RIGHT2KNOW

EMPOWERING OUR WHISTLEBLOWERS

Whistleblower

(noun) **a person who makes public disclosure of corruption or wrongdoing**

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fesmedia Africa

ODAC

Open Democracy Advice Centre

Empowering our Whistleblowers

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Introduction

In 2010 the Open Democracy Advice Centre undertook a comprehensive review of the state of whistleblowing in South Africa, entitled *The Status of Whistleblowing* (2010).[1] Three years on, the whistleblowing landscape is due another review. Research demonstrates that progress has not merely halted in the current context, but that in fact South Africa appears increasingly hostile to whistleblowing activities. It is not just legislative provisions that may require review, but other broader environmental recommendations are also needed in order to properly enable whistleblowing.

This publication looks at how to create an environment in South Africa that can encourage whistleblowers to act – this means not looking at law alone, and understanding that interventions are required at multiple points in the whistleblowing process if people are to feel supported enough to disclose.

Context

Definitions

There are varying notions of what constitutes whistleblowing. The United Kingdom Committee on Standards in Public Life defines whistleblowing as:

> *Raising a concern about malpractice within an organisation or through an independent structure associated with it.*

Comparatively, within the public discourse the term is often used in a far more broad sense to include forms of anonymous alerts to malpractice from any person, for instance as seen in the types of disclosures made to websites such as Wikileaks. In fact, this understanding subscribes more generally to the recommended definition of whistleblowing proposed by Transparency International:

> *[Whistleblowing is] the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action.*

However, in South Africa, the main protection available to "whistleblowers" is through the Protected Disclosures Act (PDA) – which describes whistleblowing very narrowly.

The social and political context

South Africa is a constitutional democracy that, since gaining freedom in 1994, has demonstrated a strong tradition for passing progressive laws, which attempt to enhance good governance. There have however been consistent issues with implementation of these laws, and their eventual impact appears limited.

The current reality of governance is not good. Financial forensics expert Peter Allwright, who in 2013 wrote a report on financial misconduct in the public service, told the Associated Press:

> *Corruption is rampant. It's out of control ... and the dedicated units that have been created to fight financial misconduct are in essence fighting a losing battle.*

It is estimated that South Africa lost R930 million to financial misconduct by workers in national and provincial governments in the fiscal year 2011-2012; which was almost three times the losses in 2009-2010. The endemic nature of corruption is a concern, and traditional methods of good governance should impact these problems, but current legislation does not seem to be assisting.

At the same time, there does not appear to be a strong political will to combat corruption. And political will is a difficult aspect of the environment to manipulate. This weakness of political will is reflected too in the increasingly hostile legislative environment to openness and transparency, more generally. The Protection of State Information Bill threatens to usher in increased secrecy in terms of classified information and, in spite of significant resistance by civil society, looks set to be signed into law (with particular fears for the possible criminal sanctions that may be utilised against whistleblowers). The General Intelligence Laws Amendment Bill, while claiming to be consolidating state security issues, appears also to be extending the powers of the Minister of State Security in a manner that contradicts transparency. The Traditional Courts Bill also demonstrates an increasing focus on securitisation, and the weakening of formal governance mechanisms and systems of constitutional accountability.

References to "poor political will", though often utilised in considerations of corruption, often also fail to consider the direct issues that have stemmed from the "politicisation of the bureaucracy".[2] Accountability within the bureaucratic structure is significantly weakened by the political appointment of bureaucratic figures, with a diminished willingness of state employees to "upset the apple cart" when that may mean losing their access to income. This remains a difficult area for intervention.

Another perspective worth considering is the circumstances under which fraudulent activity might be encouraged from a behavioural perspective. Dishonest

behaviour can be investigated from a micro-level perspective too, as a path to exploring more creative interventions to assist with the problem. It has been proposed that the two chief mechanisms for an individual being able to rationalise away their dishonest behaviour are "categorisation and attention devoted to one's own moral standards".[3] On the first mechanism, categorisation means that an individual can more easily rationalise their behaviour, particularly when the category is malleable.[4] In simple terms, the second principle means that reminding a person of one's own moral code has a significant effect, but only if this is done just before the potential act of cheating. Increasingly, South African academia is trying to explore how to deter corrupt behaviour, but the solutions proposed are still institutional and tend toward an economic-centred understanding of deterrence in a "cost-benefit" paradigm.[5] Most interesting is the concept of contagion – which also relates dishonesty to in-group and out-group considerations. Gino, Ayal and Ariely demonstrated that dishonest behaviour increases dramatically when an individual witnesses a member of their in-group participating in unethical behaviour; which helps to explain what appear to be institutionalised cultures of corruption.[6]

There are other reflections, beside the legislative paradigm, that demonstrate a socio-political context hostile to whistleblowing. Physical and social threats may also render whistleblowers vulnerable in South Africa. The Public Services Commission noted that one of the most significant factors negatively affecting government initiatives to curb corruption were the reports that "…whistleblowers are sometimes intimidated by senior officials and executive authorities when reporting corrupt activities".[7] In a workshop conducted with journalists who work with whistleblowers in KwaZulu-Natal, the group reflected that there might be a variety of reasons that inhibit whistleblowers from taking action, such as:

1. They are fearful of the possible response from their local community, or even outside persons. They fear intimidation, or even death, should they come forward.
2. They don't know the protections that are available to them, should they try and come forward.
3. They are concerned about the social impact of the disclosure. They are worried about being ostracised, or the risk that people may lose trust in them. In other words, they are worried about becoming a "social pariah".
4. Whistleblowers also don't know who to trust with information, or even whom they can approach to make a disclosure.
5. There is sometimes a "moral conundrum" in being required to act on a disclosure that might otherwise benefit people they know, or even a large group of people.
6. There is sometimes a direct monetary incentive for whistleblowers if they do not speak.

7. Finally, the endemic failures within the criminal justice system are also identified as discouraging factors (this will feature again under the review of weaknesses in the law).

Case studies

The following case studies are examples of the South African whistleblowing context.

Imraahn Ishmail-Mukaddam

In 2006 Mr Ishmail-Mukaddam, a shopkeeper and independent bread distributor, complained to the Competition Commission about collusion in the baking industry (he laid his complaint with the Congress of South African Trade Unions [Cosatu]).

His allegation of collusion arose when bakers collectively decided to reduce the discount offered to distributors.

As a result of his allegation, the Competition Tribunal found Pioneer Foods, Tiger Brands and Foodcorp guilty of breaching the Competition Act – the eventual fine ordered being for over R90 million.

However, it appears as if the act of blowing the whistle has significantly negatively impacted Mr Ishmail-Mukaddam's business; with his bread distribution figures dropping by more than half as suppliers have begun to withdraw their business.

Regardless of this, Mr Ishmail-Mukaddam stated:

> *"The role of each individual in society is to hold society to account…taking forward the struggle for democracy."*[8]

Mrs M

Mrs M worked in a division of the KwaZulu-Natal High Court Masters Office. In 2010 she was dismissed while on sick leave for occupational stress that had developed as a result of victimisation she had been experiencing in the workplace.

After her appointment in 2004, Mrs M discovered that funds were being paid to non-existent beneficiaries or to tracing agents, who then allegedly shared the money received with public officials. Mrs M reported the incident to her superiors, including Deputy Director Menzi Simelane, but then became the subject of severe workplace victimisation.

Not only did this victimisation directly affect her physical health, but even after medical practitioners advised she be transferred due to the stress she was suffering in her position, the Department failed to transfer her.

The Public Protector ordered that Mrs M be reinstated in 2013. She also found that there had been maladministration in the Department of Justice through its failure to protect Mrs M from occupational detriment and through ignoring the complaints of Mrs M and failing to take action.

Jimmy Mohlala

In January 2009 Jimmy Mohlala was gunned down outside his home. In the attack his 19-year-old son was shot in the leg.

Mr Mohlala, the former municipal speaker of Mbombela, had exposed irregularities in tenders issued for the construction of the Mbombela Stadium for the 2010 World Cup. Mohlala had claimed to have evidence in relation to tender irregularities and nefarious dealings between businessmen and politicians during the construction.

He had further alleged that the then-Mbombela Municipal Manager had colluded with contractors in the case, and that there had been corruption relating to housing.

In 2012, the charges against his four murder accused were provisionally withdrawn by the National Prosecuting Authority due to "lack of sufficient evidence". His widow has suggested that the state may have arrested the wrong people.

Solly Tshitangano

In 2010 Mr Tshitangano, in his position as then 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 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.

Mr Tshitangano's story featured on the investigative television programme *Carte Blanche* on 19 August 2012 in an exposé of corruption in Limpopo. As a result of his attempts to disclose the information, he suffered victimisation at work (including being subjected to a forensic audit) and was eventually dismissed in 2011.

Mr Tshitangano is currently challenging his dismissal in the Labour Court.

International context

The international context for whistleblowing allows us a means for comparison, for lessons that may be of use to South Africa. The United States has been described as

having clear historical periods of anti-corruption approaches, but recent strategies have involved "organisational control and law enforcement approaches" that have in many senses been reflected in the South African strategy post-1994.[9] This approach involves centring initiatives on public duty and public office (a discourse resonant in other areas of US administrative policy), as opposed to a bureaucratic-focused view that speaks more to formal duties and compliance.[10] South African initiatives such as the Batho Pele principles incorporate this kind of approach.

In 1989 the US passed the Whistleblowing Protection Act – the first tailor-made whistleblowing protection law, which covered federal employees. However, the US now has a series of whistleblowing protection laws at federal and state levels to try to deal with the peculiarities of their legislative systems, with state-level protections being the main focus for legislative interventions in the 1980s. Dealt with later is the inclusion of forms of financial incentives to compensate whistleblowers.

In contrast, Australia, also undertaking a series of recent reforms, has moved its focus away from financial incentives to trying to legitimate whistleblowing within the media.[11] Whilst Australia has also been moving away from a strictly anti-retaliation model (a point to be noted for South African reform), it has been focused on structural and institutional reform, as well as an expanded role for the media.[12] The structural approach has been expressed through, for instance, a positive obligation on officials to be ready to receive and recognise whistleblowing disclosures (seen in the Queensland legislation). However, the Australian Capital Territory's Public Interest Disclosure Act 2012 (ACT) demonstrates best practice, including statutory requirements to assess actual retaliation risks and manage those identified risks from the outset of the internal disclosure.[13]

Iceland is on the precipice of passing a whistleblower law. This bill is simple and broad. It, in many senses, offers a significant benefit: a unitary mechanism for protecting whistleblowers from all forms of harm not just labour-related, but in terms of criminal and civil sanctions as well. Its unitary framework is to be admired, but it also stems from a particular political context, i.e. a broader drive by the Icelandic government to pass a swathe of legislation in an attempt to address directly the significant issues of corruption that led to their housing collapse.

There are a variety of initiatives being taken internationally, usually as a response to particular socio-political conditions. These present South Africa with an assortment of options for moving forward in terms of our own whistleblowing reforms.

Understanding the whistleblower

While the contextual points are of value, it is worth considering directly who the whistleblower is, and the process they go through when blowing the whistle. In

2011 it was discovered that 18% of the population have claimed to blow the whistle.[14] Men are more likely to blow the whistle than women and whistleblowers tend to be older – 68% of them are over the age of 35. People who are not working are statistically more likely to blow the whistle, while the highest concentrations of whistleblowers are found in the Cape Town Metro, Eastern Cape Metros and the Durban / PMB Metro area.

The Federal Accountability Initiative for Reform (FAIR) have provided a very useful description of the whistleblowers ordeal, which echoes many of the points raised by our work with journalists seen above.[15] These "stages" provide us with insight into the different stages of intervention those working with whistleblowers should focus on, if hoping to encourage people to disclose after a proper consideration of how they might experience detriment:[16]

1. Awareness

At this point the whistleblower is first alerted to the difficulty and complexity of their situation.

2. Decision of conscience

The potential whistleblower is then forced to grapple with the decision as to how to move forward – they may at this point seek advice. This then becomes one of the first avenues for possible direct intervention with the whistleblower. Some may, at this point, chose to take no action at all.

3. Raising concerns internally

Many whistleblowers would then seek to try to raise their issue within their organisation, on the belief that action would be taken. The first might be to senior persons in their chain of command, and only after that to those at the "top" of the organisation.

This stage sometimes has the consequence of lulling the whistleblower into the false belief that action is being taken, when in fact actions might be being taken to try to conceal the wrongdoing.

4. Facing initial reprisals

Sooner than anticipated the whistleblower begins to experience negative feedback at work, such as receiving poor work reviews, or being moved to meaningless tasks, or being relocated. They might even just be told that they have unnecessarily "rocked the boat".

