CORRUPTION WATCH SUBMISSIONS TO

THE DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

IN RE

PROPOSED REFORMS

FOR WHISTLE-BLOWER PROTECTION

REGIME IN SOUTH AFRICA (DISCUSSION PAPER)

15 AUGUST 2023

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INTRODUCTION AND EXECUTIVE SUMMARY

1. Pursuant to the invitation of the Department of Justice and Constitutional Development (the Department) issued on 29 July 2023, Corruption Watch makes the following submissions and written comments on the Discussion document on proposed reforms to the whistle-blower protection regime in South Africa.

2. Corruption Watch is an anti-corruption non-profit organisation whose primary objective is to monitor and expose corruption, nepotism, and abuse of power and public funds in the public and private sectors.

3. Since Corruption Watch's inception in 2012, over 35 000 individuals have approached the organisation to report issues of corruption and misconduct. Countless more have turned to law enforcement agencies, Chapter 9 institutions, investigative institutions and more recently to commissions of inquiry. The recent escalation in the exposure of corruption in both public and private sectors has brought to the fore how inadequate the available legislative protections are for whistle-blowers. The gaps in the legal framework expose whistle-blowers to various forms of victimisation which have led to devastating consequences such as intimidation, financial loss and even death, all of which have often gone unpunished.

4. These demonstrations of bravery and courage by whistle-blowers must not be in vain. Corruption Watch believes that more needs to be done by civil society, government and the private sector to ensure that the policy, legislative and social environment is safe and conducive for whistle-blowing.

5. Corruption Watch welcomes the Department's decision to begin the important task of:

   5.1. Evaluating and addressing the shortcomings of the current legal regime;

   5.2. Seeking ways in which to strengthen the protection of whistle-blowers; and

   5.3. Addressing the prevailing culture of whistle-blower victimisation and the concealment of corruption.

6. Corruption Watch's research and experience shows that the South African public are eager to see real consequences and accountability arising from whistle-blower reports.

7. These submissions are structured as follows:

   7.1. In Part One we will provide additional context to the whistle-blower regime in South Africa;

   7.2. In Part Two we will set out our comments on the proposed amendments to the current legislation, as well as additional areas that Corruption Watch believes should be addressed.

PART ONE: THE CURRENT WHISTLE-BLOWER REGIME IN SOUTH AFRICA

CORRUPTION WATCH'S EXPERIENCE

8. As a social justice organisation actively pursuing a corruption-free society, Corruption Watch relies on the brave testimony and valuable evidence provided by whistle-blowers to inform our various interventions.

9. Whistle-blowers have repeatedly told Corruption Watch about the threats – such as harassment, intimidation, violence, and in extreme cases, loss of life – that they face to their lives and livelihoods as a result of their disclosures.

10. More recently, the violent killing of senior health department official Babita Deokaran, and the decision taken by Athol Williams to flee the country due to threats made on his life, have drawn extensive public attention to the serious challenges and risks that whistle-blowers have to endure in their efforts to root out corruption.

11. In 2023, Corruption Watch received several reports from whistle-blowers who experienced severe retaliation after they made disclosures. Most of these reports have been made in confidence and cannot be shared in these submissions. However two important examples in the public domain bear noting:

11.1. Ms Zukiswa Potye, the erstwhile Chief Executive Officer of the Media Development and Diversity Agency was dismissed from her employment after making a number of disclosures to the Public Service Commission regarding the

concerning conduct of the board of the state-owned entity. Ms Potye suffered tremendous reputational and financial damage, the latter which is still ongoing.

11.2. Clinton van Niekerk, former Moti Group employee, was detained by authorities following the blowing of the whistle against his former employer. The intimidation and retaliation experienced by Van Niekerk and his family in relation to the disclosure was so severe in nature that he was forced to seek witness protection.

12. There needs to be a societal shift in the perception of whistle-blowing, so that it is framed in such a way that it is correctly understood as a noble civic duty and not an act of betrayal. This will ensure whistle-blower safety and create a more positive culture around whistle-blowing.

13. The Discussion Document addresses the domestic legislation and international treaties applicable to whistle-blower protection in South Africa.[1] Corruption Watch agrees that these various legislative provisions must be considered and taken into account when evaluating the whistle-blower regime as a whole.

14. Corruption Watch submits that the legislative regime put in place to facilitate protected disclosures and protect whistle-blowers has a direct bearing on the protection, promotion and fulfilment of constitutional rights, and the compliance with South Africa's international human rights obligations.

[1] Part A, A p7 - 27

PERCEPTIONS ON WHISTLE-BLOWING IN SOUTH AFRICA

15. During 2021 Corruption Watch conducted a study to understand the public's perceptions, behaviours and attitudes towards whistle-blowing. The report, "Daring to Act: Perceptions on Whistleblowing in South Africa" was published in December 2021. The report is attached to these submissions as Appendix 1.

16. Through an online survey, Corruption Watch sought to understand the public's trust in institutions, their knowledge about whistle-blowing and reporting channels, and their motivations to blow the whistle and expose wrongdoing. The survey also elicited the public's views on systemic improvements that need to be made to promote a culture of safety and protection, when disclosing information.

17. All in all, participants in this study have a positive disposition towards whistle-blowing for they mainly view it as a means to bring about justice when wrong has been done. This is despite the grave challenges experienced by whistle-blowers in South Africa. However, due to a lack of trust in politicians, much of the optimism appears to be attributed to the role played by non-governmental organisations, journalists and Chapter 9 instruments as opposed to institutions such as the South African Police Service and parliament. Subsequently, given the seriousness of the practice, the respondents have also indicated that a great deal more needs to be done by the government to improve the environment.

18. Some of the key findings of the survey include the following:

18.1. The majority of respondents understand whistle-blowing to be the disclosure of information to the public, media, persons of authority, or investigative agencies about any type of abuse of power or misconduct, in all sectors of society.

18.2. Respondents believe that whistle-blowing is important in order to (a) bring justice to a situation where there was wrongdoing or to the person who was wronged, and (b) to curb corruption and crime in South Africa.

18.3. Most respondents are only partially aware or not at all aware of the laws that protect whistle-blowers in the country.

18.4. A majority (58%) of participants noted that if they had to experience corruption, crime or any form of misconduct, in either the public or private sector, they would know where to report it.

18.5. In terms of whistle-blower reporting channels, most respondents are aware of the South African Police Service (71%), followed by Corruption Watch (63%), and Chapter 9 institutions such as the South African Human Rights Commission (48%) and the Public Protector (48%).

18.6. When respondents were asked about the institutions that they would trust with their disclosure, most respondents would approach civil society organisations with their complaints, followed by Chapter 9 bodies and the media.

18.7. The vast majority of participants (76%) noted that they would report corruption or misconduct in the future, if they had to experience it.

18.8. In terms of what would motivate people to report misconduct, the majority of respondents (73%) noted that their decision would be based on a desire to bring perpetrators to account, followed by a confidence that they would be protected by the law and provided with legal, financial and mental health support.

18.9. To improve whistle-blowing in South Africa, participants believe that the government should:

18.9.1. Establish a whistle-blowing institution/agency that can provide legal, financial and mental health support to individuals; and

18.9.2. Dedicate additional resources to law enforcement agencies to ensure that whistle-blower complaints are investigated thoroughly, and perpetrators are held accountable.

19. Based on these responses, Corruption Watch made the following recommendations:

19.1. The Protected Disclosures Act, 26 of 2000 ("the Act") needs to be further reviewed and amended – in particular, the definition of a whistle-blower should not be limited to individuals who are employees or workers but be expanded to anyone who has information about wrongdoing or misconduct. As such, with an expanded definition, anyone who has disclosed information about wrongdoing or misconduct is deserving of protection.

19.2. Implement and establish an agency, in line with proposals contained in the National Anti-Corruption Strategy, to advise and support whistle-blowers. This

mechanism should provide whistle-blowers with legal, financial and mental health support. It should also assess the security risks faced by whistle-blowers and make recommendations to law enforcement agencies on the necessary protection that is required.

19.3. Leading to the establishment of the above-mentioned agency, in the meantime, the South African government should allocate money from the Criminal Assets Recovery Account Fund towards financially supporting whistle-blowers who are seeking legal, security and mental health support.

19.4. Steps should be taken to ensure that individuals or institutions who are found guilty of intimidating or harassing whistle-blowers for their disclosures are criminally sanctioned, and/or are subject to paying personal fines towards a whistle-blower support fund, or organisations established to support whistle-blowers. Similarly, law enforcement agencies who are found to be derelict in their duty of protecting whistle-blowers should face penalties, and officials overseeing these matters should be held personally liable.

19.5. Serious conversations should be held, and consideration given to compensating whistle-blowers for their acts of public service; and

19.6. All sectors of society need to take responsibility for embarking on public awareness and education programs related to whistle-blowing, as well as actions that would de-stigmatise the act of making disclosures.

PART TWO: COMMENTS ON THE PROPOSED AMENDMENTS

20. In this Second Part, Corruption Watch provides the Department with views, and suggested amendments to the current whistle-blower regime, and responds with specific comments on the proposed amendments to the Protected Disclosures Act and related legislation set out in the Discussion Document.

21. Corruption Watch has noted the criticisms of current whistle-blower protection set out in Chapter Two of the Discussion Document as well as the recommendations for reform by certain civil society groups and policy makers in Chapter Three.

    21.1. Corruption Watch aligns itself with the deficiencies highlighted in the Zondo Commission Report, and those identified by the Deputy Public Protector Kholeka Galeka.

    21.2. Corruption Watch agrees with the challenges and recommended solutions contained in the report of Just Share,[2] the paper produced by the Active Citizen's Movement[3] and the submissions of the Platform to Protect whistle-blowers in Africa.[4]

22. Corruption Watch provides an analysis of the provisions and its own recommended amendments to the legislation to ensure the widest possible protection for whistle-blowers.

23. This Part is divided into the following themes:

[2] Para 2.10 of the Discussion Document.

[3] Para 2.11; and 3.4 of the Discussion Document.

[4] Para 2.12 – 2.13; and 3.5 of the Discussion Document

23.1. The expansion of the scope and application of the Act;

23.2. Obligations on a party receiving a protected disclosure;

23.3. Ensuring environments conducive for protected disclosures;

23.4. Accessing protection and support in the event of detrimental action;

23.5. The nature of protection and support offered by the state;

23.6. Promoting and encouraging whistle-blowing; and

23.7. Monitoring and evaluation.

SCOPE AND APPLICATION OF THE ACT

24. Corruption Watch supports the expansion of the application of the Protected Disclosures Act to include disclosures and detrimental consequences arising outside of an employer / employee relationship.

25. It appears from the Discussion Document that there is broad consensus that:

25.1. The protections offered by the Protected Disclosures Act should be afforded to any person who makes a protected disclosure (and not only employees or workers);

25.2. A protected disclosure should include the disclosure of information about wrongdoing of any person (and not only the conduct of an employer); and

25.3. The Protected Disclosures Act should protect a whistle-blower from any form of adverse or detrimental conduct arising as a consequence of a protected disclosure (and not only detrimental action within the context of the workplace).

26. The Department proposes:

26.1. Amending the definition of *"occupational detriment"* to include other kinds of retaliatory conduct outside of the workplace context;

26.2. Inserting a new definition of a *"discloser"*, and

26.3. Inserting a new definition of *"qualifying disclosure"*.

27. While Corruption Watch fully supports the Department's proposal to expand the scope of the legislation, it cautions against effecting these fundamental changes by amending the definitions within the current legislation.

27.1. The proposed changes go to the heart of the whistle-blower regime in South Africa and will fundamentally change the objectives and focus of the legislation. The objective to ensure the broadest possible protection for whistle-blowers should be a foundational principle of the legislation and the starting point for the drafting of any definitions. It is not a minor change to the legislated landscape, but a fundamental shift in approach.

27.2. In addition, the proposed amendments to the definitions would require a range of consequential amendments throughout the Act. For example, the wording in section 2 "Objects and Application of the Act" will require amendment to remove

reference to the employer/employee relationship and include the broader definitions.[5]

28. For these reasons, Corruption Watch would support the repeal of the Protected Disclosures Act to make way for a new piece of legislation to be titled "whistle-blower Protection Act". whistle-blowers have thus far operated largely in the shadows and have been stigmatised in South Africa, receiving little to no recognition for their courageous actions. In order to shift the public perception of whistle-blowers in South Africa, it is important to identify, at the outset and in the Act title, that whistle-blowers are the focus of the legislation.

29. This approach would provide greater flexibility to formulate a legislative framework specifically designed to accommodate persons beyond the employment relationship. It will also allow for the language and structure of the Act to be revisited to ensure both simplicity and effectiveness.

30. Notwithstanding this view, Corruption Watch makes the following submissions on the proposed amendments to certain definitions within the Protected Disclosures Act.

Expanding of the definition 'occupational detriment'

31. Corruption Watch supports the amendment of the definition of *'occupational detriment'* so that the protection offered by the Protected Disclosures Act is not restricted to adverse action that occurs in the workplace context or within the employer / employee relationship.

[5] The wording of section 3 should be amended to read: "*No person may be subjected to any detrimental action by another person, group of persons, juristic entity or organ of state on account, or partly on account, of having made a protected disclosure*."

32. The Department proposes that the definition of *'occupational detriment'* should be amended to include a broader range of retaliatory action such as discrimination, intimidation, loss or damage to property or interference with a business or livelihood.

33. In Corruption Watch's experience, whistle-blowing can take place outside the employer / employee relationship, and the retaliatory action against whistle-blowers can impact all spheres of their life, not only their employment or experience in the workplace.[6]

34. It is not clear from the Discussion Document whether the Department proposes including the list of conduct contained in definition of *'detrimental action'* to the conduct described in the current definition of *'occupational detriment'*. Corruption Watch submits that it is still necessary to have specific protections for instances where whistle-blowing occurs in the work environment.

    34.1. The broad descriptions of conduct in the new definition will certainly include the conduct described in subparagraphs (a) to (j) of the definition of *"occupational detriment".* However, more specific descriptions of detrimental conduct in the workplace would assist whistle-blowers to describe and identify detrimental conduct.

    34.2. Corruption Watch proposes that the new definition retains the conduct described in subparagraphs (a) to (j) from the definition of *"occupational detriment".*

[6] One example of legislation with a broad scope is the Australian, Victoria whistle-blowers Protection Act 2001, which provides for disclosures about improper conduct by a natural person who believes - on reasonable grounds - that a public officer or public body, is engaged or proposes to engage in improper conduct in their capacity as a public officer or public body; or has taken, is taking or proposes to take detrimental action in contravention of section 18 of the Act (section 5). In terms of the Act, a whistle-blower may make a disclosure, even if the whistle-blower cannot identify the person or body to whom or which the disclosure relates (section 28).

