistleblowers, 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 South African legal regime for whistleblower protection is centred on the Protected Disclosures Act, 26 of 2000 (PDA or Protected Disclosures Act), which governs so-called "protected disclosures". "Protected disclosures" refers to the category of disclosures which entitle the whistleblower to certain legal safeguards (as opposed to those against which a whistleblower may validly be prosecuted). On paper, the PDA fulfils many of the theoretical requirements for whistleblower protection, although there are significant gaps. There is also a plethora of provisions in other legislation – covered in more detail in section 4 of this report – which cover specific types of whistleblowing, for example in the public sector, the corporate sector, and in relation to environmental harm.

[1] National Development Plan 2030, available at *https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf* at page 447.
[2] Tshishonga v Minister of Justice and Constitutional Development and Another [2006] ZALC 104 (26 December 2006), at para. 106.



The best system in the world is useless if you don't trust those appointed to implement it.

Brian Currin, human rights lawyer.[3]

I thought that I'd go back to corporates and life would be wonderful again, but nothing could prepare me for the devastation, the onslaught that came…The Protected Disclosures Act is not worth the paper it's written on.

Mosilo Mothepu, former CEO of Trillian Financial Advisory and State Capture whistleblower.[4]

Recent events in South Africa which will be well known to every reader make it the highest priority that a bona fide whistleblower who reports wrongdoing should receive, as a matter of urgency, effective protection from retaliation.

Judicial Commission of Inquiry into State Capture Report: Part 1.[5]

[3] Interview with Just Share, June 2020.
[4] *https://www.dailymaverick.co.za/article/2020-03-06-diary-of-a-whistle-blower-mosilo-mothepus-courageous-fight-against-state-capture/#gsc.tab=0*.
[5] *https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf*

Layered above this are the many institutions which are mandated to play a role in ensuring that people who speak out about wrongdoing by their employers are protected. These include the Public Service Commission, the Human Rights Commission, the Auditor-General, the National Prosecuting Authority and the Public Protector.

In Tshishonga, the Constitutional Court said that:

Whistleblowers are not "impipis", a derogatory term reserved for apartheid era police spies. Whistle-blowing is neither self-serving nor socially reprehensible. In recent times its pejorative connotation is increasingly replaced by openness and accountability. Employees who seek to correct wrongdoing, to report practices and products that may endanger society or resist instructions to perform illegal acts, render a valuable service to society and the employer.[6]

However, whistleblower experience has demonstrated that the more important the disclosures a whistleblower makes, the more devastating are the consequences: financial and reputational ruin; losing homes and custody of children; harassment and intimidation; criminal prosecution and the institution of spurious civil cases; the inability to find employment; personal threats and threats against family members; anxiety and depression and even, as in the recent tragic case of Gauteng Provincial Department of Health employee Babita Deokaran, murder of the whistleblower. Almost without exception, this retaliation goes unpunished.

Civil society and civic-minded lawyers and other supporters provide almost all the support that whistleblowers receive: the state is absent. Most whistleblowers also report that while the private sector might celebrate whistleblowing in public, it is unwilling to support or employ people who are known to be whistleblowers.

This report looks at whistleblower protection predominantly from the point of view of the legal regime governing protected disclosures.[7] However, as has been evidenced countless times in South Africa, the best law in the world is useless if the institutions mandated to implement it fail to do so or are complicit in undermining it.

[6] At para. 168.
[7] "Protected disclosures" is defined in the Protected Disclosures Act, covered in detail in section 4 of this report.

# 3. Analysis of the South African legal framework

This section addresses the strengths and weaknesses of the local whistleblower protection regime. Section 4 then provides a more comprehensive, detailed overview of South African legislation applicable to whistleblowing, with sections 5 and 6 covering relevant international and regional instruments, and international comparisons and best practice respectively.

## Definition of whistleblower

There is no universally accepted definition of whistleblowing. The PDA does not use the term "whistleblower" or "whistleblowing".

Transparency International, the German-based anti-corruption non-profit organisation, defines whistleblowing as:

The disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action.[8]

The International Labour Organisation[9] defines whistleblowing as:

The reporting by employees or former employees of illegal, irregular or dangerous practices by employers.[10]

The Encyclopaedia Britannica defines a whistleblower as:

An individual who, without authorisation, reveals private or classified information about an organization, usually related to wrongdoing or misconduct. Whistleblowers generally state that such actions are motivated by a commitment to the public interest.

Although the term was first used to refer to public servants who made known governmental mismanagement, waste, or corruption, it now covers the activity of any employee or officer of a public or private organisation who alerts a wider group to setbacks to their interests as a result of waste, corruption, fraud, or profit seeking.[11]

[8] Transparency International, "International Principles for Whistleblower Legislation" (2013), available at *https://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation*, at page 4.
[9] A United Nations agency whose mandate is to advance social and economic justice through setting international labour standards.
[10] ILO Thesaurus available at *https://metadata.ilo.org/thesaurus/648756062.html*.
[11] *https://www.britannica.com/topic/whistleblower*

Finally, the Ethics Institute's Whistleblowing Management Handbook describes whistleblowing as:

[T]he act of organisational stakeholders (e.g. employees, customers, or service providers), either former or current, calling attention to wrongdoing that has occurred, is occurring or is about to occur in an organisation. This is done to internal or external parties who they believe can act. It is aimed at overcoming criminal, irregular, and unethical conduct in organisations, both public and private.[12]

Definitions of a whistleblower, and of whistleblowing, are thus broad and varying. The term can cover disclosures (or the person making the disclosures) of anything from breaches of organisational ethics to systemic criminal activity. It also refers to disclosures made via internal organisation structures or made externally – whether publicly or privately. The level of protection available to a whistleblower depends on the particular circumstances, and the legal provisions governing those circumstances. The South African whistleblower protection regime stands up well on paper in several areas when viewed against Transparency International's International Principles for Whistleblower Legislation (Transparency International Principles).[13] **Appendix II** contains a comprehensive comparison of the South African legal framework and the Transparency International Principles.

However, there are significant gaps, and many severe shortcomings arise in relation to implementation, and the lack of support and protection for whistleblowers.

## Limitations of labour law remedies

The South African legal framework provides employees with protection from retributive action for whistleblowing if it takes the form of an "occupational detriment", which covers a wide range of actions other than dismissal, including: disciplinary action; suspension, demotion, harassment or intimidation; transfer against the whistleblower's will; and refusal of transfer or promotion.[14]

However, the PDA does not deal with harm which goes beyond work-related detriments, such as blacklisting, bullying, harassment, threats, legal costs, and other economic impacts, which are often the hardest to overcome.

The remedies for whistleblowers provided by the PDA are confined to labour law remedies, i.e. remedies that do not extend beyond the protections provided by labour law within the employer-employee relationship. A whistleblower can only be compensated for loss of income within the framework of the Labour Relations Act 66 of 1995 (LRA), and the amount of compensation is capped at a very low level (12 or 24 months' remuneration, depending on the circumstances).

However, the spectrum of detrimental impacts experienced by whistleblowers goes far beyond loss of income, and our legislative framework does not address any of these extended harms.

The extent of the remedies provided for in the PDA and the LRA is limited and they provide extensive discretion to the courts, including whether to grant interim relief, which can be crucial to whistleblowers to avoid irreparable harm.

[12] Ethics Institute, "Whistleblowing Management Handbook" (2020) available at *https://www.tei.org.za/wp-content/uploads/2020/09/Whistleblowing-Management-Handbook_Final-for-Web-.pdf*
[13] *https://www.transparency.org/en/publications/international-principles-for-whistleblower-legislation*
[14] 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)" available at *https://www.gov.za/sites/default/files/gcis_document/201409/34572gon702.pdf*

The PDA also does not provide for any protection relating to whistleblowers who divulge information relating to national security or state secrets. These are governed by the Protection of Information Act 84 of 1982 (PIA), which prohibits disclosure of certain information relating generally 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. The Protection of State Information Bill, which will repeal the PIA, was passed by Parliament more than five years ago but has yet to be signed into law. In June 2020, President Ramaphosa asked Parliament to reconsider the Bill. There have been no developments since then.

## Lack of protection from retaliation

Whistleblowers are protected by the PDA even when, by making the disclosure, they are acting in breach of a non-disclosure agreement. If a disclosure is classified as "protected" in terms of the PDA, the whistleblower will not be liable, in a civil or criminal case, for breaching such an agreement.

Regardless of whether a disclosure is made in breach of a non-disclosure agreement, however, whistleblowers in South Africa regularly face criminal and civil actions instituted against them as a retaliatory measure.

Although the PDA prohibits "occupational detriment" against persons who make protected disclosures, 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.

Mosilo Mophetu, the former CEO of Trillian Financial Advisory, had criminal charges laid against her by her former employer, which also pursued her in the Labour Court and the Commission for Conciliation, Mediation and Arbitration (CCMA). The Hawks and the National Prosecuting Authority investigated Mophetu for over a year; when they eventually decided not to take the matter any further, they did not even bother to inform her.

At present, the PDA does not provide any proactive protection in such circumstances, even though this is a straightforward protection to legislate. The New Zealand Protected Disclosures Act 2000, for example, provides in section 18 that no-one who makes a protected disclosure of information is liable for any civil or criminal proceeding, and cannot be subjected to a disciplinary proceeding as a result of making the disclosure.[15]

French law provides for an increased civil fine for those who bring abusive or vexatious criminal proceedings against a whistleblower for defamation.[16]

The provisions of the Companies Act 71 of 2008 are stronger than those of the PDA, but only apply to potential whistleblowers who are, inter alia, shareholders, directors, and company secretaries, and who make a disclosure in good faith to, inter alia, the Companies and Intellectual Property Commission, the Companies Tribunal, a director, an auditor or a company secretary.

[15] See *https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf* at page 26.
[16] Sapin II Law, Article 13.

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 broken the law. If the disclosure requirements of section 159 of the Companies Act are met, the whistleblower is immune from any civil, criminal, or administrative liability for that disclosure; and is entitled to compensation from any person who causes detriment or threatens to cause detriment to the whistleblower. This provision does not appear to have been extensively relied upon in South Africa.

The National Environmental Management Act 107 of 1998 and the Financial Intelligence Centre Act 38 of 2001 also protect whistleblowers from civil and criminal liability, but only in the relatively narrow circumstances applicable to environmental whistleblowing and money laundering, tax evasion and terrorist activities.

## Confidentiality and anonymity

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, i.e. where only the recipient of the disclosure knows who the whistleblower is.

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.[17]

Principle 7 of the Transparency International Principles, Preservation of confidentiality, requires that "the identity of the whistleblower may not be disclosed without the individual's explicit consent".

Principle 13, Anonymity, requires that "full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent".

South African law therefore falls significantly short of recommended best practice in this regard. Ironically, Transparency International's Best Practice Guide for Whistleblower Legislation quotes the South African Law Reform Commission's Protected Disclosures Discussion Paper in this regard:

> Confidentiality is a minimum requirement of any legislation that aims to protect whistleblowers. It is a first line of protection, and it will increase the trust in the whistleblowing system. Guaranteeing confidentiality will also incidentally help reduce anonymous disclosures.[18]

To this end, the Judicial Commission of Inquiry into State Capture Report (discussed in more detail in section 7 of this report) highlights the importance of implementing a central electronic reporting system that protects anonymity, allows for clarifying questions, and guarantees confidentiality.

[17] Cherese Thakur, "Whistleblower Protection: Does South Africa Match Up? - Part II" (2018), available at *https://hsf.org.za/publications/hsf-briefs/whistle-blower-protection-does-south-africa-match-up-part-ii#sdendnote3sym*.
[18] *https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf*, at page 18.

# Burden of proof on the whistleblower

Crucially, the question of burden of proof is not specifically regulated in the PDA. It has therefore been interpreted by the courts in the same way as it would be in any other case relating to unfair dismissal, i.e. the onus is the whistleblower to prove that the disclosure was protected in terms of the PDA, and that he or she has suffered an occupational detriment.

This approach fails to take into account the special circumstances of a whistleblower, which the Transparency International Principles of reverse onus, described below, seek to protect.

Principle 8, Burden of proof on the employer, recommends that:

In order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblower's disclosure.

This means that "the employee should only need to establish a prima facie case that (1) he or she made a disclosure and (2) suffered a negative treatment. It is then up to the employer to prove that the treatment was fair and not linked in any way to the whistleblowing, that is, it would have happened anyhow."[19]

Norway provides a good example of this. Its Working Environment Act, 2005 provides that:

If the employee submits information that gives reason to believe that retaliation … has taken place, it shall be assumed that such retaliation has taken place unless the employer or hirer substantiates otherwise.[20]

The EU Whistleblowing Directive also provides for a reversal of the burden of proof in cases of alleged detrimental treatment:

Retaliation is likely to be presented as being justified on grounds other than the reporting and it can be very difficult for reporting persons to prove the link between the reporting and the retaliation, whilst the perpetrators of retaliation may have greater power and resources to document the action taken and the reasoning. Therefore, once the reporting person demonstrates prima facie that he or she reported breaches or made a public disclosure in accordance with this Directive and suffered a detriment, the burden of proof should shift to the person who took the detrimental action, who should then be required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure.[21]

Again, the Companies Act is more effective on this point than the PDA. It provides, in section 159(6), that:

Any conduct or threat contemplated in subsection (5) 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.

[19] Ibid, at pages 55-56.
[20] Ibid at page 56.
[21] Protection of persons who report breaches of Union Law, EU Parliament Directive 2019/1937 (October 2019), L305/17 at para 97.

# Rewards and incentives

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". The payment of rewards for whistleblowing is a contentious area, with many firmly believing that it undermines the credibility of the whistleblower. But the Transparency International Principles support the idea that a system of rewards generally results in more and better-quality disclosures, and this seems to be borne out by experiences in the United States, as discussed in section 6 of this report.

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.[22]

Countries including the USA, Canada and South Korea have introduced whistleblower reward programmes that aim to increase the quantity and quality of disclosures about corruption, fraud, misconduct, and other illegal activities.[23] Such programmes can encourage the interest and development of legal skills and incentives for finding, encouraging, supporting and protecting whistleblowers.

The opposing view holds that financial rewards present a "moral hazard", and that paying for information means that the information is suspect. Some believe that rewards can prevent disclosures, by "hijacking [the potential whistleblower's] moral motivation to do the right thing".[24]

One study concluded that when the perceived risks of reporting are greater than the potential rewards, people will be much less likely to report fraud than if they had not been told about the existence of an incentive to begin with.[25] Proposing financial incentives to potential whistleblowers "changes the decision frame from 'doing the right thing' to that of a cost-benefit analysis".[26]

However, this is a simplistic view of a very complex set of considerations that every whistleblower must weigh up. At this point, given the devastation to their livelihoods and reputation, it seems impossible to achieve better protection for whistleblowers in South Africa without some form of financial support, even if this does not take the form of an outright reward.

[22] S Lubisi and H Bezuidenhout, "Blowing the Whistle for Personal Gain in the Republic of South Africa: An Option for Consideration in the Fight against Fraud?" (2016) 18 Southern African Journal of Accountability and Auditing Research at page 55.
[23] In the United States, the False Claims Act allows whistleblowers to receive a portion of monies recovered following a disclosure relating to the defrauding of the government. The US Department of Justice reported that the government had paid out $392 million to whistleblowers who exposed fraud and false claims in the amount of $3.4 billion in the 2017 fiscal year.
[24] This is according to a new study by researchers at Florida Atlantic University, Wilfrid Laurier University and Providence Colleges, "Financial awards can actually discourage whistleblowers from reporting fraud, study says", available at *https://www.sciencedaily.com/releases/2017/10/171005102702.html*.
[25] *Florida Atlantic University*, "Study says financial awards can actually discourage whistleblowers from reporting fraud" (2017), available at *https://phys.org/news/2017-10-financial-awards-discourage-whistleblowers-fraud.html*.
[26] Ibid.

# Other gaps

There are several other gaps in the South African legal framework, which, if addressed, could support a better culture of disclosure.

1. 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.

2. 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.

3. 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.

4. 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.