More insidiously, they may be victims of "smear campaigns" perpetrated by senior people to discredit and isolate them. There is also often a significant sense of being shunned, or ostracised, within their work environment (and even social environment).

This is a period of significant difficulty and suffering for the whistleblower, who begins to feel despondent at their lack of recourse.

5. The decision to commit fully

Some people at this stage give up on the process. However, others might feel even more determined to take the matter further. They then would reassess how to move forward.

At this point, some may chose to move forward anonymously – such as through providing a leak to the media. This anonymity could allow them more time to investigate internally without experiencing discrimination.

6. Going public and the consequences

Going public is often the step taken when the whistleblower feels nothing is being done about their complaint internally. However, this will usually escalate the detriments they have been exposed to so far. The smear campaign might be accelerated, and most often the credibility of the whistleblower will be the first thing that is attacked.

This also often means the whistleblower has only the media to represent their case, which can be an inconsistent storyteller and may not be motivated by the whistleblower's interests.

If the identity of the whistleblower was not known before this point, there will be accelerated attempts within the implicated organisation to now uncover them as the source.

7. The war of attrition

The position of the whistleblower is now becoming exceedingly difficulty – the wrongdoers will often have significant financial support to assist them with legal advice, public relations concerns, and even possibly for intimidation. Conversely, the whistleblower is now often isolated and discredited, probably unemployed and slowly losing social support as well.

Unions may be an avenue for support here, though also may have reasons for not being able to fully assist the whistleblower in certain situations.

This can be a time of incredibly negative emotional consequences for the whistleblowers, with some experiencing severe effects such as depression or even, tragically,

suicide. At this stage there are very few whistleblowers who would have been well equipped enough to deal with the demands of any associated legal process. They may not be able to afford even the associated legal fees.

If the transgressing organisation is a government, they may even abuse their power to prevent further disclosure – such as through the exploitation of concepts like "national security". Documents may be shredded, and the whistleblower may be harassed different government agents such as the police.

A whistleblower may even receive death threats, or have attempts taken on their lives.

8. The Endgame

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.

Importantly, FAIR notes that the most painful aspect for most whistleblowers is that there:

> *"…is no end to the story. For most, the harassment in various forms never stops. Most are never vindicated: usually their allegations remain unproven or clouded in doubt and controversy. And most never receive justice: the problems that they sought to uncover are not corrected, and no-one is called to account".*[17]

Legislative protections

We shall now turn to investigating the actual protections in place to serve different forms of whistleblowers in South Africa.

Legislative history

Main legislative efforts

The original intent was to introduce whistleblowing legislation as part of the Open Democracy Bill. The Bill, originally drafted by Etienne Mureinik and developed by a Task Team headed by Mojanku Gumbi, President Mandela's chief legal advisor, was meant to deal with four aspects of open governance. The first was access to

information, the second open government, the third was whistleblowing, and the fourth was the right to privacy. However, the first part of the draft, dealing with access to information, was split off from the rest and dealt with under the whip of a constitutional deadline – as it was required that the law giving effect to access to information be passed within three years of the coming into effect of the Constitution. The President signed that law on the 4th February 2000, as the Promotion of Access to Information Act.

However, the other parts of the Open Democracy Bill were not abandoned. Richard Calland of Idasa and Lala Camerer of the Institute for Security Studies (ISS) drafted an initial whistleblower protection bill, at the invitation of the ANC membership of the Justice Committee. Their draft was the basis for the subsequent passage of the South African law. This draft borrowed from the concept that lies behind the British Public Interest Disclosure Act (PIDA), but sought to adapt it to the context of South African law and society. The committee then developed a draft.

On 23 and 24 March 1999, the Justice Committee heard submissions on the bill. Non-governmental organisations (NGOs) under the banner of the Open Democracy Campaign Group confirmed civil society's position that the scope of the whistleblower protection in the bill had to be extended to include the private sector.

The call from the NGOs was given an important shot in arm when the delegates to the first National Anti-Corruption Summit – a multi-sectoral formation comprising business, faith organisations, NGOs, community-based organisations, donors, political parties, academic institutions, the media, labour and government – recognised the efficacy of whistleblowing in combatting corruption in the public and private sectors.

The summit captured this spirit in a resolution passed at the end of their deliberations. The resolution reads:

> *"We therefore resolve to implement the following resolution as the basis of a national strategy to fight corruption:*
>
> *"To support the speedy enactment of the Open Democracy Bill to foster greater transparency, whistleblowing and accountability in ALL sectors" (emphasis added).*

A major concern for all those working on this legislation was that it would fail at the hurdle of implementation. It was the experience of many of those working on legislation that the parliamentary process was, despite appearances, the easy bit – implementation in a civil service lacking in capacity and with a long history of secrecy and authoritarian management was not going to be easy.

One of the key weaknesses of the legislation was that the mechanisms to deal

with the inter-relationship of the law with the Labour Relations Act (LRA) were not clear to the committee. They therefore agreed in 2000 to cut and paste the damages remedies from the LRA into the PDA, pending investigation of the matter by the South African Law Reform Commission (SALRC). The PDA was assented to on 1 August 2000, and commenced into law on 16 February 2001.

In 2010 the SALRC informed ODAC that the Final Report on the Discussion Papers into the PDA had been presented to the Ministry of Justice. After several phone calls to the Department of Justice and a letter to the Deputy Minister of Justice, ODAC had a meeting with the Deputy Director General. At this meeting ODAC were told that the draft PDA amendment was not a legislative priority and therefore had not been tabled. ODAC raised arguments to the contrary and were advised to put those arguments in a letter to the Deputy Minister. ODAC did that and were told in April 2010 by the DDG that his team was preparing a report to the Deputy Minister on the draft Bill.

The SALRC report was finally released in response to a PAIA request lodged by ODAC in 2010.

Implementation of a whistleblowing support programme in South Africa

Public Concern at Work (PCAW) is a highly successful charity working out of London. This charity does training for companies and the public sector to help them to implement whistleblowing policies, and they also run a helpline for people who are considering blowing the whistle. ODAC considered that this project was a useful model for implementing the law in South Africa, particularly given that the South African Act was modelled on the British one. ODAC assumed that the private and public sector would see putting whistleblowing policies into place as useful.

It was felt that any project in South Africa would need to place a lot of emphasis on awareness-raising around whistleblowing and what it means. Relationships with other parts of civil society were seen as key, particularly with the unions. As a result a number of efforts were made to draw unions into promoting whistleblowing and its protections amongst their members.

All of ODAC's planning to assist implementation in the early years assumed that the "common interest" between employer and employee could be recognised and acted on in the South African workplace. ODAC had not counted on the deluge of legislation that the corporate and public sector would have to digest. Changes to the Labour Relations Act, the introduction of the Employment Equity Act, the Money Laundering legislation, the Surveillance and Monitoring Act, the Promotion of Access to Information Act, the Public Finance Management Act and the Basic

Conditions of Employment Act left employers reeling, and disinclined to do anything more than make a profit and meet the minimum regulatory requirements.

Repeated calls for the private sector to take up the international move to supporting whistleblowing, and local marks of approval such as in the King Code of Good Governance II and III reports, made little or no dent in the private sector.

Whilst above we considered to a degree the context for whistleblowers, civil society experiences demonstrate that the environment for whistleblowing is hostile, more so than originally imagined. The racial transformations in the workplace, limited as they have been, have not necessarily had an impact on the hierarchical nature of the workplace and South African society generally. The resistance to unionisation has been very dogged, which has limited this as an avenue for support for whistleblowers.

Whistleblowers are seen as insubordinate, failing to submerge their concerns in the interests of what the managers see as the greater good. The lack of ability on the part of managers to hear the message without shooting the messenger, has meant a distinct shift in policy on civil society's part. Civil society no longer believes that whistleblowers can act safely as individuals. Individual advice and litigation on the law as it stands do not protect whistleblowers.

The Constitution of the Republic of South Africa

Whilst there is no specific constitutional provision on whistleblowing, its framework certainly supports whistleblower protection and other tools of good governance. As was noted in Tshishonga,[18] the PDA protections of whistleblowers are not just reliant on specific sections of the Constitution, but more importantly affirm the underlying objective of the Constitution to ensure a democracy that has at its core the principle of accountability. Looking at specific sections, several seek to improve the conditions for whistleblowing in South Africa.

Section 9(1) reads:

> *Everyone is equal before the law and has the right to equal protection and benefit of the law.*

In addition, section 16(1)(b) provides:

> *Everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas.*

Also, section 23(1) states:

> *Everyone has the right to fair labour practices.*

The final provision lends support for the protections as designed under the PDA, specifically. More fundamentally perhaps, the preamble of the Constitution speaks of creating a democratic and open society – an environment that would require protections of whistleblowing for this goal to be realised.

The Protected Disclosures Act

Employees are often in the best position to detect criminal activities and irregular conduct at work.[19] The PDA, recognising this, seeks to protect employees seeking to disclose in an employment relationship. This Act remains our key law dedicated to whistleblower protection.

The law aims to:

i. Create a culture that facilitates whistleblowing; and
ii. Promote the eradication of criminal and other irregular conduct in organs of state.

As noted in Tshishonga:[20]

The PDA…affirms the "democratic values of human dignity, equality and freedom". In this respect its constitutional underpinning is not confined to particular sections of the Constitution such as free speech or rights to personal security, privacy and property. Although each of these rights can be invoked by whistle-blowers, the analysis in this case is from the perspective of the overarching objective of affirming values of democracy, which the particular rights form a part.

In terms of its scope, it is important to note that the Act applies to both public sector and private employees. It also utilises a definition of an employee to determine who is protected by the Act that is somewhat different from the definitions included under the Labour Relations Act. An employee is:

*Any person, **excluding an independent contractor**, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any person who in any manner assists in carrying on or conducting the business of an employer[21] (emphasis added).*

Further, an "employer" is defined as:

Any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer.[22]

The structure of the Act is fairly simple: it helps define what constitutes a disclosure, and describes the procedures that are required to be followed if such a disclosure is to be protected. It then creates protections from occupational detriment. The PDA thus provides forms of labour protections for persons who blow the whistle or "make a protected disclosure" in compliance with the procedures provided for in the law.

The onus of proving the various triggers for the PDA is vitally important, because whistleblowers may be discouraged from raising a "concern" under the belief they will have to prove the existence of a crime. Within the PDA, once a protected disclosure has been established, any occupational detriment received is presumed to be unfair (and any dismissal presumed to be automatically unfair dismissal). The jurisprudence has also shown us that the employee bears only the minimal onus of showing a demonstrable nexus between the making of the disclosure and the occupational detriment.[23] Once this has been shown to exist, the presumption discussed comes into play.

In terms of the law, a disclosure is the "disclosing" or revealing of information about the conduct of an employer (or employee of that employee) which the person disclosing reasonably believes shows, or tends to show, certain types of negative behaviours, criminal and otherwise. The specific examples given by the law are for a discloser to demonstrate that:

- A criminal offence has been, or is likely to be, committed;
- A person has, or is likely, to fail to comply with a legal obligation;
- A miscarriage of justice has occurred, or is likely to occur;
- It is likely, or it has been shown that, the health or safety of a person is endangered;
- The environment has been, or is likely to be, damaged;
- There has been unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act;
- That any of these above activities has been, is being, or is likely to be **deliberately concealed**.

It is important to note therefore that the actual existence of a crime is not a prerequisite for the protections to come into play. The wording of the PDA clearly indicates an attempt to protect reasonable suspicion of recalcitrant conduct.

An individual must then make this disclosure in a particular manner in order to be protected. The main procedures for this are described in sections 5–9 of the Act. Section 5 says that a discloser can make a disclosure to a legal adviser, which would include an employee's shop steward, union organiser, or attorney. While this can be done anonymously, it will make it more difficult for the organisation to investigate

the allegation. Section 6 allows for a disclosure directly to the employer, which is the preferred first avenue for disclosure. However, this must be done in good faith and in accordance with any policies the organisation has established for whistleblowing – a discloser's first step would therefore first be to try to identify whether any such polices are in place. Another avenue is to make a disclosure directly to a Member of Cabinet or the Executive Council, as an indication of this group's special authority (and the PDA defines who would constitute such a person). Given the authority of this position though, in practice it would be unlikely that many whistleblowers would have a method for accessing this as an actual avenue.

Another method for disclosure, in terms of section 8, is to make a disclosure to a regulatory body; but these bodies are currently limited to the Public Protector and the Auditor-General.

