

Protection and Support of Whistle blowers Act, 2022

ACT

To provide for measures in which individuals may in the public interest disclose information that relates to unlawful or other illegal or improper conduct or corrupt practices of others; to provide for the protection against victimisation of persons who make such disclosures; to provide for the protection against victimisation of persons related to the person who makes a disclosure if such victimisation is as a result of the latter's disclosure; to provide financial and non-financial support to individuals making disclosures and to provide for related matters.

Preamble

The strengthening of constitutional democracy and the protection and promotion of human rights including the eradication of social and economic inequalities requires a capable state and the responsive and accountable governance of public and private institutions.

Corruption, abuse of power, and misuse of public resources undermine the effectiveness and capability and capacity of the state in strengthening constitutional democracy and advancing human rights and thus threaten national stability and the necessary economic growth and prosperity for the nation.

The fight against corruption and abuse of power and public resources is thus crucial for the survival of the state and in ensuring an effective and capable state. Whistle blowers play an essential role in the fight against corruption and abuse of power and public resources and their protection and support against victimisation is important and necessary. It is thus crucial that a conducive environment should be created to encourage more people to act as whistle blowers. The victimisation of whistle blowers should not only be seen as a violation of human rights but also as a threat and attack on the state and should be prohibited and criminalised.

This Act endeavours to facilitate an effective regime that will provide protection and support for whistle blowers against victimisation.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows: --

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CHAPTER 1
DEFINITIONS, OBJECTS, INTERPRETATION, GUIDING PRINCIPLES AND APPLICATION OF THE
ACT

Definitions

1. (1) In this Act, unless the context otherwise indicates-
 - (i) "authorised person "means any of the persons specified in section xxx to whom a disclosure can be made;
 - (ii) "complainant" means a whistle blower or any person related to or associated with the whistle blower who makes a complaint under section xx having been or likely to be subjected to detrimental action in retaliation for having made a disclosure of improper conduct;
 - (iii) "court" means any court established by law;
 - (iv) "Department" means the Department of Justice and Constitutional Development;
 - (v) "Minister" means the Minister for Justice and Constitutional Development;

- (vi) "Public Protector" means the Public Protector referred to in section 182 of the Constitution;
- (vii) "regulation" means a regulation in terms of this Act;
- (viii) "related person" means a person victimised for the disclosure made by the whistle-blower;
- (ix) "South African Human Rights Commission" means the South African Human Rights Commission referred to in section 184 of the Constitution;
- (x) "whistle blower" means the any person who makes a disclosure of improper conduct in terms of this Act;
- (xi)
- (xii) "the State" includes-
 - (a) any department of State or administration in the national, provincial or local sphere of government;
 - (b) any other functionary or institution-
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation or under customary law or tradition
- (xiii)
- (xiv) "this Act" includes any regulation made in terms of this Act.

Objects of the Act

- 2. The objects of this Act are-
 - (a) to give effect to the letter and spirit of the Constitution, in particular-
 - (i) the equal enjoyment of all rights and freedoms by every person;
 - (ii) the protection and support for whistle blowers and related persons;
 - (iii) the criminalisation of detrimental action against whistle blowers and their relatives;
 - (iv) to provide remedies for whistle-blowers experiencing detrimental action;
 - (b) to provide for the establishment of a Whistle Blower Protection and Support Advisory Committee;
 - (c) to provide for measures to educate the public and raise awareness on the importance of whistle blowing against corruption and wrongdoing in public and private bodies and the protection and support of whistle blowers
 - (d) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the UN Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption.

Interpretation of the Act

- 3. (1) Any person applying this Act must interpret its provisions to give effect to-

- (a) the Constitution, the provisions of which include the promotion and protection of human rights through legislative and other measures designed to protect and support whistle blowers in exposing corruption and wrongdoing in public and private institutions;
- (b) the Preamble and objects of this Act, thereby fulfilling the spirit, purport and objects of this Act.

(2) Any person interpreting this Act may be mindful of-

- (a) any relevant law or code of practice in terms of a law;
- (b) international law, particularly the international agreements referred to on section 2 and customary international law.

(3) Any person applying or interpreting this Act must take into account the context and the purpose of this Act.

Application of the Act

4.(1) This Act binds the State and all persons.

CHAPTER 2 PROTECTED DISCLOSURES

Disclosures that are protected

5. (1) A disclosure-

- (a) made by any person;
- (b) made to an authorised person or to the public pursuant to section 6;
- (c) that complies with sections 5(2), 9 and 10.

is entitled to whistle blower protection under the provisions of this Act.