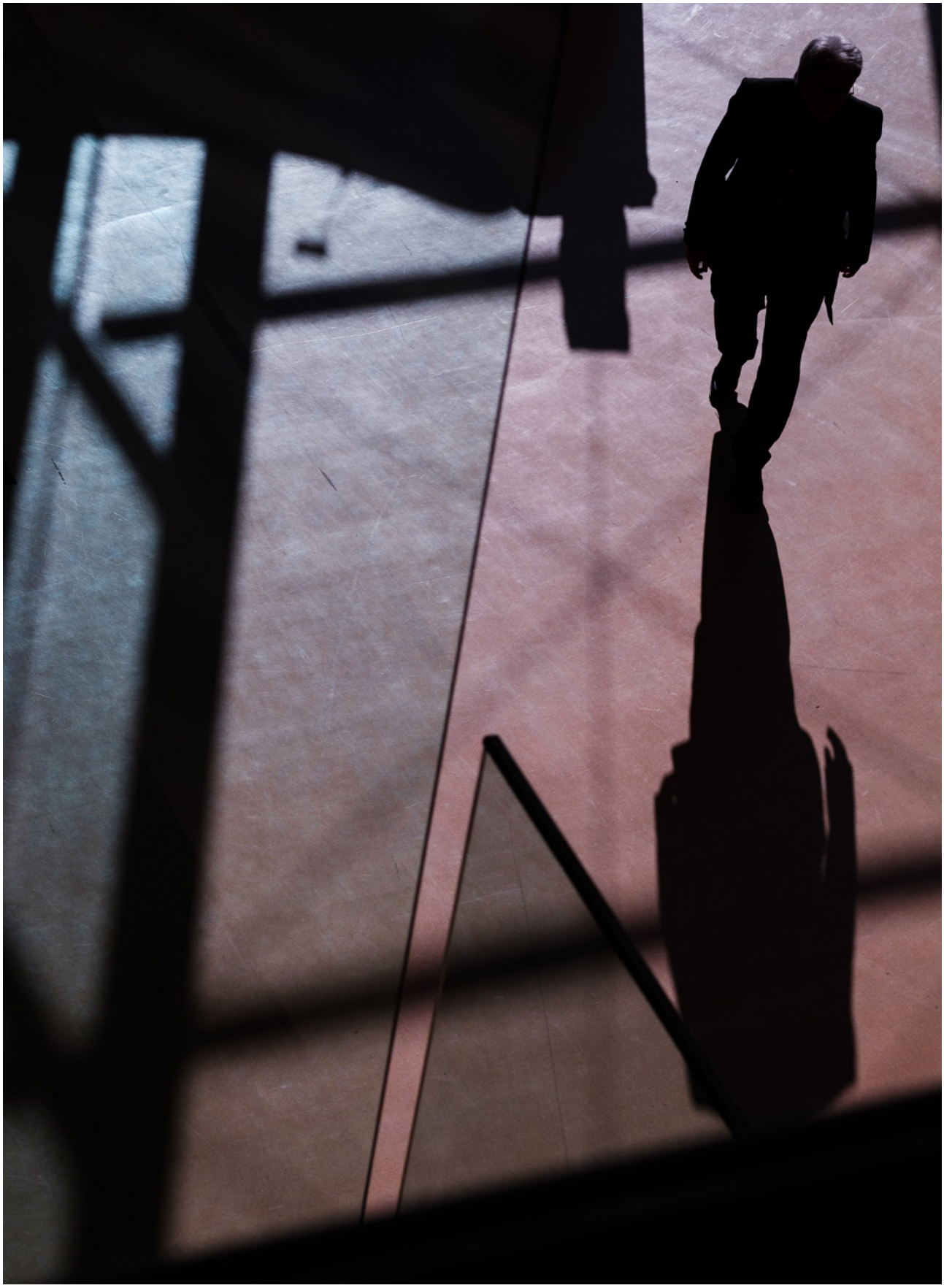
5. The PDA provides a closed list of categories of protected information relating to corrupt, illegal, fraudulent, or hazardous activities. The list is broad, but some are of the view that it should also include a general catch-all provision for information relating to a threat of harm to the public interest.

6. The PDA does not protect persons who are knowingly wrongly accused by purported whistleblowers.

7. The PDA does not protect job applicants who can be – and are often – regarded as "tainted" due to prior disclosures.[27]

8. Finally, one of the key criticisms of the framework is its lack of cohesion. As set out in section 4 of this report, there are numerous pieces of legislation that deal with whistleblowers, and varying levels of protection. There is an overall lack of clarity and unity to the regime.

[27] Cherese Thakur, "Whistleblower Protection: Does South Africa Match Up? - Part I" (2018), available at *https://hsf.org.za/publications/hsf-briefs/whistle-blower-protection-does-south-africa-match-up-part-i#sdendnote9sym*.



# 4. The South African legal framework for whistleblower protection

## Overview of legislation

This section describes the legal framework pertaining to whistleblower protection in South Africa. It does not comment on the adequacy or effectiveness of this framework, but sets out what the current law says. For an analysis of the legal framework see section 3 above. Each of the Acts in the table below is summarised in this section insofar as it is relevant to whistleblower protection.

**Appendix III** contains the full text of all relevant sections of the Acts referred to in this report, with the exception of the Protected Disclosures Act, which is relevant in its entirety.

| Legislation applicable to whistleblower protection in South Africa | | |
|---|---|---|
| **No.** | **Legislation** | **Relevant Section/s** |
| 1. | Constitution of the Republic of South Africa Act 108 of 1996 | Sections 9, 14, 16 and 23 |
| 2. | Protected Disclosures Act 26 of 2000 as amended by the Protected Disclosures Amendment Act 5 of 2017 | All |
| 3. | Labour Relations Act 66 of 1995 | Sections 185, 186(2)(d), 187(1)(h),188A(11) and 194 |
| 4. | Companies Act 71 of 2008 | Section 159 |
| 5. | Financial Intelligence Centre Act 38 of 2001 | Sections 28, 29, 37 and 38 |
| 6. | Pension Funds Act 24 of 1956 | Sections 9B, 13B(10) and 37(1) |
| 7. | National Environmental Management Act 107 of 1998 | Section 31 |
| 8. | Municipal Finance Management Act 56 of 2003 | Sections 32(6), 32(7) and 102(2) |
| 9. | Public Finance Management Act 29 of 1999 | Section 38(1)(g) |
| 10. | Prevention and Combating of Corrupt Activities Act 12 of 2004 | Sections 18 and 34 |
| 11. | Protection from Harassment Act 17 of 2011 | Sections 1 and 2 |
| 12. | Defence Act 42 of 2002 | Section 50 |
| 13. | Witness Protection Act 112 of 1998 | Section 7 and in general |

## The Constitution of the Republic of South Africa Act 108 of 1996

The Constitution does not explicitly make provision for the protection of whistleblowers. However, there are a number of rights contained in the Bill of Rights which are applicable to whistleblowing:

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

## The Protected Disclosures Act 26 of 2000

The PDA is the single most important piece of South African legislation aimed at protecting whistleblowers. The provisions of the PDA were significantly strengthened following a report from the South African Law Reform Commission in 2007.[28] The Protected Disclosures Amendment Act 5 of 2017 aimed to address some of the many shortcomings for which the original Act had been criticised. The National Development Plan 2030 itself recommended 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.[29]

The overarching purposes of the PDA are:

- to **protect public and private sector employees or workers** from being subjected to an **occupational detriment** as a result of making 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".

[28] *https://www.justice.gov.za/salrc/reports/r_pr123_protected-disclosures_2007.pdf*
[29] National Development Plan 2030 at page 450.

If the disclosure is a protected disclosure, and occupational detriment has been suffered as a result of making it, an employee or worker can approach any court with jurisdiction, including the Labour Court, for "appropriate relief".

The courts have wide powers to make any appropriate order which is "just and equitable in the circumstances" where an occupational detriment has occurred.

Any dismissal of an employee as a result of making a protected disclosure is automatically unfair, and any other occupational detriment is deemed to be an unfair labour practice. The whistleblower may then follow the relevant procedures set out in the **Labour Relations Act 66 of 1995.**

## What is a disclosure?

A disclosure in terms of the PDA means:

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; or
g. That any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.[30]

## Who can make a disclosure?

The PDA seeks to protect disclosures made by an employee or a "worker". The definition of worker includes independent contractors, consultants, agents and "any person who renders services to a client while being employed by a temporary employment service".

## To whom should disclosures be made?

Sections 5-9 of the PDA deal with protected disclosures made to legal advisors, employers, members of Cabinet or an Executive Council of a province, and a number of Chapter 9 and 10 institutions such as the Public Protector and the Auditor-General.

[30] Section 1, definitions.

The **Regulations Relating to Protected Disclosures, 2018** expand the list of bodies to which a disclosure can be made.[31] If it is made in good faith to one of these bodies, it will qualify as a protected disclosure, even if the employee did not first make the disclosure using internal procedures.

These additional bodies include the Competition Commission, the Electoral Commission, the Financial Sector Conduct Authority, the Independent Regulatory Board for Auditors and the Pension Funds Adjudicator.

## What is a protected disclosure in terms of the PDA?

For a disclosure to be protected, it must comply with provisions regarding what information should be disclosed and to whom the disclosure is made. The requirements vary according to the persons who receive the disclosure, which is somewhat confusing.

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".[32] Disclosures to employers must be made in good faith and in line with the employer's whistleblowing procedures.[33] Disclosures to certain persons and bodies included in section 8 of the PDA, such as the Auditor-General and the Public Service Commission, are protected if made in good faith.

Section 3B of the PDA sets out in detail the procedures and timeframes to be followed once a disclosure has been made. In essence, the person or body to whom the disclosure has been made must decide whether to investigate the matter or to refer it to someone else for investigation. The whistleblower must be informed of the decision, as well as the outcome of any investigation.

## Reporting mechanism for disclosure to an employer

The PDA imposes an obligation on employers, in 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.

## Civil/criminal liability

The PDA 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.[34]

## Practical Guidelines for Employees

As prescribed by section 10(4)(a) of the PDA, the then Minister of Justice and Constitutional Development issued "Practical Guidelines for Employees" on 31 August 2011.[35]

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 that every employer is responsible for taking all the necessary steps to facilitate the making of disclosures without fear of reprisal.

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[32] Section 5.
[33] Section 6.
[34] Section 9A(1)(a) and (b).
[35] Practical Guidelines for Employees in Terms of Section 10(4) (a) of the Protected Disclosures Act, 2000, available at *https://www.justice.gov.za/legislation/notices/2011/20110831_gg34572_n702-disclosure-guidelines.pdf*. These were issued in terms of section 10(4)(a) of the PDA.

## Labour Relations Act 66 of 1995

Relevant sections of the LRA must be read together with the PDA, as the PDA remedies are labour law remedies.

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.

### Unfair labour practices and unfair dismissal could amount to occupational detriments

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) bring "occupational detriment" in terms of the PDA into the legal ambit governing unfair dismissals and unfair labour practices.

The LRA limits the amount of compensation that can be paid as follows:

- Sections 194(1) and (4): compensation for unfair dismissal and unfair labour practice may not be more than the equivalent of **12 months' remuneration.**
- Section 194(3): compensation for automatically unfair dismissal may not be more than the equivalent of **24 months' remuneration.**

## Companies Act 71 of 2008

Section 159 offers protection for whistleblowers by expanding the protection provided by the PDA. It covers both profit and not-for-profit companies.

Section 159 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.[36]

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

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:

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

[36] See section 159(2).

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

Furthermore, the onus is on the person who causes or threatens to cause the detriment to show that his or her behaviour was not the result of the whistleblower's disclosure.[37]

In several respects, as explained in section 3 of this report, Analysis of the South African legal framework, section 159 of the Companies Act provides stronger protections for whistleblowers than the PDA.

## Financial Intelligence Centre Act 38 of 2001

Section 29 of the Financial Intelligence Centre Act (FICA) places a duty on people who carry on a business, manage a business or who are employed by a business, and who know or suspect or ought reasonably to 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 Financial Intelligence Centre.[38]

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. This would appear to discourage the giving of evidence by FICA whistleblowers in criminal proceedings.

## Pension Funds Act 24 of 1956

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 as a result 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.

[37] Section 159(6).
[38] See section 36.

The status of the Registrar of Pension Funds is unclear at present. The Registrar was part of the Financial Services Board, which ceased to exist on 31 March 2018 as a result of the "Twin Peaks" financial sector regulatory reforms.[39] On 1 April 2018, the Registrar of Pension Funds was "integrated into the Financial Sector Conduct Authority" (FSCA).[40]

Unathi Kamlana's appointment as Commissioner of the FSCA was announced in April 2021.[41] There is no indication that a Registrar of Pension Funds will be appointed.

The FSCA website and the website of the Pension Funds Adjudicator provide mechanisms for complaints to be made, but these do not appear to be tailored in any way to whistleblowing, in particular because it is not possible to lodge a complaint anonymously.

## The National Environmental Management Act 107 of 1998

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). Disclosures are protected if they are:

- made 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; or
- made 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; or
- made in accordance with any applicable external or internal procedure for reporting the matter concerned; or
- made where the information is available to the public.

No person who makes a disclosure under these circumstances is civilly or criminally liable or may be dismissed, disciplined, prejudiced, or harassed on account of having disclosed it.

Section 31(8) of NEMA protects the whistleblower from threats arising as a result 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.[42]

[39] *https://www.fsca.co.za/TPNL/1/FSB/thephilosophy.html*
[40] *https://www.masthead.co.za/wp-content/uploads/2019/01/Registrar-of-Pension-Funds-Annual-Report-2017.pdf*. At page 2.
[41] *https://www.masthead.co.za/newsletter/new-fsca-commissioner-and-deputy-commissioner-appointed/*
[42] Section 49A(1)(j) and section 49B(2).

## Municipal Finance Management Act 56 of 2003

In terms of this Act, an accounting officer and the board of directors of a municipal entity must report to the South African Police Services (SAPS) instances of fraud, theft, irregular expenditure and/or other losses that occur in the municipality which constitute a criminal offence.[43]

The council of a municipality must take all reasonable steps to ensure that cases are reported to SAPS if the charge is against the accounting officer or if the accounting officer fails to comply with the provisions of the Act.[44]

## Public Finance Management Act 29 of 1999

Section 38(1)(g) of the Public Finance Management Act (PFMA) obliges accounting officers of public entities[45] to report in writing to National Treasury any irregular or fruitless, wasteful, and unauthorised expenditure relating to the procurement of goods and services.[46]

[43] Section 32(6) and section 102(2).
[44] Section 32(7).
[45] Defined in the Act as a "national or provincial public entity".
[46] Regulations 9.1.2, 12.5.1, 16A8.3(f) and 16A8.5 of the Treasury Regulations issued in terms of the PFMA impose a duty on specific public officials to report unauthorised, irregular or fruitless and wasteful expenditure to the relevant bodies, such as the Accounting Officer and the South African Police Services.

## The Prevention and Combating of Corrupt Activities Act 12 of 2004

This Act domesticates the United Nations Convention against Corruption adopted by the UN General Assembly on 31 October 2003.

Section 34 requires that any person who holds a position of authority as defined in section 34(4),[47] and who knows or ought reasonably to have known or suspected that any offence in terms of this Act has been committed, must report it to a police official. Section 34(2) of the Act provides that any person who fails to report such corrupt activities is guilty of an offence.

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.

Disclosures made in terms of the above provisions in the Municipal Finance Management Act, the Public Finance Management Act and the Prevention and Combating of Corrupt Activities Act do not appear to constitute protected disclosures in terms of the PDA, because neither SAPS nor National Treasury are institutions to which disclosures can be made in terms of the Regulations Relating to Protected Disclosures.

## Protection from Harassment Act 17 of 2011

A whistleblower can apply for a protection order from harassment.[48] The Act has a wide definition of harassment, including 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 Defence Act 42 of 2002

The Practical Guidelines for Employees issued in terms of section 10(4)(a) of the PDA note that members of the South African Defence Force are either appointed in terms of the Public Service Act 1994 or the Defence Act 42 of 2002. Those appointed in terms of the former must follow its procedures for disclosure of information. Those appointed in terms of the Defence Act, however, are subject to the Military Discipline Bill, which contains restrictions on the disclosure of sensitive information.[49]

## The Witness Protection Act 112 of 1998

The Witness Protection Act provides for protection of persons who have witnessed corrupt activities. It is only available for witnesses, potential witnesses, or related persons in criminal judicial proceedings (either appearing in court or making an affidavit).