34.3. The definition could read in two parts:

34.3.1. "detrimental action",

34.3.1.1. In relation to an employee or worker means:

(a) - (j); and

34.3.1.2. In relation to any other person means:

(a) – (e).

35. Corruption Watch also proposes that the definition of *"detrimental action"* should include the following categories or descriptions of conduct:

(a) Harassment as defined in Protection from Harassment Act 17 of 2011;[7]

(b) Any action causing any mental, psychological, physical, reputational, or economic harm;

(c) Any action causing any loss or damage to property owned or frequently utilised by the whistle-blower;

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[7] *"harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know—*

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—
(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;
(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
(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
(b) amounts to sexual harassment of the complainant or a related person;

(d) The institution of civil proceedings or criminal prosecution against the whistle-blower, which a court finds to be frivolous, vexatious or an abuse of process;

(e) Any act or omission that directly or indirectly adversely affects the full and equal enjoyment of rights and freedoms as contemplated in the Constitution;

(f) Any interference with the whistle-blower's business or livelihood;

(g) The threat of any of the actions referred to above, by any person, organ of state or an institution.

36. Conduct described as *'discrimination'*:

36.1. Corruption Watch submits that clarity is required in respect of the proposed sub-section (a) that includes *'discrimination'* within the definition of detrimental action. Discrimination has a very particular meaning within the South African context and is linked to the prohibited grounds listed in section 9 of the Constitution and defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.[8] This may give rise to confusion, and legal difficulties as one attempts to bring a person's whistle-blower status within the expressly protected or analogous grounds upon which discrimination is prohibited.

[8] The definition of "discriminate" in PEPUDA is:

"discrimination" means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from,

any person on one or more of the prohibited grounds;

36.2. Corruption Watch proposes that the word *'discrimination'* be avoided, and replaced with a description of conduct that infringes equality including the equal enjoyment of constitutional rights. This achieves the same outcome as a prohibition on discrimination.

Expanding the definition of 'disclosure'

37. As the Department suggests, the broad definition of detrimental action will also require a change to the definition of "disclosure".

38. At present, a *'disclosure'* is defined as "*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*" that any of the following is occurring or is likely to occur: a criminal offence has been committed, that a person has failed to comply with a legal obligation, that a miscarriage of justice has occurred, that the health or safety of a person is being endangered, that the environment is being damaged or discrimination as contemplated in PEPUDA or the Employment Equity Act 1998 has occurred.

39. Corruption Watch proposes:

39.1. The definition should be amended to remove the requirement that the information to be disclosed related to the conduct of an employer, or an employee or worker of that employer. The information could therefore relate to wrongdoing or improper conduct of any person. This would align with the broader wording found in the

definition of *"qualifying disclosure"* in the United Kingdom's Public Interest Disclosure Act, 1998.[9]

39.2. The definition of 'disclosure' be amended to include the types of conduct identified in the definition of improper conduct adopted by Namibia in the whistle-blower Protection Act, 2017.[10] In particular the following sub-sections which provide that a disclosure would include information that shows or tends to show that:

"a person has … violated the rights and freedoms protected by Chapter 2 of the Constitution or is in the process of violating any of those rights or is likely to violate those rights;

A disciplinary offence has been committed;

In any institution, organisation, or entity there has been, there is or there is likely to be waste, misappropriation or mismanagement of resources in such a manner that the public interest has been, is being or is likely to be affected;

Expanding the definition of who is a 'discloser' / 'whistle-blower'

40. The Department recognises the need for a consequential amendment to broaden the definition of who a 'discloser' is.[11]

[9] Page 86, Discussion Document.

[10] Page 86 – 87, Discussion Document

[11] Page 86, Discussion Document.

41. Corruption Watch proposes that the term *'discloser'* is replaced with the term '*whistle-blower'*. This aligns with the objective of making the legislation more accessible to the public, centering it around whistle-blowers and shifting public perception of whistle-blowers.

42. Corruption Watch's definition of a 'whistle-blower' is:

> "A whistle-blower means a person who, in good faith, makes a protected disclosure."

43. Corruption Watch notes the Department's suggestion that the definition of 'discloser' or 'whistle-blower' exclude a person who discloses a particular type of information – for example information relating to national security. Corruption Watch does not support any carve outs to the definition of whistle-blower. The status of whistle-blower should be afforded to any person who makes a protected disclosure (as defined). It is more appropriate to place restrictions on the definition of a 'disclosure' or 'protected disclosure'.

Introduction of a definition of persons assisting or associating with a whistle-blower

44. Corruption Watch proposes that the legislation introduces a new term to describe people and institutions who provide support or assistance to a whistle-blower prior to and after the protected disclosure.

45. Corruption Watch submits that family members and those who assist whistle-blowers ought to be protected from detrimental action. In Corruption Watch's experience those who are close to whistle-blowers are frequently targeted, either simply on account of their association to the whistle-blower or on account of any assistance or encouragement provided to a whistle-blower. In order to create a healthy environment

for corruption and other improper conduct to be exposed, those connected to whistle-blowers must receive equal protection in order to ensure whistle-blowers are not isolated on account of their decision to expose.

The requirements for a disclosure to constitute a 'protected disclosure'

46. A person will only be afforded the protections under the Protected Disclosures Act if they have made a protected disclosure for the purposes of the Act.

47. Currently, the definition of a *'protected disclosure'* refers to a disclosure made to the bodies or individuals, and in accordance with the various criteria, described in sections 5 to 9 of the Protected Disclosures Act.

48. The Act applies different thresholds for a disclosure to be categorised as "protected" depending on the identity of the body or person receiving the information. The Labour Court in *Tshishonga*[12] summarised the situation, noting that–

> *"The tests are graduated proportionately to the risk of making disclosure. Thus, the lowest threshold is set for disclosures to a legal adviser. Higher standards have to be met once the disclosure goes beyond the employer. The most stringent requirements have to be met if the disclosure is made in public or to bodies that are not prescribed, for example the media."*

[12] *Tshishonga* v *Minister of Justice and Constitutional Development and Another* (2007) 28 ILJ 195 (LC) at para 198. (*Tshishonga*).

49. The current scheme is consistent with the approach in Canada, the United Kingdom and the United States of America, which encourages internal procedures and remedies to be exhausted before the information is disclosed to an external party.[13]

49.1. **Protected disclosure to employer:** When making a disclosure to an employer in terms of section 6 of the Protected Disclosures Act[14] the threshold requirement is that the disclosure is made "in good faith" and in accordance with any internal procedures.

49.2. When making a disclosure to a member of Cabinet, the threshold requirement is that the disclosure is made "in good faith".

49.3. **Protected disclosures to** designated bodies: Disclosures to the Public Protector and the Auditor-General include an additional requirement that the whistle-blower has "reasonable belief" that the information is "substantially true", and that the impropriety falls with the description of matters with which the body is ordinarily concerned.[15]

49.4. **General protected disclosures:** In circumstances where a disclosure is made to a third party, namely a party not prescribed in terms of sections 5, 6, 7 and 8, the Act creates additional qualifying requirements. Section 9 provides that in order to be protected the following is required.

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[13] *Tshishonga* at para 196.

[14] Section 6 of the Protected Disclosures Act governs protected disclosures to employers, and provides that, any disclosure made in good faith to (i) an employee's employer in accordance with any procedure prescribed, or authorised by the employee's employer for reporting, or remedying the impropriety concerned; or to (ii) the employer of the employee, where no procedure is contemplated, constitutes a protected disclosure.

[15] *Tshishonga* at para 196.

49.4.1. The disclosure must be made in good faith;

49.4.2. The discloser must reasonably believe that the information is substantially true;

49.4.3. The disclosure must not be made for the purpose of personal gain;

49.4.4. At least one of the conditions in section 9(2) applies, or in all the circumstances of the case it was reasonable to have made the disclosure.

49.5. The conditions in section 9(2) include that, at the time the employee who makes the disclosure has reason to believe that if he or she makes a disclosure to his or her employer that he or she will be subjected to an occupational detriment, or that the information will be concealed, or if the discloser has already made the disclosure to the employer or Chapter 9 body and no action was taken within a reasonable time; or if the impropriety is of an exceptional serious nature.

49.5.1. The Labour Court in *Anglorand Securities*[16] *observed* that section 9 creates an additional requirement of reasonableness.[17] The Court held that an employee must provide reasonable justification as to why the disclosure was made to a third party and could not have been dealt with internally by the employer. The Court then went on to quote *Tshishonga*–

"There should be reasonable steps to investigate the matter. The employer should be given a chance to explain or correct the situation. The

[16] *Smyth* v *Anglorand Securities Ltd* (JS 751/18) [2022] ZALCJHB 72. (Anglorand Securities).

[17] *Smyth* v *Anglorand Securities Ltd* (JS 751/18) [2022] ZALCJHB 72 at paras 65 - 66. (Anglorand Securities).

motivation for this approach is not to cover up wrongdoing, but because the internal remedy may be the most effective. Genuine engagement on the issues minimises the risks for both parties. An employee who refuses to engage runs the risk of not being able to show that his belief was reasonable. . .".

49.5.2. The facts before the Court in *Anglorand Securities* were that the whistle-blower had made the disclosure to an external third party and not to his employer. The Court found the whistle-blower had met the requirements imposed by section 9(2), because his disclosing letter expressly stated that he was concerned that his employer would cause him occupational detriment.[18]

49.5.3. This requirement, however, also has the potential to exclude certain disclosures from protection. This concern is illustrated by the comments of the Court in *Anglorand Securities* that the whistle-blower had reasonably made a disclosure, because the body to which the applicant had disclosed, was a–

"statutory body specifically tasked to monitor and enforce adherence to prescribed standards in the financial services industry in the interest of the public being serviced" and not to "a media house, journalist, internet blogger, or some or other third party pressure group or NPO pursuing a particular agenda".[19]

[18] *Anglorand Securities* at para 100.

[19] *Anglorand Securities* at para 105.

49.5.4. This comment by the Court suggests that the disclosure may have failed the 'reasonableness' inquiry if the whistle-blower had decided to approach a civil society organisation.

50. The expansion of the scope of whistle-blower protection to individuals outside of the workplace environment has consequences for this tiered scheme of requirements for qualifying disclosures.

50.1. Under the proposed expanded definitions, not all whistle-blowers would have an employer to whom a protected disclosure can or should preferably be made in the first instance.

50.2. In the non-employment context, a whistle-blower must rely on section 8 or 9 to ensure the disclosure qualifies as 'protected' under the Act. These whistle-blowers are not afforded the lower threshold disclosures permitted under section 6.

50.3. This means that the disclosure must be made to a Chapter 9 or prescribed organisation in good faith and the whistle-blower must reasonably believe that the information is substantially true (section 8(1)(ii)).

50.4. The whistle-blower will only be able to rely on section 9 in two circumstances: if they have made the disclosure to a Chapter 9 institution and there has been a failure to act within a reasonable period; or if the impropriety is of an exceptionally serious nature. Even after meeting these requirements, the whistle-blower will have to demonstrate that it was reasonable to make the disclosure.

51. These additional conditions create the unintended distinction and differentiation between an employee whistle-blower and a non-employee whistle-blower. While the employee whistle-blower, who makes a disclosure to their employer, is only required

to meet the low threshold of good faith, the non-employee whistle-blower is forced to meet a higher test in order to have their disclosure treated as protected. It is difficult to justify imposing these additional conditions on whistle-blowers who have no other option than to make the disclosure to the Chapter 9 institution or to another prescribed entity in terms of section 8.

52. Corruption Watch makes the following submissions in respect of the requirements for protected disclosures, and the definition of protected disclosure:

53. With respect to disclosures to employers and designated or prescribed bodies:

53.1. Corruption Watch proposes that the new legislation remove the 'tiered system' so that all whistle-blowers are subjected to the same threshold test for a 'protected disclosure' regardless of whether they make the disclosure to an employer, a Chapter 9 institution or a prescribed entity in terms of sections 6, 7, or 8 of the Act.

53.2. Corruption Watch submits that the appropriate standard is that disclosure is made in good faith and the whistle-blower reasonably believes that the information is substantially true. This standard must apply regardless of the identity of the receiver of the disclosure.

54. With respect to general protected disclosures:

54.1. Corruption Watch also proposes that the new legislation remove the 'gatekeeping' requirements and reasonableness test in section 9(1)(i) and (ii) which deny a whistle-blower protection unless they have first attempted to disclose to a Chapter 9 institution, or if the impropriety is of an exceptionally serious nature and require a whistle-blower to demonstrate that the disclosure was reasonable in the circumstances.

54.2. Corruption Watch submits that the appropriate standard is that the disclosure is made in good faith and the whistle-blower reasonably believes that the information is substantially true, and that the disclosure is made in the public interest and not for personal gain.

55. Corruption Watch advocates for this position for the reasons outlined below.

55.1. Firstly, Corruption Watch supports a simplification of the test for who qualifies for protection under the Act. The process should be accessible and should not place undue evidentiary burdens on a whistle-blower who seeks to obtain its protection. Applying the same standard regardless of the chosen recipient of the disclosure creates an environment which encourages whistle-blowers to come forward. This ultimately assists in exposing and rooting out corruption and other improper conduct.

55.2. Secondly, the legislation must be whistle-blower centric and place the decision of which is the most appropriate person/body to report the improper conduct in the hands of the whistle-blower concerned.

55.3. A whistle-blower will be best placed to assess their own personal risk and therefore determine which avenue would best ensure their safety. Corruption Watch supports the recommendations of Professor Richard Calland that a whistle-blower must be able to choose the safest option in the context of the facts of their situation.

55.4. It is critical that whistle-blowers have trust and confidence in the person or body to whom they make their disclosure. whistle-blowers will be less willing to make a disclosure if they feel that their identity will not be properly concealed, their confidentiality will not be maintained, or if they feel that the real risk which they

have taken will not result in any tangible consequences due to lack of capacity, inefficiencies or lack of will, on the part of the relevant body.

55.5. A whistle-blower may feel more comfortable disclosing improper conduct to non-profit organisations, such as Corruption Watch[20], or investigative journalists, such as AmaBhungane[21], with a demonstrated track record of protecting its sources and exposing improper conduct in an effective manner.

56. The European Commission notes that:

> *"(46) whistle-blowers are, in particular, important sources for investigative journalists. Providing effective protection to whistle-blowers from retaliation increases legal certainty for potential whistle-blowers and thereby encourages whistle-blowing also through the media. In this respect, protection of whistle-blowers as journalistic sources is crucial for safeguarding the 'watchdog' role of investigative journalism in democratic societies."*[22]

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[20] The role of investigative journalists in uncovering corruption was recognized by President Ramaphosa in the Commission's part 6, vol 6, para 198.