Finally, the Act refers to "general protected disclosures" in section 9. This important section means that employees can be protected under the Act even when they make disclosures more widely – such as to the media. Thus, even though the Act tries to encourage raising issues internally or within a very specific and protected environment, there are certain circumstances when a broader disclosure is still deemed worthy of protection. However, the conditions for this are fairly detailed in an attempt to create balance between the rights of the employee and the employer in such an instance.[24] It applies where the whistleblower honestly and **reasonably believes** that the information and any allegation contained in the information are **substantially true** and that the disclosure is **not made for personal gain**. There are also further considerations for allowing a generally protected disclosure, which are:

- That the discloser reasonably believed that if they tried to disclose to their employer they would be subjected to occupational detriment;
- That there was no Regulator, and the discloser reasonably believes their employer would conceal or destroy relevant information improperly if they came forward;
- That the discloser has made a similar disclosure before to their employer or a regulatory body, and no subsequent action was taken within a reasonable time;
- That the nature of the impropriety is of an exceptionally serious nature.

Further, in all circumstances, the disclosure must also be reasonable (which thus requires a consideration of the nature of the disclosure itself) and the following factors will be examined to determine reasonableness:

- The identity of the person to whom the disclosure is made;
- The seriousness of the impropriety;
- Whether or not the impropriety is continuing or is likely to occur in the future;
- Whether the disclosure is made in breach of a duty of confidentiality;

- If a disclosure was made, any action which the employer or other person has taken or might reasonable be expected to have taken in response to the disclosure;
- If a disclosure was made and no action taken, whether this disclosure was made in terms of procedures authorised by the employer; and
- The public interest.

While this seems a convoluted process, the onus mentioned earlier must be borne in mind. Further, there is jurisprudential guidance on the meaning of the various aspects of the laws as well (for guidance, see the case summaries below).

If a disclosure has been made through one of the avenues described above, what forms of detriment is an employee then protected from? The PDA describes protection from a broad variety of detriments extending from acts such as disciplinary action and dismissal, through to the denial of an appointment, being refused a reference, and even threats of any of the described detriments contained in the definition section.

In order to seek recourse under the Act, an employee can approach the Commission for Conciliation, Mediation and Arbitration (CCMA), or the Labour Court, however the High Court also has concurrent jurisdiction to determine whether the Act applies.[25]

The Companies Act

The Companies Act has protections that relate to whistleblowers; but, due to the objectives of the Act, these protections are limited to those acting within companies (although those within not-for-profit companies can disclose). It would therefore also not cover companies incorporated outside of South Africa.[26]

Particularly, in section 159 it seeks to expand on the protections contained in the PDA, including expanding on the types of information release that warrant protection. It expands on the lists of persons to whom a whistleblower can make a disclosure (including, for instance, a Board Member of the company concerned or the Companies and Intellectual property Commission). It also extends the means for protection far beyond those labour protections in the PDA through section 159(4), and provides that whistleblowers who make a protected disclosure are "immune from any civil, criminal or administrative liability for that disclosure".

In some senses, it also creates a slightly more simplified process from that contained in the PDA: the burden of proof required is a single governing standard i.e. that the disclosure be made in good faith and the person making the disclosure must have reasonably believed at the time of the disclosure that the information showed, or tended to show, that a person has committed one of the specified acts in

terms of section 159(3)(a) and (b). This relieves from some of the difficulties that may arise due to the convoluted nature of the PDA provisions.

It also extends the protections from beyond just occupational detriment, to protecting the **identity** of the whistleblower through the inclusion of the principle of "qualified privilege".[27]

Vitally, under subsection 7, it imposes a duty to create and maintain systems and procedures for facilitating whistleblowing, and to publicise these policies. This is a prescriptive step beyond the PDA, which merely appears to support such actions, rather than require it.

However, while we address later specific inadequacies with the PDA, it is worth noting that the Freedom of Expression Institute has noted that the Companies Act utilises a test of "reasonably believed" within section 159, which they submit is onerous.[28] Instead, the "reasonably suspected" test should replace this as a broader and simpler mechanism.

The Prevention and Combatting of Corrupt Activities Act

This Act sought to bring South African law in line with the United Nations (UN) Convention Against Corruption and the African Union (AU) Convention on Preventing and Combatting Corruption. Possibly the most significant objective of the Act was to create the crime of corruption. It then creates penalties and offences for those engaging in corrupt activities. The definition of general corruption (there are definitions for specific forms as well) is:

"Any person who directly or indirectly—

a) accepts or agrees or offers to accept any gratification from any other person whether for the benefit of himself or herself or for the benefit of another person; or
b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

I. that amounts to the:
   a. illegal, dishonest, unauthorised, incomplete, or biased;
   b. misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation,

II. that amounts to the:
    a. abuse of a position of authority;
    b. a breach of trust, or
    c. the violation of a legal right or set of rules;
III. designed to achieve an unjustified result; or
IV. that amounts to any other unauthorised or improper inducement to do or not do anything, is guilty of the offence of corruption".

One can see then from the general definition that, unlike some of the laws from other jurisdictions, it applies to the private sector as well.

It has an interesting structural approach to dealing with corruption by, for instance, requiring the creation of a register to prevent people who use corruption from getting government contracts or tenders, as well as requiring people in positions of authority to report corruption over R100 000. This positive obligation to report corruption is worth noting, and is contained in section 34.

There is some intersection with the Witness Protection Act. In sections 11 the Act makes it an offence for witnesses who engage in corrupt activities to alter their testimony. It also, within section 18, creates an offence for persons who attempt to corrupt or intimidate a witness. The Act also amended the Witness Protection Act to ensure that witnesses to a crime of corruption would be able to receive protection under that Act.

The National Environmental Management Act

The National Environmental Management Act provides whistleblowing protections in section 31. Notwithstanding other laws, the Act prescribes that no person can be civilly or criminally liable (or dismissed, disciplined, prejudiced or harassed) if that person in good faith reasonably believed at the time of making a disclosure that it revealed evidence of an environmental risk. The section prescribes that, for these protections to be available, the discloser must disclose the information either to:

I. A committee of Parliament or of a provincial legislature;
II. An organ of state responsible for protecting any aspect of the environment or emergency services;
III. The Public Protector;
IV. The Human Rights Commission;
V. Any attorney-general or his or her successor; or
VI. More than one of these bodies.

A whistleblower can also utilise this protection if they disclosed the information concerned to one or more news media if they, on clear and convincing grounds,

believed at the time of the disclosure:

– that the disclosure was necessary to avert an imminent and serious threat to the environment, to ensure that the threat to the environment was properly and timeously investigated or to protect himself or herself against serious or irreparable harm from reprisals; or
– giving due weight to the importance of open, accountable and participatory administration, that the public interest in disclosure of the information clearly outweighed any need for non-disclosure;
– disclosed the information concerned substantially in accordance with any applicable external or internal procedure; or
– disclosed information which, before the time of the disclosure of the information, had become available to the public, whether in the Republic or elsewhere.

In terms of section 31, you do not need to exhaust internal remedies first (though you must of course have utilised one of the procedures prescribed instead).

Protection from Harassment Act

This law presents an interesting new avenue for offering a form of protection to potential whistleblowers. The law provides a civil remedy for people to apply for a protection order from harassment, which is described as:

> *"directly or indirectly engaging in conduct that the respondent [i.e. the person harassing] 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—
> a. following, watching, pursuing or accosting of the complainant or related person resides, works, carries on business, studies, or happens to be;
> b. engaging in verbal, electronic, or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues;
> c. 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".

The clerk of the court is obliged to help you in applying for this protection order, and thus a lawyer is not required.

While there are criminal laws, such as *crimen inuria*, which could possibly also

apply to help the harassed persons, this new Act offers the potentially harassed person a simpler and faster civil process: with interim protection orders giving immediate protection. These orders can prohibit further acts of harassment, or even prevent the enlisting of other people to harass the whistleblower. Importantly, the court can order the South African Police Service to confiscate any weapons your harasser may have, and can oblige the Station Commander to investigate the harassment for potential criminal prosecution.

Witness Protection Act

The Witness Protection Act was amended by the Prevention and Combatting of Corrupt Activities Act. Witness protection was previously provided for under the Criminal Procedure Act of 1977. Though we address some issues in relation to the witness protection programme later, it is worth noting that the Act does provide for protection of persons who have been witness to corrupt activities, in particular. It is of course only available for witnesses (either appearing in court or making an affidavit) and does then mean judicial proceedings are involved. A witness can apply for such protection, and for the protection of those related to them, if they are afraid for their safety. This then seeks to remove the witness from a dangerous situation that exists.

The Promotion of Access to Information Act

The Promotion of Access to Information Act (PAIA) regulates how people can access the information of both public and private bodies. All people can use the Act, and it thus provides a useful bureaucratic mechanism for accessing more information about activities that may be of use to the whistleblower. The provisions in PAIA in many ways create a proactive mechanism for an open environment that prevents corruption – but also, if corruption exists, provides at least some tools for trying to engage with this act.

All people have a right of access to information of public bodies. All people also have a right of access to information of private bodies, if that information is required for the exercise or protection of any other right. The Act provides the procedures one must follow in order to exercise this right – if a person wants to access information from a public body they complete a Form A, and if they want to access information from a private body they use a Form C. They then submit this request to the entity concerned.

The public interest override, contained in sections 46 and 70, bears similarity to the wording of the whistleblowing sections in NEMA in the sense of how they

each weigh competing interests. It is thus clear that there is a legislative environment being created which seeks to create supporting mechanisms to advance good governance, with the public interest sitting at the core.

The Promotion of Administrative Justice Act

This Act requires government to follow fair procedures when taking decisions that affect the public or an individual. It gives people the right to request written reasons for decisions they disagree with, which allows them to explore whether or not acts of corruption may have influenced the decision. While it exists in a similar paradigm to PAIA in terms of the forms of assistance it can provide within the whistleblowing environment, it is worth noting that an administrative entity is obliged to create written reasons, whether or not those reasons existed, if the action concerned adversely affected your rights.

Journalistic source protection

A broader area that should also be considered are the forms of protections for journalistic sources. Relevant journalistic ethics in South Africa include protection for confidential sources, such as in the South African Press Code. While the Constitution may not expressly protect the right of journalists to keep their sources confidential, it does in section 16 protect the right of freedom of expression and expressly includes within this "freedom of the press and other media".

This has meant that there is no legacy of an "absolute" privilege of journalistic sources. However, there are certain levels of protection available under the current legal framework. In relation to criminal law, section 205 of the Criminal Procedures Act can be used to force disclosure on information relating to sources, in the sense that it compels witnesses to testify before court. This is a potential direct threat to the Code undertaken by journalists to protect their sources. However, an individual can only be arrested for failing to appear under section 205 if the information sought by the witness (i.e. the journalist) is "necessary for the administration of justice or the maintenance of law and order". Thus, journalistic ethics will be considered under the making of such an order. Further, there is some jurisprudence to suggest that journalistic ethics will constitute a "just excuse" for resisting a section 205 compulsion in some cases – but not necessarily all cases. While it is unlikely an absolute journalistic privilege will ever be accepted in future legal amendments, there may be a qualified privilege provided for in terms of amendments to be made to section 205.

This question of the protection of journalistic sources as a qualified privilege

has also arisen in terms of civil litigation. The most recent judgment of relevance is *Bosasa Operation (Pty) Ltd v Basson and Another* [2012] ZAGPJHC 71. When the plaintiff, who was suing the *Mail & Guardian*, tried to used the discovery process to compel the *Mail & Guardian* to reveal its sources, the court held that the names of the sources were immaterial to the defamation case and therefore need not be revealed. While not providing a blanket protection in all instances, the public interest and the need to advance the right of freedom of expression can be used to prevent disclosure in the right cases.