A judge in a civil proceeding may, on application, make an appropriate order regarding the safety of a person in the proceedings, including protecting the person's identity.[50]

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[47] The definition of authority in the Act is wide-ranging including, among others, the head of a national or provincial department; the manager, secretary or a director of a company; the executive manager of any bank or other financial institution; the CEO or equivalent of any institution or organisation; and any person responsible for overall management and control of the business of an employer.
[48] Section 2.
[49] According to the Department of Defence (DOD), the Military Discipline Bill was "withdrawn from Parliament during FY2020/21 for further consultation within the Department and with the public. The DOD is in the process of reviewing all the submissions received during the consultation process and it is envisaged that the draft Bill will be resubmitted to Parliament during FY2021/22." *https://nationalgovernment.co.za/department_annual/367/2021-department-of-defence-(dod)-annual-report.pdf*
[50] Section 15(2).

# Other relevant instruments and initiatives

## King IV Report on Corporate Governance (King IV), 2016

Principle 2 of King IV provides that the governing body of an organisation should govern its ethics in a way that supports the establishment of an ethical culture. Relevant "recommended practices" are:

The governing body should exercise ongoing oversight of the management of ethics, and in particular, oversee that it results in...the use of protected disclosures or whistle-blowing mechanisms to detect breaches of ethical standards and dealing with such disclosures appropriately.[51]

The following should be disclosed in relation to organisational ethics: …measures taken to monitor organisational ethics and how the outcomes were addressed…[52]

## The Press Code of Ethics & Conduct for South African Print & Online Media

The Press Code of Ethics and Conduct for South African Print and Online Media came into effect on 1 January 2019. It is overseen by the Press Council of South Africa, which is a voluntary, independent body made up of representatives of the press and of the public. Section 11 of the Code deals with confidential and anonymous sources and states that the media shall:

- protect confidential sources of information – the protection of sources is a basic principle in a democratic and free society;
- avoid the use of anonymous sources unless there is no other way to deal with a story, and shall take care to corroborate such information; and
- not publish information that constitutes a breach of confidence, unless the public interest dictates otherwise.[53]

## Code of Conduct for Public Servants in South Africa

The Code of Conduct was promulgated in 1997 under the auspices of the Public Services Commission, which is mandated by the Constitution to "promote and maintain a high standard of professional ethics throughout the Public Service". 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".[54]

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.

[51] Recommended Practice 9(c).
[52] Recommended Practice 10(c).
[53] Press Code of Ethics and Conduct for South African Print and Online Media Journalists, available at *http://www.presscouncil.org.za/ContentPage?code=PRESSCODE*.
[54] Code of Conduct for Public Servants in South Africa, under Performance of Duties.

## National Anti-Corruption Hotline

In 2004, the Public Service Commission (PSC), a Chapter 10 institution established in terms of section 196 of the Constitution, was mandated by Cabinet to manage the then newly established National Anti-Corruption Hotline (NACH). The NACH was launched with the aim of creating a "central database for the reporting and monitoring of cases of corruption, while eliminating the duplication of resources". Anonymous reporting is possible, and matters are forwarded to the relevant departments for investigation.

The PSC releases a quarterly bulletin called "Pulse of the Public Service". The most recent version of the bulletin appears to be Volume 19, 2021.[55] It records that "a cumulative number of **24 303** cases of alleged corruption were reported by callers and whistleblowers as at 31 December 2020 since the inception of the NACH in September 2004".

For the period 1 July to 30 September 2021, the PSC "handled a total of **272** complaints at National and Provincial Level...as at 30 September 2021, **121 (44%)** of the **272** complaints were closed and **151 (56%)** were in progress". Very little information is provided as to the nature of these complaints and the manner in which they were resolved. Most of them appear to be related to social grants-related fraud.

In August 2020, President Cyril Ramaphosa placed the then Director-General of the PSC, Dr Dovhani Mamphiswana, on precautionary suspension, with full pay, pending the institution of disciplinary proceedings for improper conduct.[56]

The Office of the State Attorney appointed an advocate in February 2020 to investigate media reports that Mamphiswana had, in December 2019, appointed the mother of his child to the position of chief director for professional ethics at the PSC.

The advocate appointed to conduct the investigation found the appointment to be the result of "nepotism, deceit, dishonesty, corruption and fraud". The report also found that the woman had been paid a full salary for the month of December despite not reporting for work.[57] Ironically, one of the mandates of the PSC is to investigate irregular appointments in the public service. In December 2020, Mamphiswana was dismissed from the post.

## National Anti-Corruption Strategy

The National Anti-Corruption Strategy (NACS) is an initiative of the South African government (in accordance with the NDP) to establish an overarching strategy to fight corruption in the country. It is intended to:

a. guide the anti-corruption approaches in the country;
b. support coordination across government, business, and civil society; and
c. provide a tool for monitoring progress.

[55] http://www.psc.gov.za/newsletters/pulse_newsletters.asp
[56] https://www.news24.com/news24/southafrica/news/public-service-commission-director-general-placed-on-precautionary-suspension-with-full-pay-20200812
[57] https://www.iol.co.za/sundayindependent/news/calls-for-probe-after-psc-boss-hired-his-baby-mama-51174602

The "NDP and NACS Vision" is:

- Ethical and accountable state, business and civil society sectors in which all those in positions of power and authority act with integrity;
- Citizens that respect the rule of law and are empowered to hold those in power to account; and
- A country with zero tolerance of corruption in any sphere of activity and with substantially reduced levels of corruption.[58]

The Anti-Corruption Inter-Ministerial Committee was established in 2014 and tasked the Anti-Corruption Task Team (ACTT) to drive the work of drafting a NACS. The ACTT Steering Committee initiated and oversaw the research and drafting of the initial NACS, which started in late 2015.[59] The National Anti-Corruption Strategy Discussion Document, drafted by PARI (Public Affairs Research Institute, an NGO) after a period of research, benchmarking, and consultation, was released for public comment in 2017.[60]

The NACS is based on nine strategic pillars that include "empowering citizens in the fight against corruption; developing partnerships; improving transparency and awareness of corruption; strengthening oversight and governance mechanisms; improving resources and cooperation of anti-corruption agencies; strengthening adherence to anti-corruption mechanisms, and improving the consequence management for non-compliance".

Pillar 1 is to "Support citizen empowerment in the fight against corruption (including improved whistleblower protection)". It recommends:

- developing systems for the protection of whistleblowers' identity and the provision of legal aid;
- developing improved investigative/referral capacity to support successful prosecutions; and
- reporting positive success stories involving whistleblowers.

The Discussion Document states that:

Whistle-blowing should be promoted and encouraged by publicising stories of successful prosecutions as a result of information provided by whistleblowers, as well as reporting on the effective protection of such persons from any form of harm or victimisation.[61]

The NACS roadmap initially indicated that the approval and launch of the final NACS would take place in 2017. Eventually, in September 2019, the government released a press statement indicating that it was "ready to consolidate its National Anti-Corruption Strategy" and that a multi-stakeholder Reference Group had met for the first time.

[58] *https://www.gov.za/zu/AntiCorruption*
[59] The Steering Committee comprised representatives from the: Department of Cooperative Governance; Department of Public Affairs and Administration; Department of Planning, Monitoring and Evaluation; Government Communication and Information Systems; Office of the Public Service Commission; National Intelligence Coordinating Committee; South African Local Government Association; and the State Security Agency.
[60] *https://www.corruptionwatch.org.za/wp-content/uploads/2017/05/NACS-Discussion-Document-Final_a.pdf*
[61] At page 7.

The Reference Group was established with representatives from government, labour, civil society, business, and academia, to provide strategic advice and "ensure that the strategy covers all aspects of fighting corruption in the country". It is chaired by Robert McBride (head of the foreign branch of the State Security Agency, currently suspended) and David Lewis (Corruption Watch) and was tasked with developing an anti-corruption strategy that could serve as a framework for a nationwide intervention for South Africa.

The strategy, called the *National Anti-Corruption Strategy 2020-2030* (NACS 2020-2030), was *approved by Cabinet* in November 2020. It covers six pillars, the first of which is to "promote and encourage active citizenry, whistleblowing, integrity and transparency in all spheres of society, which includes an implementation programme to protect and support whistleblowers and resource the whistleblowing mechanisms".

The NACS 2020-2030 emphasises the need for South Africa to "cultivate and foster a culture of reporting in which citizens understand the negative impact of corruption and where individuals are empowered to report any devious or corrupt activities they become aware of. Adequate protection of whistleblowers will ensure that citizens are willing to become partners in the fight against corruption. Protection measures will include the counselling of whistleblowers, legal support, and witness protection if needed." In this regard, the strategy envisages a role for government, business, civil society, and state institutions.

Another key pillar of the strategy focuses on improved integrity in public procurement, part of which involves whistleblowing mechanisms to report suspected acts of corruption and wrongdoing.

The strategy also proposes an interim National Anti-Corruption Advisory Council, as part of phase 2 of the strategy, to ensure greater monitoring, accountability, and transparency. Crucially, this interim structure is also responsible for setting up an independent overarching statutory structure that will report directly to Parliament. This overarching body will drive the roll-out of the strategy and coordinate all the anti-corruption activities in the country. The idea of the overarching body is based a "whole-of-government and societal approach" to combating corruption in South Africa.

The strategy provides four timeframes for its implementation, which align with the timing of the current NDP and cover the following periods:

- Immediate term: the preparatory period leading up to 31 March 2021
- Short term: 1 April 2021 to 31 March 2023
- Medium term: 1 April 2023 to 31 March 2025
- Long term: 1 April 2025 to 31 March 2030

It is not quite clear which of these includes phase 2, but it is likely to be in the short- or medium-term timeline, given the "high sense of urgency to have the permanent body established based on a comprehensive legal framework as soon as possible" expressed by many of the stakeholders in the process of consultation.

Finally, the format of the NACS has three distinct phases: the strategy, the implementation plan, and the monitoring and evaluation (M&E) framework. Versions of the implementation plan and the M&E framework have already been compiled and are included in the NACS 2020-2030 document.

The strategy is comprehensive, and has impressive accountability mechanisms, including timeframes and the M&E framework. It is quite strange, therefore, that the president failed to mention this NACS in a *special media statement* in September 2021, which details the country's efforts to fight corruption in the country.

## Financial Markets Review Report

In March 2020, after a two-year consultation period, National Treasury, the South African Reserve Bank (SARB) and the FSCA released the Financial Markets Review (final report).[62] It was developed by the Financial Markets Review Committee, established by these three institutions, to make recommendations for improved conduct in financial markets. The report makes 42 such recommendations. Recommendation 7 requires –

Regulators to consider implementing a programme that rewards whistleblowers for providing information about substantial misconduct in financial markets that leads to a successful enforcement action with monetary sanctions.

Another committee, the Financial Markets Implementation Committee, was established at the same time, to consider and implement these recommendations, but no timeframes are provided and there is no publicly available information on the work of this committee.[63]

[62] *http://www.treasury.gov.za/publications/other/FMR%202020.pdf*
[63] *https://www.fanews.co.za/article/compliance-regulatory/2/financial-sector-conduct-authority-fsca-was-fsb/1059/publication-of-the-financial-markets-review-final-report/28462*

# 5. International and regional instruments

## United Nations Convention against Corruption

South Africa is one of the 161 signatories to the United Nations Convention against Corruption[64] (UNCAC), adopted by the UN General Assembly by resolution 58/4 of 31 October 2003.

Article 32 provides for the protection from retaliation or intimidation for witnesses, experts and victims (and related persons) who give evidence concerning corruption. Although not strictly about whistleblowers, the Judicial Commission of Inquiry into State Capture Report refers to the measures set out in Article 32(2) in relation to their protection. These are:

a. Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
b. Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means

Article 33 provides for the "protection of reporting persons", and is therefore applicable to whistleblowers:

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

The Prevention and Combating of Corrupt Activities Act and the PDA domesticate this international instrument.

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

The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions, and provides for a set of measures which makes this effective. The Convention came into force on 15 February 1999.[65] South Africa ratified the Convention on 19 June 2007.[66]

[64] Available at *https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf*.
[65] Available at *https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf*.
[66] Ratification Status, available at *http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf*.

## OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions

Recommendation IX, as adopted by the Council on Bribery in International Business Transactions on 26 November 2009, provides that member countries should ensure that:

- easily accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with their legal principles;
- appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly, or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with their legal principles; and
- appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.[67]

## African Union Convention on Preventing and Combating Corruption

The Convention was adopted on 11 July 2003[68] and South Africa signed it on 11 November 2005.[69]

The objective of the Convention is 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".[70]

Article 5(5) imposes an obligation on member states "to adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities".

## Southern Africa Development Community Protocol against Corruption[71]

The Protocol was adopted by heads of state on 14 August 2001 and came into force on 6 August 2003.[72] It aims to promote and strengthen the development, within each member state, of mechanisms needed to prevent, detect, punish, and eradicate corruption in the public and private sectors.

Articles 41(e) and (f) of the Protocol provide that each State Party undertakes to adopt "measures which will create, maintain and strengthen systems for the protection of people who have in good faith reported acts of corruption" and "laws that punish those people who make false and malicious reports against innocent persons".

[67] Available at *https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf* at pages 20 -22.
[68] Available at *https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf*.
[69] Ratification Status, available at *https://anticorruption.au.int/sites/default/files/files/2021-06/36382-sl-africanunionconventiononpreventingandcombatingcorruption.pdf*.
[70] Article 2(2).
[71] See *https://www.sadc.int/documents-publications/show/*.
[72] *https://www.sadc.int/documents-publications/show/*

# 6. International comparisons and best practice

There is no single best practice or best approach to protecting whistleblowers. No country's legal regime for whistleblower protection currently fully reflects the Transparency International Principles. This is, however, a rapidly changing landscape as more and more states introduce express whistleblower protections.

For example, European whistleblowers have long been subject to weak protections that vary significantly from country to country. However, a European Union (EU) directive adopted in October 2019 (the Whistleblowing Directive)[73] now establishes "minimum standards ensuring that whistleblowers are protected effectively" and encourages whistleblowers to disclose information that will lead to "effective detection, investigation and prosecution of breaches of Union law, thus enhancing transparency and accountability".

The Whistleblowing Directive applies to private and public companies with 50 or more employees operating in the EU. It only protects whistleblowers who report breaches of EU law. The Directive:

- prohibits retaliation against whistleblowers by companies;
- exempts whistleblowers from liability for acquiring or accessing information that is reported or publicly disclosed, provided that it did not constitute a "self-standing criminal offence";
- reverses the burden of proof in cases of alleged detrimental treatment, i.e. if a whistleblower shows prima facie that he or she suffered a detriment after blowing the whistle, the other party must "prove that that measure was based on duly justified grounds" and was not connected to the whistleblowing itself; and
- provides that the whistleblower must have access to appropriate remedial action such as interim relief pending the resolution of relevant legal proceedings.

The Whistleblowing Directive was required to be implemented into national law by all EU member states by 17 December 2021. It is, therefore, too early to assess its effectiveness.

Australia amended its law in 2019 to include enhanced protections for whistleblowers, but it is similarly too early to assess the effectiveness of the changes.[74]

Countries which are considered to have comprehensive legal frameworks for the protection of whistleblowers include the United Kingdom, the United States, Canada, and Japan.[75] South Africa, in general, ranks on par with these countries in terms of on-paper legal protection, and ahead of many other states.

This section focuses on the United Kingdom and the United States, as these jurisdictions' frameworks are reasonably comprehensive and established, and easily comparable to South Africa.

[73] Protection of persons who report breaches of Union Law, EU Parliament Directive 2019/1937 (October 2019), L305/17.
[74] Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 10 of 2019 (Australia).
[75] T Marshall and M Sheehan (DLA Piper), "Whistleblowing report: an employer's guide to global compliance", 2nd ed. p 4.