(2) Despite subsection (1), a disclosure is not protected if at the time that it is made it is –

- (a) prohibited by any law; or
- (b) Known or proved that it is or it was made under any of the circumstances referred to in section 10.

6. (1) For the purposes of this Act, the following persons or entities, are authorised persons to whom a disclosure of improper conduct may be made-

- (a) an employer of the whistle blower;
- (b) a police officer;
- (c) a Prosecutor;
- (d) the Auditor-General;
- (e) a staff of the Intelligence Agencies;
- (f) a member of Parliament;

- (g) a staff of any State Anti-Corruption Agency;
- (h) the South African Human Rights Commission;
- (i) the Public Protector;
- (j) the Commission for Gender Equality;
- (k) the Public Service Commission;
- (l) Any regulator body established by law.

CHAPTER 3

DETRIMENTAL ACTION

Detrimental action

7. (1) For the purposes of this Act, a person is considered to be subjected to detrimental action if that person –

- (a)** being an employee, is subjected to intimidation, harassment or any action causing personal harm or injury or loss or damage to property or any interference with his or her lawful employment by the employer or a fellow employee or by any other person or institution, or
- (b)** not being an employee, is subjected to discrimination, intimidation, harassment or any action causing personal harm or injury or loss or damage to property or any interference with his business or livelihood by any person or an institution.

(2) For the purposes of subsection (1)(a), interference with a person's lawful employment includes –

- (a) dismissal;
- (b) suspension;
- (c) redundancy;
- (d) demotion;
- (e) refusal of transfer or promotion;
- (f) transfer against his or her will;
- (g) alteration of working conditions or retirement to his or her disadvantage;
- (h) discrimination or adverse treatment in relation to that person's employment, career, profession, trade;
- (i) taking of disciplinary action; or
- (j) a threat to take any of the actions referred to in paragraphs (a) to (i)
- (k) any other act that prejudices and/or victimises an employee.

(3) For the purposes of this Act, detrimental action is prohibited or actionable if the action is taken against the whistle blower or a person related to or associated with the whistle blower.

CHAPTER 4
PROTECTION FROM VICTIMISATION/PROHIBITION AND CRIMINALISATION OF
VICTIMISATION OF WHISTLE BLOWERS AND THEIR SUPPORT AND ASSISTANCE

Whistle blower protection

8. (1) A whistle blower is, from the date of receipt of the disclosure of improper conduct by an authorised person is entitled to protection under this Act as follows:

- (a) protection of confidential information;
- (b) subject to section 10, immunity from civil or criminal action;
- (c) protection from detrimental action; and
- (d) where applicable and [appropriate], protection under the Witness Protection Act 112 of 1998,

and for the purpose of paragraphs (a) and (d), the protection must be extended to any person related to or associated with the whistle blower.

(2) Whistle blower protection conferred under this Act is not –

- (a) limited or affected in the event that the disclosure of improper conduct does not lead to any disciplinary action or prosecution of the person against whom the disclosure has been made; and
- (b) affected in the event that disciplinary action is taken or a prosecution is instituted against the person in respect of whom the disclosure of improper conduct has been made.

(3). This Act does not limit the protection conferred by any other law to any person in relation to information given in respect of the commission of an offence.

Protection of confidential information

9. (1) A person who-

- (a) makes or receives a disclosure of improper conduct;
- (b) obtains confidential information in the course of an investigation into such disclosure;
- (c) in whatever way or by whatever means obtains confidential information,

may not disclose the confidential information or any part thereof to any person or to the public, except in accordance with the provisions of this Act or any other law.

(2) Subsection (1) does not apply to a person who discloses confidential information –

- (a) for the purpose of giving effect to the provisions of this Act;
- (b) when required to do so by any competent court; or
- (c) when required to do so in terms of any law

(3) Where a whistle blower is a witness in a matter that relates to information given by that whistle blower, the court or other authority before which the matter is being heard may, on the application made to it by the whistle blower or by a person acting on behalf of the whistle blower, order that the whistle blower give his or her evidence *in camera*.

(4) If any book, paper or document which is part of evidence liable to inspection in any civil, criminal or other proceedings in any court, tribunal or other authority contains any entry in which any whistle blower is named or described or which might lead to his or her discovery, the court, tribunal or other authority before which the proceedings are being held must cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the identity of the whistle blower.

(5) A person who contravenes or fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding R100 000 or to imprisonment for a period not exceeding 10 years, or to both fine and imprisonment.