AmaBhungane received a confidential hard drive in 2017 with 100 000 – 200 000 emails and documents which related to the business enterprises of the Gupta family which later became known as the 'Gupta Leaks' which were relied upon in the Commission of enquiry into State Capture chaired by Deputy Chief Zondo.

AmaBhungane received confidential information which led to the exposure of corrupt activities involving McKinsey and Trillian, owned by Mr Salim Essa and Eskom in 2017 and reported on the same, bringing the activities to the public's attention.

Investigative journalists were also credited with receiving unique and confidential information and reporting on corrupt activity in Bosasa (2009), Regiments Capital Partners (2018), VBS Mutual Bank (2018), the Public Investment Corporation, Cum-ex, Steinhoff and the Moti Group (2023).

[21] *Mazetti Management Services (Pty) Ltd and another* v *Amabhungane Centre for Investigative Journalism* unreported case no 2023-050131 of 03 July 2023.

[22] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law at para 46.

56.1. Thirdly, employers and other bodies who seek to encourage internal reporting before external reporting may do so by creating an environment which is easy, efficient, effective and provides maximum protection to whistle-blowers.

56.2. Fourthly, once the disclosure is made public, the appropriate authorities will have an opportunity to take the necessary steps to investigate and act on the disclosure. An employer, Chapter 9 institution, or the SAPS will not be permanently deprived from receiving the information regarding the improper conduct, they simply may not be the first to receive it.

57. Corruption Watch's proposal regarding the media aligns with the relevant case law. One of the questions in *Tshishonga* was whether disclosures made to the media about impropriety in the workplace were protected under the Protected Disclosures Act. In finding that the disclosure to the media was protected, the Court *inter alia* stated that–

> *"[t]he media is one of the pillars that promote and uphold democracy [and that] [c]orruption undermines democracy, [therefore] the media's exposition of corruption is good for democracy, [in circumstances where] [w]histleblowers depend on the media and other organs of civil society to help level the playing fields as they are often lonely voices against powerful interests."*[23]

57.1. The Court went on to state that disclosures made to the media would not be justified if they were not in the public interest, which may be the case if confidentiality had to be maintained so that the complaints could be better investigated, or the employer protected until the suspicions were confirmed.[24] The

[23] *Tshishonga* at para 251.

[24] *Tshishonga* at para 253.

Court found that the disclosures were made in the public interest as they involved the public service and public officials and were therefore reasonable.[25]

OBLIGATION ON PARTY RECEIVING A PROTECTED DISCLOSURE

Creation of an offence not to act on a protected disclosure

58. The Protected Disclosures Act does not expressly impose a duty on the person to whom the disclosure is made to investigate such a disclosure, nor does the statute include the failure to investigate as a form of *'occupational detriment'.*

59. The Department believes that there is a need to hold institutions and individuals to account where they do not act on protected disclosures, and proposes to include an additional subsection to section 8, namely subsection (3), which provides that a person or body referred to in subsection (1), who does not act upon receipt of a disclosure made to him or her, commits an offence and is liable on conviction to imprisonment not exceeding 2 years or a fine not exceeding R2 million.

60. Corruption Watch supports this proposal subject to the caveat expressed in paragraphs below.

61. The Court in *Tshishonga* noted that the definition of *"protected disclosure"* does not require an employee to formally request the recipient of the disclosure to conduct an

[25] *Tshishonga* at para 262 and 263.

investigation and found that *"it was implicit in the act of reporting wrongdoing to such persons or bodies that an investigation must follow."*[26]

62. The Supreme Court of Appeal in *Engineering Council of SA*[27] noted that the purpose of the Protected Disclosures Act was to make provision for procedures in terms of which employees in both the private and the public sectors may disclose unlawful or irregular conduct by their employers or by other employees and to provide for the protection of employees who make such disclosures. The SCA went further to state that, even though it was argued that the purpose of the Protected Disclosures Act was to have the subject of the disclosure investigated, *"that was not the stated purpose of the Protected Disclosures Act",* and that instead the Protected Disclosures Act *"seeks to protect the employee who makes a protected disclosure from retribution from their employer in consequence of having made a protected disclosure"*.

63. The Court in *Tshishonga* noted that the Protected Disclosures Act assumes that employers and other recipients of information would investigate complaints, but it imposes no obligation on them to do so, and held that the trauma which a whistle-blower undergoes can come to naught if nothing is done to investigate the disclosures or act against the wrongdoers.[28]

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[26] *Tshishonga* at para 197.

[27] *City of Tshwane Metropolitan Municipality* v *Engineering Council of SA and Another* (2010) 31 ILJ 22 (SCA) at para 33. (*Engineering Council of SA*).

[28] *Tshishonga* at para175.

64. The Court went on to hold that, because the Protected Disclosures Act focused so narrowly on protecting whistle-blowers, it could fall short of producing the outcomes that satisfy its crime fighting aims.[29]

65. Corruption Watch makes the following submissions in respect of the proposed amendment:

66. The obligation "to act" must be clearly defined:

67. The proposed amendments[30] introduce consequences for a failure to "act" on receipt of a disclosure of improper conduct. However, no guidance is provided regarding what action would be sufficient to discharge the obligation and avoid sanction. The ambiguity will render enforcement challenging.

68. In these circumstances, Corruption Watch submits that the proposed amendment to the Protected Disclosures Act must be refined to introduce provisions that clarify what action is required by bodies and organisations, identified and prescribed to receive and evaluate disclosures of improper conduct.

69. By way of example, the new provisions must contemplate the taking of certain steps by the recipient of the disclosure, to address disclosures of improper conduct, including but not limited to performing an initial evaluation, conducting an investigation, referring the whistle-blower or information to an appropriate authority, instituting disciplinary proceedings or informing.

[29] *Tshishonga* at para 177.

[30] Page 91, Discussion Document.

70. In this regard, Corruption Watch submits that, when an organisation is mandated to receive protected disclosures, or when a civil society organisation volunteers to receive protected disclosures, each organisation (whether mandated or voluntary), in accordance with its capacity, must publish and make known those steps it intends and has the capacity to take, upon the receipt of a disclosure of improper conduct.

71. Corruption Watch wishes to raise a concern about the introduction of this offence if the provision is intended to apply to disclosures under section 9, or to organisations prescribed under section 8(1).

71.1. There are a number of civil society organisations who are likely to receive protected disclosures from members of the public, but which do not necessarily have the capacity or expertise to deal with all complaints at a level that would be considered appropriate. In certain circumstances, it may also be difficult for an organisation to provide the assistance referred to in section 8(2) of the Act. These organisations should not be faced with the sanctions envisaged by the proposed amendments.

71.2. Corruption Watch proposes a mechanism where identified organisations, who have expressly stated that they do not have the capacity to investigate disclosures, may receive protected disclosures under section 9, or under section 8(1) (if prescribed) but where their obligation to “act” is limited to the obligation to refer the whistle-blower, or the protected disclosures to relevant/ accountable body/ institution. It may therefore be necessary to distinguish between the obligations imposed on different categories of organisations / bodies.

72. Corruption Watch therefore supports the inclusion of an obligation to be placed on mandated organisations or voluntary organisations to take certain steps, upon the

receipt of a disclosure of improper conduct from whistle-blower, and the creation of an offence and imposed sanction should the obligation not be fulfilled. However, further consideration must be given to the exact nature of this obligation, and exceptions required for civil society organisations and other stakeholders with limited resources.

Obligation to keep protected disclosures confidential

73. The Department proposes that there be an inclusion of improved measures to keep a protected disclosure confidential where information may identify the discloser, save for in instances where, amongst others, (i) the discloser consents to the release of the identifying information, (ii) there are reasonable grounds to believe that the release of the identifying information is essential for the effective investigation of the protected disclosure, and (iii) to prevent a serious risk to public health, public safety, the health or safety of an individual, or the environment. The proposed wording by the Department includes that *"[e]very receiver of a protected disclosure must use their best endeavours to keep confidential information that might identify the disclosure".*

74. Corruption Watch agrees that the preservation of confidentiality is crucial for the adequate protection of whistle-blowers.

74.1. In terms of the South African Law Reform Commission's Protected Disclosures Discussion Paper,

"*[c]onfidentiality is a minimum requirement of any legislation that aims to protect whistle-blowers. It is a first line of protection, and it will increase the trust in the*

whistle-blowing system. Guaranteeing confidentiality will also incidentally help reduce anonymous disclosures."[31]

74.2. The Judicial Commission of Inquiry into State Capture Report highlighted the importance of implementing a central electronic reporting system that protects anonymity, allows for clarifying questions, and guarantees confidentiality.

74.3. The New Zealand Protected Disclosures Act, 2000, provides three main protections in respect of protected disclosures, including confidentiality, where the person receiving the disclosure "must use his or her best endeavours" to keep confidential the identity of the disclosing party, except in special circumstances. This protection is not extended in instances where the disclosure is falsely made or made in bad faith.

74.4. In Australia, the New South Wales Protected Disclosure Act on the other hand, provides an even higher protection, by providing that the identity of the whistle-blower making a disclosure must be kept confidential, and that the documents relating to a protected disclosure cannot be released under a Freedom of Information Act request. The South African Law Reform Commission noted that the reason why the New South Wales Protected Disclosure Act provided for this kind of confidentiality was that *"the fewer people who know that one has made a protected disclosure, the less the likelihood of reprisals for making the disclosure."*[32]

31 https://www.justice.gov.za/salrc/dpapers/dp107.pdf

32 https://www.justice.gov.za/salrc/dpapers/dp107.pdf. at para 3.34.

75. Corruption Watch submits that the Protected Disclosures Act should include a duty of confidentiality on the receiver of the disclosure, which would limit the possibility of a whistle-blower suffering detrimental action.

76. Corruption Watch supports the proposed amendments, however:

77. Corruption Watch submits that proposed sub-section (b) should at the very least be limited to situations where there are reasonable grounds to believe that the release of the identifying information is essential to prevent serious risk to public health, public safety, the health or safety of any individual or the environment. Corruption Watch does not support a provision that permits disclosure of a whistle-blower's identity for broader, subjective reasons such as "the need to comply with the principles of natural justice" or the "need for an effective investigation of the disclosure". These grounds for disclosure are open to abuse.

77.1. The terminology must be peremptory, and the words *"best endeavours"* must be removed, as it leaves too much room for ambiguity and/or potential abuse;

77.2. The Act should provide for additional support and protection for instances where a whistle-blower's identity has been wrongfully disclosed;

77.3. It must be considered a sanctionable criminal offence to disclose the identity of a whistle-blower without their express consent.

Shorter time frames for the investigation of a protected disclosure

78. The Department proposes to amend section 3B (3) of the Protected Disclosures Act, which sets the maximum timeframe within which an investigation of a protected

disclosure must be conducted, to six months from the time the protected disclosure was made.

79. The Department proposes to amend the timeframe from six months to a maximum of three months, as shortened timeframes will give whistle-blowers confidence in the system, where decisions and feedback are expedited.

80. Corruption Watch supports this proposal.

ENSURING ENVIRONMENTS CONDUCIVE TO PROTECTED DISCLOSURES

Sanctions for individuals from discouraging a whistle-blower

81. The Department proposes that in order to increase protection to a whistle-blower, a new section be included to deter conduct aimed at discouraging whistle-blowing.

82. The proposed new section provides that any person who uses force, coercion, threats, intimidation or any other coercive means against another person, with the intent to prevent them from, or influence them to refrain from making a disclosure commits an offence and is liable on conviction to a fine not exceeding R5 million or to imprisonment for a period not exceeding 5 years, or to both a fine and imprisonment.

83. Corruption Watch supports this proposal but submits that the sentencing thresholds provided for should be increased for repeat offenders.

Prohibition of agreements that contract out of the Protected Disclosures Act

84. Section 2(3) of the Protected Disclosures Act makes void any provision in a contract of employment or in an agreement between an employer and employee, which purports to exclude any provision of the Protected Disclosures Act, including an agreement to refrain from instituting or continuing any proceedings under the Protected Disclosures Act or any proceedings for breach of contract.

85. The Department proposes the introduction of a new section providing that certain provisions seeking to undermine the whistle-blower protections will be unlawful.[33] This includes provisions contained in an agreement, contract, or internal procedure of an organisation that requires a person to (i) not disclose serious wrongdoing that is, or could be a protected disclosure, (ii) not to disclose information that could support, or relate to, a protected disclosure, (iii) to withdraw a protected disclosure, (iv) abandon a protected disclosure, or (v) make a disclosure of serious wrongdoing in a way that is inconsistent with the Protected Disclosures Act.

86. Corruption Watch supports this proposal.

86.1. Corruption Watch submits that the very existence of these kinds of clauses in contracts or policies reduces the likelihood of persons subject to the contracts or policies making protected disclosures. These clauses should not only be void and unenforceable but should be prohibited.

86.2. Moreover, there needs to be public education around the prohibition of the use of non-disclosure agreements that seek to compel silence.

[33] Concluding Remarks, page 100 (j), Discussion Document.

87. Clauses of this nature – often used to deter or stymie whistle-blowers - have been the subject of comment by the Courts and Law Reform Commission:

87.1. The South African Law Reform Commission found that a problem experienced in several jurisdictions, is that potential whistle-blowers are deterred from making disclosure by threats of defamation suits and/or "official secrets" suits.[34]

88. The Protected Disclosures Act 2014 of the Republic of Ireland includes a "no contracting-out of protections" clause, which states that any provision in an employment contract that prohibits or restricts the making of protected disclosures is void.

89. In this regard, the same reasoning applied by the courts and commissions above, can be used for the justification of the inclusion of a provision prohibiting any contracts or agreements from contracting out of the application of the Protected Disclosures Act, given that the constitutional values of openness and accountability serve the public interest.

90. The Act must protect a whistle-blower from criminal and disciplinary action for a breach of confidentiality.

Immunity for breach of confidentiality and non-disclosure clauses

91. In addition to the outright prohibition of contractual clauses or policies discouraging protected disclosures, Corruption Watch proposes that the statute offers an 'over-

[34] https://www.justice.gov.za/salrc/dpapers/dp107.pdf. at para 3.39.

ride' in respect of confidentiality and non-disclosure clauses, and a general immunity from civil or criminal liability.

92. The Protected Disclosures Act in its current form does not shield whistle-blowers from criminal and civil liability, particularly in the form of defamation suits and official secret suits. This kind of litigation is often used to intimidate potential whistle-blowers.

93. A whistle-blower may be forced to breach these kinds of clauses in order to blow the whistle on corruption and improprieties; and will face the risk of legal action for breach of contract.