Iceland is also discussed as it has recently attempted to tackle one of the most difficult problems associated with whistleblowers: stigma.

# United Kingdom

The United Kingdom is considered to have a good whistleblower protection framework. It consists of two key pieces of legislation: the Public Interest Disclosure Act of 1998 and the Employment Rights Act of 1996, as well as rules established by the Financial Conduct Authority and the Prudential Regulation Authority.

## UK protections

### Public Interest Disclosure Act, 1998[76] (PIDA)

The PIDA deals with whistleblowers acting in the public interest. The list of protected disclosures is comprehensive and includes disclosures in relation to the following circumstances:

- a criminal offence has been committed, is being committed or is likely to be committed;
- a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject;
- a miscarriage of justice has occurred, is occurring or is likely to occur;
- the health or safety of any individual has been, is being or is likely to be endangered;
- the environment has been, is being or is likely to be damaged; or
- 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.

The PIDA protects whistleblowers covered by non-disclosure agreements (with exceptions such as lawyers and doctors, who are professionally bound to respect confidentiality). It provides for potential reinstatement as well as for compensation for unfair dismissal (linked to the Employment Rights Act below). Compensation is not capped, but is linked to the loss suffered by the individual, including future losses. Compensation may be reduced by up to 25% where the motive for the disclosure was one of bad faith.

### Employment Rights Act, 1996[77] (ERA)

The 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.

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".

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

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.

[76] *http://www.legislation.gov.uk/ukpga/1998/23/contents*
[77] *http://www.legislation.gov.uk/ukpga/1996/18/contents*

### Financial Conduct Authority and Prudential Regulation Authority[78]

The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) issued a consultation paper in 2015 (following a parliamentary report) proposing the introduction of whistleblower protections and procedures in financial institutions.[79] As a result of that consultation process, the FCA and PRA published a set of rules protecting the confidentiality of whistleblowers.[80] The rules apply to the following entities:

- United Kingdom deposit-takers with assets of £250 million or more, including banks, building societies, and credit unions;
- PRA-designated investment firms;
- Certain insurance and reinsurance firms and the Society of Lloyd's and managing agents.

These firms are required to take the following measures:

- appoint a "whistleblower 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 whistleblowers;
- 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 whistleblowing.

The rules define a whistleblower 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".

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

## UK shortcomings

The International Labour Organisation notes the following shortcomings in the UK framework:

- It does not establish an independent body to receive disclosures.
- It protects confidential reporting rather than anonymous reporting.
- Although it does establish external reporting channels (complaints can be made to a "Minister of the Crown" and to the Employment Tribunal), mostly it relies on internal procedures in the case of the private sector.[81]

[78] *https://www.bankofengland.co.uk/whistleblowing; https://www.handbook.fca.org.uk/handbook/SYSC/18.pdf*
[79] Consultation Paper FCA 15/4 PRA CP6/15 Whistleblowing in deposit-takers, PRA-designated investment firms and insurers (2015).
[80] FCA PS15/24 Whistleblowing in deposit-takers, PRA-designated investment firms and insurer *(https://www.fca.org.uk/publications/policy-statements/ps15-24-whistleblowing-deposit-takers-pra-designated-investment-firms)*
[81] ILO Law and practice on protecting whistleblowers in the public and financial sectors (2019), Working Paper 328.

In spite of the comprehensive framework, whistleblowers in the UK still face barriers such as stigma and damage to their careers and personal lives when their identities are revealed – particularly where they are required to report internally. Some of the most interesting examples of this emanate from whistleblowing in the National Health Service (NHS).

Peter Duffy was a consultant urologist at the University Hospitals of Morecambe Bay NHS Trust.[82] Mr Duffy blew the whistle on malpractice, negligence, cover-ups and ongoing surgical risk-taking at the Trust, including missed cancer diagnoses, operations based on incorrect diagnoses and "avoidable death", which he reported to the Care Quality Commission (the independent regulator of health and social care in England).

He relates that he then faced a decade-long campaign against him involving unsubstantiated, malicious allegations which ruined his professional life and forced him to live separately from his family. Even though he was awarded £102 000 in compensation by an employment tribunal, he was unable to work in the NHS, eventually going to work on the Isle of Man.

In a speech to the Royal Society of Medicine in March 2019, Duffy detailed the dysfunctional relationship between the NHS and professional regulators, medical defence bodies and the government. He blamed the government's failure to adequately protect him. On the failure of the law, he said:

In my opinion, the law fails whistleblowers in at least three critical areas. Firstly, in an employment tribunal you would logically expect the emphasis to be on the whistle-blowing, the clinical errors and the actions of the dismissing NHS Trust and its managers. But no. You the whistleblower are the one on trial. It's your character, behaviour, integrity and reputation that will be impugned, with every attempt made to smear and discredit you in the eyes of the Tribunal. It is standard practice for the NHS Trust to trawl back through years of emails, HR records, occupational health records and so on, in order to find anything with which to censure or degrade you under hostile cross-examination. It is a horrible experience. It simply allows the NHS to indulge in another round of whistleblower victimisation and abuse.

The next area where whistleblowers are failed is over the issue of cost threats…The threats are huge, in my case six figures. It tactically arrives at the last minute…you can't tell the Tribunal that you the whistleblower and any witnesses are being threatened and intimidated, as the letter is without prejudice, so you can't disclose it.

Finally, the law demands an evidential link between whistleblowers and constructive dismissal, if the whistleblower is to receive full compensation. It's not enough to show that you blew the whistle and shortly later you were illegally sacked. The Tribunal needs an evidential smoking gun to link the two. This evidential link is an almost impossible test, particularly as the NHS conducts a scorched earth policy towards evidence right from the start.[83]

[82] P Duffy "Whistle in the Wind: Life, death, detriment and dismissal in the NHS. A whistleblower's story" (2019).
[83] *https://minhalexander.files.wordpress.com/2019/04/peter-duffy-royal-society-of-medicine-speech-26-march-2019.mp4*

# United States of America

The USA has a long tradition of formally protecting whistleblowers. It is considered to have one of the most comprehensive frameworks on whistleblower protection and incentivisation.

The US regime is comprised of three key pieces of legislation, each of which provides for confidentiality of identity and personal data protection. In addition to these, there is provision for monetary compensation in specific cases and protection for whistleblowers in the intelligence community.

## USA federal protections

The Whistleblower Protection Act of 1989, amended in 2012, covers federal employees and gives whistleblowers the right to file a retaliation complaint in federal court.[84]

The Sarbanes-Oxley Act of 2002 covers private, listed companies and their subsidiaries.[85] 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. The Act includes a requirement to provide independently operated hotlines for anonymous disclosure.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 covers whistleblowers in the financial industry.[86] A whistleblower is defined as an "individual who provides information relating to a violation of the securities laws to the SEC [Securities Exchange Commission] according to its established procedures".

The Dodd-Frank Act:

- protects whistleblowers' confidentiality;
- provides for direct disclosure to the SEC without a requirement to go through internal procedures first;
- allows for financial awards for whistleblowers who disclose original, high-quality information where the enforcement results in over $1 000 000 in sanctions. These awards usually range between 10% and 30% of the overall sanction. The money for these awards comes from a special fund, established by Congress, and financed exclusively by the sanctions paid by violators of securities law;
- criminalises any type of measure taken in retaliation of whistleblowing; and
- provides that non-disclosure / confidentiality agreements can violate the Act. Initially, companies tried to circumvent the whistleblower incentives with contractual restrictions (gagging clauses). In response, the SEC has issued an order barring these clauses.

Besides the three Acts, relevant regulators also have guidelines and rules on whistleblower protection, including the United States Commodity Futures Trading Commission and the SEC.[87] These regulators act as agencies in charge of the whistle-blowing process, meaning that they receive information, investigate claims and (in the case of the SEC) award financial incentives.

[84] https://www.sec.gov/eeoinfo/whistleblowers.htm
[85] http://www.soxlaw.com/
[86] https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf
[87] https://www.whistleblower.gov/

According to the SEC Whistleblower Program's 2021 annual report, the programme is leading to high-quality disclosures that in turn are strengthening the enforcement of SEC laws. Since the inception of the programme, whistleblower disclosures have led to orders for nearly $5 billion in monetary sanctions. The SEC received the most whistleblower tip-offs ever in one year in its 2021 financial year, and awarded approximately $564 million in rewards to 108 whistleblowers. It also saw the two highest whistleblower rewards ever paid out during that period: $114 million and $110 million respectively.[88]

While the identity of most whistleblowers is confidential, Edward Siedle has been a well-known and regular whistleblower to the SEC for over 30 years, specifically in relation to asset management and pension funds. He exposed the failure of JP Morgan Chase to properly disclose conflicts of interest to some of its wealthy asset management clients, for which he was awarded a share of $50 million by the SEC and a further $30 million from the Commodity Futures Trading Commission Whistleblower Reward Program, for the same misconduct.[89]

Siedle is unusual in that he voluntarily revealed his identity after the SEC announced its decision on the case.[90] A former SEC lawyer, he has forged a successful career from whistle-blowing, both for his own account and by assisting other whistleblowers. While this is an unusual case, it is an example of how the system can work, and Siedle is vocal about the role that rewards play in whistleblower decision-making. In his words:

There is no question in my mind that today's whistle-blower programs give regulators critical leverage in enforcing the law and enhancing protection of investors, which is a game-changer.

Pay whistleblowers more, I say – the sky should be the limit. If Wall Street crooks can earn billions from scamming, it should be possible for whistleblowers to earn billions ending the fleecing – paid out of funds recovered by the SEC.[91]

## USA shortcomings

While the framework is fairly comprehensive, it is still subject to some of the more common criticisms of whistleblower protection:

- Whistleblowers are still subject to social stigma.
- Whistleblower protection protects confidentiality rather than anonymity.
- Unless whistleblowers follow the specific reporting procedures laid down by legislation, they will not receive any protections.
- None of the legislation obliges companies to set up whistleblower programmes, which are considered important for providing, among other things, whistleblower training, support, confidentiality, and anti-retaliation protections.

[88] *https://www.sec.gov/files/owb-2021-annual-report.pdf*
[89] *https://www.bloomberg.com/news/articles/2017-07-20/jpmorgan-whistle-blowers-seen-reaping-record-61-million-bounty*
[90] *https://www.forbes.com/sites/edwardsiedle/2018/02/20/sec-cftc-record-whistleblower-award-is-a-big-win-for-consumers-investors/#11be40412a8c; https://www.sec.gov/news/press-release/2018-44*
[91] *https://www.providencejournal.com/opinion/20191121/my-turn-edward-siedle-sec-should-look-into-ri-case*

A less fortunate whistleblower than Siedle, Gordon Massie was a top executive at American International Group (AIG) when he discovered fraudulent irregularities in AIG's accounting practices that were taking place throughout the organisation. At first Massie tried to deal with the irregularities within the company, but he eventually went public when these attempts failed. He relates that, after reporting alleged fraud and malfeasance to federal regulators in 2005, he became marginalised within the company: stripped of responsibility, humiliated, and ostracised by his colleagues who, he says, were afraid to associate with him for the sake of their own careers.

Massie's employment was terminated without severance on the basis that he was a "malcontent", although he eventually reached a settlement with the company. At the time of going public, Massie believed the law would protect him, and he said that he "had no idea what he was in for." He was unable to find work within his industry.[92]

Massie highlights that even with the protections offered by the Sarbanes-Oxley Act, employees still face significant risk of retaliation, job loss and damage to their careers in exposing fraud. While the law does try to protect and reward whistleblowers, ultimately, much still depends on the company having strong and ethical systems in place to apply the provisions of the Act.[93]

## New York expanded Whistleblower Protection Law

New York expanded protection provided to whistleblowers under new provisions in the New York Labour Law section 740, which came into effect in January 2022.[94]

The law strengthens protections for whistleblowers in the private sector, exposing companies to "significant additional liability". Among other things, it expands the definition of employees to include former employees and contractors, and it removes the requirement that there be "an actual violation of the law". Under the new law, whistleblowers will be protected if they "reasonably believe" an employer's activity or misconduct:

- is in violation of a "law, rule or regulation," including executive orders and judicial or administrative decisions, rulings, and orders; or
- poses a substantial and specific danger to the public health or safety.

The law also expands the definition of prohibited "retaliatory actions" to include:

- adverse employment actions against current employees, such as discharge, suspension, or demotion;
- actions or threats that would adversely impact a former employee's current or future employment; or
- contacting or threatening to contact immigration authorities on an employee or their family members.

Finally, the law expands "the remedies potentially available to whistleblowers to include: front pay,[95] civil penalties not to exceed $10,000, and punitive damages (in addition to back pay[96]). It extends the statute of limitations from one year to two years, and gives whistleblowers the right to a jury trial.

[92] G Massie "The Whistleblower's Dilemma: Confronting fraud at AIG" (2011).
[93] *https://www.voanews.com/a/even-after-sarbanes-oxley-whistleblowers-face-dilemma-131011833/174893.html*
[94] *https://www.nysenate.gov/legislation/laws/LAB/740*
[95] Front pay refers to damages paid out to plaintiffs in employment cases in order to make up for lost compensation resulting from discrimination or retaliation.
[96] Back pay refers to financial compensation that an employer owes an employee for work already completed.

## Other relevant legislation

### False Claims Act[97]

This Act provides that anyone who has knowingly submitted a false claim against the government is liable to pay damages and a penalty. A false claim refers to a situation when a company or person fraudulently charges the government for services which it then fails to deliver, or for which it has overcharged. There are many examples of this, but it is most common in the healthcare and medical industries when a person makes false claims to Medicare or Medicaid.

The False Claims Act allows for third parties who have knowledge of the false claim, known as relators, to file for violations on the government's behalf.[98] Once filed, the government takes over the investigation and prosecution of the action, although the relator is given a hearing. If the government declines to prosecute, the relator may proceed with the action.

If the government successfully prosecutes the false claim, the relator is entitled to a significant portion of the amount recovered by the government: up to 30%, unless there are special circumstances for reducing it. The relator is also entitled to be reimbursed for legal fees.[99]

[97] 31 US Code ss 3729 – 3733 (1862).
[98] 31 US Code s 3730 (b).
[99] 31 US Code s 3730 (d).

# Iceland

Whistleblowers almost universally report that one of the hardest things they have had to deal with is the stigma of being a whistleblower. Since the 2008 global financial crisis, Iceland has made inroads into changing the perception of whistleblowers by presenting whistle-blowing as an act of loyalty, and in protecting whistleblowers from some of the more severe forms of social, emotional and reputational retaliation that they so often face.

Iceland leveraged public outrage after the 2008 economic crash to raise the profile of whistleblowers: the country's economy was badly affected by the state's and bankers' mismanagement of finances. The state was able to successfully prosecute nine senior bankers for crimes relating to the economic meltdown, largely as a result of information provided by whistleblowers.

Journalists and their sources also played a vital role in uncovering the crimes, which led to the introduction, in 2010, of a new law known as the 'Journalism-haven Statute'. Among other things, it provides for the protection of anonymous sources.

Despite all of this, Iceland did not have dedicated whistleblower protection legislation until 2020.[100] The new legislation, which took effect from 1 January 2021, has the following key provisions:

- Direct reporting to law enforcement or regulators (as opposed to internal reporting).
- Where the whistleblower does not receive an adequate response to his or her report (either to the company, regulators, or law enforcement) he or she may report it directly to the press, provided there is a justifiable reason to believe that the conduct may involve a prison sentence, or in other exceptional circumstances (such as national security or a public health emergency).
- Strict confidentiality must be automatically provided for whistleblowers – essentially, a condition precedent for any whistleblower to come forward.
- Whistleblowers are protected from retaliation from employers, who may not fire them, significantly change their work, or infringe their rights in any way.
- The scope of potential violations is broad, and direct knowledge of actual violations is not required.
- The Act refers to "contemptible conduct", which is conduct that "endangers public interests, such as conduct that threatens the health or safety of people or the environment, without any manifest violation of law or regulation".[101] This definition is the farthest-reaching in the world and has been lauded as a "gold standard" in whistleblower protection.

The main criticism of the Act is that it does not make any provision for financial rewards or incentives.

