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To the Director-General: Justice and Constitutional Development

Att: Mr H du Preez

Submission on Draft Protected Disclosures Amendment Bill

We thank the Department for considering our submission and for the extension granted in order to submit it.

The submission covers the following ground:

1. *Introduction*
    i. *R2K's Vision & Mission*
2. *Our interest in the draft Bill*
3. *Case studies of the challenges of whistleblowing*
    i. *Ms Roberta Nation*
    ii. *Ms Kantha Padayachee*
    iii. *Ms Segomoco Sibambato*
    iv. *Mr Mojalefa Murphy*
    v. *Mr Solly Tshitangano*
4. *Comments on the draft Amendment Bill*
    i. *General Remarks*
    ii. *Disputed Amendment 9b*
5. *Protected Disclosures and the Protection of State Information Bill*
6. *Creating a society that celebrates whistleblowing*

1. Introduction

The Right2Know Campaign ("R2K") is a nation-wide coalition of people and organisations concerned with promoting openness and the free flow of information, particularly in terms of the right to access information and freedom of expression. Our campaign is coordinated through voluntary working groups in the Western Cape, Gauteng, KwaZulu-Natal, as well as an elected national working group consisting of representatives from key civil society organisations, community groups and social movements across the country.

While the Right2Know Campaign launched in August 2010 as a coalition of organisations and people responding to the Protection of State Information Bill (also known as "the Secrecy Bill"), the Campaign quickly transformed into a social movement focusing on broader challenges to the free flow of information, including defending and promoting the rights of whistleblowers.

1.1 R2K's Vision & Mission

Our Vision:

"We seek a country and a world where we all have the right to know – that is to be free to access and to share information. This right is fundamental to any democracy that is open, accountable, participatory and responsive; able to deliver the social, economic and environmental justice we need. On this foundation a society and an international community can be built in which we all live free from want, in equality and in dignity."

Our Mission:

- To co-ordinate, unify, organise and activate those who share our principles to defend and advance the right to know.
- To struggle both for the widest possible recognition in law and policy of the right to know and for its implementation and practice in daily life.
- To root the struggle for the right to know in the struggles of communities demanding political, social, economic and environmental justice.
- To propagate our vision throughout society.

- To engage those with political and economic power where necessary.
- To act in concert and solidarity with like-minded people and organisations locally and internationally.

For more information on our programme, our principles, key documents of the organisation and a list of donor organisations and financial information, please visit www.r2k.org.za.

2. Our interest in the draft Bill

A key component of our broader campaign for the right to know is the need to protect and promote whistleblowers.

We recognise the aim of the Protected Disclosures Act to create a safety net for whistleblowers who speak out against wrongdoing. Before dealing with the draft amendments, it is important to first outline the current environment facing whistleblowers, notwithstanding the contributions of the existing Act. The experience of R2K through its members and affiliate organisations in the past four years generally reflects that many individuals who 'blow the whistle' in the current environment are likely to suffer terrible consequences.

In 2013, R2K commissioned a report from the Open Democracy Advice Centre on the state of the "whistleblower environment" and possible reforms[1]. The report notes that overwhelmingly, individuals who blow the whistle are likely to face victimisation and harassment, often leading to demotion, suspension or dismissal if they speak out against their employer. Whistleblowers whose disclosures become public are at risk of smear campaigns, counter-allegations to discredit them, or legal threats to silence them or bankrupt them through litigation. These conditions are financially and emotional destructive to whistleblowers and their families. There are documented cases of whistleblowers receiving death threats, and most tragically there are a number

[1] The report, "Empowering Our Whistleblowers", is available at www.r2k.org.za/whistleblower-report

of whistleblowers who appear to have been assassinated, paying the ultimate price for their decision to speak out against injustice and wrongdoing.