(6) Where it is brought to the attention of the South African Human Rights Commission (or any other relevant authority?) that any person intends to disclose or publish confidential information which is protected under this Act to any other person who is not an authorised person or to the public, the Commission must in the prescribed manner-

(a) issue a written notice prohibiting that person from disclosing or publishing the information; and

(b) serve the notice on that person.

(7) A notice referred to in subsection (6) acts as a temporary order prohibiting the person in respect of whom it was issued from disclosing or publishing the confidential information specified in the notice.

(8) A temporary order referred to in subsection (1) is valid until-

(a) the expiry of 14 days from the date on which the notice was served on the recipient;

(b) the date on which the confidential information ceases to be protected under this Act;

(c) the date on which the order is cancelled made by the Commission or a court

(d) the date on which the order is set aside by the Tribunal/Court on application made to it under subsection (9); or

(e) the date on which a final order is made by a court or the temporary order is set aside or varied by the court on application made to it by the Commissioner under subsection (10).

(9) A person against whom a notice referred to in subsection (6) was issued may at any time before the notice ceases to be effective in terms of subsection (8), in the manner prescribed, apply to a court to have the temporary prohibition order imposed by the notice set aside or varied, and on receipt of the application, a court may set aside or vary the order or dismiss the application.

(10) The Commission may, within 14 days after the notice referred to in subsection (6) was served on the recipient, in the manner prescribed apply to a court to have the temporary prohibition order confirmed, and a court may confirm the order by making it a final prohibition order, set aside or vary the temporary order or dismiss the application.

(11) In an application made under subsection (9) or (10), a court may make any other order as it considers appropriate in the matter but it may not make an order for costs.

(12) A person who contravenes or fails to comply with a temporary order referred to in subsection (7) or a final order made under section (10) commits an offence and is liable on conviction to a fine not exceeding R50 000 or to imprisonment for a period not exceeding 10 years, or to both the fine and imprisonment.

Immunity from civil or criminal proceedings

10. A whistle blower is not liable to civil or criminal proceedings or to disciplinary action for making a disclosure that is protected under this Act, unless it is proved that the whistle blower knew that the information contained in the disclosure was false and that the disclosure was made in bad faith.

Protection from detrimental action/victimisation

11. (1) A person may not take detrimental action against a whistle blower or any person related to or associated with the whistle blower in retaliation for a disclosure of improper conduct.

(2) A person is considered as having taken detrimental action against a whistle blower or any person related to or associated with the whistle blower if-

(a) the person takes or threatens to take the detrimental action because-

(i) the whistle blower has made a disclosure of improper conduct; or

(ii) the person believes that the whistle blower has made or intends to make a disclosure of improper conduct; or

(iii) the person incites or permits another person to take or threaten to take the detrimental action for any reason under paragraph (a).

(3) A whistle blower is not to be considered as having been subjected to detrimental action if-

(a) it is established by evidence on a balance of probabilities that the disclosure protected by this Act was not a contributory factor to the alleged detrimental action;

(b) it is established by evidence that the disclosure protected by this Act did not contribute to the alleged detrimental action; or

(c) the person against whom the complaint is directed has the right in law to take the action complained of and the action taken is shown to be unrelated to the disclosure made.

(4) Despite anything to the contrary in any law, in any proceedings under this Act concerning an allegation or a complaint of detrimental action the burden of proving that the detrimental action taken against a whistle blower or any person related to or associated with the whistle blower is not in retaliation for a disclosure of improper conduct lies on the person who has or is alleged to have taken the detrimental action.

(5) A person who contravenes or fails to comply with subsection (1) commits an offence and is liable on conviction to a fine not exceeding R100 000 or to imprisonment for a period not exceeding 15 years, or both the fine and imprisonment.

Protection under Witness Protection Act, 1998

12. (1) If a whistle blower wishes to make a report and application contemplated in paragraph (a) and (b) of subsection (1) of section 7 of the Witness Protection Act 112 of 1998, the whistle blower may, if he or she so wishes, make that report to an authorised person and the authorised persons must comply with relevant provisions of sections 7, 9 and 10 of the Witness Protection Act.

(2) If a whistle blower is unable to make report and application as contemplated in section 7 of the Witness Protection Act 112 of 1998, the authorised person may make the report and application on behalf of the whistle blower as contemplated in that section.

