



24 January 2017

## **SUBMISSION TO: The Portfolio Committee**

In respect of including criminal sanctions for false disclosures within the Protected Disclosures Act of South Africa

## **FROM: Whistleblowing International Network (WIN) members and supporters**

WIN connects and strengthens civil society organizations that defend and support whistleblowers in law and in practice around the world. The Network provides counsel, tools and expertise needed by those working in their countries to address corruption, waste, fraud, abuse, illegality and threats to the public interest. WIN works across professional fields to promote public interest whistleblowing as matter of human rights and democratic accountability

### **National WIN participants**

Centre for Human Rights (Centro de derechos humanos), University of Chile  
 Oživení, Czech Republic  
 Whistleblower-Netzwerk e. V / Whistleblower-Network, Germany  
 Access-Info Clearinghouse Japan Japan  
 Commonwealth Human Rights Initiative, India  
 Transparency International Ireland Ireland  
 Project on Organizing, Development, Education and Research (PODER) Mexico  
 NOWMalaysia, Malaysia  
 Pištaljka ("The Whistle") Serbia

Open Democracy Advice Centre South Africa  
 Public Concern at Work United Kingdom  
 Government Accountability Project United States of America  
 Campaign for Good Governance, Sierra Leone

### **International WIN Associates and Supporters**

GlobaLeaks Italy  
 Center for Free Expression, Ryerson University, Canada  
 FreePressUnlimited, The Netherlands  
 Article19, United Kingdom

We, the above-signed members, associates and supporters of WIN, write to urge you to reconsider including any provision that would create a criminal offence of intentionally disclosing false information as part of your reform of the South Africa's Protected Disclosures Act.

***Specifically we urge you to remove section 9B of the Protected Disclosures Act.***

South Africa was one of the first countries in the world to introduce comprehensive workplace whistleblower protection in 2000. In so doing, the nation sent out a strong message to its citizens, and to the world, that it was renewing its democratic commitment to be open and accountable to all its' people.

The reforms that South Africa is currently undertaking recognises that the whistleblower protection law must be brought up to date and strengthened to ensure the country remains a world leader in effectively challenging and rooting out corruption. The majority of the proposed amendments to the Protected Disclosures Act have rightly been considered in light of 17 years' experience of how the law has worked in practice in South Africa, specifically addressing its weaknesses and where it has failed to adequately protect those who have disclosed information about wrongdoing in the public interest. These are progressive changes welcomed by the international whistleblower protection community.

Whistleblower protections are specifically aimed at addressing the vulnerability of individuals who can and should be able speak up about wrongdoing, harm or other indices of corruption<sup>1</sup> without putting their own lives and livelihoods at risk. However, while those at work or in the communities affected by wrongdoing may be in the best position to identify and therefore speak up about it, often they do not do so.

Such individuals are rarely able to investigate or fully address the problem themselves and are vulnerable to pressure and persecution in the workplace and beyond. Silence can stem from a lack of knowledge about their rights or the safe channels available to them for reporting their concerns, the fear of losing their livelihoods or careers, and threats or actual physical retaliation against themselves, their families or people they know. Which unfortunately is not without reason - there are many cases which show whistleblowers often pay a high price for disclosing information.

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<sup>1</sup> See articles 33 and 8 of the United Nations Convention against Corruption (UNCAC) which call on member States to (33) incorporate legal protections against any unjustified treatment for any person who report in good faith and on reasonable grounds (8) to consider establishing measures and systems to facilitate reporting by public officials of any acts of corruption. In elaborating on Article 33 in the Technical Guide to UNCAC the emphasis is on ensuring that protections will extend to individuals who report "indications of wrongdoing" - ie "information which is not of such detail to constitute evidenc in the legal sense of the word." See discussion in UNODC (2015) Resource Guide on Good Practices in the Protection of Reporting Persons, p.23.

Legal protections help prevent workplace detriment, avoid the worst excesses of retaliation and provide a swift and appropriate remedy when these do occur. They are meant to offer an alternative to silence and support reliable public services, consumer and public safety, the protection of human rights and justice.

Most countries have provisions in their laws to protect against false accusations - whether in the law of defamation or in the criminal code. There is no evidence that legislation specifically protecting whistleblowers has increased the risk or frequency of false reporting. In fact, available research indicates that actively promoting safe reporting channels increases the likelihood of the authorities properly investigating possible wrongdoing, and for organisations to address such issues earlier<sup>2</sup>.