3. Case studies of the challenges of whistleblowing

In order to foreground our comments on specific aspects of the draft Amendment Bill, it is necessary to examine a few case studies of individuals who have blown the whistle, in order to understand why the existing safety mechanisms often fail to be effective. These case studies are drawn from R2K's annual 'Whistleblower Calendars', which seek to celebrate and recognise people who have blown the whistle. In the interests of brevity, these accounts cannot detail these experiences, but we attempt here to capture the flavour of the severe difficulties encountered by ordinary people who blow the whistle[2].

i. Roberta Nation

Roberta Nation worked for the State Security Agency's medical scheme, Optimum Medical Scheme, evaluating medical claims made by SSA employees. When she detected claims that appeared to be fraudulent, her attempts to report and investigate the matters brought her into conflict with her direct superiors, and she was victimised and harassed; she says she become a target of suspicion and criticism from her supervisors. She was forced to do extra secretarial work on top of her fraud-evaluation duties, which both limited her ability to perform those duties and caused her to suffer from anxiety and depression.

Finally, while on sick leave due to work-related anxiety in 2012, she was dismissed – the Agency stated that she had been absent without leave, despite evidence that she had notified her managers.

Nation believes she was fired because of her efforts to report and investigate fraud in the Agency's medical scheme. She launched a grievance procedure, and after struggling to get the matter resolved internally, she approached attorneys at the Open Democracy Advice Centre for support and legal advice in 2011.

[2] In each case we have striven to verify the stated facts using news reports, public documents and testimony of the individuals themselves. Any errors are regretted.

During this time, the acting director of the SSA contacted her attorneys, advising that their involvement, "without the required security clearance may amount to a contravention of, among others, the Protection of Information Act 1982 and the Intelligence Services Act 2002."

Nation has been forced to approach the courts to be reinstated; her case is due to be heard in the High Court in 2014. She wishes to be reinstated as an employee of the SSA, but moved to a different department in light of the long-running victimisation she experienced in her former department.

Nation's struggle highlights the importance of better legal protection for whistleblowers in South Africa's security bodies; in Roberta's case, she felt that she required outside representation in order to get impartial advice.

Ii. Kantha Padayachee

Kantha Padayachee was suspended from her job in KwaZulu-Natal's department of health; she later testified in court that her suspension came after she blew the whistle on a controversial tender given to a company called Intaka Holdings, after she learned that Intaka's owner was making a donation to the ANC in exchange for the tender.

Ms Padayachee, the mother of two, had worked for the Department of Health in KwaZulu-Natal for almost a decade and she was appointed to the head of the legal department in 2009.

In February 2010 she was suspended, one day after making a statement to the Hawks about an oxygen-related tender handled by the Provincial Department of Health. The Hawks at that stage were already investigating a R144-million tender to supply water purification plants to the health department. The tender had gone to Intaka Holdings, owned by Uruguayan businessman Gaston Savoi, allegedly in exchange for a donation to the African National Congress. (According to Ms Padayachee's court testimony, she was told by the former KZN MEC for

Health that Savoi would make a donation to the ANC – allegedly R1-million – in exchange for the tender.)

Though she was officially suspended on counts of misconduct and alleged racism – which she states are baseless – the fact that it occurred so soon after making a statement to the Hawks suggests that it was a response to her disclosure.

As a result of this disclosure, several senior provincial government officials were charged with money laundering, racketeering and fraud, including the MECs for Health and for Economic Development. (The NPA has subsequently withdrawn the charges against both individuals.)

Since being suspended in 2010, Ms Padayachee challenged her suspension and disciplinary process in court. In November 2013, nearly four years later, her case ended in an out-of-court settlement, in terms of which she has signed a non-disclosure agreement. Her legal costs were borne by herself and it is clear that the experience was financially and emotionally draining for her and her family. However this has not been the end of the matter, as Ms Padayachee has indicated that the Department has not complied with the provisions of the agreement and she may be forced to go to court for remedy.

This situation reinforces our view that whistleblowers continue to face challenges despite the provisions of the PDA.

iii. Segomoco Sibambato

Segomoco Sibambato was former Corporate Services Manager at the Transport Education and Training Authority (Teta); she was suspended from her position in 2010, with her employers citing a range of disciplinary infractions. She was dismissed in March of 2011.