Void contractual terms

13. (1) A provision in a contract of employment or other agreement between an employee and an employee or any persons is void if it-

- (a) seeks to prevent an employee or any person from making a disclosure of improper conduct;
- (b) has the effect of discouraging the employee or any person from making a disclosure of improper conduct;
- (c) precludes the employee or any person from making a complaint in respect of detrimental action taken against the employee; or
- (d) prevents an employee or any person from bring an action before the Tribunal/Commission, any court or other body or institution to claim relief or remedy in respect of the detrimental action.

(2) Subsection (1) also applies to any contract or any agreement in existence on the commencement of this Act.

Legal assistance (and other relevant support? (psychological support?))

14. If during the course of-

- (a) an investigation in terms of this Act;
- (b) any legal proceedings instituted against a whistle blower concerning a matter arising from a disclosure made by a whistle blower which disclosure is protected under this Act; or
- (c) proceedings before the court/ any other forum that involves a whistle blower,

the Human Rights Commission, or any other authorised body, on its own or on request of an authorised person, investigator or investigation agency, is of the opinion that the whistle blower is in need of legal assistance or any other appropriate assistance, must provide such assistance by itself or through other bodies such as the South African Legal Aid Board.

Termination of protection/support

15. (1) The Commission may revoke whistle blower protection/support conferred under this Act if it is of the opinion, based on an investigation or in the course of an investigation that-

- (a) the whistle blower himself or herself has, after making a disclosure of improper conduct, participated or continued to participate in the improper conduct disclosed;
- (b) the whistle blower, in his or her disclosure of improper conduct, intentionally made a material statement which he or she knew or believed to be false or did not believe to be true;
- (c) the disclosure of improper conduct is frivolous or vexatious;
- (d) the disclosure of improper conduct is made solely or substantially with the motive of avoiding dismissal or other disciplinary action; or
- (e) the whistle blower, in the course of making the disclosure or providing further information, commits an offence under this Act.

(2) If whistle blower protection is terminated under subsection (1) the Commission must give a written notice to that effect to the whistle blower.

(3) A person who is aggrieved by the decision of the Commissioner made under subsection (1) may in the prescribed manner and within the prescribed period apply for the decision to be reviewed by a court.

(4) A court may make an order for the continuation of the whistle blower protection and may also make such consequential orders necessary to give effect to the order for relief.

(5) Where a person has made an application for review under subsection (3), whistle blower that has been granted to that person continues until such time that a court makes a decision to terminate that protection.

CHAPTER 5

COMPLAINTS OF DETRIMENTAL ACTION

Complaints of detrimental action

16. (1) A whistle blower or any related to or associated with the whistle blower who honestly and reasonably believes that he or she has been or is likely to be subjected to detrimental action by any person in retaliation for making a disclosure of improper conduct may in the prescribed manner make a complaint to the South African Human Rights Commission.

(2) A complaint referred to in subsection (1) must be filed within the prescribed period from the date that the complainant knew, or in the Commission's opinion ought to have known that

the detrimental action was taken, but a complain may be filed after that period if the South African Human Rights Commission having regard to the circumstances of the case considers that it is appropriate.

Commission's decision whether to the investigate

17. (1) The South African Human Rights Commission must decide whether to deal with the complaint or not within the prescribed period after the date on which the complaint is received.

(2) If the Commission decides-

(a) to deal with the complaint it must send a written notice of its decision to the complainant and to the person or entity that has the authority to take disciplinary against each person who participated in the taking of the measure alleged by the complainant to constitute detrimental action; or

(b) not to deal with a complaint, it must send a written notice of its decision to the complainant and set out the reasons for the decision.

(3) The Commission may refuse to deal with a complaint if it is of the opinion that-

(a) the subject matter of the complaint has been adequately dealt with or could more appropriately be dealt with by other bodies such as the Commission for Conciliation, Mediation and Arbitration (CCMA);

(b) the complaint is beyond the jurisdiction of the Commission; or

(c) the complaint was not made in good faith

(4) A person who is aggrieved by the decision of the Commission made under subsection (2) may in the prescribed manner and within the prescribed period apply for the decision to be reviewed by a High Court.

Investigation of detrimental action

18. (1) If the Commission decides to deal with a complaint it must assign an investigator/duly qualified staff member to investigate the complaint.

(2) An investigator must conduct an investigation into the complaint as informally and expeditiously as possible and in the prescribed manner.

(3) Before commencing an investigation under this section an investigator must-

(a) notify the chief executive concerned or any other person against whom a complaint of detrimental action has been made and inform that chief executive or that other person of the substance of the complaint to which the investigation relates; and

(b) notify any other appropriate person, including every person whose conduct is called into question by the complainant, and inform that person of the substance of the complaint.