94. Section 9A excludes civil liability arising from the breach of another law, oath, contract practice or agreement that requires confidentiality or restricts disclosures. However, this protection only arises where the disclosure relates to a criminal offence or a "*substantial contravention of, or failure to comply with the law*".

95. This protection should be extended to all whistle-blowers regardless of the content of their disclosure. In circumstances where the employer wishes to enforce its contractual agreement, it must be required to (a) allege a breach of a contractual provision, (b) prove the breach, and (c) prove that its actions were lawful. The inclusion of robust protection for whistle-blowers may encourage more persons to blow the whistle. The employer should bear the onus of proving that there was a breach of the contractual provisions and that it acted lawfully.

96. Such a provision is provided for in the European Union (EU) whistle-blower Directive. Article 21(2) states that:

"Without prejudice to Article 3(2) and (3), where persons report information on breaches or make a public disclosure in accordance with this Directive they shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive."[35]

97. The New Zealand Protected Disclosures Act, 2000, provides three main protections in respect of disclosures, including a general immunity from civil or criminal proceedings, which might otherwise have resulted. The protection against civil and criminal proceedings ensures that–

". . . an employee who discloses information under the Act cannot be held liable in respect of that disclosure, whether civilly or criminally. Employers who pass the information on to the authorities are guaranteed the same immunity".[36]

98. According to the South African Law Reform Commission, this immunity was a considerable incentive to blow the whistle and is thought to be the most valuable protection the Act gives.[37]

99. This approach has been endorsed by the Courts. Although it is true that employees have to act in the employer's best interest, observe its right to confidentiality, be

[35] Directive (EU) 2019/1937 Of The European Parliament And Of The Council Of 23 October 2019 on the protection of persons who report breaches of Union law Found here

[36] Lawlink:Whistle-blowers at Work (July 2001), available online at http://www.lawlink.co.nz/lawbiz/employment/shistle.asp .

[37] https://www.justice.gov.za/salrc/dpapers/dp107.pdf. at para 3.20.

loyal and preserve its viability, good name and reputation, the Court in *Tshishonga* held that the obligation to act in the employer's best interest, observe its right to confidentiality, be loyal and preserve its viability, good name and reputation are obligations that:

> *"… are owed to the employer as an organisation and to the state as the employer in the case of public servants, [and] that it did not attach to individuals …. The duty of confidence and loyalty to the employer is not absolute that it can protect an employer or other employees who act wrongfully."*[38]

100. The Labour Appeal Court in *Potgieter*[39] noted that, the fact that the information constituting a protected disclosure may be sensitive to an employer or possibly expose an employer to potential reputational harm, could not be used to deny an employee from protection in terms of the Protected Disclosures Act, and held that–

> *"While due regard must be paid to the reputational damage that an organisation may suffer as a result of disclosure of adverse information which is prejudicial to its commercial interests, I am of the view that a finding that the mere disclosure of sensitive information renders the employment relationship intolerable would, . . . seriously erode the very protection that the abovementioned legal framework seeks to grant to whistle-blowers. . . .".*

101. The Court in *Tshishonga* continued–

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[38] *Tshishonga* at para 171.

[39] *Potgieter v Tubatse Ferrochrome and Others* (2014) 35 ILJ 2419 (LAC) at para 31 *(Potgieter).* See also *State Information Technology Agency (Pty) Ltd v Sekgobela* (2012) 33 ILJ 2374 (LAC) at para 31*(SITA*), where the Labour Appeal Court found that the legitimacy of any disclosures did not depend on how it was treated by whoever it was made to.

"To manage the conflict between the duty to disclose and the duty of confidence, employers must make available effective internal procedures for reporting wrongdoing [and] ensur[e] that its policy on the management of confidential information is clear and consistently applied."[40]

101.1. In *Anglorand Securities,*[41] an employee made a protected disclosure to the Financial Services Board, and as a consequence thereof, was dismissed following a disciplinary hearing. One of the charges laid against the employee was that he had *"vindictively and maliciously made a protected disclosure to the detriment of the company and the Group and to shareholders, which disclosure [was] without merit".* In recommending the dismissal of the employee, the Chairperson of the disciplinary panel found that the employee, as a senior staff member, was aware of the company Code of Conduct and Ethics, and ought to have avoided what ultimately brought irreparable damage to the Company's reputation, by bringing it into the public domain.

101.2. On review, the High Court held that even in circumstances where the disclosure may destroy or has destroyed the relationship of trust with the employee, it did not render the conduct of the employee in making the disclosure unreasonable. The Court held that that consequence was undoubtedly most often the case, where information concerning impropriety by an employer, was brought out into the open by one of its employees. It went on to hold that, such a consequence could not warrant the stripping of the protection from the disclosure, simply because of what the employer perceived

40 *Tshishonga* at para 173.

41 *Smyth* v *Anglorand Securities Ltd* (JS 751/18) [2022] ZALCJHB 72 at paras 131 and 133. (Anglorand Securities).

it caused to the trust relationship, as it would undermine the very purpose the Protected Disclosures Act was designed to achieve.[42]

101.3. In *Tshishonga* the Court held that disclosures of wrongdoing cannot be a breach of confidence, and the defence that an employee breached confidentiality has to be approached with caution, so that it does not strip the Protected Disclosures Act of its content. The Court went on to state that the enquiry was confined to breach of confidence to third parties, such as the media, which must also be assessed against the countervailing forces of openness and accountability.[43]

101.4. The Court therefore found that the whistle-blower, a senior public servant, had a statutory obligation to disclose criminal and any other irregular conduct and to report to the authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest, as he would not have been able to do his job effectively by turning a blind eye to what he reasonably believed were improprieties. [44]

102. To this end, Corruption Watch proposes that a provision, which mirrors Article 21(2) of the European Union whistle-blower Directive, be included in the Protected Disclosures Act, to read as–

"where a person makes a disclosure of wrongdoing or makes a protected disclosure in accordance with this Act, he or she shall not be considered to have

[42] *Anglorand Securities* at para 111.

[43] *Tshishonga* at para 197.

[44] *Tshishonga* at paras 268 – 269.

breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a disclosure on wrongdoing or protected disclosure, provided that he or she had reasonable grounds to believe that the disclosure on wrongdoing or protected disclosure of such information was necessary for revealing improper conduct or wrongdoing pursuant to this Act."

The appointment of 'whistle-blower champion'

103. The Department proposes the inclusion of a provision appointing an "ethics officer" who (i) is responsible for ensuring and overseeing the integrity, independence and effectiveness of the organisation's policies and procedures governing whistle-blowing, and (ii) implements and maintains appropriate and effective internal arrangements.

104. Corruption Watch supports this proposal.

104.1. Companies and organisations must standardise their internal whistle-blowing policies and bring them into alignment with international and domestic law.

104.2. Proper compliance of the 'ethics officer' would be required. This would entail appointing someone who is adequately qualified and rigorously vetted, so that the appointment is not reduced to a tick box exercise.

104.3. The ethics officer could receive disclosures but those would eventually need to be channeled through the formal complaints process.

104.4. The role and responsibilities of a proposed ethics officer could - in the context of private companies - (to prevent a duplication of resources) fall under the auspices of the Social and Ethics Committee (for those companies that are

required to have one). There are also certain government departments that have existing ethics officers - details of which are available from the Department of Public Service and Administration - these could be utilised so as to prevent a duplication of resources.

Mandatory whistle-blower policies for prescribed companies

105. Section 6(2) of the Protected Disclosures Act currently provides that every employer must authorise appropriate internal procedures for receiving and dealing with information about improprieties and to take reasonable steps to bring the internal procedures to the attention of every employee and worker.

106. Consequently, the Protected Disclosures Act goes beyond that of the EU Directive, but there are no provisions to ensure that employers comply with such legislation, there are no inspections by officials or submissions by employers to verify that such policies have been implemented.

107. The House for Whistle-blowers Act (Wet Huis voor klokkenluiders), 1 July 2016, in the Netherlands used to make it obligatory for companies employing 50 or more employees to establish an internal whistle-blowing policy. It has now transposed the EU Directives, which state that all private and public sector employers with 250 employees or more are required to implement a whistle-blowing system, while smaller organisations with between 50 and 249 employees have been given extra time to complete the process.[45]

108. Corruption Watch supports amendments and submits:

[45] Page 99, Discussion Document.

108.1. The Department should consider providing additional guidance for the content of such policies. This could be done by including a *pro forma* policy as a Schedule or Appendix to the Act, or by way of Regulation. This guidance can include (without limitation): the process of making the disclosure, the extent to which confidentiality will be ensured, to whom the disclosure has to be made, the timeframes to respond, guidelines for responding, guidelines for internal and external investigations, guidelines for secure escalation to the Commission and / or other appropriate law enforcement agency, mechanisms to prevent retaliation and the mechanisms to report retaliation.

108.2. The Act should provide for measures to ensure compliance from employers in this regard.

ACCESSING PROTECTION AND SUPPORT

Format of complaint

109. The Department proposes a new provision in the Protected Disclosures Act, which provides that a 'discloser', who has reasonable grounds for believing that detrimental action has been taken against them, may file a complaint in a prescribed form.[46]

110. Corruption Watch is concerned that this may limit the people who may seek to lodge a complaint, as this requirement to make a complaint in a prescribed form

[46] Page 92, Discussion Document.

may restrict the protected disclosures to the organisation that has authored the prescribed form.

111. In this regard, a prescribed form should be offered as one method of making a protected disclosure. It should not be mandatory.

Time Bar provision

112. The Department proposes a new provision that provides that a complaint regarding detrimental action is filed no later than 60 days from the day on which the complainant knew, or in the Commission's opinion, ought to have known that the detrimental action was taken.[47]

113. Corruption Watch submits complaints regarding detrimental action be filed by no later than 180 days from the day on which the complainant knew, or in the Commission's opinion, ought to have known that the detrimental action was taken. Corruption Watch submits that a hard time bar is not appropriate in this context and that provision be made for condonation applications to be filed, which will allow for the filing of late complaints in circumstances where a reasonable and acceptable explanation can be provided.

The SAHRC as the appropriate body to receive complaints

114. The Department proposes that the South African Human Rights Commission ("SAHRC") be the designated organisation to receive complaints of detrimental

[47] Page 92, Discussion Document.

action, to investigate the complaints, and to take decisions in respect of those complaints.

115. Corruption Watch supports the notion that whistle-blowing and whistle-blower protection is a human rights issue however considers the SAHRC as a designated organisation to be an interim measure until such time as an appropriate, tailored organisation be established to take over from the SAHRC once established and operational.

116. The SAHRC, should it assume interim responsibility, has the necessary powers, as regulated by national legislation, to perform these new functions, including the power to:

i. Investigate and report on the observance of human rights;

ii. Take steps to secure appropriate redress where human rights have been violated;

iii. Carry out research; and

iv. Educate.

117. As an appropriate interim measure, Corruption Watch does not believe that the SAHRC is ultimately the best suited designated organisation to deal with complaints of detrimental action for the following reasons:

117.1. SAHRC currently faces severe capacity constraints. The Chairperson of the SAHRC noted in his forward to the Annual Report that the Commission faces

"major human resources capacity challenge" as a result of the Commission's vast mandate and the need to ensure a presence and reach in all provinces.

117.2. The CEO noted that: "*The Commission [SAHRC] still operates under cost containment efforts that were made in previous financial years, through freezing of certain posts. This results in work being taken on beyond carrying capacity*."

117.3. In these circumstances, and in the absence of significant additional funding, it seems unlikely SAHRC would be in a position to effectively and efficiently carry out the important work assigned to it by the Act.

117.4. Further, investigating certain aspects of improper conduct may require specialist expertise, involving financial, legal, technology and accounting expertise. This is not the kind of expertise that the SAHRC currently requires for the performance of their current mandate.

117.5. It is also crucial that the institution mandated with receiving whistle-blower complaints is one with a reputation for acting expeditiously.

118. The SAHRC is already identified by the Protected Disclosures Act as a body required to receive protected disclosures. It is not desirable that the SAHRC be required to receive protected disclosures, and to deal with complaints of detrimental conduct arising from those protected disclosures.

119. The Department should consider whether the SAHRC will be required to administer the support to whistle-blowers detailed below, or whether whistle-blowers will be referred to another entity for this purpose. This would be another administratively intensive role for which the SAHRC may not be suitably capacitated.

120. Notwithstanding the above, Corruption Watch accepts that the designation of the SAHRC into this role may be a suitable interim position, provided adequate funding is made available. The SAHRC will however require immediate and urgent capacity building - in the form of financial allocation, human resources and technical training - to assume the additional mandate whilst it serves as the interim institution.

Longer term goal of independent whistle-blower tribunal

121. Corruption Watch proposes that in the long term an independent disclosure protection tribunal be established to fulfil the role of receiving and investigating complaints regarding detrimental action, facilitating redress for whistle-blowers, and administering state-funded support.

122. The effectiveness of a disclosure protection tribunal will depend on a range of factors, including the legal framework governing the tribunal, the independence of its members, and the degree of protection offered to whistle-blowers.

123. A good disclosure protection tribunal should have several features, which include:

123.1. Independence: the tribunal should be free from any influence or control by the government or other parties, so as to ensure that it makes fair and impartial decisions without fear of political interference or retaliation;

123.2. Expertise: the tribunal should be staffed by individuals with a thorough understanding of the law and the issues facing whistle-blowers, so as to ensure that the tribunal can make an informed and impartial decision. Retired judges heading the tribunal would be viewed as an advantage, given that they have

significant experience in legal matters and would be well equipped to deal with the protection of whistle-blowers.

123.3. Accessibility: the tribunal should be easily accessible to whistle-blowers, with procedures in place for filing complaints and receiving protection. The tribunal must afford complainants the option to make disclosures via written statement, camera, video testimony or whatever other reasonable alternative means that would assist in ensuring the safety of the whistle-blower. Such alternative means are commonplace in jurisdictions such as the USA, where they have been successfully applied.

123.4. Confidentiality: the tribunal must have strict procedures in place to ensure that the confidentiality of whistle-blowers and the protected disclosures are treated with paramount importance.

123.5. Remedies: the tribunal should have the power to provide effective remedies for whistle-blowers who have suffered retaliation or other negative consequences as a result of their disclosures, which may include ordering the reinstatement of the whistle-blower, an award of compensation, and the provision of other forms of relief.

123.6. Transparency: the tribunal should be transparent in its operations, providing for procedures for public access to information about its activities and decisions, which will promote accountability and public trust in the tribunal's work.

Procedure regarding the investigation of detrimental action

124. The Department has proposed the inclusion of a new provision governing the investigation of alleged detrimental action. This section provides that the SAHRC may refuse to deal with a complaint if it is of the opinion that (i) the subject matter of the complaint has been adequately dealt with or could be more appropriately dealt with by the judicial system, (ii) the complaint is beyond the jurisdiction of the SAHRC, or (iii) the complaint was not made in good faith.