Asset disclosure

There are several laws that seek to manage disclosure of assets within the public sector, which is an attempt to provide structural solutions to corruption in a preventative manner. A general weakness of asset disclosure in South Africa, however, is oversight – which intersects this area then with access to information and proactive disclosure.[29]

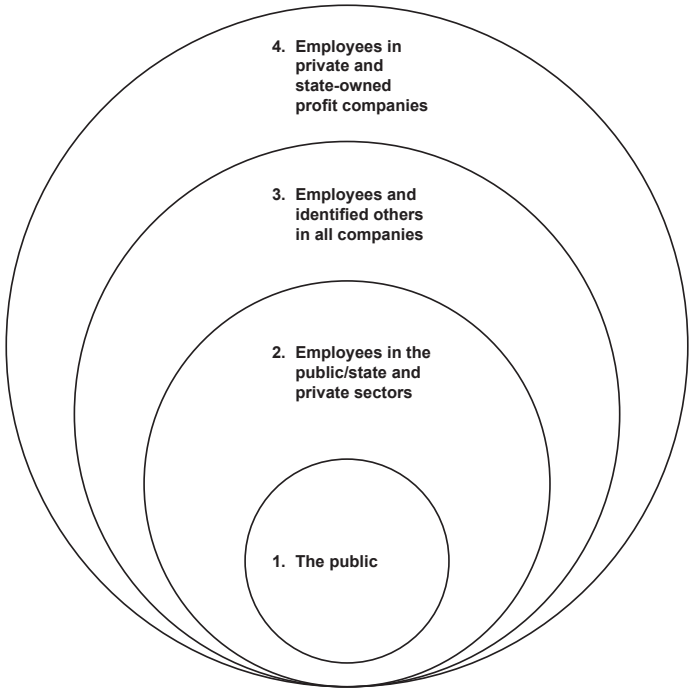
In terms of particular legislative requirements, the right to access information contained in disclosure records is more specifically outlined in the Executive Members' Ethics Act 82 of 1998, the Local Government Municipal Systems Act 32 of 2000 and the various Codes of Conduct across the different branches and spheres of government, for example the Code of Conduct for Assembly and Permanent Council Members. There are also requirements under the Public Service Regulations of 2001.

Legislative shortfalls

There are essentially four different frameworks, or spheres for protection, as described by Martins in Figure 1 on the following page.

Within all these spheres, there are lacunas, which seem to unnecessarily limit protection. We will deal with the main pitfalls below. The least protections are for members of the general public that make disclosures. Further to the legislative pitfalls, members of the public are discouraged from blowing the whistle for fear of reprisals, and also because they suspect there would be no follow up to their complaint.[30] One of the greatest pitfalls of the South African legislation is the incongruity of the legal framework. This inadequacy is reinforced by the recommendation of Transparency International, who note that there should ideally be "…a single, comprehensive legal framework for whistleblower protection".[31]

Figure 1 Four spheres for protection



The Protected Disclosures Act

The South African Law Reform Commission has made extensive recommendations on potential improvements that could be made to the law in its Discussion Paper 107 (2004). However, we shall consider additional areas of concern.

Scope of the law

The law has a limited understanding of what constitutes an employment relationship and, critically, fails to extend the concept to include independent contractors, consultants, agents and other such workers. This means it excludes "former employees, prospective employees, volunteers or company pensioners".[32] Thus, the PDA excludes significant groups who may have knowledge of wrongdoing by or within an organisation and who are at risk of significant harmful retribution by the organisation if they were to blow the whistle. The labour market increasingly "deformalises" labour relationships through outsourcing, steadily increasing the number of vulnerable persons in this lacuna. This limitation of the scope of the PDA thus undermines one of the express objectives of the Act, namely promoting the eradication of unlawful and irregular conduct within organisations.

Even more broadly, it limits protections to those within an employment relationship. While this is linked in many senses to the forms of relief and understanding of detriment the PDA relates to, the fact remains that, as the Auditor-General noted, a valuable and frequent source of information is not "from persons within the normal employer/employee relationship, but rather independent contractors or members of the public".[33]

One of the fundamental benefits of a whistleblowing law is in terms of its ability to provide organisations with a risk management tool, allowing entities to take early corrective action and demonstrate sound governance. Yet, the scope of the law does not create a positive obligation to include implementation mechanisms such as whistleblowing policies.

Remedial issues

There are some notable gaps in terms of the possibilities for resolving whistleblowing disputes under the PDA. Fortunately, the jurisprudence interpreted the PDA to allow for concurrent jurisdiction with the High Court for disputes under the PDA.[34] This still means though that all forums for redress in terms of the PDA are court-based – leading to significant costs and time delays. Typical weaknesses of the criminal justice system's inefficacies are thus incorporated into the PDA; weaknesses that can be exploited by companies with financial muscle who can tie-up cases with procedural delay tactics. A solution would be for the PDA to require or permit recourse to alternative dispute resolution mechanisms.

There are also some issues in relation to the form and amount of compensation available. When occupational detriment is shown, the compensation due stems from the Labour Relations Act. For unfair dismissal, there will be for reinstatement and/or the payment of compensation for non-patrimonial losses up to a maximum of the equivalent of 24 months' salary, plus any patrimonial losses suffered. In the case where an unfair labour practice is demonstrated, the compensation is for the revision of the conduct and/or compensation for non-patrimonial loss up to a maximum equivalent to 12 month's salary, plus any patrimonial losses. The Act also allows for interdicts to be ordered against an employer if the correct factual circumstances exist.

The financial compensation is limited then to only that experienced from the occupation detriment, and not the full range of financial repercussions that may arise from the making a disclosure. The limitation on the non-patrimonial forms of damage (i.e. things such as traumatic stress that cannot be directly related to the financial state), present difficulty in terms of compensating for the full range of repercussions that were discussed under the consideration of the whistleblower's ordeal.

This lack of protection is additional support for the inclusion of financial incentives as an almost pre-emptive form of full compensation for whistleblowers (see further below).

Protection of State Information Bill

This law, soon to be signed by the President of the Republic, creates criminal offences in relation to protected (or classified) state information. The various kinds of criminal offences created are the main concern for potential whistleblowers.

Probably the most worrisome issue in relation to the extent of offences created is that they extend beyond the mere original holder and "protector" of the information, and to the general public at large. So, while a public official is the person that through their line of work may have a duty to protect confidentiality, once they have failed this duty the law nevertheless creates criminal sanctions even further to any subsequent member of the public who is provided, or comes into contact with, that information.

Particularly, any offences created for the **act of disclosing** would seem to directly threaten legitimate whistleblowing in the public interest, in the sense that traditional PDA understandings of whistleblowing speak of the act of disclosure when creating its protections. To overcome this, the Bill was amended in section 43 to read:

> *"Any person who unlawfully and intentionally discloses classified information in contravention of this Act is guilty of an offence and liable to a fine or imprisonment for a period not exceeding five years, except where such disclosure is—*
>
> *a)* ***protected under the Protected Disclosures Act,*** *2000 (Act No. 26 of 2000) or*
> ***section 159 of the Companies Act,*** *2008 (Act No. 71 of 2008); or*
>
> *b) authorised by* ***any other law****" [Emphasis added].*

However, given the weaknesses in the scope of the Protected Disclosures Act and Companies Act, this does not legitimately protect independent contractors or retired workers or, of course more broadly, a legitimate citizen whistleblower. It is also worth noting this protection is not extended to section 49 criminal offences for those form of disclosures. This is thus the most limited form of public defence that could have been included. It is further unclear how it will be established that a disclosure would fall under these grounds for an exclusion.

The espionage offences created have severe penalties, with no forms of exclusion

or additional defences; and were essentially created for the circumstances when the delivering, communicating, or holding of information may benefit a foreign state. The possibility that the espionage offences could too criminalise legitimate whistleblowing remains a possibility. Section 36 states:

1. It is an offence punishable on conviction by imprisonment for a period not less than 15 years but not exceeding 25 years—
    1. to unlawfully and intentionally communicate, deliver or make available state information classified top secret which the person knows or ought reasonably to have known would directly or indirectly benefit a foreign state; or
    2. to unlawfully and intentionally make, obtain, collect, capture or copy a record containing state information classified top secret which the person knows or ought reasonably to have known would directly or indirectly benefit a foreign state.
2. It is an offence punishable on conviction by imprisonment for a period not less than 10 years but not exceeding 15 years—
    1. to unlawfully and intentionally communicate, deliver or make available state information classified secret which the person knows or ought reasonably to have known would directly or indirectly benefit a foreign state; or
    2. to unlawfully and intentionally make, obtain, collect, capture or copy a record containing state information classified secret which the person knows or ought reasonably to have known would directly benefit a foreign state.
3. It is an offence punishable on conviction by imprisonment for a period not less than three years but not exceeding five years—
    1. to unlawfully and intentionally communicate, deliver or make available state information classified confidential which the person knows or ought reasonably to have known would directly or indirectly benefit a foreign state; or
    2. to unlawfully and intentionally make, obtain, collect, capture or copy a record containing state information classified confidential which the person knows or ought reasonably to have known would directly or indirectly benefit a foreign state.
4. If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in this section, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

Further, section 38 on hostile activity offences, which also excludes defences for the public or whistleblower, states:

1. It is an offence punishable on conviction by imprisonment for a period not

exceeding 20 years for any person to—

1. unlawfully and intentionally communicate, deliver or make available state information classified top secret which the person knows or ought reasonably to have known would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the national security of the Republic; or
2. unlawfully and intentionally make, obtain, collect, capture or copy a record containing state information classified top secret which the person knows or ought reasonably to have known would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the national security of the Republic.

2. It is an offence punishable on conviction by imprisonment for a period not exceeding 15 years for any person to—
   1. unlawfully and intentionally communicate, deliver or make available state information classified secret which the person knows or ought reasonably to have known would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the national security of the Republic; or
   2. unlawfully and intentionally make, obtain, collect, capture or copy a record containing state information classified secret which the person knows or ought reasonably to have known would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the national security of the Republic.
3. It is an offence punishable on conviction by imprisonment for a period not exceeding five years for any person to—
   1. unlawfully and intentionally communicate, deliver or make available state information classified confidential which the person knows or ought reasonably to have known would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the national security of the Republic; or
   2. unlawfully and intentionally make, obtain, collect, capture or copy a record containing state information classified confidential which the person knows or ought reasonably to have known would directly or indirectly benefit a non state actor engaged in hostile activity or prejudice the national security of the Republic.

While it appears clear this Act will be subject to legal challenge, it remains a significant feature of the South African whistleblowing environment.

Political and policy gaps

National Anti-Corruption Hotline

The National Anti-Corruption Hotline can in some senses be seen as an attempt to provide broader protections to whistleblowers that may not fall within the remit of the PDA. However, its efficacy is questionable. It should be noted that this is not an anomaly – the Open Democracy Advice Centre also attempted to establish a citizen hotline, which failed to receive the numbers of advice seekers that could warrant the maintenance of the system.[35]

In eight years, the Hotline was only able to assist in the recovery of R110 million in public servants' misappropriation of funds as a result of their investigations. More worryingly, fewer than 1 500 officials have had action taken against them – in spite of the Hotline costing significant sums of money to maintain. The main reasons for this inadequacy have generally been the lack of investigative capacities within departments themselves and entities failing to investigate when cases are referred back to them.

The Hotline has thus – in an attempt to not impose itself on departments – created a useless looping mechanism that suffers from the same weakness that allows corruption to exist at all: if departments were disposed to efficient internal investigation, measures outside the scope of the PDA would probably not be required.

The Public Services Commission also noted within its recommendations to improve the Hotline that in many senses weaknesses resulted from the lack of internalising mechanisms within public sector departments to enhance the functioning of the Hotline (e.g. monitoring and statistics).[36]

Perhaps the most pertinent issue is that, for the Hotline to be effective, whistleblowers need to feel capacitated and protected coming forward. The weak environment for encouraging whistleblowers we see in South Africa is not adequately countered by the existence of the Hotline, though the allowance for anonymous reporting is beneficial.

That the Hotline requires further capacitation has also been confirmed by the Department of Public Service and Administration, with the support of the Presidency, submitting as one of its commitments under the Open Government Partnership the need to further capacitate both the National Anti-Corruption Forum and Hotline. However, the mechanisms to do so have not been properly considered. Further, over a year after submitting the commitment, the achievement was limited to a training of 2 018 anti-corruption officials who are not directly assigned within either agency.[37]

This inadequacy leaves the question of the citizen whistleblower in significant doubt – when a piece of law such as the Protection of State Information Bill is expressly attempting to create criminal offences for members of the public, how is the law going to provide mechanisms to protect the legitimate citizen whistleblower blowing the whistle outside an employment relationship?