While we agree that whistleblower protections should not extend to those who deliberately report information they know to be untrue, this is distinct from including a *criminal offence of false reporting* within a law designed to *promote and protect whistleblowers* who still remain far more vulnerable than they should in law and in practice around the world.

We submit that introducing such a clause would seriously undermine the important steps you are taking to ensure the Protected Disclosures Act is a more effective anti-corruption and good governance mechanism. It sends a signal throughout Africa, and to countries just embarking on such legislation around the world, that is both counterproductive and potentially harmful. We state this from the perspective of our collective legal and practical experience of over 40 years and our knowledge of developments globally in the field of public interest whistleblowing.

We note that the current legal position in South Africa is that a person deliberately making a false disclosure:

- a. does not attract the protection of the Act, and is liable for dismissal and other workplace sanctions;
- b. may be found guilty of fraud, for which criminal sanctions apply, if their false disclosures result in them receiving a benefit;
- c. will, depending on the substance of the disclosure and its impact, be liable for defamation;
- d. may be charged with *crimen iniuria*.

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<sup>2</sup> “Our data shows that, generally speaking frauds that are detected through **active** [emphasis added] methods tend to be caught sooner and cause smaller losses than frauds that are detected passively.... Thus, organisations might be able to reduce the duration and cost of fraud by implementing controls or process that will increase the likelihood of active detection...” Association of Certified Fraud Examiners (2016) *Report to the Nations on Occupational Fraud and Abuse: 2016 Global Fraud Survey*, p. 25

This shows that the grounds to prosecute someone who deliberately discloses false information exist already in South African law. We submit that the need to introduce a new offence is not necessary and counterproductive.

## International Best Practice

A number of international conventions and legal instruments deal with whistleblowing in the international context, including the recent Council of Europe's Recommendation adopted in 2014. None specifically recommend including a criminal offence for false reporting within laws or procedures designed to encourage reporting and protect whistleblowers:

- United Nations Convention against Corruption (2003) ;
- OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation) (2009)
- OECD Recommendation on Improving Ethical Conduct in Public Service (1998)
- Council of Europe Civil and Criminal Law Conventions on Corruption (1999)
- Council of Europe Recommendation CM/Rec(2014)7 and Explanatory Memorandum (2014)
- Inter-American Convention against Corruption (1996)
- African Union Convention on Preventing and Combating Corruption (2001)

The United Nations Convention Against Corruption (UNCAC) (to which South Africa is a signatory) and its Technical Guide, focus on ensuring State Parties legally protect persons reporting a wide range of information including indices (ie. information indicating but not necessarily direct evidence) of corruption against detriment or reprisal.

Article 33 of UNCAC requires that:

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

We note that this provision takes the view that the system must provide protection for those who report in good faith (ie. honestly even if mistaken) and does not call for the criminalisation of false disclosures.

The UNODC Guide on Good Practices was published in 2015 to support State Parties in the implementation of the UNCAC articles as they relate to whistleblowing. It

reviewed and discussed whistleblower protection laws and mechanisms worldwide. The Guide does not identify as good practice nor recommend criminalising false reporting within whistleblower protection laws. Instead the Guide shows that most reforms to existing whistleblower mechanisms and new laws around the world are reducing barriers to protection and strengthening their implementation and range. For example, the Guide identifies the need to distinguish ‘good faith’ from ‘motive’ to clarify that having an ulterior motive or mistaken belief should not be a bar to protection. In 2013, the United Kingdom’s Public Interest Disclosure Act was amended to remove good faith.<sup>3</sup> (See also details on new protections against criminal liability in Ireland and Serbia later).

The 2015 Guide further states: “If, however, someone reports information that they know to be untrue, then clearly there should be safeguards, meaning that the individual would not be able to seek protection from the law and could be sanctioned if harm was caused.”<sup>4</sup>

South Africa is part of the G20 founded in 1999 with the aim of studying, reviewing, and promoting high-level discussion of policy issues pertaining to the promotion of international financial stability.