125. Corruption Watch supports this proposal adding further that these reasons for exclusion must be given in writing.

126. Corruption Watch proposes that where a complaint could be more appropriately dealt with by the High Court, while a specialised court be created to hear matters that arise from detrimental action.

127. The Department proposes that an investigator must conduct a suitably qualified investigation into the complaint as informally and as expeditiously as possible and in the prescribed manner.

128. Corruption Watch is concerned about the proposed informality of the investigations to be conducted. Corruption Watch submits that investigations must be carried out as thoroughly as possible, and the inclusion of the phrase “prescribed manner”, in the Department’s proposed wording, suggests a level of formality.

129. The Department proposes that before commencing an investigation under this section, an investigator must *inter alia* notify the Director-General concerned or any other person against whom a complaint of detrimental action has been made and

inform the Director-General or that other person of the substance of the complaint to which the investigation relates.

129.1. Corruption Watch supports this proposal and would include the accounting officers (as defined in the PFMA) as well as all directors or chief executive officers of companies to bring the matter to their attention.

THE NATURE OF THE PROTECTION AND SUPPORT

Physical protection and security

130. The Department proposes to introduce a provision whereby the state will provide protection to whistle-blowers, together with their immediate family members in instances where their lives or property is endangered.

131. The Department proposes that the new provision will afford a whistle-blower the opportunity to request state protection and the state shall provide protection it considers adequate.

132. Corruption Watch supports this proposal, as family members of the whistle-blowers often also face harm and detrimental action.

132.1. More information is however required in respect of (i) how protection may be requested, (ii) where the protection would be offered, and (iii) which state institution would provide the protection.

132.2. It is important to draw on past experiences with the South African Police Services and the National Prosecuting Authority in respect of their witness protection programmes.

133. Section 11 of the Ugandan Whistle-blowers Protection Act states that state protection is available, upon request, to a whistle-blower who makes a disclosure and who has reasonable cause to believe that their life or property, or the life or property of a member of their family, is endangered or likely to be endangered as a result of the disclosure.

134. Ghana has similar provision in section 17 of its Whistle-blower Protection Act. This kind of intervention is much needed in South Africa, where retaliation against whistle-blowers has included murder, the death of the whistle-blower and/ or those close to them.

135. It is recommended that, in order to afford state protection to whistle-blowers, South Africa would need to domesticate certain aspects of the United Nations Convention Against Corruption,[48] which states, at Article 32(2):

> *"2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*
>
> *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*

[48] UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422.

testimony to be given through the use of communications technology such as video or other adequate means."[49] *(own emphasis)*

Inclusion of the definition of whistle-blower in the Witness Protection Act

136. The current regime of the Witness Protection Act does not cater to witnesses who are whistle-blowers – though the term '*witness*' should be broad enough to accommodate both. Nevertheless, to avoid ambiguity or any alternative interpretation, Corruption Watch recommends that the Witness Protection Act specifically includes a reference to whistle-blowers.

136.1. The Witness Protection Act does not contemplate whistle-blowers, even though the definition of a witness is broad enough to encompass whistle-blowers and their entitlement to protection.

136.2. The Department proposes that clarity in this regard will inspire confidence in potential whistle-blowers who require protection and that consideration be given to define who a witness is and who a whistle-blower is in the Witness Protection Act, in keeping up with universal standards.

136.3. Corruption Watch supports this proposal and supports the inclusion of the definition set out above.

[49] United Nations Convention Against Corruption Found here

Legal support

137. Whistle-blowers should have access to individual confidential advice, free of charge. The Netherlands, for example, put in place an Advice Department and an Investigations Department to counsel whistle-blowers and to investigate claims that are presented to them.[50]

138. Specifically, the Advice Department is tasked with informing, advising and supporting a whistle-blower in respect of the steps to be taken regarding their suspicion of wrongdoing, referring whistle-blowers to administrative bodies or services charged with investigating criminal offences where appropriate, and providing general information about dealing with a suspicion of wrongdoing. Thus, such a department would ensure that the whistle-blower is aware of the correct procedure and processes to follow to ensure that their claim is investigated and to ensure their safety.

139. The Canadian government does provide up to $3,000 for independent legal advice, but access to this limited amount is discretionary.[51]

140. While it may not be possible or practical for South Africa to provide free independent legal advice to all potential whistle-blowers, the government could create an online guideline outlining the process a whistle-blower should follow to ensure that their disclosure remains confidential, inform them of what their rights are, and what steps can be taken to ensure their protection.

[50] See The whistle-blower Authority Act, Netherlands 2016, AVT15/BZK116131, s 3(a), Found here

[51] See Office of the Public Sector Integrity Commissioner, “Support for Legal Advice”, online: Office of the Public Sector Integrity Commissioner Found here

Legal assistance and representation through Legal Aid Board

141. The Department proposes the inclusion of a new provision affording assistance for the legal representation of whistle-blowers who face detrimental action as a result of the protected disclosure.

142. The Department proposes that the new provision provides that, if the Minister is of the opinion that a whistle-blower is in need of legal assistance, in circumstances where legal proceedings have been instituted against the whistle-blower, the Minister must issue a certificate to the whistle-blower recommending that the Legal Aid Board consider granting the whistle-blower legal aid.

143. Corruption Watch supports this proposal, subject to the following considerations:

143.1. the Rules of the Legal Aid Board will have to be amended to remove earning thresholds in their entirety for matters of this nature. The earning thresholds are currently set at (i) a monthly limit of R8200 after tax, (ii) total value of house and belongings must not exceed R711 700.00, and (iii) total value of all belongings should not exceed R151 700.00 if the applicant does not own a house. The means test in respect of whistle-blowers would have to be removed;

143.2. Corruption Watch does not support a system that relies on ministerial discretion as this could have detrimental consequences in cases of a political nature.

143.3. Similarly, the terminology used in the proposed provision indicates that the Minister would make a recommendation instead of a directive to the Legal Aid Board. This suggests that the Legal Aid Board may be at liberty to refuse to provide the legal assistance; and

143.4. Corruption Watch recommends that any costs orders made following successful legal action be channelled back into the Legal Aid Board for further whistle-blower assistance.

Financial compensation

144. The Department proposes the inclusion of a provision creating a fund for whistle-blowers in order to assist those who have been dismissed and who face severe financial hardship in meeting their basic needs, including those of their dependents.

145. Corruption Watch supports this proposal in principle, as temporary relief is crucial for the protection of whistle-blowers.

145.1. There are concerns regarding the practical use and management of the proposed fund. Appropriate safeguarding of these funds will be required in order to prevent misuse.

145.2. Consideration must be given to different funding models for compensation.

145.3. Adequate protection of information and confidentiality regarding the provision of funding in terms of this fund will also be required.

146. The Discussion Paper addresses this and suggests the creation of a whistle-blower fund.[52]

147. Like that of the reward fund, this fund could be comprised of funds reclaimed following successful recoveries resulting from whistle-blower claims. However, it

[52] Page 99, Discussion Document.

will likely need to be supplemented by the state. It could also be funded from the same pool that covers witnesses under the Witness Protection Act.

148. This fund would cover costs related to protecting the whistle-blower, such as housing and living expenses where it is necessary for the whistle-blower to be relocated. Furthermore, it would provide assistance to whistle-blowers who become unemployed as a result of their disclosure. Such funds would be limited to the period for which they are necessary, being until the whistle-blower's safety is no longer at risk and/ or they are able to find alternative employment.

Facilitating redress against those who commit detrimental action - the reverse onus

149. The question of the burden of proof is not specifically governed by the Protected Disclosures Act, and the courts have interpreted it in the same way as it would in any other case relating to unfair dismissal.

150. Section 187(1)(h)(i) of the Labour Relations Act[53] *inter alia* provides that a dismissal is automatically unfair if the employer, in contravention of the Protected Disclosures Act, dismisses an employee for having made a protected disclosure, as defined in the Protected Disclosures Act.

151. The meaning of this section was explained in *SITA*[54], where the Labour Appeal Court stated that, in order for an employee to succeed in claiming that he was dismissed for making a disclosure, an evidentiary burden is placed on the employee to show that he had indeed made a disclosure, as defined in the Protected Disclosures Act,

[53] Labour Relations Act, 66 of 1995 (LRA).

[54] *SITA* at para 17.

which disclosure constituted the primary reason for his dismissal, and that in turn, the Court must satisfy itself that the disclosure falls within the confines of the Protected Disclosures Act. This is a question of fact, upon which a court must make a finding. Thereafter, the employer must discharge the burden of showing that the employee's dismissal was not unfair. The Labour Appeal Court continued that, *"evidence [therefore] plays a key role and a failure to produce any or sufficient evidence is a risky option to take"*.[55]

152. Corruption Watch submits that the onus placed on a whistle-blower to prove that a disclosure was made in terms of the Protected Disclosures Act, in the first leg of the inquiry, is too onerous on a whistle-blower. It is often possible for employers to conceal retaliatory action, in the form of disciplinary measures or dismissal, as justified – due to a breakdown of trust or disclosure of trade secrets – and thus, it can be difficult for whistle-blowers to prove otherwise, or even to access the evidence to do so (as the employer may have terminated their access to the employer's systems). The difficulty in proving causation between the disclosure and detrimental treatment contributes to low rates of success in whistle-blowing claims globally.[56]

153. The Department has acknowledged these issues and proposes including a new sub-section within section 3 of the Protected Disclosures Act, which provides that:

> *"Any conduct or threat contemplated in subsection (1) is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled*

[55] *SITA* at paras 18 and 32.

[56] See page 25 'Are Whistleblowing Laws Working? A Global Study of whistle-blower Protection Litigation?' (2021) Found here

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."

154. Corruption Watch supports this proposed amendment.

155. In the South African context, guidance can be sought from section 159 of the Companies Act 71 of 2008, which governs protection for whistle-blowers. Section 159(6) of the Companies Act expressly provides 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.

156. By comparison, in Norway, section 2 A-2(4) of the Working Environment Act, 2005, provides that–

"[t]he employer has the burden of proof to demonstrate that a whistle-blower has not followed proper procedure in violation of sections 2 A-1 and 2 A-2[57]."

157. While section 2 A-4 of the Working Environment Act, 2005 governs the prohibition against retaliation, with subsection (4) providing that–

[57] 2A-1 governs "the right to report issues of concern in the undertaking" and 2 A-2 governs "procedure in connection with reporting issues of concern.".

"[i]f an employee submits information that gives reason to believe that retaliation has taken place, the employer must substantiate that no such retaliation has taken place."

158. In respect of the European Union, the EU Whistleblowing Directive adopted in October 2019, recognises that action taken against whistle-blowers outside of the work-related context, through legal suits related to defamation, trade secrets, confidentiality can pose a serious deterrent to whistle-blowing. In this regard, introductory paragraph 28 of Directives provides that–

"the person initiating the [legal] proceedings should carry the burden of proving that the reporting person does not meet the conditions laid down by this Directive".[58]

159. While Article 21(5) of the Directive provides that–

"[i]n proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds."

160. Therefore, the EU Directive introduces a reversed burden of evidential proof, which is essential to ensure a 'fair fight.' The burden of proof may be reduced, as in the

[58] Protection of persons who report breaches of Union Law, EU Parliament Directive 2019/1937 (October 2019), L305/17 found at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937 at para 97.

case of Slovenia's Integrity and Prevention of Corruption Act, 2010, or shifted in favour of the employee, as in the case of the United States' Whistle-blower Protection Act, 1989 (Government of Slovenia, 2010; Government of the United States of America, 1989).

161. In India, Section 11(2) of the Whistle-blowers Protection Act provides for the burden of proof to lie on the public authority (Government of India, 2014)[59] which provides:

> *"If any person is being victimised or likely to be victimised on the ground that he had filed a complaint or made disclosure or rendered assistance in inquiry under this Act, he may file an application before the Competent Authority seeking redress in the matter, and such authority shall take such action, as deemed fit and may give suitable directions to the concerned public servant or the public authority, as the case may be, to protect such person from being victimised or avoid his victimisation: Provided that the Competent Authority shall, before giving any such direction to the public authority or public servant, give an opportunity of hearing to the complainant and the public authority or public servant, as the case may be: Provided further that in any such hearing, the burden of proof that the alleged action on the part of the public authority is not victimisation, shall lie on the public authority." (own emphasis)*

[59] Whistle Blower Protection Act of 2014, India Found here

PROMOTING AND ENCOURAGING A CULTURE OF WHISTLEBLOWING

Incentives

162. Section 9(1)(b) of the Protected Disclosures Act provides that a generally protected disclosure is any disclosure made in good faith by an employee *"who does not make the disclosure for the purposes of personal gain, excluding any reward payable in terms of any law".*

163. In dealing with the question whether an employee should make a disclosure as a *quid pro quo* for the promise of some benefit or reward, the Court in *Anglorand Securities* held that, an employee *"must not be in it for the money"* unless it is *"a legally prescribed benefit or reward".*[60]

164. Currently, the Protected Disclosures Act does not make provision for any reward for whistle-blowing.

165. Corruption Watch supports the introduction of a financial incentive for whistle-blowers to further encourage disclosures. This approach has been adopted in a number of jurisdictions:

165.1. In Namibia, whistle-blowers may be rewarded for their disclosures, in circumstances where a disclosure leads to an arrest and prosecution, or the recovery of money or property, by being given a percentage of the proceeds.

165.2. The position in Uganda is that section 17 of the Whistle-blower Protection Act, 2010, provides that a whistle-blower should be rewarded 5% of the net

[60] *Anglorand Securities* at para 68.

liquidated sum of money recovered consequent upon the recovery of the money based on the disclosure, and payment is made within six month of the recovery of the money.

165.3. While in Ghana, section 22 of the Whistle-blower Act, 2006 makes provision for a Fund to reward individuals who make the disclosures.

165.4. The United States' False Claims Act[61] (FCA) includes a qui tam provision that allows civilians who are not affiliated with the government to file actions on behalf of the government. The person filing under the FCA can expect to receive a portion of any recovered damages. Since its inception, the government has been able to recover more than $62 billion under the Act and 71% of the actions were filed by whistle-blowers. The reward for reporting the fraud ranges between 15-30% of the recovery received by the government.

166. It was also the recommendation of the Zondo Commission, which provided:

"Providing incentives for whistle-blowers to come forward, through the creation of a fund derived from the recovery of stolen monies."

167. In drawing from these African funding models, and recommendations of the Zondo Commission, Corruption Watch submits that the Protected Disclosures Act must make provision for the creation of a fund from which whistle-blowers may receive rewards, both financial and non-financial. Non-financial rewards could include, but are not limited to: public recognition, access to personal/ professional development

[61] 31 U.S.C. §§ 3729.

programmes, promotions and/ or additional training opportunities (in an employment context).