[100] *https://www.althingi.is/altext/150/s/0431.html*
[101] Article 1, Government Bill on the Protection of Whistleblowers No 431.

# 7. The Judicial Commission of Inquiry into State Capture Report: Part 1

"Whistleblowers like Ms Stimpel are the final defence against corruption and state capture taking hold in SOEs [state-owned enterprises]. Without people like her, who are willing to resist the pressures being applied on them to bend the rules, the chances that these illegal activities at SOEs will be exposed reduces considerably."

Part 1 of the Judicial Commission of Inquiry into State Capture Report (the Zondo Commission Report), published in January 2022, recognises the crucial role of whistleblowers in exposing corruption in public procurement, and it recognises that the current protection frameworks are insufficient. However, the Platform to Protect Whistleblowers in Africa (PPLAAF) has critiqued the report for its limited recommendations to address these deficiencies, urging that SA adopt the recommendations of the Zondo Commission but also emphasising that further steps will still be needed to protect whistleblowers. It notes particularly that the recommendations are insufficient to (1) ensure that whistleblowers are taken seriously, and (2) deter retaliation. Also, the discussion of whistleblowers in the report, including the recommendations, are limited to those who reveal corruption, fraud, or undue influence in public procurement activities.

## Zondo Commission's recommendations

Two of the Zondo Commission's final recommendations relate to whistleblowers:

First, it recommends the establishment through legislation of an independent Agency against corruption in public procurement that has, among other things, a Council (with an Inspectorate, a Litigation Unit, a Tribunal, and a Court) to formulate measures for reporting, and for whistleblower protection and incentivisation. The function of the Inspectorate will include running a comprehensive and secure database to receive information and complaints from tenderers and whistleblowers (according to the rules established by the Council), and to provide protection and support in accordance with article 32(2) of UNCAC.

Second, to improve protection for whistleblowers, it recommends either new legislation or amending current legislation that:

- incorporates the protections stipulated in article 32(2) of UNCAC;
- identifies the Inspectorate of the Agency as the correct channel for disclosure;
- allows for incentives by way of rewarding whistleblowers with a percentage of the proceeds recovered on the strength of their information, provided that the information disclosed by the whistleblower has been material in the obtaining of the award; and
- authorises immunity from criminal or civil liability.

[102] *https://www.pplaaf.org/2022/01/12/zondo-commission-whistleblower-recommendations.html*

# 8. Insights from South African whistleblowers and experts in whistleblower protection

The following people were interviewed for this report:

- **Stefaans Brümmer:** managing partner (at the time), amaBhunghane Centre for Investigative Journalism.
- **Brian Currin:** labour, civil & human rights lawyer; instrumental in setting up the Truth & Reconciliation Commission; has represented or assisted in the representation of a number of whistleblowers in the apartheid and democratic eras.
- **Rosemary Hunter:** pension fund lawyer; former Deputy Registrar of Pension Funds at the Financial Services Board; whistleblower.
- **David Lewis:** executive director, Corruption Watch.
- **Gideon Pogrund:** founder and director, Ethics & Governance Think Tank, GIBS.
- **Khadija Sharife:** Platform to Protect Whistleblowers in Africa (PPLAAF).
- **Alison Tilley:** coordinator, Judges Matter; previously with the Open Democracy Advice Centre, involved in the process of drafting the Protected Disclosures Act.
- **Hennie van Vuuren:** executive director, Open Secrets.

In addition, insights were gained from print and online interviews, webinars, research reports and articles by and about whistleblowers and experts including Cynthia Stimpel, Suzanne Daniels and Mosilo Mothepu.[103]

Interviewees provided candid insights, which are discussed here without attribution to particular individuals unless necessary.

In early 2020, the GIBS Ethics & Governance Think Tank released its inaugural *Ethics Barometer for South African Business*.[104] The survey engaged with more than 8 000 employees at 15 major South African companies.

Employees were questioned on their perceptions of the approach of their organisations to a broad range of issues, ranging from whether they pay tax responsibly and treat customers fairly, to how employees are treated in the workplace.

One of seven “key insights” from the survey related to “speaking up about ethical failures” and “cultivating a culture of dissent”.

[103] In addition to interviews and articles referenced elsewhere in this report, see: “Speaking Truth to Power: the stories of South African Whistleblowers” at *https://www.youtube.com/watch?v=F5iMpS5WDbs&feature=emb_err_woyt*
[104] *https://www.gibs.co.za/Documents/Ethics%20Barometer%20Online%20Report.pdf*

While 45% of respondents said that they had witnessed one or more of 18 types of misconduct over the past 24 months, only 30% of these had reported it. The two most common reasons provided for the failure to report instances of misconduct were: (i) "I fear I'll be victimised"; and (ii) "the company won't take action; nothing will happen".[105]

Similarly, of all the questions in the barometer, employees had the most negative perception around whether they felt "free to speak out against wrongdoing without fear of retaliation", i.e. of all questions, they least strongly agreed that their organisations tolerated dissent.

The Ethics & Governance Think Tank and the University of Nottingham are currently engaged in a joint project on whistleblower protection in South Africa, funded by the UK government. The project conducted extensive interviews with 25 whistleblowers and people who support whistleblowers. The institutions have published a white paper,[106] and will also publish two academic papers, and a list of recommendations for law reform and other mechanisms to strengthen whistleblower protection.[107]

Perhaps the most significant and strongly held view among whistleblowers is that the PDA is "not worth the paper it is written on". Whistleblowers feel deeply that the legislation has failed to protect them. They also feel strongly that purported constitutional rights and protections are purely theoretical.

While this view is held across the board, it is particularly bitter for the whistleblowers associated with "state capture". For them, the institutions which exist to investigate unlawfulness and protect private citizens were used as tools to intimidate and silence them, because those they were accusing had all the power and resources of the state at their disposal.

Those working within civil society on whistleblower issues report that, during the Zuma era, most public sector employees were too terrified to come forward with information about wrongdoing. This fear has started to ease, but much of it persists in the absence of examples of good outcomes for whistleblowers. In fact, in light of recent examples of retribution against whistleblowers, this fear is unlikely to subside.

Babita Deokaran was a senior financial officer at the Gauteng Provincial Department of Health. She was an important witness in an investigation by the Special Investigating Unit into corruption within the Department involving tender fraud amounting to more than R300 million. She was believed to have been helping authorities link senior political figures to irregular procurement deals and contracts related to Covid-19 PPE (personal protective equipment). Deokaran was murdered on 23 August 2021 while sitting in her car outside her home after dropping off her daughter at school.

Athol Williams, an academic and former senior partner at consultancy Bain & Co., testified at the Zondo State Capture Commission about high-level corruption implicating Bain and other companies in state capture. He left the country after the murder of Babita Deokaran, in fear of his own safety, and maintains that the government has provided him with no support or protection.[108]

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[105] Ibid at page 13.
[106] See *https://gibsic.blog/2021/11/11/new-gibs-whitepaper-south-african-whistleblowers-tribulations-and-triumphs-by-nicola-kleyn-gideon-pogrund-elme-vivier-theresa-onaji-benson-and-mollie-painter/*
[107] We were also advised that Corruption Watch and law firm Cliffe Dekker Hofmeyr published a manual on whistleblowing in South Africa. In addition, a book by journalist Mandy Wiener, "The Whistleblowers", was released in October 2020.
[108] *https://www.dailymaverick.co.za/article/2021-11-28-athol-williams-i-will-continue-whistle-blowing-and-making-the-corrupt-uncomfortable/*

Whistleblowers must often simultaneously deal with being treated as heroes by the media and the general public, but as pariahs in their professional lives. They struggle to find employment once they are known to be "troublemakers", and many complain that the same companies which applaud their actions in public forums will not even consider employing them.

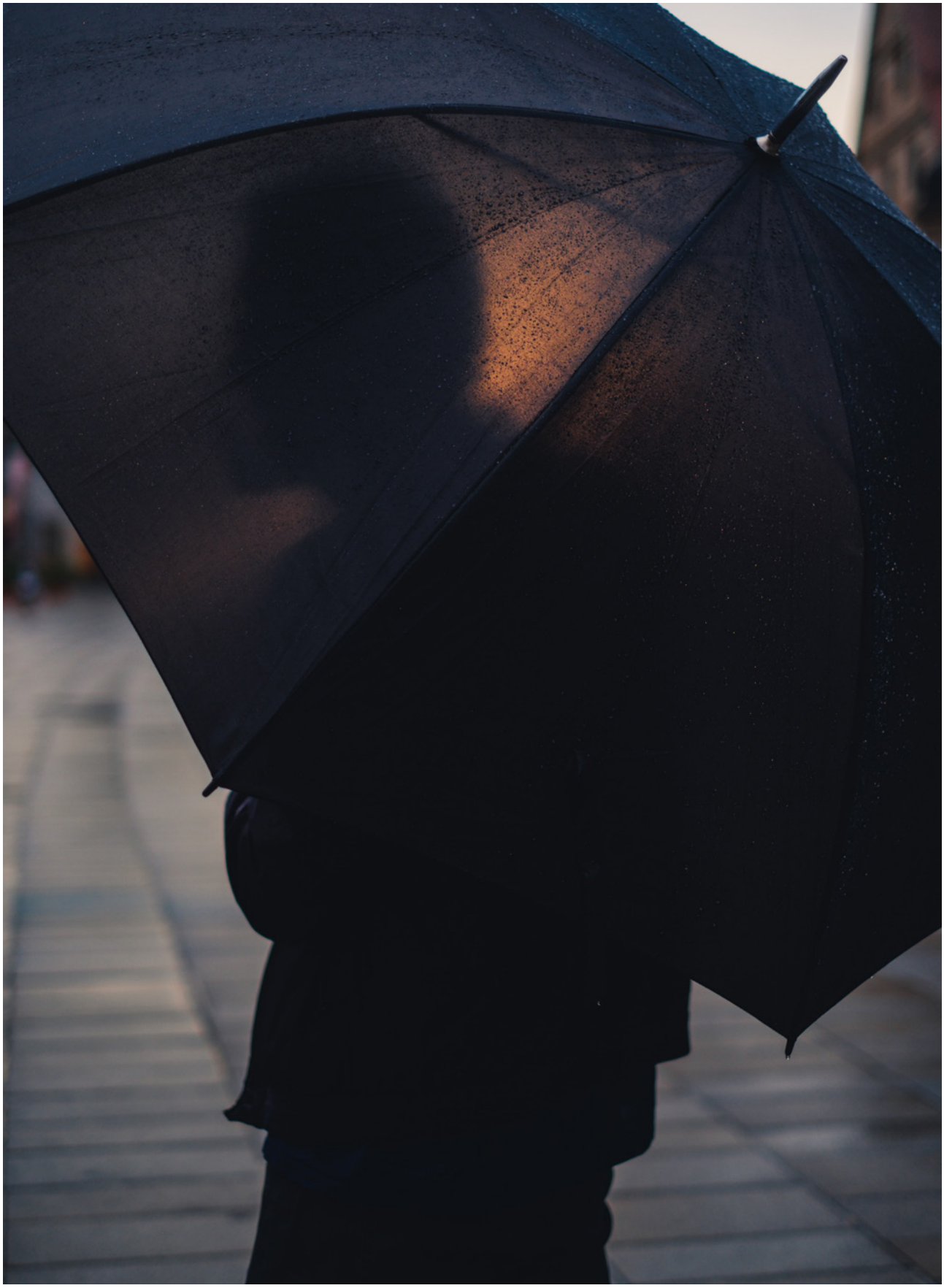
For many whistleblowers, their jobs are only the first thing they lose. Many also lose their pensions when they lose their jobs. They lose their homes when banks foreclose on them, or when they are forced to sell them to pay for legal fees in defending themselves against spurious civil and criminal legal actions, fees which can run into the millions of rands. Many are harassed, bullied, intimidated or ostracised at work. They and their family members are threatened. They suffer immense anxiety, depression and fear.

Whistleblowers are often accused of having waited too long to disclose the information they have, but the decision to blow the whistle is a complex one. Many whistleblowers report being unsure, at first, that they were really seeing what they thought they were seeing, doubting themselves rather than believing that colleagues and superiors could be capable of such conduct.

Others think that they have to gather hard evidence before they speak out – a not unreasonable assumption when the law requires them to prove that any occupational detriment suffered was retaliation for making a disclosure. Whistleblowers might be implicated in the wrongdoing at some level (in fact, sometimes those with the most valuable information are also the most implicated), or be afraid of being implicated if they speak out. Experts report that people often deliberate for years before blowing the whistle. They "reach a tipping point within themselves".

These problems become more entrenched as more and more people see what has happened to whistleblowers in South Africa: a number of people interviewed for this report expressed incredulity that anyone in this country would risk blowing the whistle, when it is quite clear that the consequences for doing so will be severe.

However, a number of interviewees expressed the view that in many cases whistleblowers simply don't feel that they have a choice, from a personal ethical point of view. They see that something is happening which deeply offends their value system, and they can't ignore it, even when they do know what the personal consequences will be.



# 9. Recommendations for championing change

As this report has comprehensively outlined, South Africa's legal framework for whistleblower protection, while relatively robust on paper in comparison to many other jurisdictions, nevertheless has some significant flaws and gaps.

As the report also makes clear, however, the challenges faced by whistleblowers are not only attributable to shortcomings in the legislation. These challenges arise from a complex concatenation of state and private sector conflict and complicity, weak institutions, the absence of penalties for retaliation, and the frequently extreme imbalance of power and resources between whistleblowers and those whose misconduct they are trying to expose.

At a fundamental level, the problems encountered by whistleblowers are reflective of the problems with South African society more broadly, in particular the pervasive lack of accountability or consequences for malfeasance. Rebuilding public institutions such that they are trusted by citizens to protect them and work for the public good cannot possibly be the work of a campaign to improve whistleblower protection alone.

Many of these challenges are not unique to South Africa, but recommendations for reform and improvement must be appropriate to the local context. Set out below are a series of proposals to improve whistleblower protection, as well as the pros and cons related to each of these proposals, integrating input and insights from the experts interviewed for this report. These proposals collate some of the recommendations of the many experts working in this field with our own views and suggestions.

## Interventions that rely on State action

The most obvious State intervention is legal reform, which, even with strong political will, is a long and complicated process. It took **fourteen years** for the South African Law Commission to produce recommendations for amendments to the PDA after it was requested to do so by the parliamentary portfolio committee.

Any legal reform process of the PDA should prioritise:

- protecting whistleblowers from retaliation for making disclosures;
- removing the caps on compensation for unfair dismissal and unfair labour practices, and providing financial rewards and incentives for whistleblowing;
- implementing a reverse burden of proof system that requires employers to prove that actions taken against whistleblowers are not retaliation for disclosures they have made;
- strengthening the law to ensure protection of whistleblowers' identities; and
- consolidation of whistleblower protection legislation.

There are growing calls for a dedicated, independent anti-corruption agency in South Africa.[109] The National Anti-Corruption Strategy Reference Group has been tasked with considering this approach. Such an agency could be responsible for the gathering, analysing, and publishing data on the implementation and effectiveness of whistleblower protection laws; training and public education; receiving and investigating complaints; following up on cases; monitoring local and international developments, and driving reform.

The Zondo Commission has also recommended the single agency approach. Although its report is limited to issues relating to corruption, fraud and undue influence in public procurement activities, the mandate, role, and functions of such an entity might easily be expanded to include all whistleblowers.

Some argue that a core, centralised entity would be preferable to a variety of agencies with seemingly overlapping mandates.[110] Ironically, however, a single mandated agency may also be more susceptible to political pressure and abuse.[111]

Several interviewees felt strongly that it is important not to "give up on" the State, or at least to think about how any private initiative could align with initiatives that the State is proposing. They argue that private interventions can be used to nudge the government into action.

Some expressed hope that there are indications that President Ramaphosa might be starting to take a firmer stance on corruption, which could present a window of opportunity for collaboration to strengthen whistleblower protection. They emphasised that business should be playing a strong role in pushing the government to be proactive and to follow through on its many promises to improve protection.