Mandated agencies

There are various agencies mandated in terms of laws to whom disclosures can be made (not just within the PDA), such as the Public Protector's Office, the Auditor-General, the Public Service Commission and the National Anti-Corruption Hotline. There are in addition sector-specific bodies such as the Health Professionals Council of South Africa, etc. Yet members of the public who approach such entities may not be adequately protected, given the limited remits for each.[38]

Below is a table of agencies and mandates, as adapted from Dr Vinothan Naidoo:[39]

Agency	Mandate that covers anti-corruption and whistleblowing
Auditor-General	Referred to as 'pro-active intervention', auditing of departmental financial management practices
Public Protector	Investigation of non-criminal cases involving ethical/code of conduct transgressions in the public service
Public Service Commission	Oversight, monitoring, and research on financial misconduct including some investigative work on relevant cases
Independent Complaints Directorate	Investigate cases of police misconduct, including corruption, where cases are 'fairly simple, non-complex and non-resource demanding…'
National Anti-Corruption Hotline	Under the management of the Public Service Commission, the Hotline receives complaints of corruption, encourages collaboration on whistleblowing strategies and refers cases to Departments for further investigation
South African Human Rights Commission	Investigation of any alleged fundamental human rights violations, whether lodged as a complaint or not, with mediation powers (see for instance NEMA)
South African Police Service Commercial Branch	Investigate criminal offences including corruption
National Prosecuting Authority (NPA)	Prosecute criminal cases involving corruption
Directorate of Special Operations (operates under the NPA)	Investigate high profile and complex corruption cases of an organised nature
Asset Forfeiture Unit (operates under the NPA)	Investigate cases and seize or freeze assets
Department of Public Service and Administration	Policy and strategic planning role in relation to anti-corruption

There has been academic and policy debate as to whether a core, centralised entity would perhaps be preferable to a variety of agencies with seemingly overlapping mandates. Perhaps pragmatically, the PSC have noted that – even if a single oversight mechanism were to be preferred – this would need to arise organically from the coordination of the agencies currently working in the area.[40] There are also some potential negatives to a single mandated agency: namely, it may be more susceptible to political pressure and abuse. What is in fact required is effective coordination between the variety of agencies, as well as clarity of mandate, so that citizens are adequately capacitated to know which entities are able to provide the support needed in any given situation.

Further, within the PDA, disclosures can only be made to the agencies of the Auditor-General and Public Protector, in spite of a broad range of agencies having the capacity to deal with whistleblowing issues. Whilst the mere capacity to disclose to such agencies is useful as the discloser need not first have raised it internally, it does come with consequent limitations such as delays, or the discovery that the complaint does not suitably fit within the remit of the agents mandate (for instance, to lay a complaint with the Public Protector you must demonstrate that you were improperly prejudiced by a government agent or official). There is seemingly little basis for not extending possible regulatory agencies to entities such as the Independent Complaints Directorate or Public Services Commission.[41]

Security for whistleblowers

As BluePrint has noted:

> *A whistleblower may take on serious risk to their financial position, reputation and personal safety when disclosing wrongdoing in the public interest. After making a disclosure, a whistleblower may be subject to threats and reprisal from fellow employees or another person as a result of that disclosure.*

That the environment may be physically unsafe for whistleblowers has been noted, but the law seems to inadequately address the reality of the risks for those involved.

We should consider one of the mechanisms for the direct security of whistleblowers i.e. the witness protection programme. As seen above, this is governed largely by the Witness Protection Act, which obliges the Department of Justice with oversight. Coverage applies to any witness who has reason to believe that his/her safety or that of a related person is under threat by reason of being witness to a crime which, when read with the Prevention and Combatting of Corrupt Activities

Act, would include witnesses in a case involving corruption. The Department of Justice is charged with oversight of the performance of the programme (though the National Prosecuting Authority controls the budget). However, witness protection is a support to the criminal justice system; people only have this form of protection available if they **are engaged as witnesses** in a criminal proceeding (some other forms of proceedings are included, but it must just be noted that judicial proceedings are the trigger). The NPA has reported on a decreasing number of persons leaving the witness protection programme, which demonstrates some confidence in the system.[42] However, perhaps more indicative is the fact that not significant amounts of people are placed under this form of protection in the first place. From 2011 to 2012 the programme handled only 407 witnesses and 462 related persons, with 28 criminal prosecutions finalised while on the programme. After completion of their testimonies as well, 31 witnesses with 21 dependents were discharged from the programme.[43] That there are also political imperfections in relation to the witness protection programme in South Africa has been confirmed by recent wrangling within Parliament to have the programme moved from the oversight of the National Directorate on Public Prosecutions to avoid undue influence.[44] A particularised difficulty for the individual whistleblower is that there are often (necessarily) stringent protection agreements required in order to make the programme effective, that nevertheless discourage many from participation.

The Companies Law may move beyond the PDA to provide for civil and criminal protections, but there seems to be few legislative attempts to address directly the vulnerable security state of the whistleblower.

Recommendations

After a consideration of the socio-political and legislative environment, as well as the specific weakness within the South African context, we will now turn to a broad range of recommendations to improve the environment for the South African whistleblower.

Code of Good Practice

There are various forms of codes and policies that seek to guide behaviour within the broader transparency environment. For instance, the Batho Pele principles serve as an ethical guide for public servants. The Code of Conduct for Public Servants (1997) (which creates an offence of misconduct) obliges a public servant to:

a) Always:
   a. Act in the best interests of the public.
   b. Be honest when dealing with public money.
   c. Report all cases of fraud and corruption to the appropriate authorities.
b) Never:
   a. Favour friends or relatives or abuse their authority.
   b. Use their official position to obtain gifts or benefits.
   c. Accept any gifts or benefits when offered them as these may be seen as a bribe.

Nevertheless, a weakness in the PDA (but also reflecting on the broader whistleblowing environment) is the failure to contain an obligation for companies to take proactive steps to facilitate whistleblowing and to investigate claims by whistleblowers. While the Companies Act goes slightly further, its protections are still not adequate to properly and proactively promote whistleblowing an organisation as opposed to **how** to promote whistleblowing.

We would therefore suggest that, in addition to the introduction of a statutory obligation to take proactive measures to enable and encourage disclosures, a Code of Good Practice, similar to the British PAS or Schedule 8 of the Labour Relations Act (Code of Good Practice: Dismissal), should be developed to give guidance to organisations on how best to fulfil their responsibilities in terms of the PDA. This would help to facilitate the development of a culture of disclosure within organisations and society as a whole, and provide forms of practical reference to empower organisations on whistleblowing. A Code of Good Practice facilitates business to "do better" in terms of whistleblowing, but also engages them in the perception change needed in order for an environment truly conducive to openness to be established.[45] Such a practice works for organisations similarly to how policy works within government departments: it lays the foundations for a change in perspective, and facilitates practical implementation.

Simply stated, there is not enough guidance on good practice. Yet there remains little reason as to why organisations should not be able to benefit from, and build upon, the broad body of knowledge that is steadily growing around the world on creating an organisational environmental conducive to whistleblowing. Such a Code could also be utilised for interpretative guidance from agencies charged with recourse, particularly in relation to how to balance the competing interests of the organisation and the individual. Most fundamentally though, the Code could also have a role in terms of synergising the legislative framework – a core legislative lacuna as identified earlier.[46]

Such a Code would also be a good place to try to address alternative measures that seek to engage directly with the individual behavioural issues that contribute to dishonesty. For instance, to try to counter the social factors that sometimes mean public officials are more able to be dishonest given the behaviour of the in-group, strengthened recourse to ethical codes could be of assistance (including considerations on behavioural research). The Batho Pele Principles are an existing ethical code that promote transparency and seek to define and guide public service conduct. However, the existence of moral codes is often not enough to counter unethical behaviour: the effective point to intervene in an incident of dishonesty is just prior to the event, if you wish to affect behaviour through a reference to moral codes.[47] In the public service in South Africa, every day has a potential for acts of dishonesty – so what is the critical point to intervene? Every morning. Thus a possible solution worthy of experimenting with would be using the Batho Pele principles as a means for accessing the personal computers of officials. So, for instance, a randomised selection of words could be excluded from the Principles that the official is required to fill in before their computer opens – this would mean they would have to engage and read the Principles, but experimentation has demonstrated that the exact recall of the Principles would not be necessary – as exact recall of the "Ten Commandments" did not affect the cheating, the mere reminder was enough.[48]

Whistleblowing Network

The lack of consolidation within the legal framework[49] extends too to the lack of consolidation in terms of avenues for recourse, and even to an incongruity in terms of where a whistleblower can go for advice. This, when weighed with the poor levels of protection available directly to the citizen whistleblower, clearly indicates the need for consolidated platforms for persons seeking assistance.

A Network is also required as a mechanism for – outside of government and organisations – raising awareness in relation to whistleblowing. The need for awareness-raising is pertinent, and the numbers seem to indicate the government is not managing in the performance of this task on its own.[50] As evidence of this, only 30% of South Africans claim to know about the PDA.[51] This Network would not be seen as replacing the need for other agencies such as the Public Protector and Public Services Commission to become more active in raising awareness of whistleblowing in South Africa, but would still be a necessary addition.

This is not a local problem alone, and recently the international community has sought to again refresh efforts to protect and empower whistleblowers though the establishment of the Whistleblowing International Network.

The nature of such a network now becomes worthy of investigation. Trade unions have always been seen as strong allies in the fight against corruption, given their relationship to labour and the fact that the protection mechanisms are largely in relation to labour, i.e. the PDA. However, how do we incorporate organisational interests directly as well? When we consider the role of organisations in terms of advancing internally a culture of whistleblowing, access to such a Network would be empowering – however, if the justification were merely in terms of information sharing for capacitation, perhaps their interests would be met if the recommendation to create a Code of Good Practice were adequately followed through.

A further area for consideration is the relationship of such a Network to the National Anti-Corruption Forum. The National Anti-Corruption Forum is a multi-sectoral body tasked with empowering whistleblowers, but has been criticised for being "toothless".[52] This weakness was acknowledged by government itself when it tabled as one of its OGP Commitments the need to "[e]nhance national integrity through capacity-building of the National Anti-Corruption Forum and Anti-Corruption Hotline". The Department of Public Services and Administration has not taken any direct steps in terms of this commitment to the Hotline or NACF in particular, but has instead engaged in activities relating to anti-corruption officials. Foreseeably, such a network would not impinge either on the NACF's main resolution of 2011, to be:

> *…primary platform for the development of a national consensus through the coordination of sectoral strategies against corruption.*

Its co-ordination role remains, even if collaboration for advocacy purposes is promoted by another entity.

Such a Network could then be used to start driving the advocacy for a review process of the PDA – a process that has seemingly stalled as the Department of Justice invests energy into the passage of the Protection of Personal Information Bill. Importantly too, this research has identified clear gaps and made a series of specific recommendations; recommendations which need to be driven through concerted and consolidated advocacy that could be taken up by such a Network.

Financial incentives for whistleblowers

The False Claims Act was originally passed in the US during its Civil War, as a result of rapidly increasing government procurement with limited oversight possible.[53] Borrowing from English law the principle of *qui tam* incentives, the law sought in a sense to encourage private citizens to act on behalf of the state in matters related to fraud. Thus, if citizens uncovered fraud, they could act on behalf of the state to

recover money and would then receive a reward for "their troubles". With periods of waning and accelerating utility, the 2008 financial crisis precipitated a more direct response. The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law in 2010 in the US, regulates corporate governance. Of particular interest though, is its version of financial incentives: a whistleblower can receive up to 30% of any fines, penalties or repayments of loss from their reporting (whilst also allowing whistleblowers to bypass internal mechanisms for reporting).[54] This is obviously controversial, with critics fearing disgruntled employees and false accusations motivated by a desire for profit that may lead to a waste of money in investigations. However, within the provisions are incorporated systems that attempt to mitigate these negative effects, such as the ineligibility to receive such an incentive if privy to privileged communications within the organisation.[55] A whistleblower is also required to submit original information from within the whistleblowers own knowledge pertaining to a violation of the relevant securities laws. The goal therefore is not to increase the number of whistleblowers – but to increase the number of quality whistleblowers coming forward.

There has been a submission that this incentivisation has not led to a dramatic increase in reporting under similar laws.[56] However, under the Dodd-Frank Law in 2012, the relevant agency received more than 3 000 tip offs from all states and from 49 countries.[57] The case for *qui tam* incentives lies in its capacity to offset detriment through compensation, but also as an acknowledgment that the individuals reporting may have better access to quality information than could be gathered by an external entity after an anonymous tip off.[58] It could also address the issues of limited compensation available under the PDA, providing a form of pre-emptive compensation for the very real losses that whistleblowers have been shown to suffer from acts of disclosure. In South Africa, we would propose that the Special Investigating Unit would have a role to play in considerations of the appropriate ways to incorporate financial incentives.

Protecting the public

It has already been strongly indicated in the environmental scan that the position of the citizen whistleblower is exceptionally precarious – the social and political environment is hostile to their actions, there are no legislative attempts to provide them with direct support, and even more political solutions such as the National Anti-Corruption Hotline fail to assist them in practice due to limitations of enforcement mechanisms, and weak implementation. Further, Blueprint for Free Speech has noted that those who assist disclosers seem to have little recourse either. While witness protection extends to relations of the witnesses, PDA protections necessarily

are limited to the direct damages (though with non-patrimonial losses) experienced by the whistleblower. Recommendations must include attempts to deal with this gap.