Civic awards and public education campaigns and in schools

168. The United States' Whistle-blower Protection Act of 2017 requires that employers regularly train employees on their rights and remedies, with separate training for managers on their responsibilities.[62] The existence of such programmes can be used as a mitigating factor when businesses are found to have flouted laws (have been involved in corruption).[63] This incentivises their existence where not coercive.

169. Such training is recommended in a South African context. Furthermore, training will ensure that both employees and employers are informed of their rights and responsibilities, as well as the processes, procedures and penalties involved.

EVALUATION

170. In Japan, their Whistle-blower Protection Act No. 122 of 2004 makes provision for its own evaluation, stating that 'approximately five years after this Act comes into force, the Government shall examine the state of enforcement of this Act and shall take necessary measures based upon those results.'[64]

171. Systematically collecting data and information is another means of evaluating the effectiveness of a whistle-blowing system. In the United States, for example, the

[62] Whistle-blower Protection Act of 2017; 5 U.S.C. § 2301 (Note). Found here

[63] The UK Bribery Act has a similar mitigating factor.

[64] The whistle-blower Protection Act Law no 122 of 2004 Found here

Merit Systems Protection Board has gathered information by conducting surveys with employees about their experiences as whistle-blowers. Such efforts play a key role in assessing the progress – or lack thereof – in implementing whistle-blower protection legislation.

172. We would recommend that South Africa conducts an independent review of the effectiveness of its whistle-blower policies on a five year interval basis, to ensure that the policies are implemented correctly and effectively; and to note where improvements can be made. Reviews are to be conducted by the Department of Planning, Monitoring and Evaluation, with reviews being tabled in Parliament.

CONCLUSION

173. Corruption Watch recognises the efforts and strides taken by the Department to ensure the improved protection of whistle-blowers in South Africa. Further, the broadened understanding of whistle-blowing is welcomed and it is encouraging that this courageous act will be understood as a human rights issue.

174. Corruption Watch appreciates the opportunity to make submissions on this important legislation and looks forward to further engagement with the Department in due course.

175. Corruption Watch thanks Advocate Frances Hobden, Advocate Natalie Chesi-Buthelezi and Norton Rose Fulbright for their assistance in preparing these submissions.


2021
DARING TO ACT
PERCEPTIONS ON WHISTLE-BLOWING IN SOUTH AFRICA
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LIMITATIONS

This study, conducted by Corruption Watch, sought to understand perceptions, attitudes and behaviours related to whistle-blowing in South Africa. Twenty questions were developed and administered through an online surveying instrument, with a total of 2 010 responses received over a two-month period. Due to the nature of the study and its methodology, these findings cannot be considered as a representative view of the South African population in its entirety.

SAMPLE

Some key factors to note with regards to the sampled group are:

- Of the total respondents, 52% identified as male, 47% identified as female and the remainder identified as non-binary or chose not to say.
- The majority of participants (38%) are between the ages of 18 and 35 years, with 23% between the ages of 36 and 50 years, and a further 23% aged 51-65 years.
- Most participants in this study identify as Black African (45%), followed by White (36%), Coloured (9%) and Indian (6%).
- In terms of provincial locations, 46% of respondents live in Gauteng, 19% in the Western Cape, 15% in KwaZulu-Natal and 6% in the Eastern Cape. The remaining 14% of participants are spread across Limpopo, Free State, Mpumalanga, North West, and the Northern Cape.
- Most people in the study have a post-graduate qualification and are considered as part of a middle-income group, and
- Though diverse, the group of participants is not statistically comparable with the social demographics data presented by Statistics South Africa.

A full breakdown of the population sample is available on request.

IN TIMES OF UNIVERSAL DECEIT, TELLING THE TRUTH IS A REVOLUTIONARY ACT

George Orwell

CONTENTS

FOREWORD

By Cynthia Stimpel
Former South African Airways treasurer

Whistle-blowing is a pro-social act that encourages, among other things, freedom in the sharing of information and the protection of human rights.

However, whistle-blowers often experience severe victimisation and retaliation in the workplace. They are treated as the pariahs of society, and often face such reprisals as threats by employers, harassment, character assassination, demotion, legal challenges, suspension and even dismissal. The majority of whistleblowers end up losing their jobs and subsequently face severe financial stress.

Reflecting on my own journey as a whistle-blower has not been easy as, I'm certain, many other whistle-blowers can attest. In one of the most horrible consequence of whistle-blowing in the history of our country, Babita Deokaran was shot several times and murdered on 23 August 2021. Her crime was speaking out on the alleged corruption involving the procurement of personal protective equipment at the Gauteng department of health in the wake of the Covid-19 pandemic.

More recently, Athol Williams, Author of *Deep Collusion*, and whistleblower against Bain and Company – a multi-national corporate accused in the capture of the South African Revenue Service – has had to flee South Africa for his own safety.

There are others who still feel unsafe and unprotected, and experience financial and mental health related issues as a result: Mosilo Mothepu, Bianca Goodson, Suzanne Daniels, Altu Sadie, Ian Erasmus, June Bellamy, Martha Ngoye, Tiro Holele, and many, many others.

Reviewing the results of Corruption Watch's recent survey as captured in Daring to Act, I can resonate with the keys findings. In my own experience as a whistleblower, I did not view myself as this "great hero". I only did my job to the best of my ability when I saw members of the executive and the board of directors of my organisation transgressing company policies and procedures.

My first instinct was to give guidance, and then I tried to stop it from happening at various levels of our company. This resulted in my victimisation through firstly being suspended, then being charged with misconduct, and thereafter through character assassination, which led to my leaving SAA.

The character assassination has become common reaction from senior management and perpetrators, used in both small companies and large corporates alike, and even public institutions such as schools. It makes it so much harder to defend oneself, as it is intended to undermine and discredit the whistle-blower, causing damage to their psyche.

Another element of society that plays a role in the negative publicity of whistle-blowers is the media by sensationalising their experience for the sake of headlines aimed at getting readers' attention.

I believe that the media should become more sensitive to the whistle-blower, do their investigations correctly and also encourage the principle of right of reply.

No-one wakes up and decides to become a whistle-blower. It is a process that takes time and much thinking and planning. In most cases the whistle-blower does not even know the correct steps to follow because there isn't a proper path defined in the ordinary world of work. Furthermore, the only piece of legislation meant to protect whistle-blowers, the Protected Disclosures Act, is severely deficient and needs to be enhanced.

Whistle-blowers tend to speak out against wrongdoing out of a sense of duty to the company or to their country. We all battle with our conscience, as we decide how, and when, and to whom to report fraud or corruption.

With this said, the rising levels of illegal and unethical conduct in both the public and private sectors in our country reinforces the imperative for organisations to take active steps against corruption.

These steps range from inculcating ethical values within and beyond the company, and in our country, to developing processes to safeguard against individual and organisational misconduct, and more importantly, taking action when irregular conduct is discovered.

It's in this context that organisations learn to understand that the detriment suffered by an individual who blows the whistle against corruption may go far beyond the financial impact and the loss of their job. The detail is in the personal risk they have taken, to stand up and to speak their truth. They stand to lose everything!

Studies on the mental health of whistle-blowers also show that retaliation can severely impact their emotional being, causing anxiety, depression, feelings of isolation, and symptoms of post-traumatic stress disorder[1].

In conclusion, I would like to recommend points taken from various surveys and studies by the Gordon Institute of Business Science[2] on what organisations can do to encourage whistle-blowing:

1. Prioritise and focus executive attention on actively building an ethical culture that welcomes whistleblowing
2. Actively involve non-executive members of boards
3. Prioritise organisational communication and training on whistle-blowing
4. Make it easy and safe to blow the whistle
5. Take steps to avoid whistle-blower abuse and retaliation;
6. Monitor and manage investigations
7. Take action against unethical conduct
8. Regularly communicate the outcomes of whistle-blowing management
9. Support NGOs dedicated to working with whistle-blowers
10. Honour and celebrate whistle-blowers

[1] Bjorkelo, 2013
[2] South African Whistle-blowers: Tribulations and Triumphs, 2021

EXECUTIVE SUMMARY

As a social justice organisation actively pursuing a corruption-free society, Corruption Watch relies on the brave testimony and valuable evidence provided by whistle-blowers to inform our various interventions. Whistle-blowers have repeatedly told Corruption Watch about the threats – such as harassment, intimidation, violence, and in extreme cases, loss of life – that they face to their lives and livelihoods as a result of their disclosures. More recently, the violent killing of senior health department official Babita Deokaran, and the decision taken by Athol Williams to flee the country due to threats made on his life, have drawn extensive public attention to the serious challenges and risks that whistle-blowers have to endure in their efforts to root out corruption.

It is in this light that Corruption Watch conducted a study to understand the public's perceptions, behaviours and attitudes towards whistle-blowing. Through an online survey, we sought to understand the public's trust in institutions, their knowledge about whistle-blowing and reporting channels, their motivations to blow the whistle and expose wrongdoing, and their views on systemic improvements that need to be made to promote a culture of safety and protection, when disclosing information.

Some of the key findings of the survey include the following:

1. The majority of respondents understand whistle-blowing to be the disclosure of information to the public, media, persons of authority, or investigative agencies about any type of abuse of power or misconduct, in all sectors of society.
2. Respondents believe that whistle-blowing is important in order to a) bring justice to a situation where there was wrongdoing or to the person who was wronged, and b) to curb corruption and crime in South Africa.
3. Most respondents are only partially aware or not at all aware of the laws that protect whistle-blowers in the country.
4. A majority (58%) of participants noted that if they had to experience corruption, crime or any form of misconduct, in either the public or private sector, they would know where to report it.
5. In terms of whistle-blower reporting channels, most respondents are aware of the South African Police Service (71%), followed by Corruption Watch (63%), and Chapter 9 institutions such as the South African Human Rights Commission (48%) and the Public Protector (48%).
6. When respondents were asked about the institutions that they would trust with their disclosure, most respondents would approach civil society organisations with their complaints, followed by Chapter 9 bodies and the media.
7. The vast majority of participants (76%) noted that they would report corruption or misconduct in the future, if they had to experience it.
8. In terms of what would motivate people to report misconduct, the majority of respondents (73%) noted that their decision would be based on a desire to bring perpetrators to account, followed by a confidence that they would be protected by the law and provided with legal, financial and mental health support.
9. Respondents believe that whistle-blowers are well-meaning persons intending to do good in society, and individuals who are deserving of financial rewards/ compensation for their disclosures.
10. In an effort to improve whistle-blowing in South Africa, participants believe that the government should:
    (a) Establish a whistle-blowing institution/agency that can provide legal, financial and mental health support to individuals. And;
    (b) Dedicate additional resources to law enforcement agencies to ensure that whistle-blower complaints are investigated thoroughly and perpetrators are held accountable.

All in all, participants in this study have a positive disposition towards whistle-blowing for they mainly view it as a means to bring about justice when wrong has been done. This is despite the grave challenges experienced by whistle-blowers in South Africa. However, due to a lack of trust in politicians, much of the optimism appears to be attributed to the role played by non-governmental organisations, journalists and Chapter 9 instruments as opposed to institutions such as the South African Police Service and parliament. Subsequently, given the seriousness of the practice, the respondents have also indicated that a great deal more needs to be done by government to improve the environment.

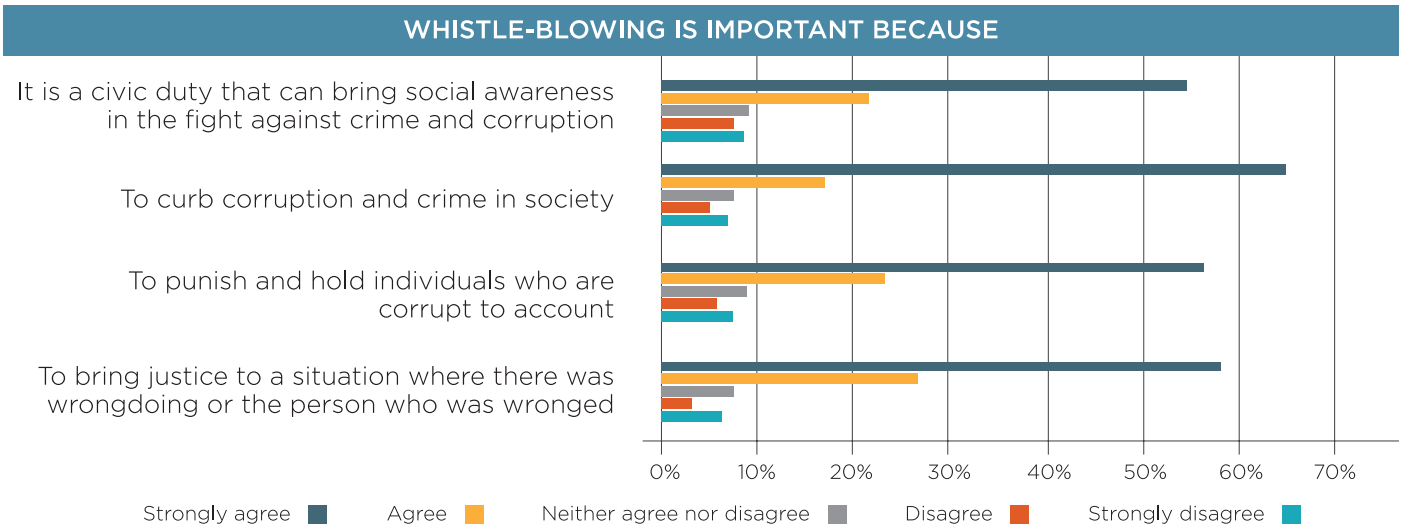
DEFINITIONS, PERCEPTIONS, AWARENESS AND TRUST

Asked to give a response to the question of what explanation was closest to their description of whistle-blowing, 70% of participants opted to say that it is 'reporting any form of wrongdoing' and 'disclosing information to the public, media, persons of authority, or investigative agencies about any type of abuse of power or misconduct, in all sectors of society'. The respondents' perspective goes beyond the official definition of a whistle-blower according to the Protected Disclosures Act[3], which defines a whistle-blower as an employee who, in good faith, discloses information that reveals illegal or irregular conduct by their employer to a regulatory authority or reporting mechanism. The views reflected by participants are largely in line with Transparency International's[4] official definition of a whistle-blower – someone who 'discloses information about corruption or other wrongdoing being committed in or by an organisation to individuals or entities believed to be able to effect action – the organisation itself, the relevant authorities, or the public'.