In the G20 position paper on *Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles For Legislation* they report that the criminalisation of “false disclosures” is a rarity in whistleblower protection laws.<sup>5</sup> Such criminalisation was excluded from best practice, with the G20 instead recommending that protection even be afforded to “...[false] disclosures that are made in honest error.”<sup>6</sup>

In the recent Recommendation on the Protection of Whistleblowers and Explanatory Memorandum<sup>7</sup> adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 it states:

Principle 10 concerns the rights of natural persons only, whether an employer or third party, who suffers loss or injury as a result of a report or disclosure. The normative framework should not take away their rights under general law (civil and

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<sup>3</sup> United Kingdom Public Interest Disclosure Act (1998) as amended by the Enterprise and Regulatory Reform Act (2013). Section 18 removes the requirement that a worker or employee must make a protected disclosure ‘in good faith’. Instead, tribunals have the power to reduce compensation by up to 25% for detriment or dismissal relating to a protected disclosure that was not made in good faith.

<sup>4</sup> See discussion on good faith and motives pp. 24 - 26 GUIDE

<sup>5</sup> OECD (2011), *Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, available at: <http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>, at 8.

<sup>6</sup> Ibid, p

<sup>7</sup> Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>  
Council of Europe (2014) Explanatory Memorandum to the Recommendation on the Protection of Whistleblowers. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=2170183&Site=CM>

administrative) in cases where the report or disclosure contains inaccurate or misleading information.<sup>8</sup>

Principle 12 affirms that that anyone prejudiced by a disclosure should be able to assert their rights via general law which, we submit, is currently the case under South African law. Further, Principle 23 recommends that should a whistleblower be subject to criminal or civil actions for their disclosures, they should be able to rely on the fact that they acted in accordance with the national legal and normative framework.

No provisions are included in the Recommendation for the criminalization of false disclosures. Instead we submit the thrust of the Council of Europe's 2014 Recommendation is to promote public interest whistleblowing as a matter of open and accountable governance by strengthening the protection of whistleblowers.<sup>9</sup>

Article 5 of the African Union African Union Convention on Preventing and Combating Corruption the convention says that countries should

Adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.

As set out earlier in this submission, we understand such legislative measures are already in place within South Africa's legislative framework: individuals who make false reports are liable for dismissal and other workplace sanctions; they can be prosecuted for fraud should a false disclosure benefit them; and they may be liable for defamation.

The OECD Convention on Bribery of Foreign Public Officials in International Business Transactions is an anti-corruption convention which provides a "framework for developed countries to work in a co-ordinated manner to criminalise the bribery of foreign public officials in international business transactions".

South Africa has ratified the Convention which has been in force since August 2007. In terms of the Convention a further set of "Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions

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<sup>8</sup> See Explanatory Memorandum, para.56.p. 30.

<sup>9</sup> Principle 10 states that "Any person who is prejudiced, whether directly or indirectly, by the reporting or disclosure of inaccurate or misleading information should retail the remedies available to him or her under the rules of general law."

Principle 12 states that "The national framework should foster an environment that encourages reporting or disclosure in an open manner. Individuals should feel safe to freely raise public interest concerns."

Principle 22 states that "Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy."

Principle 23 states that "A whistleblower should be entitled to raise, in appropriate civil, criminal or administrative proceedings, the fact that the report or disclosure was made in accordance with the national framework"

was adopted by the Council on 26 November 2009 and is binding on all signatories to the OECD Convention.

Recommendation IX requires member countries to ensure that certain whistleblowing channels are in place and certain whistleblowers are protected. More specifically, member countries must ensure that:

1. Easily accessible channels are in place for reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities;
2. Appropriate measures are in place to facilitate reporting by public officials.....directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery ...;
3. 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.

No mention is made of criminal sanction for false disclosures.

The Southern African Development Community (SADC) Protocol against Corruption (“the SADC Protocol”) (2001) takes it lead from the AU Convention and locates whistleblowing as a key element within an effective anti-corruption framework. It recognises the negative impact of corruption in the public and private sectors on good governance, accountability and transparency. It commits member states, including South Africa, to create, maintain and strengthen systems for protecting individuals who, in good faith, report acts of corruption.

The Protected Disclosures Act and the laws of South Africa meet, if not surpass, the standards set by the SADC Protocol and the AU Convention.

The Council of Europe’s Criminal Law Convention on Corruption (ETS No. 173) requires that each Party adopt such measures as may be necessary to provide effective and appropriate protection for those who report criminal offences in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities. The Civil Law Convention on Corruption (ETS No. 174) includes a provision on the protection of public sector employees and the explanatory report on the convention states ‘corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong’. Neither Convention mentions criminalising false disclosures.