## Interventions that do not require State participation

The most debilitating impacts of being a whistleblower relate to:

- the difficulty of remaining anonymous;
- financial harm, not only by virtue of loss of employment, but also because whistleblowers must often spend so much money to protect and defend themselves;
- vulnerability to, and powerlessness in the face of retaliation; and
- inability to find employment again after they have been exposed as whistleblowers.

In short, the incentives are perverse: there is virtually nothing to deter or prevent the subject of a whistleblower's disclosures from going all out to silence them, and there is very little to incentivise whistleblowers to come forward. Any plan for improving whistleblower protection in South Africa should try to address this core problem.

[109] See, for example, *https://www.news24.com/news24/columnists/guestcolumn/lawson-naidoo-its-time-for-a-single-agency-model-to-fight-corruption-20200806*.
[110] Open Democracy Advice Centre, "Empowering our Whistleblowers" 2014, available at *https://www.corruptionwatch.org.za/wp-content/uploads/migrated/WhistleblowingBook.pdf* at page 30.
[111] Open Democracy Advice Centre (note 105) at page 30.

## Legal fund

Creating an independently administered fund to assist whistleblowers with legal costs is often suggested (especially by whistleblowers) as a practical way to support whistleblowers in realising their rights, which are rendered illusory if they cannot be enforced due to financial constraints. The removal of this obstacle might provide encouragement to whistleblowers to make disclosures.

The rules of such a fund could provide that monies received from costs orders in favour of whistleblowers in successful cases must be repaid to the fund to maintain it.

However, in the first instance, the number of successful cases in which a whistleblower is awarded costs is unlikely to be significant under the current legal regime. Also, although this approach might strengthen the whistleblower's ability to defend him- or herself, it retains the power imbalance: the whistleblower is always on the defensive.

## Proactive legal support

Without changing the legal regime, a possible option to simultaneously incentivise whistleblowers and deter potential retaliation is to proactively take up the cases of whistleblowers who have been harassed, intimidated, and deprived of their pensions, homes and livelihoods, and institute civil claims against those responsible for the retaliation. The purpose of such litigation would be to obtain significant damages which are not limited to loss of compensation.

Such an approach would require focus, resources, time, and capacity. It could start small, with one or two cases, and build up precedent and capacity. Ideally, this would require a small team of dedicated lawyers. Retaining lawyers in private practice on a case-by-case basis would be expensive, and likely run into conflict of interest problems (as many law firms would have pre-existing relationships with the companies or entities that the whistleblower is reporting against).

It is likely that a small number of successful cases, or even one very significant case, would result in changes in behaviour, and possibly in reactive legislative changes. Initially, funds would need to be raised from the private sector, but a condition of taking on any case could be that if it is successful, a portion of damages goes back into the entity.

## Hybrid foundation/fund approach

Both options above have limitations. Restricting support to legal costs only is generally considered to be insufficient to cover the myriad different kinds of support that whistleblowers need, not least of which is support to protect themselves and their families. The proactive legal support proposal is probably too ambitious at this stage, given the complexities in establishing, staffing, and funding such an entity.

There are numerous complex considerations involved in setting up any new organisation, institution or fund to tackle whistleblower protection in South Africa. Who would administer the fund and run the organisation? Would it be an entirely new entity, or a complement or an addition to the capacity of existing NGOs? How would it be administered and governed to avoid the possibility or perception that those contributing to the fund have any undue influence over which whistleblowers are supported and which are not?

Establishing an entity to which any whistleblower has direct access would be a significant undertaking. All the civil society organisations and individuals who have supported whistleblowers describe how they inevitably end up providing legal, practical, financial, and emotional support to the whistleblowers they support.

They are contacted at all hours with a multiplicity of concerns and requests. They themselves are sometimes subjected to threats and intimidation for supporting a whistleblower. The process of assessing and investigating and verifying whistleblower disclosures – to the extent that civil society is capacitated to do even this – is expensive, time-consuming and requires very particular expertise.

There is also a strong view among many of the interviewees for this report that efforts and support should be focused on helping those whistleblowers whose disclosures have the greatest potential to effect systemic change.

Taking these considerations into account, there could be significant merit in a "hybrid option". This would entail setting up a fund or a foundation capitalised by private sector and individual donations, and independently administered. The fund would develop terms of reference or guidelines detailing the kind of support it could provide and would then accept applications – preferably from organisations already supporting whistleblowers, for financial support for particular cases, including urgent support and assistance.

Such a fund would have been exceptionally valuable in the case of the so-called Gupta Leaks, for example. The people to whom the Gupta Leaks were disclosed immediately realised that the whistleblowers needed to get out of South Africa. None of them had access to the kind of resources that would enable them to pay for flights and accommodation overseas, however, so they approached a wealthy "patron" for help.

This person – known as "Lady MacBeth" in various published accounts of the events, and recently exposed as businesswoman Magda Wierzycka[112] – took a different view to the journalists and lawyers supporting the whistleblowers about how the matter should be handled. She leaked the information to a huge group of individuals and organisations before the whistleblowers had left the country. This led to enormous anxiety and stress for all involved and could have been avoided if there had been an impartial fund to apply to for support.

The fund could consider applications for financial support for a wide variety of needs and requests, but the implementation would be carried out by the organisation or person who makes the application, with obligations to record and account for how funds are spent. Applications could be made, for example, for financial support for:

- a wide range of legal costs;
- personal protection/security;
- temporary or permanent relocation costs;
- counselling and other psychological support;
- rewards for disclosures which result in particular kinds of impact; and/or
- specialist technical or professional services which can bolster or prove a whistleblower's allegations.

As one expert put it, "if you create the opportunity, people will bring the ideas to you". Considering that one of the key aims of the NACS is to "support coordination across government, business, and civil society", the NACS Reference Group could have an important role to play.

This kind of entity could provide a broad range of support to whistleblowers, and to their supporters, without requiring the extensive expertise and infrastructure necessary to receive, "vet" and filter thousands of tip-offs and disclosures. Such an entity would build on and strengthen, rather than duplicate, existing capacity within civil society, while leveraging and helping to coordinate private sector and government support.

## Public awareness campaign: addressing the stigma

Either in conjunction with other approaches, or on its own, there is a real need for a public awareness campaign to address the stigma of whistleblowing. The campaign should raise the positive public profile of whistleblowing as a service to democracy, and of whistleblowers as champions of transparency and accountability.

[112] *https://www.news24.com/fin24/economy/exclusive-magda-wierzycka-defends-re-leaking-the-guptaleaks-as-journos-accuse-her-of-betrayal-20210127*

# 10. Conclusion

Deciding to blow the whistle is not easy in any jurisdiction, and there is no country in the world which has perfect mechanisms for protecting whistleblowers. In South Africa, these mechanisms are particularly weak, despite a swathe of legislation which regulates “protected disclosures”, and despite the existence of multiple multi-stakeholder initiatives and commitments to strengthen whistleblower protection.

South Africa has never been renowned as a place where the powerful are held to account. Public levels of trust in both the government and the private sector are extremely low. Creating a society in which whistleblowers are respected and safe is a task which will take Herculean efforts, as it will involve rebuilding trust and faith in institutions that have long ceased to provide a meaningful public service. However, there are real opportunities for a private sector initiative to make a start at levelling the playing field for whistleblowers.

# Appendix I

## Non-governmental organisations working to support whistleblowers and/or strengthen whistleblower protection

## Local organisations

### The Whistleblower House

The Whistleblower House is a non-profit organisation set up by Ivan Pillay and launched in February 2022. It aims to provide access to a broad range of services for whistleblowers including legal, financial, security, and psychological support. It will also play a public interest role: raising awareness, addressing stigma, and advocating for effective implementation of whistleblowing management systems within organisations, among other things. Its goal is to provide a dedicated, full-spectrum service that will fill the void left by inadequate laws and implementation of whistleblower protections.

The Whistleblower House is a direct response to real whistleblowers' experiences, in recognition of the vital role of whistleblowers in exposing state capture and the risks and challenges they faced. It has several well-known individuals as part of the team, including Ben Theron and Cynthia Stimpel.

*www.whistleblowerhouse.org*

### AmaBhungane

AmaBhungane is an independent non-profit investigative journalism centre. As an investigative news outlet it engages with whistleblowers as sources for many of its stories, and is therefore involved in the protection of their identity, although its resources are limited in terms of the protection it can provide. One strategy to protect whistleblowers is, paradoxically, building a significant public profile for the whistleblower through the media.

AmaBhungane receives thousands of tip-offs a year, but only has the capacity and resources to deal with a small fraction of these. Inevitably, it must choose those cases that have the biggest potential to achieve systemic change when they are exposed. This means that many cases which are important and worthy, and which would make national headlines in other countries, cannot be investigated.

AmaBhungane has most recently been covering the story of whistleblower Tebogo Kekana and Busisiwe Mkhwebane, the Public Protector. Kekana submitted an affidavit to the Speaker of Parliament and the Presidency in which he alleged that Mkhwebane had instructed him to insert a recommendation to alter the mandate of the Reserve Bank into her CIEX report, a recommendation which was allegedly given to her by a State Security Agency official.[113]

[113] *https://www.news24.com/news24/southafrica/news/exclusive-meet-the-whistleblower-taking-a-stand-against-public-protector-busisiwe-mkhwebane-20191222*
See also *https://amabhungane.org/stories/exclusive-meet-the-whistleblower-taking-a-stand-against-public-protector-busisiwe-mkhwebane/*

The affidavit also claims that during Mkhwebane's Vrede Dairy Farm investigation, Kekana and other investigators were instructed to remove information implicating politicians in wrongdoing.

*www.amabhungane.org*

## Corruption Watch

Corruption Watch is the local chapter of Transparency International. Corruption Watch provides a platform for reporting corruption, investigates allegations of corruption, acts as a research and information centre, and mobilises campaigns against corruption.

The organisation operates a facility (allowing people to report via calls, messages, call-backs and online reporting) for reporting corruption, which can be done anonymously. The organisation investigates allegations itself, and hands over evidence to the relevant authorities.

*www.corruptionwatch.org.za*

## Organisation Undoing Tax Abuse (OUTA)

OUTA is a non-profit organisation focused on tackling maladministration, corruption and misappropriation of public funds. OUTA specifically deals with whistleblowing when it comes to information relating to these forms of misconduct. OUTA supported SAA whistleblower Cynthia Stimpel.[114]

*www.outa.co.za*

## Council for the Advancement of the South African Constitution (CASAC)

CASAC is an NGO that seeks to promote constitutional rights, with a particular focus on socio-economic rights, judicial independence, the rule of law, public accountability, and open governance. CASAC runs a Red Card Corruption campaign which includes a focus on the protection of whistleblowers.

In 2012, CASAC was involved in the case of Mr Solly Tshitangano, the former Acting Chief Financial Officer of the Limpopo Department of Education. Mr Tshitangano was dismissed in December 2011 for his role in exposing evidence of corruption and maladministration in that Department. CASAC has been lobbying for his reinstatement.

*www.casac.org.za*

## Helen Suzman Foundation (HSF)

Helen Suzman Foundation is a research institute which researches and advocates issues relating to democracy, governance and accountability.

Among other things, HSF published a number of briefs on whistleblower protection in South Africa in 2018, which set out the legislative framework for the protection of whistleblowers and the procedures and systems that can be used to ensure that whistleblowers are protected.[115]

[114] *https://outa.co.za/blog/newsroom-1/post/state-capture-witnesses-boost-outas-case-against-myeni-149*
[115] *https://hsf.org.za/publications/hsf-briefs/whistle-blower-protection-does-south-africa-match-up-part-i*

In addition, HSF has also published a series called "Professional Service Industries: Facilitating Malfeasance for a Fee", which looks at the role of professional service industries in facilitating corruption. Among its recommendations are: (1) that regulators provide whistleblowing mechanisms as a proactive step to prevent misconduct from arising; and (2) the imperative for professional firms to have a whistleblowing policy in place which deals with internal procedures.[116]

*www.hsf.org.za*

## Open Secrets

Open Secrets is a non-profit organisation, founded by Hennie Van Vuuren, himself a whistleblower in the arms deal case, which works to expose economic crime and enhance accountability in the private sector.[117] The organisation has worked with high-profile whistleblowers, including Rosemary Hunter.

*www.opensecrets.org.za*

## Platform to Protect Whistleblowers in Africa (PPLAAF)

PPLAAF is a legal NGO that provides free legal, media and other services to whistleblowers. It also conducts strategic litigation involving whistleblowers and undertakes research and advocacy relating to whistleblower protection. Individual whistleblowers can report via PPLAAF's messaging service, online portal or hotline.

PPLAAF has supported a number of prominent South African whistleblowers, including the Gupta Leaks whistleblowers and state capture whistleblowers Bianca Goodson and Mosilo Mothepu.

Following the release of the Zondo Commission Report, PPLAAF released its own set of recommendations on improvements to the PDA.[118] These include:

- creating an independent whistleblower regulatory authority;
- adopting strict and obligatory timetables for processing and acting on protected disclosures;
- establishing punitive sanctions for breaches of the PDA;
- providing full legal immunities for whistleblowers;
- changing labour regulations to allow a fair remedy in case of an occupational detriment done to a whistleblower;
- allowing rewards to the whistleblower in case of asset recovery following a disclosure;
- establishing mechanisms to safeguard whistleblowers' physical safety; and
- extending protection measures to third persons who assisted the whistleblowers, such as family, colleagues or civil society organisations.

*www.pplaaf.org*

[117] *https://www.opensecrets.org.za/in-conversation-with-arms-deal-whistleblower-hennie-van-vuuren/*
[118] *https://www.pplaaf.org/downloads/PPLAAFSAwhistleblowerrecommendations.pdf*

## Right2Know (R2K)

The Right2Know Campaign is an activist organisation that seeks to advance freedom of expression and access to information.

R2K has undertaken research and published reports on whistleblowers,[119] and regularly speaks out about their plight in South Africa. It has also featured the Gupta Leaks whistleblowers on its "Champions Calendar", which celebrates courageous individuals and organisations that have made an important contribution to advancing the right to know.[120]

*www.r2k.org.za*

## The Anti-Intimidation and Ethical Practices Forum (AEPF)

The AEPF is a collaboration between six South African professional bodies: the institutes of Chartered Accountants (SAICA), Directors (IOD), Internal Auditors (IIA), Professional Accountants (SAIPA), Risk Management (IRMSA) and the Association of Certified Fraud Examiners (ACFE), together with the Ethics Institute and Corruption Watch.

The AEPF supports professionals working in auditing, accounting, business, governance, and risk management, who increasingly face the prospect of intimidation when responding to and reporting corruption in the workplace.

It does this in four key ways: (1) providing a platform to raise concerns about corruption and intimidation; (2) educating members and providing practical advice to potential whistleblowers; (3) acting together to push for the improvement of legislation and policies; and (4) providing a collective professional voice on issues relating to governance and accountability in the public and private sectors.

The AEPF also conducts an annual survey on ethical practices in South Africa, although the most recent survey was published in 2018.

*www.aepf.co.za*

[119] *http://www.r2k.org.za/whistleblowing-research-report_fd/*
[120] *https://www.r2k.org.za/2018/11/29/presenting-2019-champions-for-the-right-to-know-calendar/*

# Other local organisations

## Whistle Blowers Pty (Ltd)

Whistle Blowers (Pty) Ltd is a private company that provides an ethics hotline which public and private companies can subscribe to. It is certified by the Ethics Institute and is one of largest independent ethics hotline providers in Sub-Saharan Africa.

The company has a 24/7/365 live information centre that takes calls. Individuals can also report using the SMS Please Call Me service, the web-based reporting system, using email, using post and fax, or using the whistleblowers hotline app.

When a call is placed to a subscribing company's dedicated hotline number, it is answered by an information agent of Whistle Blowers Pty Ltd. The company claims that it has the necessary data security and information systems to secure anonymity.

*www.whistleblowing.co.za*

## The University of Pretoria's Gordon Institute of Business Science: Ethics & Governance Think Tank

GIBS is a business school which offers academic programmes and a wide range of executive courses. It runs an Ethics & Governance Think Tank, founded and led by Rabbi Gideon Pogrund, which seeks to promote ethical conduct in companies.