WHICH STATEMENT BELOW BEST DESCRIBES YOUR UNDERSTANDING OF WHISTLE-BLOWING?	
Reporting any form of wrongdoing.	31%
Disclosing information to the public, media, persons of authority, or investigative agencies about mismanagement and corruption in the public sector.	13%
Disclosing information to the public, media, persons of authority, or investigative agencies about any types of abuse of power or misconduct, in all sectors of society.	39%
Reporting any form of wrongdoing to a government or business hotline.	16%
Other.	1%

These interpretations are better understood when looking at why respondents deemed whistle-blowing as important. Almost 64% considered the act as a societal approach to reducing corruption and criminality. The second and third most important reasons pertain to the respondents' sense of justice and seeking accountability where there has been wrongdoing.

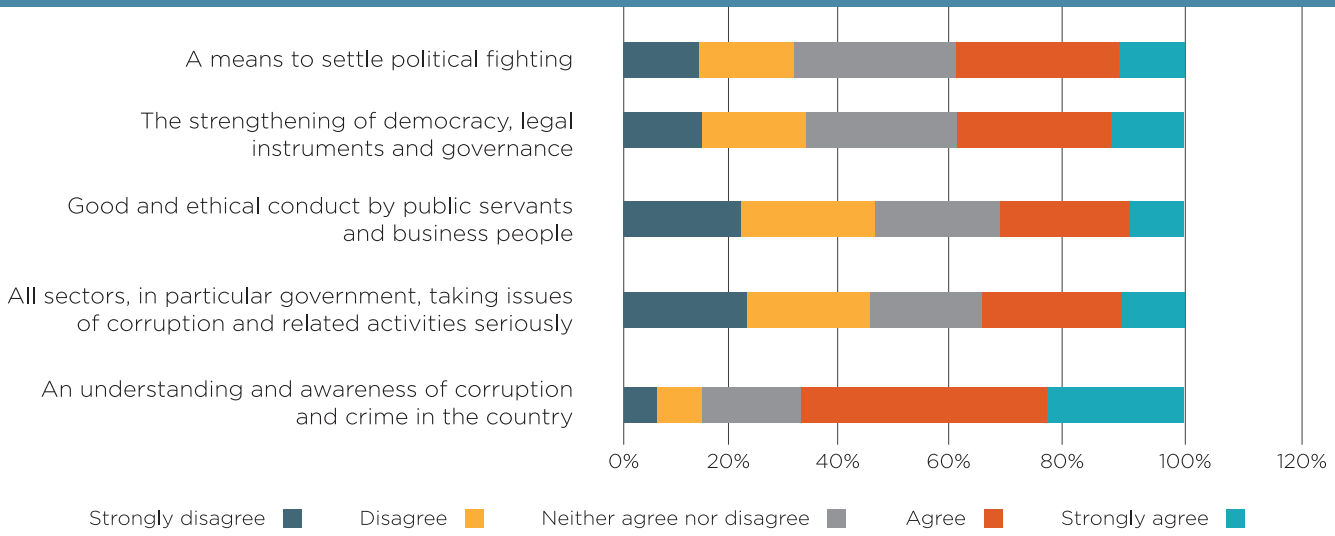
[3] https://www.gov.za/sites/default/files/gcis_document/201409/a26-000.pdf
[4] South African Whistle-blowers: Tribulations and Triumphs, 2021



When it comes to the acts taken by individuals to expose corruption and misconduct in South Africa, respondents in this survey agree that whistle-blowers have contributed to an understanding and awareness of how corruption and crime has manifested in the country. There is also a belief that whistle-blowing, in its various forms, has led to the strengthening of our democracy, legal instruments and governance.

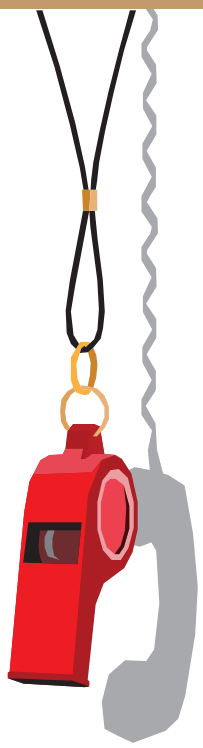
However, participants have also noted that despite the many individuals who have come forward with their disclosures, government in particular is still not taking serious steps to root out corruption, and there has been little to no impact in terms of motivating good and ethical conduct among public servants and the private sector.

WHISTLE-BLOWING IN SOUTH AFRICA HAS LED TO

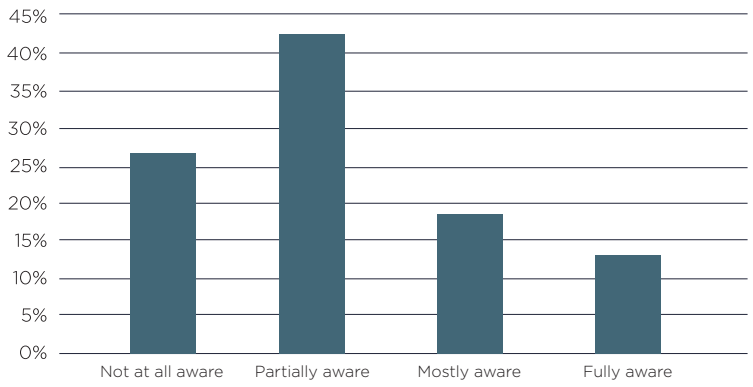


There is also a strong belief among respondents that whistle-blowers are well-meaning individuals, who are intending to do good in our society, and who are deserving of financial rewards and compensation for their disclosures.

PEOPLE WHO HAVE BLOWN THE WHISTLE ARE:	Weighted average (out of 5)
Well-meaning persons intending to do good in society	4,07
Protected in terms of the law and should not fear legal and/or financial consequences as a result of their disclosure	3,19
Recognised and respected for their public service	3,19
Individuals deserving of financial rewards/compensation for their public disclosure	3,36
People serving their own interests	2,7

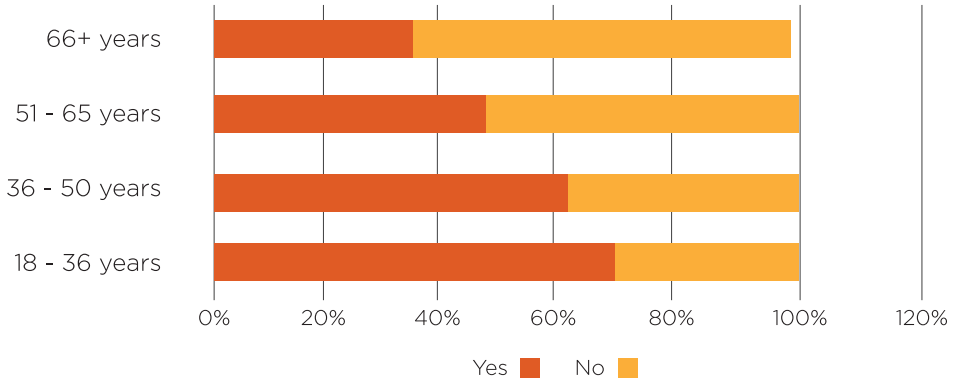


AWARENESS OF LAWS THAT PROTECT WHISTLE-BLOWERS IN SOUTH AFRICA



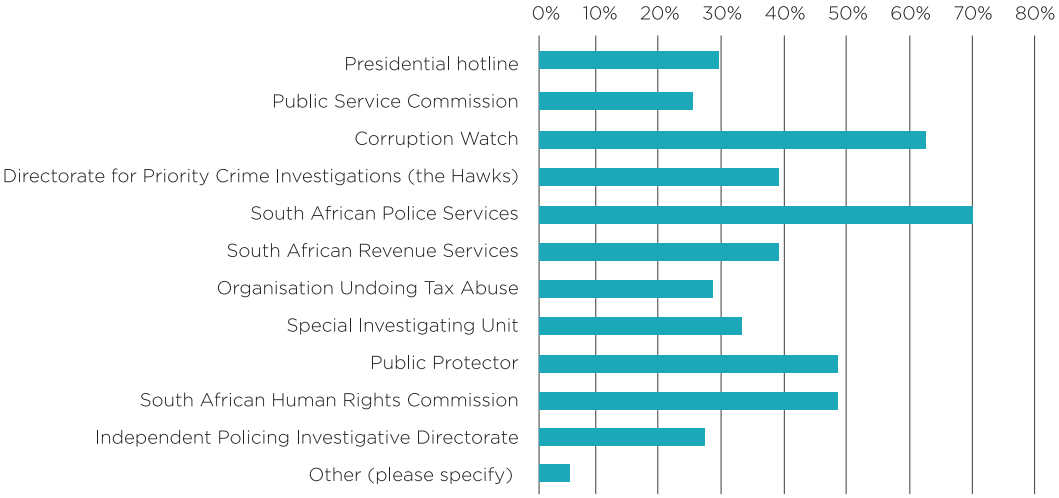
In relation to whistle-blower laws, the majority of respondents (68%) are only partially aware or not at all aware of the legislation that seeks to protect whistle-blowers in South Africa, whereas the remaining 32% of participants are either mostly or fully aware of whistle-blower laws.

IF YOU HAD TO EXPERIENCE CORRUPTION, CRIME OR ANY OTHER FORM OF MISCONDUCT, DO YOU KNOW WHERE TO GO?



Moving to awareness of reporting channels, most people (58%) claim that if they had to experience corruption, crime or any form of misconduct in either the public or private sector, they know where to report such matters. This figure is highest in the age group of 18-35, with 70% of young people noting that they are aware of the different channels available to report issues of corruption, crime or misconduct. Awareness of reporting channels declines in the older age groups, especially 51-65 years, and 66 years and over.

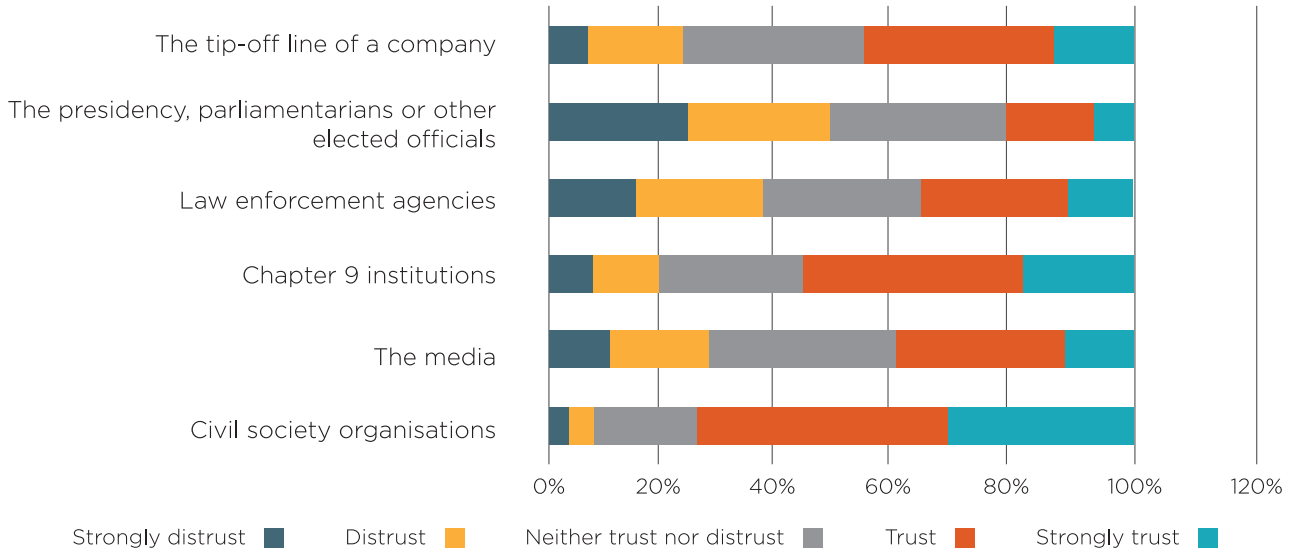
AWARENESS OF REPORTING CHANNELS



Related to knowledge and awareness about different whistle-blower channels, the majority of respondents are aware of the South African Police Services (70%), Corruption Watch (63%), followed by the South African Human Rights Commission (48%), and the Public Protector (48%). We note the potential for bias in responses to this question, due to Corruption Watch administering this survey, which may have led towards heightened awareness about the organisation amongst respondents.

Linked to the awareness of whistle-blower channels, most respondents note that if they were to blow the whistle on corruption, they would most likely trust civil society organisations with their disclosures, as well as chapter 9 institutions. However, there are strong sentiments of distrust towards the Presidency, parliamentarians and elected officials, and law enforcement agencies when it comes to disclosing information about corruption to these individuals and institutions.

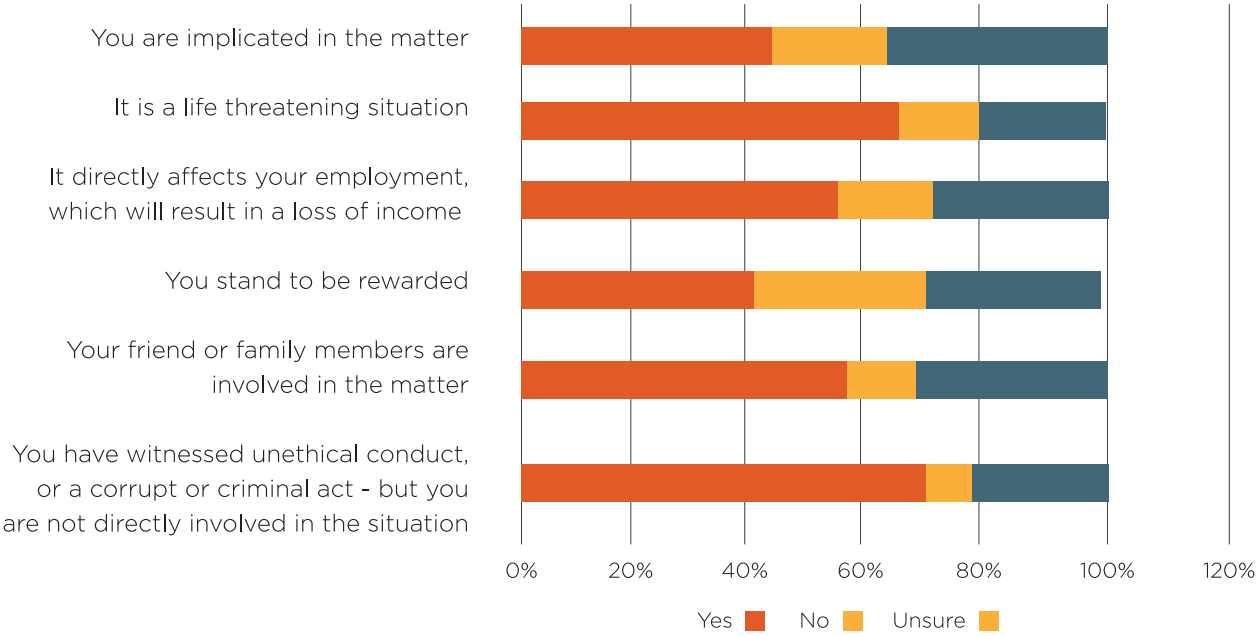
IF YOU HAD TO BLOW THE WHISTLE ON CORRUPTION, WHO WOULD YOU TRUST WITH YOUR INFORMATION?