The PDA is obviously not designed to deal with the issue of the citizen whistleblower, given the nature of the protections it provides and its remedies. The South African Law Reform Commission confirmed this when it would not make recommendations for the extension of the PDA to this category – noting that their protections were available through reporting to alternative agencies and with other laws.[59] For SALRC, it is a question of effective remedies.[60] However, what avenues would be appropriate for ensuring greater protection?

Forms of public interest defences must also be suggested when offences that may affect the citizen whistleblower are created – but this form of case-by-case legislative intervention may prove difficult (see for example attempts to correct the Protection of State Information Bill). BluePrint For Free Speech has recommended an ideal provision as being one that instead extends protections not to the type of whistleblower (i.e. employee v citizen), but instead in terms of the type of disclosure made (i.e. one in the public interest). The question is thus whether or not this could be facilitated through the drafting of a new law, or regimentally adjusted in all relevant and future statutory mechanisms.

Mechanisms for empowering whistleblowers

Carrying from above, particularly in relation to the citizen whistleblower, the central question that repeatedly occurs is: how can we provide support to the vulnerable whistleblower?[61] The goals of the Network may be in part to address their needs, but a potential mechanism to channel their work would be the creation of a portal for the distribution of information that addresses directly the avenues for recourse and advice for all the different types of whistleblowers, and not just those directly addressed through the PDA or Companies Act.

The lack of political motivation to pursue action against corrupt actors has been identified as having a negative impact on the whistleblowing environment. An interesting proposition may be to encourage those affected by incidences of corruption to pursue an action against the corrupt, presumably through the Prevention and Combatting of Corrupt Activities Act, on behalf of the state (which is in some senses an extension of the idea originally identified by the False Claims Act addressed above). In South Africa, this would mean attempting to get a certificate *nolle prosequi* from the National Director of Public Prosecutions to pursue a case yourself. Thus, you engage in what is called "private prosecution" of the case. The

problematic areas for consideration are:

a) costs – the costs of carrying the prosecution are then borne by the private party;
b) criminal charge – a criminal charge must be laid;
c) attainment of the *nolle* – you must persuade the prosecutor to allow you to proceed with the case;
d) locus – what is the level of connection required to the case in order to pursue the prosecution? This may affect the role of outside actors, such as Corruption Watch, who might otherwise be able to assist with such an act.

Security for whistleblowers

Recommendations must consider the possible ways to improve the security available for South African whistleblowers. What actually motivates a whistleblower to disclose? Research has shown that safety is generally the most important factor for people considering whether to blow the whistle.[62] Thus, a recommendation is for security issues to be addressed directly by legislative provisions, potentially within the PDA itself.

Protective measures might be included legislatively through the granting of powers to the court to order special forms of protective measures, based on a consideration of all relevant factors, some of which could include:

- Where the discloser lives;
- How the discloser makes a living;
- The family situation of the discloser, etc.

There are also external security mechanisms that can be promoted from an advocacy perspective through considerations of anonymity in reporting to journalists as the investigator of acts, rather than public agencies. For instance, the ToR Project provides free and direct browser security and can be used in application as a tool for journalists and their sources.

Amendments to the Protected Disclosures Act

While most of the recommendations above will either require new legislation, or be dealt with through policy and advocacy concerns, there are still direct areas of potential intervention in terms of the existing law.

Scope

A fundamental need is to extend the definitions within the PDA to deal with limitations in terms of scope. This extension of the ambit is a primary recommendation

of the South African Law Reform Commission.[63] Specifically, it is proposed that the definition of "employee" be amended to include independent contractors and other "workers" of this kind. It must be borne in mind that "worker" in the traditional understanding under the Labour Relations Act excludes certain members of the Armed Forces (and others) and we would thus not support a simple adoption of that definition. This would then need to be brought in line with the definition of "employer". In order to control this extension, the purpose of such would be to expand the definition to include all persons with knowledge about unlawful, corrupt or otherwise irregular conduct within an organisation.

Further, the PDA must recognise disclosures made to any kind of agency or organisation capable of addressing the allegation of the whistleblower as a protected disclosure.

Positive provisions

Given the extent of external socio-political factors that inhibit whistleblowers from feeling like they can act, the PDA must make express provision for organisations and other recipients of disclosures to protect the confidentiality of whistleblowers. In addition to this, specific mechanisms outside the PDA that currently support confidential whistleblowing (such as the National Anti-Corruption Hotline) must be improved with the particular considerations of the "user" (i.e. the whistleblower) in mind. This is one of the main recommendations of the Public Services Commission.[64]

Further, remedies must be extended to include immunity from civil, criminal and administrative prosecution and damages – and must not be limited by reference to the LRA, but rather left subject to ordinary damages principles.

The issue of agents capable of receiving disclosures has been addressed somewhat above. However, it may also be preferable for the PDA to establish a dedicated adjudication body that would be vested with investigative and enforcement powers to overcome the noted cost barriers, and to prevent abuse of the current judicial process by reluctant employers.

We would also recommend that the PDA create an obligation on all organisations to develop whistleblowing policies and procedures, to publicise these internally and to external entities in a commercial or other relationship with the organisations, to act on disclosures by conducting investigations and reporting back to the whistleblower on progress that has been made. In other words, more must be done to create positive obligations on both public and private entities to implement systems that directly encourage whistleblowing and militate against fraud and corruption.

A further avenue to improve the PDA, particularly seeking to address the weak-

ness of political will that sees a low number of internal investigations proactively pursued, would be to enhance monitoring efforts in terms of the PDA. Therefore, the PDA should require all organisations to submit annual reports on their policies, procedures, disclosures received and their responses thereto, as well as details of the number and nature of any reprisal against whistleblowers. Consequently, it should also assign a body (or bodies) responsible for receipt of the reports described to provide advice to the public and to promote awareness, knowledge use and implementation of whistleblowing laws.

Negative provisions

There are not enough provisions that negatively sanction actions taken – or not taken – by organisations in terms of proactively encouraging whistleblowing. Possible amendments would therefore be to require the publication of whistleblowing manuals, with a failure to comply resulting in penalties. Most of the negative forms of sanctions that do exist in our laws relate directly to the corrupt actor, and in that sense do not look broadly enough at the structure within which that actor was able to act. However, this may be addressed in the Code of Good Practice as well. Under the Open Government Partnership, the Department of Public Service and Administration is engaged in supporting a process to review existing regulations governing the conduct of public officials to include sanctions for corruption related cases, but little action has yet been undertaken in pursuit of this by the Department of Public Services and Administration.[65]

Future action

Organisational scan

To determine what actions are necessary, a brief scan of organisations in South Africa that engage on whistleblowing is appropriate.

AmaBhungane

Website: http://www.amabhungane.co.za/

AmaBhungane is the investigative journalism unit within the *Mail & Guardian.* AmaBhungane engages with whistleblowers as sources for many of their stories and thus, given relevant journalistic ethic codes, does not reveal information about these sources of information. In spite of this anonymity, in South Africa whistleblowers

are still conscious of intimidation and hesitate to come forward: the potential risks have a chilling effect. For a whistleblower to feel safe they may need to create a significant public profile through the media.

Corruption Watch

Website: http://www.corruptionwatch.org.za/

Corruption Watch deals with attempts to combat corruption and thus, from that point, assists both the whistleblower within an employment relationship and the citizen whistleblower. They provide a facility for reporting corruption, which can be done anonymously, and then investigate these allegations. The anonymous reporting means that if a person is uncertain of whether their suspicions of corruption are correct or not, they still have an avenue to try and report these suspicions without unnecessarily risking negative consequence. Once an investigation is complete, their evidence is handed over to the relevant authorities and they then monitor progress in the given case. They frequently use the media to help expose corruption and mobilise action around incidences of corruption.

Green Peace

Website: http://www.greenpeace.org/africa/en/

Greenpeace aims to help expose crimes against the environment, wherever they may occur. Accordingly, they have had referrals of environmental whistleblowers from non-Cosatu unions, private contractors etc. The organisation tries to keep referrals confidential in order to encourage whistleblowers to come forward.

Lawyers for Human Rights

Website: http://www.lhr.org.za/

Lawyers for Human Rights (LHR) is a human rights organisation that works in public interest litigation. The organisation undertakes specialised projects and provides legal advice to those whose constitutional rights have been violated. Their experience of whistleblowers has been that they are often low-level civil servants who do not feel they can influence their organisation's internal policy, and thus refer their employees to the LHR for assistance.

Legal Resources Centre

Website: http://www.lrc.org.za/

The Legal Resources Centre is a human rights legal centre. Focusing on impact human rights litigation, the organisation has not had much experience with whistleblowing cases in particular. However, they have dealt with fraud and corruption cases.

Open Democracy Advice Centre

Website: http://www.opendemocracy.org.za/

ODAC was originally established to support whistleblowers, but specifically in relation to the PDA. It also sought to assist in the implementation of that Act. Formerly, there was a dedicated helpline that sought to provide the employee whistleblower with advice on the protections available under the PDA, but this resulted in few viable cases for strategic litigation. The litigation unit has also shut down, given the strength of pro bono litigation elsewhere, and the focus has shifted to legal policy work.

The approach of ODAC is in recognition of the high costs of litigation. The organisation also targets its training specifically at trade unions, in light of its experience that the typical whistleblower in South Africa feels safest revealing information within this trade union relationship due to a belief of heightened anonymity.

Private sector

There are some private sector initiatives that seek to assist potential whistleblowers, though it has been noted that many internal mechanisms are usually internal hotlines to company auditors, which are mainly focused on money recovery rather than support to the whistleblowers themselves.

An example of an external private whistleblowing facility can be seen at http://www.whistleblowing.co.za. It is a subscription service that allows employees to blow the whistle anonymously. They will also provide assistance in training staff and creating whistleblowing policies.

ProBono.org

Website: http://www.probono.org.za/

ProBono.Org is a non-governmental organisation that links members of the public

to lawyers for free consultation and legal advice. This service could extend to advice for whistleblowers.

Right2Know

Website: http://www.r2k.org.za/

The Right2Know campaign is a coalition of organisations and people responding to the Protection of State Information Bill (the Secrecy Bill), and related "right to know" issues.

Due to the significant media profile of the campaign, individual whistleblowers have approached the organisation for assistance and advice. Right2Know then attempt to refer these whistleblowers to their most relevant partner organisation for further assistance. They have also sought to advocate on whistleblowing issues, preparing an annual calendar celebrating and profiling significant South African whistleblowers.

Rural Health Advocacy Project

Website: http://www.rhap.org.za/

The Rural Health Advocacy Project (RHAP) advocates for improved health in and for rural communities. In so doing, it provides support and advice to rural health care workers. Health workers have at time sought advice and assistance in relation to corruption in health facilities. RHAP does not allow for anonymous reporting, though health workers can approach them to report incidences. They also work in conjunction with Section 27, if litigation is a possibility.

Section 27

Website: http://www.section27.org.za/

Section 27 is a public interest law centre that focuses on the advancement of socio-economic rights, and more specifically the right to health. They have also litigated in other socio-economic rights cases, including education-related litigation involving the "textbook scandal", which has involved working with whistleblowers. The Centre has noted that potential whistleblowers are victimised and that this victimisation can even extend to family members.

The 7-Point Whistleblowing Test

In conclusion, and based on the research and recommendations, we have developed a test to be used to assess the South African whistleblowing environment moving forward.

1. A Code of Good Practice is established that can provide guidance to private and public bodies on interpretations of the law, implementation of whistleblowing policies, and alternative mechanisms for preventing corruption.
2. A whistleblowing network of civil society organisations is established to assist with the provision of advice and support, awareness-raising, and parliamentary advocacy on whistleblowing issues.
3. Whistleblowers are actively encouraged to come forward through financial incentives, the provision of security, and other alternative mechanisms aimed directly at the needs of the different types of whistleblower.
4. The forums that exist for whistleblowers are implemented effectively, which includes the agencies charged to deal with whistleblowers.
5. All new laws passed support and encourage whistleblowers, rather than detract from any of their existing rights. Laws are consistent and the full spectrum of possible statutory protections made clear and cohesive.
6. Whistleblowers are protected from civil, criminal and administrative liability for legitimate public interest disclosures.
7. The Protected Disclosures Act is amended for maximum benefit by *inter alia:*
    a. Extending protection to independent contractors and former employees.
    b. Extending the number of agencies to whom a protected disclosure can be made as far as reasonably possible.
    c. Allowing for confidential disclosures.
    d. Create positive obligations to create whistleblowing policies.
    e. Create positive obligations for annual reporting on policies and actions taken in terms of policies.
    f. Lifting the cap on compensation.