(4) If the investigator so request, employers and other persons who have information that is relevant to an investigation must provide the investigator with any facilities, assistance, information and access to their respective premises that the investigator may require for the purpose of the investigation.

(5) If the investigator concludes that he or she is unable to complete an investigation because of insufficient cooperation on the part of the employer or other person, the investigator must make a report to the Commission to that effect.

(6) A person who contravenes or fails to comply with subsection (4) or with a request made by an investigator under that subsection commits an offence and is liable on conviction to a fine not exceeding R50 000 or to imprisonment for a period not exceeding 10 years, or to both the fine and imprisonment.

Commission's decision after the investigation

19. (1) As soon as possible after the completion of an investigation, the investigator must submit a report of his or her findings to the Commission.

(2) If, after receipt of the report, the Commission is of the opinion that a reference of the matter to a court in relation to the complaint is-

(a) warranted, the Commission must refer the matter to a court or another appropriate forum for a determination of whether or not detrimental action was taken against the complainant; or

(b) is not warranted in the circumstances, the Commission must dismiss the complaint.

(3) In considering whether referring the matter to a court or another appropriate forum, the Commission must take into account whether-

(a) there are reasonable grounds for believing that detrimental action was taken against the complainant;

(b) having regard to all the circumstances relating to the complaint, it is in the public interest to refer the matter to a court or another appropriate forum.

(4). The Commission must in writing notify each of the following of the action under subsection (1)-

(a) the complainant;

(b) if the complainant is an employee, the complainant's employer;

(c) if the complainant is a former employee, the person or entity who was the complainant's employer at the time the alleged detrimental action was taken;

(d) if the complainant is against any other person that is not an employer, that other person;

(e) the person or persons identified in the investigation report as being the person or persons who may have taken the alleged detrimental action; and

(f) the person or entity with the authority to take disciplinary action against any person referred to in paragraph (e);

(5) A person who is aggrieved by the decision of the Commission made under subsection 2 may, within the prescribed period, apply for the decision to be reviewed by a court.

Remedies for detrimental action

20. (1) Following a determination that there was detrimental action, the Commission may, on behalf of the complainant-

- (a) claim for damages for breach of contract;
- (b) claim damages or compensation of any loss or injury suffered;
- (c) obtain an interdict; or
- (d) claim for any other relief or remedy to which the complainant may be entitled.

(2) The right of a whistle blower or any person related to or associated with the whistle blower to bring proceedings for damages or compensation under this Act does not affect any other remedy that may be available to him or her under any other law.

Powers of a court to grant remedies

21. (1) A court must conduct an inquiry into a complaint and all parties and other persons considered necessary by the court on the matter must be heard.

(2) If, after the enquiry, the court is satisfied that a person has taken or intends to take detrimental action in retaliation for a disclosure of improper conduct, the court may grant a remedy to the complainant, including without limitation, any of the following remedies-

(a) in the case of an employee complainant, an order for-

- (i) reinstatement;
- (ii) reversal of transfer
- (iii) transfer of the complainant to another branch or establishment of the employer;
- (iv) back pay for lost remuneration together with interest; or
- (v) any other relief that is necessary to eliminate the effects of detrimental action;

(b) an order for payment of damages, compensation, costs, interest or any other form of pecuniary relief to the complainant;

(c) payment to the complainant of an amount equal to any expenses and any other financial losses incurred by the complainant as a result of the detrimental action;

(d) an interdict restraining the person who has taken or intends to take detrimental action from continuing, repeating, threatening to continue or repeat, taking, causing or inflicting the detrimental action against the complainant in any manner; or

(e) any other relief as the court considers fit.

(3) The court may on application by the Commission, or a complainant or any person acting on behalf of the complainant, at any appropriate time, make an interim order that the court considers appropriate in the circumstances.

Disciplinary action against person taking detrimental action

22. (1). A court may, by order, require an employer or any person acting on behalf of the employer's behalf, to take all necessary measures to take disciplinary action, including termination of employment or revocation of appointment, specified by the court/Tribunal against any person named in the application who was determined by it to have taken the detrimental action.