REPORTING PATTERNS

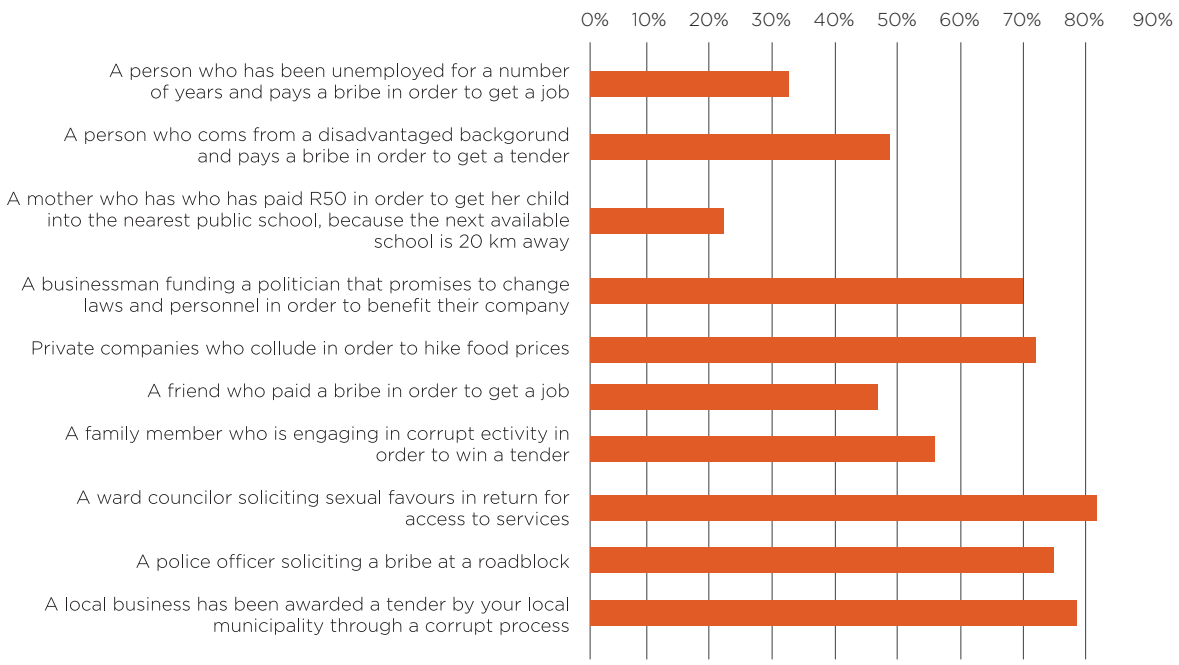
In an attempt to understand the different contexts that would drive people to report corruption, crime or other forms of misconduct, we posed various scenarios to the participants in order to gauge their willingness to report. In the first instance, respondents noted that they would most likely report wrongdoing if a) they had witnessed unethical conduct, but were not directly involved in the situation, and b) if it were a life-threatening situation. Participants also indicated that they would be willing to report an incident even if their friends or family members were involved in the matter.

WOULD YOU REPORT WRONGDOING IF:



Faced with a further set of scenarios, respondents were more likely to report individuals who occupy positions of power, such as ward councillors, police officers, and business people. They were least willing to report acts that involved 'petty' corruption, or people coming from disadvantageous backgrounds where the supposed means of engaging in corruption justifies the ends. For example, respondents were least willing to report a mother who has paid a R50 bribe to get her child into a school, because the next available school is 20km away, or a person who has been unemployed over a number of years and pays a bribe to secure a job.

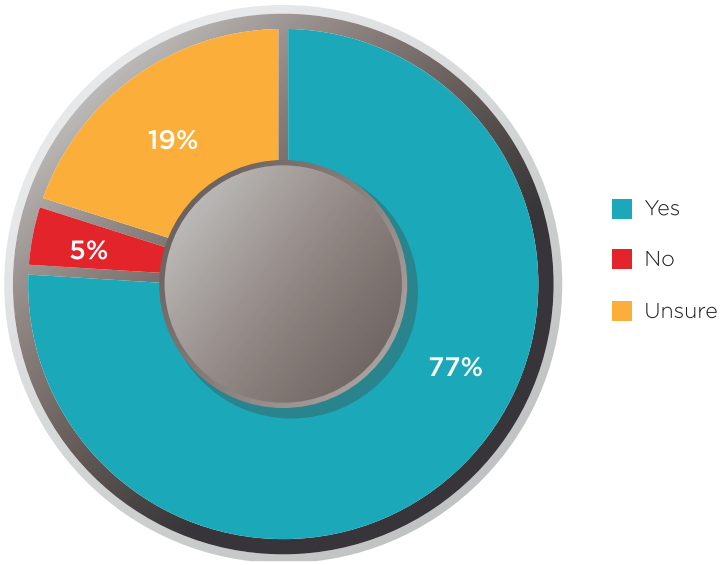
WHICH OF THE FOLLOWING ACTS ARE YOU LIKELY TO REPORT?



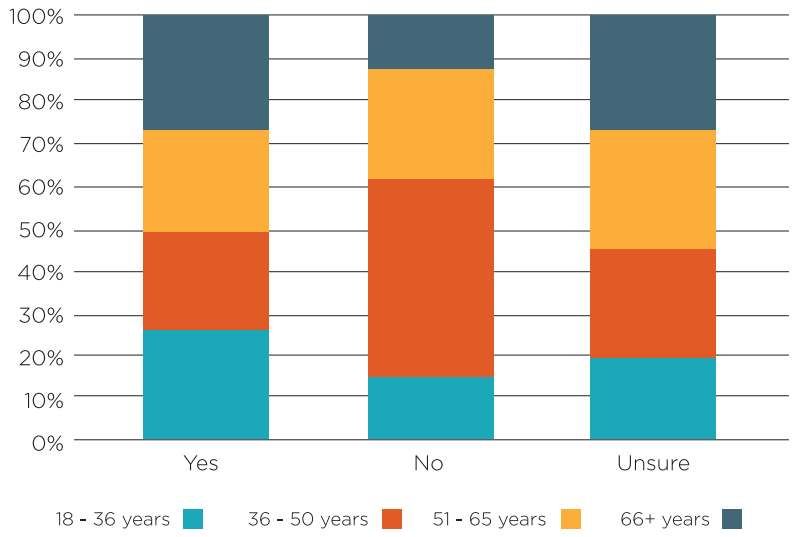
MOTIVATIONS AND EXPECTATIONS

Despite the recent public attention in relation to the negative consequences that whistle-blowers face, 77% of the participants note that they would still be willing to report corruption or misconduct if they had to experience it. This figure is highest amongst the population group aged between 18-35.

IF YOU HAD TO EXPERIENCE CORRUPTION OR MISCONDUCT IN THE FUTURE, WOULD YOU REPORT IT?



IF YOU HAD TO EXPERIENCE CORRUPTION OR MISCONDUCT IN THE FUTURE, WOULD YOU REPORT IT?

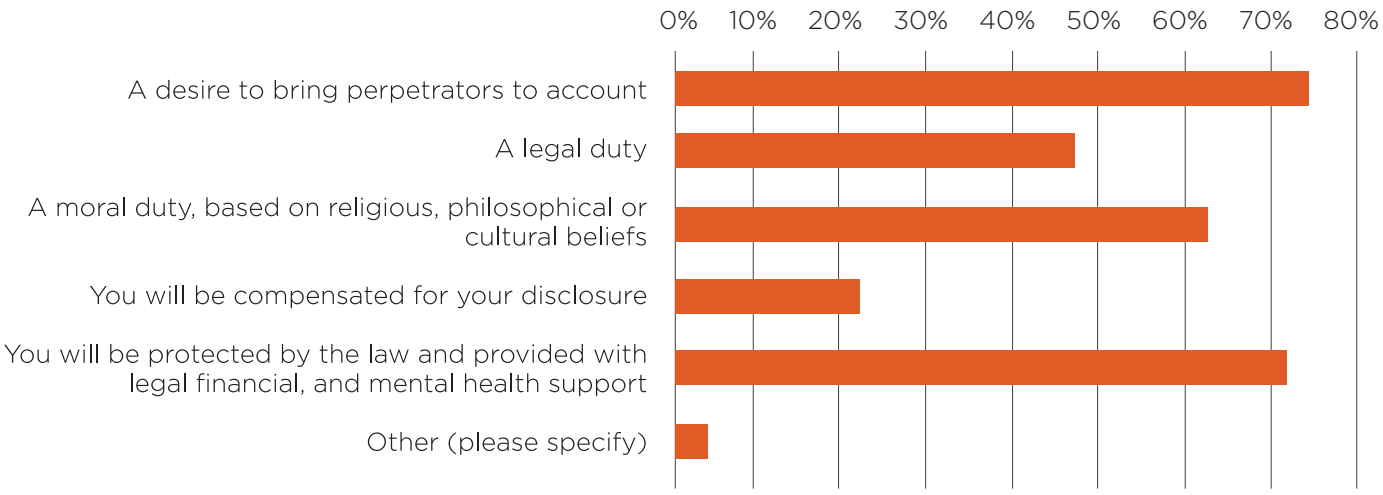


In the event that the respondents were to blow the whistle, they have high expectations that their disclosures would be treated confidentially and that they would be protected, and that their allegations would be investigated and if found to be true, the guilty party would be held accountable.

IN THE EVENT THAT YOU ARE A WHISTLE-BLOWER, YOU MOSTLY EXPECT:	Weighted average (out of 5)
That your information will be treated confidentially and you will be protected	4.24
That your allegations will be investigated and, if found to be true, the guilty party will be held accountable	4.26
That your information will be used to contribute towards research and policy changes which will result in closing the gaps that allow for wrongdoing and misconduct to occur	4.14

Participants in this survey said that their main motivation to report corruption, crime or misconduct in the future would be a desire to bring perpetrators to account, followed by a guarantee that they would be protected by the law and provided with legal, financial and mental health support.

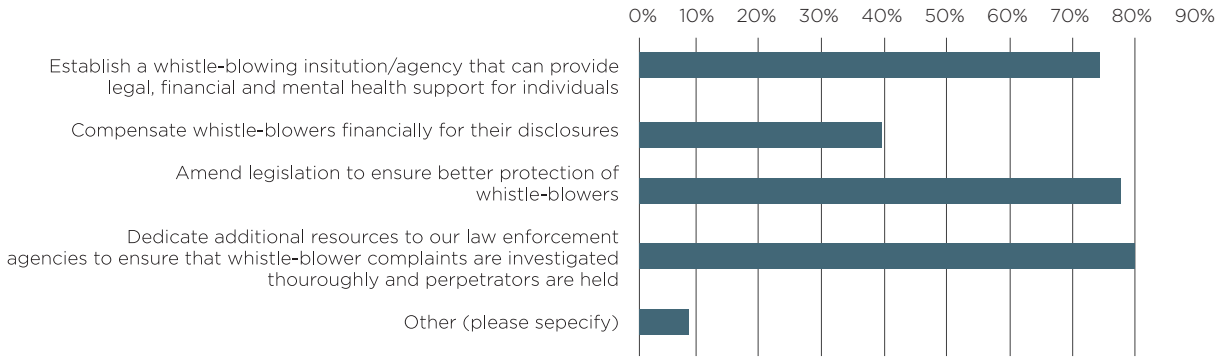
WHAT WOULD MOTIVATE YOU TO REPORT CORRUPTION, CRIME OR MISCONDUCT IN THE FUTURE?



Lastly, when it comes to steps that should be taken to improve whistle-blowing in South Africa, the majority of respondents (80%) indicated that the government should dedicate additional resources to law enforcement agencies to ensure that whistle-blower complaints are investigated thoroughly and perpetrators are held accountable.

Secondly, participants have called for an amendment of legislation to ensure better protection of whistle-blowers. Importantly, there is fairly strong support for the establishment of a whistle-blower agency that could provide whistle-blowers with legal, financial and mental health support.

WHAT SHOULD THE SOUTH AFRICAN GOVERNMENT DO TO IMPROVE WHISTLE-BLOWING?



CONCLUSION

Since Corruption Watch's inception in 2012, over 35 000 individuals have come to us to report issues of corruption and misconduct. Countless more have turned to law enforcement agencies, Chapter 9 institutions, investigative institutions and more recently to commissions of inquiry. These demonstrations of bravery and courage must not be in vain, and more needs to be done by civil society, government and the private sector to ensure that the policy, legislative and social environment is safe and conducive for whistle-blowing. In addition, there is a thirst to see real accountability and consequences to emanate from whistle-blower reports.

The findings of this study should be used to inform and improve systems, policies and programmes that could lead towards the eventual reduction of corruption in our society. In this regard, Corruption Watch recommends the following:

- The Protected Disclosures Act needs to be further reviewed and amended – in particular, the definition of a whistle-blower should not be limited to individuals who are employees or workers, but be expanded to anyone who has information about wrongdoing or misconduct. As such, with an expanded definition, anyone who has disclosed information about wrongdoing or misconduct is deserving of protection.
- Implement and establish an agency, in line with proposals contained in the National Anti-Corruption Strategy, to advise and support whistle-blowers. This mechanism should provide whistle-blowers with legal, financial and mental health support. It should also assess the security risks faced by whistle-blowers and make recommendations to law enforcement agencies on the necessary protection that is required.
- Leading to the establishment of the above mentioned agency, in the meantime the South African government should allocate money from the Criminal Assets Recovery Account Fund towards financially supporting whistle-blowers who are seeking legal, security and mental health support.
- Steps should be taken to ensure that individuals or institutions who are found guilty of intimidating or harassing whistle-blowers for their disclosures are criminally sanctioned, and/or are subject to paying personal fines towards a whistle-blower support fund, or organisations established to support whistle-blowers. Similarly, law enforcement agencies who are found to be derelict in their duty of protecting whistle-blowers should face penalties, and officials overseeing these matters held personally liable.

- Serious conversations should be held on and consideration given to compensating whistle-blowers for their acts of public service, and
- All sectors of society need to take responsibility for embarking on public awareness and education programmes related to whistle-blowing, as well as actions that would de-stigmatise the act of making disclosures.

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