However, these processes appear to have been instituted against her after she raised concerns internally that the CEO had flouted procurement policies. She had later reported these concerns to the National Anti Corruption Hotline, the

Public Protector and the Department of Higher Education and Training. In addition to her dismissal, she also faced a legal challenge in the Labour Court relating to disciplinary infractions, but this case appears to have stalled.

An investigation by the Department of Higher Education and Training appears to have vindicated Ms Sibambato 's claims that procurement policies were violated, and this appears to have led to the suspension of Teta's CEO. However, there has been no redress for Ms Sibambato .

iv. Mojalefa Murphy

Senior physicist Mojalefa Murphy says he was forced to resign over 12 years ago from the National Research Foundation (NRF) in retaliation for investigating a colleague for financial mismanagement at iThemba LABS, where Mr Murphy was acting director. In his struggle to clear his name, he has been denied access to documents and is now seeking an appeal in Court.

Mr Murphy, who was once one of South Africa's foremost black nuclear physicists, was a senior manager at the National Research Foundation (NRF) 12 years ago. He states that his troubles began when he was investigating a fellow senior management colleague for gross wrongdoing; he states that he came under enormous pressure from superiors at the NRF to not pursue the matter. Facing what he calls "a retaliatory assault" on his career, he disclosed the apparent bending of rules to the Department of Science and Technology, which has oversight, which he believes compounded the hostility he faced in the workplace.

After being forced to resign from the NRF, Mr Murphy was interrogated by investigators from DeLoittes about alleged mismanagement at iThemba LABS. He cooperated with these investigations and is convinced that their report and findings would clear his name, but he has not been able to access the report from NRF. A request in terms of the Promotion of Access to Information Act was refused.

As a result, Mr Murphy faces the challenge of clearing his name in order to seek further employment. He was shut out of the job market in South Africa, and so sought employment abroad, but was constantly denied access to the investigation reports needed to clear his name. He is now seeking remedy through the courts.

v. Solly Tshitangano

In 2010 Mr Tshitangano, in his position as Acting Chief Financial Officer in the Limpopo Provincial Department of Education, sought to raise concerns about the legality of a tender between the province and a private company called EduSolutions to procure and deliver textbooks to Limpopo schools.

After his internal complaints were ignored, he escalated his disclosure to the Premier of Limpopo, the Public Protector and the Presidency – but still with no result.

When the mater of Limpopo textbooks became a national scandal because of his disclosures, Mr Tshitangano suffered victimisation at work including being subjected to a forensic audit. He was eventually dismissed in 2011. He reached an out-of-court settlement with the department in May 2014.

These are just a few cases outlining the complex challenges that face whisteblowers seeking protection for speaking out. Unfortunately, even with the existing, well-intentioned safeguards, an act of whistleblowing continues to be a totally a life-changing event. As noted in the 2013 report, "Empowering Our Whistleblowers":

> Unfortunately, the wrongdoers more often triumph at the end of the process than the normal whistleblower. Some whistleblowers may be successful and their reputations later restored to a degree, with recognition for their efforts. Some may try to start a new life, in a new place, with a new job in an effort to keep the social impact to a minimum. However, many are damaged permanently in some way – even through psychological after-effects such as depression.

4. Comments on the Draft Protected Disclosures Amendment Bill

4.1 General remarks

Many aspects of the draft Bill represent a significant achievement in the fight for comprehensive protection for whistleblowers in the workplace. We list some of the encouraging developments contained in the draft Bill:

- Widening the definition of who can receive protection for blowing the whistle, by extending "employee" to mean former employees of the State or corporate entities, and including 'temporary employment services' and 'independent contractors' in the those whose disclosures are to be protected;
- Protecting whistleblowers from some forms of 'retribution' that were not envisaged in the existing Act – including civil claims made against those who disclose criminal offences;
- Ensuring that there is joint liability of the employer and client who subject employees/workers to occupational detriment;
- Obliging those to whom disclosures have been made in terms of the PDA to acknowledge the disclosure within 14 days and to investigate or, wherever possible to refer the investigation to another body as well as the duty to notify the worker/employee of the investigation being conducted;
- Allowing any worker subjected to occupational detriment to approach a court directly for appropriate relief, including the specification of appropriate remedies to be administered by a competent court;
- Obliging employers to authorise appropriate internal procedures for receiving and dealing with information about improprieties as well as a duty to take reasonable steps to bring the internal procedures to the attention of all employees/workers.