The Inter-American Convention against Corruption requires signatories to have systems for protecting public servants and private citizens who, in good faith, report

acts of corruption, including protecting their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.

In *Whistleblowing: International Standards and Developments* by David Banisar<sup>10</sup> a paper which, like the UNODC Guide 2015, reviewed whistleblower legislation from around the world and proposes standards that should be adopted by nations in their own legislation, the author says.

The law should protect whistleblowers that made a disclosure in good faith even if the information was not to the level of a protected disclosure. The law should not allow for the threat of criminal sanctions against whistleblowers that make false disclosures. In cases of deliberate falsehoods, allowing for normal sanctions such as loss of job should be sufficient.

Further, after an analysis of laws in a variety of jurisdictions measured against the UN Convention Against Corruption, Transparency International proposed that any formulation of a provision against false disclosures consistent with the Convention should only be drafted to reference civil and employment liabilities already in existence<sup>11</sup>.

## National Laws on the Protection of Whistleblowers

We estimate there to be anywhere between 30-35 dedicated whistleblower protection laws around the world<sup>12</sup> and as many as 60 sectoral provisions, and few of these criminalise intentionally false statements. International trends are instead towards strengthening whistleblower protections (see recent laws in Australia, Ireland and Serbia below) including providing immunities from civil and criminal suit, and ensuring the proper implementation of existing protections.

1. We have been provided with the Department of Justice document entitled “Note: Portfolio Committee: Protected Disclosures Amendment Bill, 2015”.

In that document the writer cites, among five national laws, section 29 of [Namibia’s Anti-Corruption Act, 2003](#) that provides that a person who knowingly provides false information to an authorised officer of the Anti-Corruption Commission, is guilty of an offence and is liable, among others, to five years

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<sup>10</sup>[https://www.researchgate.net/publication/228124587\\_Whistleblowing\\_International\\_Standards\\_and\\_Developments](https://www.researchgate.net/publication/228124587_Whistleblowing_International_Standards_and_Developments) Corruption And Transparency: Debating The Frontiers Between State, Market And Society Publisher: World Bank-Institute for Social Research, Editors: I. Sandoval, pp.64

<sup>11</sup> Transparency International (2013) *Whistleblower Protection and the UN Convention Against Corruption*. see para. 4.11 and 4.11; and Principle 9, page 25.

<sup>12</sup> Devine, T (2015) *International Best Practices For Whistleblower Policies* Government Accountability Project: USA



imprisonment. The Note also refers to Section 66 of [Kenya's Anti-Corruption and Economic Crimes Act](#) which prohibits and sanctions giving false evidence to the Anti-Corruption Commission.

Neither the Kenyan nor Namibian laws are whistleblowing statutes. These two examples confirm, as in most jurisdictions around the world including South Africa, it is a crime to lie to the government. These laws do not, we submit, support an argument that threatening criminal liability should be included in a remedial law providing workplace protections for those who raise concerns about institutional wrongdoing or negligence.

2. Korea's Anti-corruption and Civil Rights Commission protects and rewards whistleblowers who report corruption and oversees both the *Act on Corruption* and the *Act on the Protection of Public Interest Whistleblowers, 2011*. In the law which established in 2008 the Commission it states "a person who reports an act of corruption despite the fact that he or she knew that his/her report was false shall not be protected by this Act."<sup>13</sup> Again, this denies a whistleblower the protection of the law, but does not criminalise false reporting in the whistleblower protection statute which aims to encourage citizens to participate in the fight against corruption in that country.

In 2011, Korea adopted a new [Act on the Protection of Public Interest Whistleblowers](#) and an Enforcement Decree<sup>14</sup> to expand the scope of public interest disclosures and further strengthen the protection of whistleblowers. Under the whistleblower protection law disclosing information knowing it to be false or for the purpose of eliciting an illegal benefit (eg. demand for money or special privileges) is not deemed to fall within the definition of public interest whistleblowing under the Act.<sup>15</sup> Thus false reporting is not protected by the law.

3. India's [Whistleblowers Protection Act, 2011](#) was adopted by the Indian Parliament in 2014 but has not yet come into force. The law itself is very different from the South African model and unlike any other whistleblower statute of which we are aware. This is because its specific aim is

*to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion **against any public servant** and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against*

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<sup>13</sup> Article 57 of the Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption & Civil Rights Commission, 2008 (Korea)

<sup>14</sup> Enforcement Decree of the Act on the Protection of the Public Interest Whistleblowers (2011) (Korea)

<sup>15</sup> Article 2 (Definitions) 2 (a) (b), Act on the Protection of Public Interest Whistleblowers Act (No. 10472) (2011) (Korea).