The Think Tank undertakes research and engages with a wide range of companies. In November 2019, together with Business Leadership South Africa (BLSA), it launched the *GIBS Ethics Barometer*, which draws on a Harvard Business School tool adapted to the South African context. The barometer measures companies' progress over time, and will create a national benchmark with a view to establishing clear targets to which corporates can aspire. Some of the issues to be assessed include information related to whistleblowing.

*www.gibs.co.za*

# International organisations

## Transparency International

Transparency International is an international NGO with local chapters in over 100 countries. It focuses broadly on issues relating to corruption, transparency, integrity and justice. Transparency International is closely linked to Corruption Watch in South Africa, which operates as its local chapter.

In 2013, Transparency International developed the *International Principles for Whistleblower Legislation* which are widely regarded as international best practice for whistleblowing protection regimes. In 2018, it developed its *Best Practice Guide for Whistleblowing Legislation* to provide guidance to policymakers and whistleblowing advocates on the implementation of the Principles.

*www.transparency.org/en*

## Whistleblowing International Network (WIN)

The Whistleblowing International Network (WIN) is an international network of NGOs and civil society groups working in the field of whistleblower protection. It provides a platform for members to share legal and practical expertise, develop democratic responses to whistleblowing at domestic and international levels, and support increased capacity to protect whistleblowers worldwide. WIN provides counsel, tools, and expertise to civil society organisations that defend and support whistleblowers around the world.

Currently, it does not appear to have a presence in South Africa nor any South African members.

*www.whistleblowingnetwork.org*

## The United Nations Convention Against Corruption Civil Society Coalition (UNCAC Coalition)

The UNCAC Coalition is a global coalition of civil society organisations in over 100 countries. There are a number of South African CSOs which are either members or affiliates.

The UNCAC Coalition engages in joint actions around positions common to UNCAC members, facilitates the exchange of information, and supports national civil society efforts. It also facilitates engagement and contributions to the UNCAC review process. One of its key areas of focus is the protection of whistleblowers and anti-corruption activists.

*www.uncaccoalition.org/about-us/about-the-coalition*

# Appendix II

## Analysis of South Africa's Protected Disclosures Act 26 of 2000 against Transparency International's *International Principles for Whistleblower Legislation*[121]

"N/A" indicates that there is no South African legislation which gives effect to the Principle concerned.

| Category | TI Principle | PDA Provision |
|---|---|---|
| **Guiding Definition** | 1. *Whistleblowing* – the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action. | PDA Preamble and section 1 |
| **Guiding Principle** | 2. *Protected individuals and disclosures* – all employees and workers in the public and private sectors need:<br>• accessible and reliable channels to report wrongdoing;<br>• robust protection from all forms of retaliation; and<br>• mechanisms for disclosures that promote reforms that correct legislative, policy or procedural inadequacies, and prevent future wrongdoing. | PDA sections 5, 6, 7, 8<br>Section 8 read together with Regulation GNR. 949, 2018<br>PDA section 3 |
| **Scope of Application** | 3. *Broad definition of whistleblowing* – whistleblowing is the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation; miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest; and acts to cover up any of these. | PDA section 1 |
| | 4. *Broad definition of whistleblower* – a whistleblower is any public or private sector employee or worker who discloses information covered in Principle 3 (above) and who is at risk of retribution. This includes individuals who are outside the traditional employer-employee relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers and former employees. | PDA section 1 |
| | 5. *Threshold for whistleblower protection: "reasonable belief of wrongdoing"* – protection shall be granted for disclosures made with a reasonable belief that the information is true at the time it is disclosed. Protection extends to those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed. | Definition of disclosure states, "...who has reason to believe that the information concerned shows or tends to show...".<br>PDA section 9 |
| **Protection** | 6. *Protection from retribution* – individuals shall be protected from all forms of retaliation, disadvantage or discrimination at the workplace linked to or resulting from whistleblowing. This includes all types of harm, including dismissal, probation and other job sanctions; punitive transfers; harassment; reduced duties or hours; withholding of promotions or training; loss of status and benefits; and threats of such actions. | PDA sections 1 and 3 |

[121] "Best practices for laws to protect whistleblowers and support whistleblowing in the public interest", available at https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf

| Category | TI Principle | PDA Provision |
|---|---|---|
| **Protection** | 7. *Preservation of confidentiality* – the identity of the whistleblower may not be disclosed without the individual's explicit consent. | N/A |
| | 8. *Burden of proof on the employer* – in order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblower's disclosure. | N/A |
| | 9. *Knowingly false disclosures not protected* – an individual who makes a disclosure demonstrated to be knowingly false is subject to possible employment/professional sanctions and civil liabilities. Those wrongly accused shall be compensated through all appropriate measures. | PDA section 9B |
| | 10. *Waiver of liability* – any disclosure made within the scope of whistleblower legislation shall be immune from disciplinary proceedings and liability under criminal, civil and administrative laws, including those related to libel, slander, copyright and data protection. The burden shall fall on the subject of the disclosure to prove any intent on the part of the whistleblower to violate the law. | PDA section 9A |
| | 11. *Right to refuse participation in wrongdoing* – employees and workers have the right to decline to participate in corrupt, illegal or fraudulent acts. They are legally protected from any form of retribution or discrimination (see Principle 6, above) if they exercise this right. | N/A |
| | 12. *Preservation of rights* – any private rule or agreement is invalid if it obstructs whistleblower protections and rights. For instance, whistleblower rights shall override employee "loyalty" oaths and confidentiality/nondisclosure agreements ("gag orders"). | PDA section 9B |
| | 13. *Anonymity* – full protection shall be granted to whistleblowers who have disclosed information anonymously and who subsequently have been identified without their explicit consent. | N/A |
| | 14. *Personal protection* – whistleblowers whose lives or safety are in jeopardy, and their family members, are entitled to receive personal protection measures. Adequate resources should be devoted for such protection. | N/A |
| **Disclosure Procedures** | 15. *Reporting within the workplace* – whistleblower regulations and procedures should be highly visible and understandable; maintain confidentiality or anonymity (unless explicitly waived by the whistleblower); ensure thorough, timely and independent investigations of whistleblowers' disclosures; and have transparent, enforceable and timely mechanisms to follow up on whistleblowers' retaliation complaints (including a process for disciplining perpetrators of retaliation). | PDA sections 3B and 6(2)(a) |
| | 16. *Reporting to regulators and authorities* – if reporting at the workplace does not seem practical or possible, individuals may make disclosures to regulatory or oversight agencies or individuals outside of their organisation. These channels may include regulatory authorities, law enforcement or investigative agencies, elected officials, or specialised agencies established to receive such disclosures. | PDA Chapter 8; Regulation GNR. 949, 2018 |

| Category | TI Principle | PDA Provision |
|---|---|---|
| **Disclosure Procedures** | 17. *Reporting to external parties* – in cases of urgent or grave public or personal danger, or persistently unaddressed wrongdoing that could affect the public interest, individuals shall be protected for disclosures made to external parties such as the media, civil society organisations, legal associations, trade unions, or business/professional organisations. | PDA Chapter 8; Regulation GNR. 949 of 14 September 2018 |
| | 18. *Disclosure and advice tools* – a wide range of accessible disclosure channels and tools should be made available to employees and workers of government agencies and publicly traded companies, including advice lines, hotlines, online portals, compliance offices and internal or external ombudspersons. Mechanisms shall be provided for safe, secure, confidential or anonymous disclosures. | PDA section 10(4)(a) read together with practical guidelines |
| | 19. *National security/official secrets* – where a disclosure concerns matters of national security, official or military secrets, or classified information, special procedures and safeguards for reporting that take into account the sensitive nature of the subject matter may be adopted in order to promote successful internal follow-up and resolution, and to prevent unnecessary external exposure. These procedures should permit internal disclosures, disclosure to an autonomous oversight body that is institutionally and operationally independent from the security sector, or disclosures to authorities with the appropriate security clearance. External disclosure (i.e. to the media, civil society organisations) would be justified in demonstrable cases of urgent or grave threats to public health, safety or the environment; if an internal disclosure could lead to personal harm or the destruction of evidence; and if the disclosure was not intended or likely to significantly harm national security or individuals. | N/A |
| **Relief and Participation** | 20. *Full range of remedies* – a full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering. A fund to provide assistance for legal procedures and support whistleblowers in serious financial need should be considered. | PDA section 4 |
| | 21. *Fair hearing (genuine "day in court")* – whistleblowers who believe their rights have been violated are entitled to a fair hearing before an impartial forum, with full right of appeal. Decisions shall be timely, whistleblowers may call and cross-examine witnesses, and rules of procedure must be balanced and objective. | PDA section 4 |
| | 22. *Whistleblower participation* – as informed and interested stakeholders, whistleblowers shall have a meaningful opportunity to provide input to subsequent investigations or inquiries. Whistleblowers shall have the opportunity (but are not required) to clarify their complaint and provide additional information or evidence. They also have the right to be informed of the outcome of any investigation or finding, and to review and comment on any results. | PDA section 3B(4) |

| Category | TI Principle | PDA Provision |
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| **Relief and Participation** | 23. *Reward systems* – if appropriate within the national context, whistleblowers may receive a portion of any funds recovered or fines levied as a result of their disclosure. Other rewards or acknowledgements may include public recognition or awards (if agreeable to the whistleblower), employment promotion, or an official apology for retribution. | N/A |
| **Legislative Structure, Operation and Review** | 24. *Dedicated legislation* – in order to ensure clarity and seamless application of the whistleblower framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach. | PDA |
| | 25. *Publication of data* – the whistleblower complaints authority (below) should collect and regularly publish (at least annually) data and information regarding the functioning of whistleblower laws and frameworks (in compliance with relevant privacy and data protection laws). This information should include the number of cases received; the outcomes of cases (i.e. dismissed, accepted, investigated, validated); compensation and recoveries (maintaining confidentiality if the whistleblower desires); the prevalence of wrongdoing in the public and private sectors; awareness of and trust in whistleblower mechanisms; and time taken to process cases. | N/A |
| | 26. *Involvement of multiple actors* – the design and periodic review of whistleblowing laws, regulations and procedures must involve key stakeholders including employee organisations, business/employer associations, civil society organisations and academia. | N/A |
| | 27. *Whistleblower training* – comprehensive training shall be provided for public sector agencies and publicly traded corporations and their management and staff. Whistleblower laws and procedures shall be posted clearly in public and private sector workplaces where their provisions apply. | N/A |
| **Enforcement** | 28. *Whistleblower complaints authority* – an independent agency shall receive and investigate complaints of retaliation and improper investigations of whistleblower disclosures. The agency may issue binding recommendations and forward relevant information to regulatory, investigative or prosecutorial authorities for follow-up. The agency shall also provide advice and support, monitor and review whistleblower frameworks, raise public awareness to encourage the use of whistleblower provisions, and enhance cultural acceptance of whistleblowing. The agency shall be provided with adequate resources and capacity to carry out these functions. | N/A |
| | 29. *Penalties for retaliation and interference* – any act of reprisal for, or interference with, a whistleblower's disclosure shall be considered misconduct, and perpetrators of retaliation shall be subject to employment/professional sanctions and civil penalties. | N/A |
| | 30. *Follow-up and reforms* – valid whistleblower disclosures shall be referred to the appropriate regulatory agencies for follow-up, corrective actions and/or policy reforms. | N/A |

# Appendix III

## South African legislation applicable to whistleblowing

| No. | Legislation | Extract |
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| 1. | **Companies Act No. 71 of 2008** | **Section 159: Protection for whistleblowers.—**<br><br>(1) To the extent that this section creates any right of, or establishes any protection for, an employee, as defined in the Protected Disclosures Act, 2000 (Act No. 26 of 2000)—<br>(a) that right or protection is in addition to, and not in substitution for, any right or protection established by that Act; and<br>(b) that Act applies to a disclosure contemplated in this section by an employee, as defined in that Act, irrespective of whether that Act would otherwise apply to that disclosure.<br><br>(2) Any provision of a company's Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of this section.<br><br>(3) This section applies to any disclosure of information by a person contemplated in subsection (4) if—<br>(a) it is made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, a person performing the function of internal audit, board or committee of the company concerned; and<br>(b) the person making the disclosure reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, had—<br>(i) contravened this Act, or a law mentioned in Schedule 4;<br>(ii) failed or was failing to comply with any statutory obligation to which the company was subject; [Subpara. (ii) substituted by s. 98 (d) of Act No. 3 of 2011.]<br>(iii) engaged in conduct that had endangered, or was likely to endanger, the health or safety of any individual, or had harmed or was likely to harm the environment;<br>(iv) unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or<br>(v) contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.<br><br>(4) A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section—<br>(a) has qualified privilege in respect of the disclosure; and<br>(b) is immune from any civil, criminal or administrative liability for that disclosure.<br><br>(5) A person contemplated in subsection (4) is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in this section and, because of that possible or actual disclosure, the second person—<br>(a) engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment; or<br>(b) directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and—<br>(i) intends the first person to fear that the threat will be carried out; or<br>(ii) is reckless as to causing the first person to fear that the threat will be carried out, irrespective of whether the first person actually fears or feared that the threat will or would be carried out.<br><br>(6) Any conduct or threat contemplated in subsection (5) 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. |

| No. | Legislation | Extract |
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| | | (7) A public company or a state-owned company must directly or indirectly—<br>(a) establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and<br>(b) routinely publicise the availability of that system to the categories of persons contemplated in subsection (4). |
| 2. | Constitution of the Republic of South Africa 1996 | **Section 9: Equality.—**<br><br>(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.<br><br>(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.<br><br>(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<br><br>(4)* No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.<br><br>(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. |
| | | **Section 14: Privacy.—**<br><br>Everyone has the right to privacy, which includes the right not to have—<br>(a) their person or home searched;<br>(b) their property searched;<br>(c) their possessions seized; or<br>(d) the privacy of their communications infringed. |
| | | **Section 16: Freedom of expression.—**<br><br>(1) Everyone has the right to freedom of expression, which includes—<br>(a) freedom of the press and other media;<br>(b) freedom to receive or impart information or ideas;<br>(c) freedom of artistic creativity; and<br>(d) academic freedom and freedom of scientific research.<br><br>(2) The right in subsection (1) does not extend to—<br>(a) propaganda for war;<br>(b) incitement of imminent violence; or<br>(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. |
| | | **Section 23: Labour relations.—**<br><br>(1) Everyone has the right to fair labour practices.<br><br>(2) Every worker has the right—<br>(a) to form and join a trade union;<br>(b) to participate in the activities and programmes of a trade union; and<br>(c) to strike.<br><br>(3) Every employer has the right—<br>(a) to form and join an employers' organisation; and<br>(b) to participate in the activities and programmes of an employers' organisation. |

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| | | (4) Every trade union and every employers' organisation has the right—<br>(a) to determine its own administration, programmes and activities;<br>(b) to organise; and<br>(c) to form and join a federation.<br><br>(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).<br><br>(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1). |
| 3. | Defence Act No. 42. of 2002 | **Section 50: Limitations of rights.—**<br><br>(1) Subject to the Constitution, the rights of members or employees may be restricted in the manner and to the extent set out in subsections (2) to (7).<br><br>(2) To the extent necessary for purposes of military security and safety of members of the Defence Force and employees, such members and employees may from time to time be subjected to—<br>(a) searches and inspections;<br>(b) screening of their communications with people in or outside the Department;<br>(c) security clearances which probe into their private lives; and<br>(d) shared accommodation or privation in accordance with the exigencies of military training and operations.<br><br>(3) To the extent necessary for security and the protection of information, members of the Defence Force and employees may be subjected to restrictions in communicating any kind of information, and where appropriate, may be subjected to prohibition of communication of information.<br><br>(4) To the extent necessary for military discipline, the right of members of the Regular Force, serving members of the Reserve Force and members of any auxiliary service to peaceful and unarmed assembly, demonstration, picketing and petition, may be subjected to such restrictions as may be prescribed.<br><br>(5) (a) Entry into, remaining in and movement in and around designated military areas may be restricted to authorised persons and subject to such conditions as may be prescribed.<br>(b) Members of the Defence Force may, while in service, be required and ordered to serve, move or reside anywhere in the Republic and the rest of the world.<br><br>(6) To the extent necessary for national security and for maintaining the Defence Force as a structured and disciplined military force, the rights of members of the Regular Force, serving members of the Reserve Force and members of any auxiliary force to join and participate in the activities of trade unions and other organisations may be subjected to such restrictions as may be prescribed.<br><br>(7) To the extent necessary for national security, access to information in the Department may be restricted.<br><br>(8) No member of the Regular Force—<br>(a) may serve as a member of Parliament or any other legislative body;<br>(b) may be a member of the Reserve Force and vice versa; and<br>(c) may be a member of the South African Police Service and vice versa. |