4.2 Disputed amendment: clause 9b

Though in general we view proposals above as broadly progressive, we are currently vexed with the insertion of clause 9b, which proposes to penalise the disclosure of false information.

It states that *"An employee or worker who intentionally discloses false information knowing that information to be false or not knowing or not believing it to be true is guilty of an offence and is liable to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment*."

We propose deleting this clause entirely. Our proposal is motivated by the following factors:

- The clause assumes that a consequence of the protections afforded in the PDA is that false, frivolous or vexatious disclosures will be made. However, this is unlikely to be the case given the existing climate in which whistleblowers exist. The decision to make disclosures regarding malfeasance, corruption and incompetence is seldom, if ever, taken lightly. Under such conditions therefore, the safeguard against a potential abuse of the protections included in the PDA may achieve the opposite effect: of further chilling the will to blow the whistle.
- To this effect we affirm the Law Reform Commission's report on the Protected Disclosures Act[3], with respect to its evaluation and recommendation noted in 5.10 stating:

  > *The Commission confirms its preliminary recommendations that where an employee or a worker knowingly makes a false disclosure such disclosure should not be criminalized. A person who deliberately or recklessly discloses false information does not qualify as a whistleblower (except under section 5 of the PDA in its present form) and might also be guilty of criminal defamation, crimen injuria or fraud at common law.*

- In other words, the law of civil defamation is an adequate safeguard against intentionally peddling falsehoods that damage individuals' public standing.
- We also do not envisage that the non-criminalisation of false disclosures would result in an undue diversion of state resources towards investigating disclosures made to various bodies.

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[3] Law Reform Commission Report, 2007 (p 54 clause 5.10) accessed online: http://www.justice.gov.za/salrc/reports/r_pr123_protected-disclosures_2007.pdf

- As noted in the Law Reform Commission's report, most international jurisdictions do not criminalise whistleblowing.
- Finally, we do not believe clause 9b strikes the appropriate balance between protecting individuals' reputations, safeguarding institutional resources against wasteful abuse and protecting disclosures made in good faith, even when individuals "do not believe such disclosures to be true."

5. Protected Disclosures and the Protection of State Information Bill

In evaluating the effectiveness of the draft Amendment Bill, it is necessary to examine related drafting in the Protection of State Information Bill (POSIB), which poses a very serious legal threat to whistleblowers. It is our view that the POSIB's defects and restrictions on whistleblowing undermine the efforts to improve whistleblower protection in this draft Amendment Bill.

A detailed analysis of the POSIB lies beyond the scope of this submission. However, it is worth exploring the express connection between the PDA and POSIB, found in clause 41 of POSIB which regulates possession and disclosure of classified information, stating that possession and disclosure of classified information is lawful if executed (inter alia) in terms of the PDA.

Clause 41, itself a positive inclusion in POSIB, was inserted apparently in response to concerns that the POSIB effectively criminalised whistleblowing and other acts of receiving or disclosing information in the public interest. However, even with the draft amendments proposed in the Protected Disclosures Amendment Bill, the situation leaves much to be desired.

First, the PDA's protections are available only to those who qualify as workers or employees (even in the expanded definition of worker/employee tabled in these draft amendments). Journalists, whistleblowers, activists and researchers who come into possession of classified information do not qualify for the PDA's protections.

Second, the PDA would not protect against disclosures made in the public domain, such as through the news media. Such disclosures remain expressly criminalised in the POSIB regardless of the public interest attaching thereto.