*victimisation of the person making such complaint and for matters connected therewith and incidental thereto. [emphasis added]*

It therefore requires a whistleblower to identify an individual public servant who may be guilty of corruption or misuse of power. The law then goes on to provide that “any person who makes any disclosure mala fide and knowingly that it was incorrect or false or misleading” liable to imprisonment for a term of up to two years and a fine. This is the only whistleblowing statute referred to by the Department of Justice which appears to have criminalised false disclosures within the body of the law.

However, the Act is not in force yet despite being duly enacted by the Indian Parliament in 2014; and further proposed amendments would make whistleblowers liable for prosecution under the Official Secrets Act and for sedition. The stated purpose of the Indian law - to root out individual malfeasance within the public service - falls outside legal and international norms on whistleblowing protection. It is not a model on which any other legal framework to promote public interest whistleblowing and protect whistleblowers, including the South African Protected Disclosures Act, is based. Even if it were well taken, we submit that it is not a justification for South Africa to include a provision which threatens to jail whistleblowers through the law that aims to protect them.

4. In the United Kingdom, the [Public Interest Disclosure Act, 1998](#) (as amended 2013) regulates the protection of whistleblowers. The legislation protects a wide scope of public interest information, covers a wide range of workers and forms part of the UK’s employment law framework. It does not criminalise false disclosures.
5. The New Zealand [Protected Disclosures Act](#) does not include criminal sanctions against whistleblowers. It simply excludes from the protection of the law those who make intentionally false disclosures. Section 20 of the Act reads, “The protections conferred by this Act and by [section 66\(1\)\(a\)](#) of the Human Rights Act 1993 do not apply where the person who makes a disclosure of information makes an allegation known to that person to be false or otherwise acts in bad faith.”
6. Australia recently passed a federal [Public Interest Disclosures Act, 2013](#). Section 10 provides immunity from any civil, criminal or administrative liability (including disciplinary action) for individuals making a public interest disclosures but clarifies that this does not extend to those who knowingly make false disclosures. The law does not criminalise intentionally false disclosures.

7. In Ireland the Minister of Public Expenditure and Reform responsible for the introduction of a comprehensive law to protect whistleblowers adopted in 2014 - [Protected Disclosures Act](#) - decided not to include a criminal offence for false disclosures not only because it was unnecessary but because of its potential to have a serious chilling effect.

According to an exchange between TI Ireland and the Assistant Secretary in the responsible Department, the Minister took account of international evidence, including best practice and OECD guidelines (G20), as well as the experience of whistleblowing in Ireland. He determined that, notwithstanding the fact that a deliberately false disclosure would not be protected under the new law, any risk of criminal prosecution was very likely to discourage bone fide whistleblowers from raising concerns regarding wrongdoing in the workplace, thus defeating the primary aim of the legislation. No such provision was, therefore, included in the new legislation and the relevant sectoral provisions have been repealed.

8. The [Ghanaian law](#) specifically provides that the whistleblower is “not liable to civil or criminal proceedings in respect of the disclosure unless it is proved that that whistleblower knew that the information contained in the disclosure is false and the disclosure was made with malicious intent”. This does not criminalise false disclosures in the whistleblower statute but instead makes it clear that the law does not extend to those who make false disclosures.
9. Serbia has taken steps to renew its democracy and adopted the [Law to Protect Whistleblowers](#) at the end of 2014. The Act does not extend its protections to anyone it deems to have abused the law which under Article 11 includes disclosing information knowing it to be false or seeking illegal gain. It does not criminalise false reporting.

We, the undersigned, are very concerned that the attempt to include this provision constitutes a retrogressive step taken by the legislature against international best practice and convention. We would strongly recommend that the legislature removes this section as a demonstration of their commitment to protect public interest whistleblowers in South Africa, a commitment that the PDA was originally created to preserve.

We fully support the balance of the Bill which we believe will appropriately strengthen the right of South Africans to speak out against wrongdoing.

We thank the Committee for the opportunity to make these submissions and would be happy to supply any further information that the Committee might find helpful in its deliberations on this important matter.