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| 4. | Financial Intelligence Centre Act No. 38 of 2001 | **Section 28: Cash transactions above prescribed limit.—**<br><br>An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount—<br>(a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or<br>(b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting. |
| | | **Section 29: Suspicious and unusual transactions.—**<br><br>(1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that—<br>(a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;<br>(b) a transaction or series of transactions to which the business is a party—<br>(i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;<br>(ii) has no apparent business or lawful purpose;<br>(iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act;<br>(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service;<br>(v) relates to an offence relating to the financing of terrorist and related activities; or<br>(vi) relates to the contravention of a prohibition under section 26B; or<br>(c) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities,<br>must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.<br><br>(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1)(a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.<br><br>(3) No person who made or must make a report in terms of this section may, subject to subsection 45B(2A), disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made, otherwise than—<br>(a) within the scope of the powers and duties of that person in terms of any legislation;<br>(b) for the purpose of carrying out the provisions of this Act;<br>(c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or<br>(d) in terms of an order of court.<br><br>(4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than—<br>(a) within the scope of that person's powers and duties in terms of any legislation;<br>(b) for the purpose of carrying out the provisions of this Act;<br>(c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or<br>(d) in terms of an order of court. |

| No. | Legislation | Extract |
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| | | **Section 37: Reporting duty and obligations to provide information not affected by confidentiality rules.—**<br><br>(1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part, Part 4 and Chapter 4.<br><br>(2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between—<br>(a) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or<br>(b) a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced. |
| | | **Section 38: Protection of persons making reports.—**<br><br>(1) No action, whether criminal or civil, lies against an accountable institution, reporting institution, supervisory body, the South African Revenue Service or any other person complying in good faith with a provision of this Part, Part 4 and Chapter 4, including any director, employee or other person acting on behalf of such accountable institution, reporting institution, supervisory body, the South African Revenue Service or such other person.<br><br>(2) A person who has made, initiated or contributed to a report in terms of section 28, 29 or 31 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part is competent, but not compellable, to give evidence in criminal proceedings arising from the report.<br><br>(3) No evidence concerning the identity of a person who has made, initiated or contributed to a report in terms of section 28, 29 or 31 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part, or the contents or nature of such additional information or grounds, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings. |
| 5. | Labour Relations Act No. 66 of 1995 | **Section 185: Right not to be unfairly dismissed or subjected to unfair labour practice.—**<br><br>Every employee has the right not to be–<br>(a) unfairly dismissed; and<br>(b) subjected to unfair labour practice. |
| | | **Section 186(2)(d): Meaning of dismissal and unfair labour practice.—**<br><br>"Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act. |
| | | **Section 187(1)(h): Automatically unfair dismissals.—**<br><br>(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act. |
| | | **Section 188A(11): Inquiry by arbitrator.—**<br><br>Despite subsection (1), if an employee alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 26 of 2000), that employee or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the employee. |

| No. | Legislation | Extract |
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| | | **Section 194: Limits on compensation.—**<br><br>(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.<br><br>(2) . . . . . .<br>[Subs. (2) deleted by s. 48 (b) of Act No. 12 of 2002.]<br><br>(3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.<br><br>(4) The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' remuneration. |
| 6. | Local Government: Municipal Finance Management Act No.56 of 2003 | **Section 32(6): Unauthorised, irregular or fruitless and wasteful expenditure.—**<br><br>The accounting officer must report to the South African Police Service all cases of alleged—<br>(a) irregular expenditure that constitute a criminal offence; and<br>(b) theft and fraud that occurred in the municipality. |
| | | **Section 32(7): Unauthorised, irregular or fruitless and wasteful expenditure.—**<br><br>The council of a municipality must take all reasonable steps to ensure that all cases referred to in subsection (6) are reported to the South African Police Service if—<br>(a) the charge is against the accounting officer; or<br>(b) the accounting officer fails to comply with that subsection. |
| | | **Section 102(2): Irregular or fruitless and wasteful expenditure.—**<br><br>The board of directors of a municipal entity must promptly report to the South African Police Service any—<br>(a) irregular expenditure that may constitute a criminal offence; and<br>(b) other losses suffered by the municipal entity which resulted from suspected criminal conduct. |
| 7. | National Environmental Management Act No. 107 of 1998 | **Section 31: Access to environmental information and protection of whistleblowers.—**<br><br>(1) . . . . . .<br>[Subs. (1) deleted by s. 14 of Act No. 14 of 2009.]<br><br>(2) . . . . . .<br>[Subs. (2) deleted by s. 14 of Act No. 14 of 2009.]<br><br>(3) . . . . . .<br>[Subs. (3) deleted by s. 14 of Act No. 14 of 2009.]<br><br>(4) Notwithstanding the provisions of any other law, 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 an environmental risk and the disclosure was made in accordance with subsection (5). |

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| | | (5) Subsection (4) applies only if the person concerned—<br>(a) disclosed the information concerned to—<br>(i) a committee of Parliament or of a provincial legislature;<br>(ii) an organ of state responsible for protecting any aspect of the environment or emergency services;<br>(iii) the Public Protector;<br>(iv) the Human Rights Commission;<br>(v) any attorney-general or his or her successor;<br>(vi) more than one of the bodies or persons referred to in subparagraphs (i) to (v);<br>(b) disclosed the information concerned to one or more news media and on clear and convincing grounds believed at the time of the disclosure—<br>(i) that the disclosure was necessary to avert an imminent and serious threat to the environment, to ensure that the threat to the environment was properly and timeously investigated or to protect himself or herself against serious or irreparable harm from reprisals; or<br>(ii) giving due weight to the importance of open, accountable and participatory administration, that the public interest in disclosure of the information clearly outweighed any need for nondisclosure;<br>(c) disclosed the information concerned substantially in accordance with any applicable external or internal procedure, other than the procedure contemplated in paragraph (a) or (b), for reporting or otherwise remedying the matter concerned; or<br>(d) disclosed information which, before the time of the disclosure of the information, had become available to the public, whether in the Republic or elsewhere.<br><br>(6) Subsection (4) applies whether or not the person disclosing the information concerned has used or exhausted any other applicable external or internal procedure to report or otherwise remedy the matter concerned.<br><br>(7) No person may advantage or promise to advantage any person for not exercising his or her right in terms of subsection (4).<br><br>(8) No person may threaten to take any action contemplated by subsection (4) against a person because that person has exercised or intends to exercise his or her right in terms of subsection (4). |
| 8. | Pension Funds Act No. 24 of 1956 | **Section 9B: Protection of disclosures.—**<br><br>(1) The registrar must 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.<br><br>(2) In addition to what is provided in sections 8 and 9 of the Protected Disclosures Act, a disclosure by a board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or administrator to the registrar constitutes a protected disclosure.<br><br>(3) (a) A board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or an administrator who makes a protected disclosure in accordance with this section, may not suffer any occupational or other detriment.<br>(b) Any person referred to in paragraph (a) who suffers any detriment, including occupational detriment as defined in the Protected Disclosures Act, may—<br>(i) seek the remedies provided for in section 4 of the Protected Disclosures Act, where occupational detriment has been suffered;<br>(ii) approach any court having jurisdiction for appropriate relief; or<br>(iii) pursue any other process and seek any remedy provided for in law. |
| | | **Section 13B(10): Restrictions on administration of pension funds.—**<br><br>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. |

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| | | **Section 37(1): Penalties.—**<br><br>(1) Any person who–<br>(a) contravenes or fails to comply with section 4, 10, 13A, 13B or 31;<br>(b) induces or attempts to induce any person to become a member of, or to contribute to, a fund not registered under this Act; or<br>(c) in any application in terms of this Act deliberately makes a misleading, false or deceptive statement or conceals any material fact,<br>is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment. |
| 9. | **Prevention and Combating of Corrupt Activities Act No. 12 of 2004** | **Section 18: Offences of unacceptable conduct relating to witnesses.—**<br><br>Any person who, directly or indirectly, intimidates or uses physical force, or improperly persuades or coerces another person with the intent to—<br><br>(a) influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or<br>(b) cause or induce any person to—<br>(i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;<br>(ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings;<br>(iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings;<br>(iv) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;<br>(v) give or withhold information relating to or contained in a police docket;<br>(vi) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or<br>(vii) be absent from such trial, hearing or other proceedings,<br>is guilty of the offence of unacceptable conduct relating to a witness. |
| | | **Section 34: Duty to report corrupt transactions.—**<br><br>(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed—<br>(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or<br>(b) the offence of theft, fraud, extortion, forgery or uttering a forged document,<br>involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995, (Act No. 68 of 1995).<br><br>(2) Subject to the provisions of section 37 (2), any person who fails to comply with subsection (1), is guilty of an offence.<br><br>(3) (a) Upon receipt of a report referred to in subsection (1), the police official concerned must take down the report in the manner directed by the National Head of the Directorate for Priority Crime Investigation, appointed in terms of section 17C (2) (a) of the South African Police Service Act, 1995, (Act No. 68 of 1995), and forthwith provide the person who made the report with an acknowledgment of receipt of such report.<br>(b) The National Head of the Directorate for Priority Crime Investigation must within three months of the commencement of the South African Police Service Amendment Act, 2012, publish the directions contemplated in paragraph (a) in the Gazette, during which period any existing notice issued in terms of the Act shall remain in force.<br>(c) Any direction issued under paragraph (b), must be tabled in Parliament before publication thereof in the Gazette. |

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| | | (4) For purposes of subsection (1) the following persons hold a position of authority, namely—<br>(a) the Director-General or head, or equivalent officer, of a national or provincial department;<br>(b) in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);<br>(c) any public officer in the Senior Management Service of a public body;<br>(d) any head, rector or principal of a tertiary institution;<br>(e) the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);<br>(f) the executive manager of any bank or other financial institution;<br>(g) any partner in a partnership;<br>(h) any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;<br>(i) any other person who is responsible for the overall management and control of the business of an employer; or<br>(j) any person contemplated in paragraphs (a) to (i), who has been appointed in an acting or temporary capacity. |
| **10.** | **Protection from Harassment Act No. 17 of 2011** | **Section 1: Definitions and application of Act.—**<br><br>(1) In this Act, unless the context indicates otherwise—<br>**"child"** means a person under the age of 18 years;<br>**"clerk of the court"** means a clerk of the court appointed in terms of section 13 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and includes an assistant clerk of the court so appointed;<br>**"complainant"** means any person who alleges that he or she is being subjected to harassment;<br>**"court"** means any magistrate's court for a district referred to in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);<br>**"electronic communications identity number"** means a technical identification label which represents the origin or destination of electronic communications traffic, as a rule clearly identified by a logical or virtual identity number or address assigned to a customer of an electronic communications service provider (such as a telephone number, cellular phone number, email address with or without a corresponding IP address, web address with or without a corresponding IP address or other subscriber number);<br>**"electronic communications service provider"** means an entity or a person who is licensed or exempted from being licensed in terms of Chapter 3 of the Electronic Communications Act, 2005 (Act No. 36 of 2005), to provide an electronic communications service;<br>**"harassment"** means directly or indirectly engaging in conduct that the respondent knows or ought to know—<br>(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—<br>(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;<br>(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or<br>(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or<br>(b) amounts to sexual harassment of the complainant or a related person;<br>**"harm"** means any mental, psychological, physical or economic harm;<br>**"member of the South African Police Service"** means any member as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995);<br>**"Minister"** means the Cabinet member responsible for the administration of justice;<br>**"peace officer"** means a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);<br>**"prescribed"** means prescribed in terms of a regulation made under section 19;<br>**"related person"** means any member of the family or household of a complainant, or any other person in a close relationship to the complainant; |

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| | | **"respondent"** means—<br>(a) any person against whom proceedings are instituted in terms of this Act; and<br>(b) for the purposes of sections 4, 5 and 6, any person who is reasonably suspected of engaging in or who has engaged in harassment of the complainant or a related person;<br>**"sexual harassment"** means any—<br>(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;<br>(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;<br>(c) implied or expressed promise of reward for complying with a sexually oriented request; or<br>(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request;<br>**"sheriff"** means a person appointed as a sheriff in terms of the Sheriffs Act, 1986 (Act No. 90 of 1986);<br>**"this Act"** includes the regulations; and<br>**"weapon**" means—<br>(a) any firearm or any handgun or airgun or ammunition as defined in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000); and<br>(b) any object, other than that which is referred to in paragraph (a), which is likely to cause serious bodily injury if it were used to commit an assault.<br><br>(2) This Act does not prevent a person who may apply for relief against harassment or stalking in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), from applying for relief in terms of this Act. |
| | | **Section 2: Application for protection order.—**<br><br>(1) A complainant may in the prescribed manner apply to the court for a protection order against harassment.<br><br>(2) If the complainant or a person referred to in subsection (3) is not represented by a legal representative, the clerk of the court must inform the complainant or person, in the prescribed manner, of—<br>(a) the relief available in terms of this Act; and<br>(b) the right to also lodge a criminal complaint against the respondent of crimen injuria, assault, trespass, extortion or any other offence which has a bearing on the persona or property of the complainant or related person.<br><br>(3) (a) Notwithstanding the provisions of any other law, the application for a protection order may, subject to paragraph (b), be brought on behalf of the complainant by another person who has a material interest in the wellbeing of the complainant or related person.<br>(b) An application referred to in paragraph (a) must be brought with the written consent of the complainant, except in circumstances where the complainant is a person who, in the opinion of the court, is unable to do so.<br><br>(4) Notwithstanding the provisions of any other law, any child, or person on behalf of a child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.<br><br>(5) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court has a reasonable belief that the complainant or a related person is suffering or may suffer harm if the application is not dealt with immediately.<br><br>(6) Supporting affidavits by persons who have knowledge of the matter concerned may accompany the application.<br><br>(7) The application and affidavits must be lodged with the clerk of the court who must immediately submit the application and affidavits to the court. |

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| 11. | Public Finance Management Act No. 1 of 1999 | **Section 38 (1)(g): General responsibilities of accounting officers.—**<br><br>(1) The accounting officer for a department, trading entity or constitutional institution on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board. |
| 12. | Witness Protection Act No. 112 of 1998 | **Section 7: Application for protection.—**<br><br>(1) Any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may—<br>(a) report such belief—<br>(i) to the investigating officer in the proceedings concerned;<br>(ii) to any person in charge of a police station;<br>(iii) if he or she is in prison, to the person in charge of the prison where he or she is being detained or to any person registered as a social worker under the Social Work Act, 1978 (Act No. 110 of 1978), or deemed to be so registered and who is in the service of a Department of State;<br>(iv) to the public prosecutor or the interested functionary concerned; or<br>(v) to any member of the Office; and<br>(b) apply in the prescribed manner that he or she or any related person be placed under protection.<br><br>(2) (a) If a witness is for any reason unable to make a report as contemplated in subsection (1)(a) or to make an application for protection as contemplated in subsection (1)(b), any interested person or the investigating officer concerned, who has reason to believe that the safety of the witness or any related person is or may be threatened as contemplated in subsection (1), may make such a report or application on behalf of the witness.<br>(b) Subject to section 12, an application for protection of a minor may be made by or on behalf of the minor without the consent of his or her parent or guardian.<br><br>(3) Any person to whom a report is made as contemplated in subsection (1), must assist the applicant in the making of an application for protection and, unless he or she is the Director, must forthwith—<br>(a) inform the Director of the application; and<br>(b) submit the application to the Director or a witness protection officer.<br><br>(4) The Director may, whenever he or she deems it necessary, refer an application for protection submitted to him or her, to a witness protection officer for evaluation and the submission of a report as contemplated in section 9(1). |

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