Resources

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Case summaries

Bagarette & Others v Performing Arts Centre of the Free State & Others (2008) 29 ILJ 2907 (LC)

Facts

The three applicants, who were the CEO, the chief financial officer (CFO) and the HR officer of the Performing Arts Council of the OFS ("PACOFS") were suspended and called to a disciplinary enquiry. The charges against them related to alleged financial improprieties that had been revealed by an audit conducted by a forensic investigation firm known as JGL. The applicants referred three disputes to the CCMA: unfair suspension, discrimination or victimisation, and occupational detriment arising from a protected disclosure. These disputes were unresolved at conciliation, and the CCMA issued certificates of non-resolution. The discrimination and protected disclosure disputes had been referred to the Labour Court.

The present application was an urgent application for an interdict. The applicants asked the Labour Court to uplift their suspension and to restrain PACOFS from proceeding with disciplinary action against them. They also asked the court to set aside the appointment of JGL, and to find that the chairperson had made racist remarks, which constituted an occupational detriment.

The background to the matter was that, during 2005, various allegations of mismanagement, financial impropriety and nepotism were made by members of the public and others against PACOFS. The three applicants were implicated in these allegations. Ernst and Young were appointed to do an internal audit, but their report was considered inadequate by the chairperson of PACOFS' Board, who accordingly appointed JGL to perform a forensic investigation. As the chairperson did not follow procedure when taking this decision, the CFO disclosed to the Auditor General that the decision to appoint JGL was irregular and contravened the Public Finance Management Act (PFMA). This disclosure was made in September 2006. The Board subsequently ratified the decision to appoint JGL.

In April 2007, after receiving JGL's first report, the chairperson suspended the three applicants and charged them with disciplinary offences.

Findings

The application to set aside the appointment of JGL

The court held that it lacked jurisdiction to set aside the appointment of JGL, because this was not a decision taken by the state in its capacity as employer. Even if JGL's appointment had indeed contravened the Public Finance Management Act, this was not a matter falling within the jurisdiction of the Labour Court.

The allegation of discrimination

The court held further that the allegations of racism and discrimination could not be resolved on the papers. In any event, these allegations had already been referred to the Labour Court. Likewise, the disputed suspensions were now ripe for a hearing before the CCMA. In respect of these two matters, therefore, the applicants had an adequate alternative remedy.

The application to interdict PACOFS from proceeding with the disciplinary enquiry

The court then turned to the application for an interdict restraining PACOFS from proceeding with the disciplinary enquiry. The court considered whether the disciplinary charges against the applicants were as a result of them having made a protected disclosure. The court held that the alleged protected disclosure (that the appointment of JGL was irregular) was made some seven months before applicants were suspended and charged.

Moreover, the suspension and charges were as a direct result of JGL's forensic report. The applicants had failed to show a link between the disclosure and the occupational detriment, and had therefore failed to show a *prima facie* right to the relief sought.

The court remarked that there is seldom good reason to interfere with disciplinary proceedings. It held that the applicants had an adequate alternative remedy, in that they could raise their defence at the disciplinary hearing. Applicants would not suffer irreparable harm, because an independent advocate would chair the hearing and because applicants were permitted to have legal representation.

Outcome

The application for an interdict was dismissed.

WHAT THIS CASE TEACHES:

There must be a link between the disclosure and the occupational detriment if one wants to use the PDA as a defence in an unfair labour practice or unfair dismissal case.

City of Tshwane Metropolitan Municipality v Engineering Council of South African and Another [2009] ZASCA 151

Facts

Mr Weyers, a professional electrical engineer, was employed by the Tshwane Municipality as managing engineer: Power System Control. His responsibility was to ensure that systems were correctly configured, so as to provide continuous and safe electrical supply to consumers in the municipality.

The municipality was chronically understaffed and new appointments had to be made. The work is difficult and dangerous, and mistakes pose a serious risk both to employees and to the public. Weyers devised a written test for candidates for the positions, but most applicants scored below 40%. In the end Weyers proposed appointing those who scored highest; these were white males. The municipality's employment equity plan, however, required the employment of black people.

There followed a lengthy process around the appointments. Weyers was eventually removed from the recruitment process and was informed that no whites would be considered for positions. Weyers was genuinely concerned that safety standards and service delivery would be compromised if unqualified applicants were appointed, and he told the municipality that "these positions I would like to fill are critical to the Service Delivery of Tshwane Electricity, and while they are not filled with competent personnel we are sacrificing Batho Pele".

Weyers consulted his professional body, the Engineering Council, which told him that he was obliged to report to the Council any attempt to force him to make such appointments.

Weyers then wrote a letter to the Municipal Manager, copied to the Department of Labour and to the Engineering Council, expressing his concern over the imminent appointment of unqualified personnel, distancing himself from such appointments, and asking to be relieved of his section 2(7) appointment in terms of the Occupational Health and Safety Act (OHSA).

Weyers was suspended and disciplined for copying his letter to outside bodies without authorisation. The Pretoria High Court interdicted the employer from imposing any disciplinary sanction, and the Tshwane Municipality appealed to the SCA against that order.

The issues before the SCA were:

1. Whether the High Courts had jurisdiction over the matter, as Tshwane Municipality contended that it was a matter for the Labour Courts.
2. Whether the court below was correct to hold that the distribution of Weyers' letter to the Engineering Council and the Department of Labour was protected under either the PDA, the OHSA or the Engineering Profession Act.

Jurisdictional challenge

The City of Tshwane argued that only the Labour courts had jurisdiction over the matter, but the SCA rejected this argument because section 4 of the PDA clearly provides that an employee may approach "any court having jurisdiction". Accordingly, the High Court had jurisdiction. The SCA also rejected an argument that the matter was a "quintessential labour-related issue": although the matter arose in the context of employment, it concerned questions of public safety, the obligations of professionals, and the accountability of the municipality for proper service delivery. The court also said that many of the issues that arise in relation to protected disclosures (such as whether an employee has "reasonable grounds" to believe that an offence has been committed) are better dealt with in the ordinary courts than in the labour courts.

Whether Weyers' actions were protected

The court considered only the PDA in its findings. After stating that the purpose of the PDA is to protect employee who disclose unlawful or irregular conduct by their employers or other employees, the court turned to consider whether Weyers' letter was a "disclosure" and if so whether it was "protected".

Did the letter constitute a 'disclosure'?

This question was considered with reference to section 2 of the PDA. The City argued that the letter did not contain "information", but only Weyers' opinion that unsuitable candidates were about to be appointed. The SCA held however that a person's opinion is a fact, and also that a narrow interpretation of "information" would engender a culture of silence, in contrast to the constitutional values of transparent and accountable governance. An honestly-held opinion qualifies as information.

Was the disclosure protected?

This question was answered with reference to section 9 of the PDA. It was common cause that Weyers acted in good faith and that he reasonably believed the information disclosed to be true. It was manifest that Weyers acted not from self-interest, but from a genuine concern about safety standards and service delivery.

The City however argued that Weyers did not previously disclose the information to his employer as required by section 9(2)(c), because the City was at all times aware of his view in any event. The SCA rejected this argument: it would undermine the purpose of the PDA if employees were denied protection when the employer already knew about the wrongdoing. The City's argument that a "disagreement" did

not amount to a "disclosure" was also rejected. In any event, it was an impropriety of a serious nature to appoint people who lacked the skill to do the job safely.

Finding

The court found that Weyers had communicated his concerns to the City but that it had disregarded them. Weyers' disclosure to the Engineering Council and the Department of Labour was therefore protected and the decision of the High Court to interdict the employer from imposing any disciplinary sanction on Weyers was upheld.

WHAT THIS CASE TEACHES:

Not only the Labour Court but also the High Court has jurisdiction in PDA matters.

An honestly-held opinion qualifies as information.

If the employer knows about the wrongdoing it serves no purpose to disclose to the employer – you can make a wider disclosure (section 9 of the PDA).

Global Technology Business Intelligence (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2005) 26 ILJ 472 (LC)

This was a review application against a CCMA jurisdictional ruling.

Facts

At the CCMA, the applicant alleged that he had been dismissed in part for seeking legal advice after being counselled by his employer for poor performance. The employer had then argued that the CCMA lacked jurisdiction, since this was an allegation of an automatically unfair dismissal because of a protected disclosure.

The CCMA held that it was an ordinary dismissal for misconduct or poor work performance, and that the CCMA had jurisdiction. The Commissioner noted that the objective of the Protected Disclosures Act was to protect a whistleblower from retaliatory action by an employer. The employer's argument that the employee's referral amounted to an allegation of an automatically unfair dismissal based on a protected disclosure simply represented the employer's view of the dispute.

The issue before the court

The court had to decide whether to overturn the CCMA Commissioner's jurisdictional ruling.

Finding

The court held that it is the employee who determines the nature of the dispute referred to the CCMA. There was accordingly no reason to overturn the Commissioner's ruling. The application was dismissed.

WHAT THIS CASE TEACHES:

The employee decides what the nature of the dispute is (i.e. how to refer a dispute).

Minister for Justice and Constitutional Development & Another v Tshishonga (LAC) Case No. 6/2007

In this case the Department of Justice appealed against the amount of compensation awarded to Tshishonga by the Labour Court.

The Department said that the award of the maximum permissible amount of 12 months remuneration was excessive.

Findings

Davis JA found that the court *a quo* erred in its interpretation of section 194 of the LRA. The award should not have been made with reference to Tshishonga's remuneration: his remuneration was merely a reference point for calculating the amount at which the award could be capped. The amount of compensation had rather to be determined with reference to the legal principles applicable to cases of defamation.

Tshishonga was entitled to compensation for his patrimonial (financial) loss of R177 000 in legal fees incurred to defend him at the disciplinary enquiry. He was also entitled to compensation for his non-patrimonial losses for defamation. Citing the SCA decision in *Mogale v Seima*, the court found that the factors to be considered in determining damages include:

- The seriousness of the defamation.
- The nature and extent of the publication.
- Reputation.
- Motives and conduct of the defendants.

Davis JA found that Tshishonga had been humiliated on national television by the Minister of Justice, and that this unfair conduct was compounded by the fact that the Department of Justice had a heightened responsibility to be seen to be upholding the spirit of the PDA, being to "promote the constitutional values of accountability and transparency in the public administration of this country".

Davis JA also noted however that the courts have not been generous in their awards for non-patrimonial loss. Nevertheless a "significant" award was justified. The actual amount to be awarded is discretionary; there is no tariff. The amount should be more than the R12 000 awarded in the Mogale case.

In the court's opinion, an award of R100 000 for non-patrimonial loss was justified.

Outcome

The court therefore awarded Tshishonga a total amount of R277 000, being R177 000 for costs incurred in his defence and R100 000 for the defamation.

WHAT THIS CASE TEACHES:

Courts can award both financial and non-financial loss.

Ngobeni v Redding NO & Another (2009) 30 ILJ 365 (LC)

In this case, the Labour Court refused to review a decision taken by a private arbitrator refusing to extend the terms of reference in the arbitration agreement to include a claim under the PDA.

Facts

Ngobeni, a medical manager, was dismissed after he was found guilty of circulating an allegedly offensive email to employees of the company worldwide. Ngobeni and his employer entered into a private arbitration agreement. The dismissal was at this stage characterised as an ordinary misconduct dismissal. Ngobeni sought reinstatement, two months back-pay, and R1 million *solatium* for *contumelia*.[66]

After the private arbitration had commenced, but before the cross examination of the employer's first witness, Ngobeni for the first time raised the argument that his dismissal had been in consequence of a protected disclosure.

The arbitrator, however, ruled that his terms of reference did not include the determination of an automatically unfair dismissal arising out of a breach of the PDA.

Ngobeni asked the Labour Court to review and set aside this finding. He sought an order declaring that the arbitrator's ruling did not preclude him from referring an automatically unfair dismissal dispute to the CCMA. Alternatively, he sought an order permitting him to resile from the private arbitration agreement, so that he could pursue an automatically unfair dismissal claim at the CCMA.

Ngobeni's application to the Labour Court was filed out of time and he applied for condonation.

Findings

The court held, firstly, that it could not grant condonation of late filing of Ngobeni's application. No good reason for lateness had been advanced, and the applicant had no prospects of success.

Secondly, the court held that there were no reviewable defects in the conduct of the private arbitration. Even if an arbitrator makes mistakes of fact or law, these do not render a decision reviewable unless the arbitrator was actually dishonest.

Thirdly, the court held that it was not open to Ngobeni to seek to enlarge the grounds of substantive unfairness to rely on the PDA, after the private arbitration hearing had already commenced.

Finally, the court held that it was open to Ngobeni to launch proceedings under the PDA in an "appropriate forum" and that a declarator to this effect was unnecessary.

Outcome

The application was dismissed with costs.

WHAT THIS CASE TEACHES:

The terms of reference cannot be changed once proceedings start.