Third, the most severe possession- and disclosure-related offences in POSIB are not subject to the protection provided in POSIB's clause 41, and therefore not protected by the PDA either. In terms of clauses 34 of POSIB relating to "Espionage and Related Offences" it is an offence to "unlawfully and intentionally communicate, deliver or make available" or "unlawfully and intentionally make, obtain, collect, capture or copy a record containing" state information that is classified confidential, secret or top secret, if "the person knows or ought reasonably to have known would directly or indirectly benefit a foreign state". Clause 36 relating to "Hostile Activities" makes it an offence to "unlawfully and intentionally communicate, deliver or make available" or "unlawfully and intentionally make, obtain, collect, capture or copy a record containing" state information that is classified confidential, secret or top secret, if "which the person knows would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the national security of the Republic."

The penalties for these offences range from between 5 and 25 years' imprisonment, depending on the level at which the information has been classified. However, we note that the current drafting may criminalise whistleblowers, in as much as it criminalises possession and disclosure of classified information where the intention is to disclose information in the public interest, where a by-product may be "to directly or indirectly benefit" a foreign state or non-state actor. We thus remain to be persuaded that legislative reform of the PDA will ultimately safeguard whistleblowers from the provisions of the Protection of State Information Bill.

6. Creating a society that celebrates whistleblowing

This submission has already noted the difficulties experienced by whistleblowers in the workplace, in navigating the procedures set out in law to protect themselves – furthermore, even when those procedures are successfully

navigated, many whistleblowers find protection is not forthcoming. It is important to improve the legal protection given to individuals in those situations. The legal framework could go further to enabling whistleblowers beyond the draft Amendments tabled here.

Examples of approaches to whistleblower empowerment is given below:

- *Instituting a whistleblower protection fund*: this would allow for physical safety measures to be instituted for those who blow the whistle despite the physical threats posed to their lives. Additionally such a fund, established by the committee and administered by the Department could assist in funding legal challenges for whistleblowers.
- *Introducing provisions for 'citizen whistleblowing':* The amendments have significantly broadened the potential scope of what constitutes a 'whistleblower'. However this scope may be even further broadened to include citizens as well as employees. Thus the scope of the protections of the Act would be extended beyond the confines of the workplace.
- *Increasing the number of bodies to whom disclosures can be made:* By allowing disclosure of impropriety to any regulatory body or body of association with proper investigatory powers the potential difficulties posed by the over-burdening of a few complaints' authorities may be avoided.
- *Increasing awareness of the PDA's protections:* Gazetted guidelines should be published which mandate all public bodies as well as major private corporations to ensure that all employees are made aware of their rights under the PDA.

However, the challenges facing whistleblowers go beyond the need for legal reform. It has been said that South African whistleblowers face challenges that are almost unique among constitutional democracies. The harassment, torture and in some cases murder of whistleblowers is a direct threat to the free flow of information in an advanced democracy anywhere and particularly one as young as South Africa's. We must remember that those who blow the whistle do not only face 'occupational detriment', but sometimes pay an even higher price.

These include auditors and financial officers such as Lawrence Moepi, Moses Tshake and Joshua Ntshuhle; activists and community leaders such as Nkuleleko Gwala, Moss Phakoe, Dumisani "Bomber" Ntshangase, and Piet Pale; elected officials and public servants such as Thandi Mtsweni, Samuel Mpatlanyane, and Jimmy Mohlala.

We believe that whistleblowers face a legitimate crisis, and it is not only a legal problem but also a political one. The institutional culture in the private and public sectors of South Africa must embrace whistleblowers as vital actors in our collective efforts to safeguard and deepen our democracy, not as 'impimpis', troublemakers and sell-outs.

The draft amendments under discussion are a positive step forward. However, there is a great need for leadership from all state institutions, starting at the top, as well as the corporate sector, to show through their actions that there is a commitment to promoting and protecting whistleblowing in our society.

Ends.