Radebe and Another v MEC, Free State Province Department of Education (2007) JOL 19112 (O) (HC)

Facts

The applicants were employed by the Free State Department of Education (FS-DOE). At the end of 2005 they produced a document containing allegations of fraud, corruption and nepotism on the part of the Free State MEC for Education ("the MEC"). They sent this document to national figures (the President and the National Minister of Education) and provincial figures (including the Premier, the MEC and the Superintendent General of Education) with the intention that their allegations should be investigated.

The MEC warned the applicants that she regarded their allegations as baseless, defamatory and designed to disrupt the functioning of her department and that she would take legal action if they did not stop. Applicants replied that they intended to continue. They were then called to a disciplinary enquiry to answer a variety of charges including a main charge of *crimen injuria*.

The applicants then applied to the High Court for an interdict restraining FSDOE from proceeding with the disciplinary enquiry, pending referral of an unfair labour practice dispute to the Education Labour Relations Council.

The issues before the court

Who is the employer?

The national Minister of Education was joined in the proceedings because there was some dispute as to who was the employer. Section 1 of the PDA only covers disclosures made against the employer. Applicants argued that the MEC and the National Minister of Education were co-employers. The court assumed in favour of this contention without making a finding on it.

Does the information constitute a disclosure?

The court held in favour of the applicants, without deciding the issue, that they may have reasonably believed that the information showed some impropriety on the part of the MEC and some of her employees.

Does the information disclosed meet the criteria for protection?

The information was disclosed to parties who were not the employer. Therefore the criteria to be satisfied are those in Section 9 of the PDA. The purpose of these more stringent criteria is to strike a balance between encouraging employees to expose wrongdoing in the workplace, whilst protecting the reputations of others in the event that the allegations are false.

In this case, the respondents did not produce alternative facts to those produced by the applicants. They simply contended that the allegations were baseless and false and did not disclose any wrongdoing on their part.

In order to be protected under Section 9, the disclosures must first be made:

- in good faith, and
- in the reasonable belief that its contents were substantially true.

The court found that the disclosures contained:

- speculation, in that facts are cited which are susceptible to entirely innocent motives and improper motives are attributed without any evidence of those motives;
- suspicion, rumour and conjecture, in that facts are cited and investigations requested without any evidence of wrongdoing;
- only one single instance in which, *prima facie*, the requirements of s 9 of the Act may have been met.

The court found that the presence of a single possible such instance amongst a large number of instances which did not qualify for protection, tilted the balance

of convenience against the granting of interim relief, especially as the applicants:

- were able to raise the instance in the pending disciplinary hearing;
- were only then, three months after the dispute arose, proposing to refer it to the Education Labour Relations Council.

The court therefore found that the applicants "cannot be supposed to have acted in good faith when no basis existed for the allegations therein, nor could they reasonably have believed the information to be substantially true". It was also not reasonable for the applicants to make such serious allegations without making any attempt to verify the information.

Finding

As there had been no protected disclosure, there was no basis on which to interdict the employer from proceeding with the disciplinary proceedings.

Outcome

The application was dismissed with costs.

WHAT THIS CASE TEACHES:

The highest protection is when an employee makes a disclosure to an employer. Make sure that you know who your employer is (especially if you are employed by a state institution). Speculation, suspicion and rumour will not constitute a disclosure for a Section 9 disclosure. The disclosure needs to be substantially true.

Radebe & Another v Mashoff, Premier of the Free State Province and Others (2009) 18 LC 10.10.1

Facts

The applicants were employed by the Free State Department of Education (FSDOE). At the end of 2005 they produced a document containing allegations of fraud, corruption and nepotism on the part of the Free State MEC for Education ('the MEC'). They sent this document to national figures (the President and the National Minister of Education) and provincial figures (including the Premier, the MEC and the Superintendent General of Education) with the intention that their allegations should be investigated.

On the instruction of the national Minister of Education, the FSDOE investigated the allegations. The applicants refused to cooperate with the investigating team on the basis that the State Attorney had already issued a letter dismissing the

allegations and that they sought an independent investigation, not one conducted by the FSDOE.

In the absence of cooperation from the applicants, the team issued a report, which described the applicants' allegations as "baseless and unfounded and malicious". The report recommended disciplinary measures against the applicants.

The applicants were charged with *crimen injuria*, alternatively that in publishing or communicating defamatory statements they contravened the Employment Educators Act 76 of 1998.

Applicants launched an application in the High Court seeking to interdict the disciplinary enquiry on the basis that they were protected by the PDA. That application was dismissed.

The applicants refused to participate in the disciplinary hearing, because they regarded themselves as whistleblowers. The enquiry proceeded without them. Both applicants were found guilty of contravening the Employment Educators Act, and they were demoted to the next lower rank.

Applicants appealed unsuccessfully, and then referred an unfair labour practice dispute to the Education Labour Relations Council. When this dispute could not be resolved it was referred to the Labour Court.

The issues before the court

The court considered whether the applicants had made a disclosure as defined in s1 of the PDA and, if so, whether or not it was protected. Even though the court ultimately found that the applicants had not made protected disclosures, the court commented on the interpretation and application of many of the provisions in the PDA.

The court first remarked that for a disclosure to be a disclosure in terms of the PDA it must have all of the following elements:

- disclosure of information;
- regarding any conduct of an employer or an employee of that employer;
- made by any employee who has reason to believe;
- that the information concerned shows or tends to show one or more of the improprieties listed in s1(a) – (g) disclosure of information.

The court held that "information" consists of facts; it does not include "questioning certain decisions and/or processes of an employer".

In *Tshishonga v Minister of Justice and Constitutional Development* the court stated that "information includes, but is not limited to, facts" and that information would "include such inferences and opinions based on facts which show that suspicion is reasonable and sufficient to warrant an investigation."

Disclosure about an employer

Section 3 of the Employment of Educators Act 76 of 1998 (EEA) clarifies that first applicant's employer is the head of the FSDOE who is the Superintendent-General, and the second applicant's employer is Thabong Primary School; therefore the MEC and the Minister are not employers for the purposes of the PDA.

In this case, the court held that because the complaint was about the MEC, who was not the employer, complaints about her conduct could not amount to disclosure in terms of the PDA.

Where s1(b) of the PDA says "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject": the word "person" should be given a limited meaning, referring only to the employer of the discloser, or to another employee of that employer.

'reason to believe'

The following definition of "reason to believe" should be followed:

"the reason to believe must be constituted by facts giving rise to such belief and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice".

Information that 'shows or tends to show'

Information must be "carefully documented and supported". Opinions, speculations, uninformed questions and baseless and unsupported allegations do not constitute information "upon which a reason to believe can be formed" and are therefore not disclosures in terms of the PDA.

The information concerned has to show or tend to show an impropriety. "Show or tend to show" has been found to mean "something less than a probability".

'bona fide'

The court further considered whether the disclosure was *bona fide* and held that applicants' refusal to co-operate with the investigation, and their failure to attach supporting documents to their "disclosure document", indicated that it was not.

The employer's investigation of the allegations

The court held that it was not open to the applicants to refuse to participate in the investigation, rendering it not a proper investigation, and then complain that the employer did not properly investigate their allegations.

Application of sections 6, 7 and 9

Any disclosure not made to the employer of the employee disclosing the impropriety does not receive protection under Section 6. In this case many of the

recipients, including the President, the National Minister, the Premier of the Free State, the MEC of the Free State, the DDG of Education and the DD of the Lejweleputswa Education District, were not the employers of the applicants.

Section 7, in this case, would include the President of the Republic, the Minister of Education, the Premier and the MEC, subject to whether the disclosures were made in good faith.

Section 9 applies, in this case, to the DDG and DD since they are not the employer nor do they act on behalf of the employer. Again this is subject to any disclosure having been made in good faith.

Finding

The Court held that the applicants' disclosures were not protected disclosures for the purposes of the Act. They were not made *bona fide*, nor were they shown to be substantially true.

Moreover, the conduct complained of was that of the MEC, who is not the employer; there was no complaint about the Superintendent-General (who is the employer of the first applicant) or Thabong Primary School (who is the employer of the second applicant).

Outcome

The application was dismissed, each party to pay its own costs.

WHAT THIS CASE TEACHES:

That information consists of facts. It does not include questioning certain decisions and/or processes of an employer.

If you are employed by a government department you must make sure who your employer is when considering who to make the disclosure to and about whom you are disclosing information.

When the PDA in Section 9 talks about employee reasonably believing...this belief must be backed by facts giving rise to such a belief. A belief based on hearsay evidence or not backed by facts won't be protected.

Opinions, speculations, uninformed questions and unsupported allegations do not constitute information and are not disclosures under the PDA.

Fourth National Anti-Corruption Summit Resolutions

The Fourth National Anti-Corruption Summit was held at the Sandton Convention Centre on 8–9 December 2011. It was attended by more than 300 delegates.

The National Anti-Corruption Forum (NACF) hosts the biennial National Anti-Corruption Summits. The primary function of the Summits is to report back on the implementation of resolutions and to pass new ones for further implementation. The NACF also uses the Summit to reflect on the nature and state of corruption in the country and the initiatives and efforts needed to be put in place to deal with corruption. Consequently, it passes resolutions to address these concerns. The Resolutions of the Fourth National Anti-Corruption Summit are therefore included below.

Resolutions

We the delegates drawn from the various sectors of South African society—

Observe International Anti-Corruption Day on 9 December 2011, acknowledging that, while our country has adopted several laws in accordance with our Constitution of the Republic of South Africa, key international conventions aimed at combatting corruption, it needs to find innovative ways to ensure their effective implementation;

Note with growing concern the worsening ratings measured by corruption perception indices of South Africa's ethical performance, and the destructive impact and unsustainable effect on our social fabric of the combined ills of corruption at top levels and conspicuous consumption in a context of widening economic and social inequality;

Welcome the promised progress to strengthen transparency and accountability in the revised Public Service Integrity Management Framework, and call for its speedy implementation;

Acknowledge that some parts of civil society and the private sector have not yet consistently implemented similar financial disclosure provisions for directors in their organisations;

Acknowledge the positive role being played by various fora established by government to enhance cooperation and collaborative synergies, including the Inter-Ministerial Committee on Corruption, the Multi-Agency Working Group, the Anti-Corruption Task Team and the Public Service Anti-Corruption Unit;

Note reports of progress in the review of the Protected Disclosures Act, called for in NACF Resolutions of 2005 and 2008;

Acknowledge concrete steps taken by the private sector and government aimed at deepening cooperation in the fight against corruption, and encourage future collaboration between all sectors;

Welcome recent positive developments indicating greater resolve by government to take firm action in active support of the work of Chapter 9 institutions;

Recommit ourselves as individual delegates, organisations and sectors to actively promote good governance and an ethical culture in all spheres of South African life;

Resolve as follows:

1. We reaffirm the original vision of the NACF, as set out in the Memorandum of Understanding on its Establishment, as the primary platform for the development of a national consensus through the coordination of sectoral strategies against corruption.
2. Sector representatives commit to securing the renewed commitment of their leadership to give effect to the vision and objectives of the NACF.
3. We reaffirm our commitment to holding ourselves and each other accountable to report regularly on effective implementation of sectoral and joint strategies.
4. We commit to engage with our respective constituencies and with each other to revise the National Anti-Corruption Strategy and implementation modalities.
5. Sector representatives undertake to review their sectoral anti-corruption initiatives and programmes aimed at realising an agreed National Anti-Corruption Strategy.
6. Each sector commits to review and where necessary reconstitute its representation on the NACF.
7. We recognise that to give effect to the vision, objectives and programmes of the NACF it is necessary to identify and secure adequate resources to review and capacitate its structures at local, provincial and national level.
8. To develop a comprehensive education, awareness and communication campaign to promote an ethical culture, develop an improved understanding of the many facets of corruption, and the contributions being made to combat this scourge.
9. To reaffirm the resolutions adopted at previous Summits that remain unimplemented, call on all sectors to take urgent and decisive action to demonstrate their commitment to both their previous joint undertakings and to this shared

Forum, and to include them in the National Anti-Corruption Programme. Previous resolutions are attached for ease of reference.

10. We commit ourselves to engage to consider options for the implementation of and respect for the Constitutional Court's ruling requiring the establishment of independent anti-corruption capacity.
11. Noting reference in the Preamble to the review of the PDA, we call for comprehensive protection for whistleblowers, and the right to access to information in line with the national Constitution.
12. The NACF is tasked to urgently produce a strategic programme of action supported by a business plan, including timeframes, to give effect to all resolutions.

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This research was commissioned by the Right2Know Campaign, together with Amubhungane, Corruption Watch, Greenpeace, Section 27 and ODAC.