(2) In making an order under subsection (1), the court must take into account the factors ordinarily considered by employers when they discipline their employees, including, but not limited to-

- (a) the gravity of the detrimental action;
- (b) the level of responsibility inherent in the position that the person occupies;
- (c) the person's previous employment record;
- (d) whether the detrimental action was an isolated incident;
- (e) the person's rehabilitative potential;
- (f) the deterrent effect of the disciplinary action;
- (g) the extent to which the nature of the detrimental action discourages the disclosure of improper conduct under this Act; and
- (h) the extent to which inadequate disciplinary action in relation to the detrimental action would have an adverse effect on confidence in private or public institutions.

Personal liability

23. (1) Over and above any outcome of a disciplinary action taken against any person deemed to have taken a detrimental action against a whistle blower or any person related to or associated with the whistle blower, such a person may be sued and is liable for damages or to pay compensation under this Act in his or her personal capacity.

CHAPTER 6

GENERAL PROVISIONS AND IMPLEMENTATION OF THE ACT

General

Reward for making a disclosure

24. A whistle blower who makes a disclosure of improper conduct that leads to the arrest and prosecution of an accused person may be rewarded with a prescribed amount of money from the Criminal Assets Recovery Fund(???)

Regulations

25. The Minister may, and where required in the circumstances, make regulations for the better implementation of the provisions of this Act.

CHAPTER 7

REVIEW OF ACT, SHORT TITLE AND COMMENCEMENT

Establishment of the Whistle Blower Protection and Support Advisory Committee

26. The Minister must, immediately upon promulgation of this Act, by notice in the Gazette, establish a Whistle Blower Protection Advisory Committee and appoint members, consisting of –

- (a) the Chairperson of the South African Human Rights Commission or his or her representative
- (b) the Public Protector or his or her representative;
- (c) two representatives from civil society
- (d) two experts in the field of whistle blower protection and support;
- (e) Two representatives from the Public Service Commission; and
- (f) A representative from the Information Regulator

27. (1) The Whistle Blower Protection and Support Advisory Committee –

- (a) must advise the Minister on the operation of this Act;
- (b) must advise the Minister about laws and policies that impact negatively on the protection and support of whistle blowers;
- (c) discuss regular reports on the protection and support of whistle blowers

(2) The Whistle Blower Protection and Support Advisory Committee may conduct its business and proceedings at its meetings as it deems fit.

(3) Members of the Whistle Blower Protection and Support Advisory Committee referred to section AAA (c) and (d) are appointed for a period of five years and may be reappointed upon the expiry of the term of office.

(4) The other terms and conditions of appointment of members of the Whistle Blower Protection and Support Advisory Committee are as prescribed.

(5) The administrative work connected with the performance of the functions of the Whistle Blower Protection and Support Advisory Committee must be performed by officers designated by the Director-General of the Department.

(6) The members of the Whistle Blower Protection and Support Advisory Committee are entitled to such remuneration, allowances and other benefits as may be determined by the Minister in consultation with the Minister of Finance.

Short title and commencement

28. (1) This Act is called the Protection and Support of Whistle blowers Act, 2022, and comes into operation on a date determined by the Minister by notice in the Gazette.

Draft

Memorandum

Corruption and wrongdoing have a devastating and negative impact on effective, accountable governance in the country and undermines the ability of the state to discharge its obligation in advancing human rights and in ensuring a better life for all citizens.

The main objective of this Act is to encourage citizens to expose acts of corruption and wrongdoing in the public and private sphere through whistleblowing. This is to be done by protecting and supporting whistle blowers for their civic responsibility in helping to fight corruption and wrongdoing.

The protection entails the prohibition against the victimisation of whistle blowers, which constitutes an infringement of the human rights of whistle blowers, and the criminalisation of such victimisation. The Act also provides for the compensation of whistle blowers by perpetrators of their victimisation and where this is not possible or adequate, by the state.

The Act further provides for the support of whistle blowers in instances of their victimisation. This support entails financial and psychosocial support to be provided for by the state through relevant state entities including relevant constitutional bodies such as the South African Human Rights Commission (a debate on whether there should be a new state agency with a specific mandate to protect and support whistle blowers or that existing constitutional bodies such as the SAHRC and the PP should carry out this function which is in any case is part of their combined constitutional mandate need to addressed and concluded).

Whistle blowers should be assisted by the state or relevant state bodies against acts of victimisation (which could include loss of jobs and or job opportunities). This assistance, depending on the nature and extent of the victimisation will be in the form of financial or non - financial support or both. A whistle bower fund under the control of a relevant Chapter 9 body or a newly established agency will be established in this regard.

To encourage as many citizens as possible to be whistle blowers, the Act provides for various promotional and awareness activities, including awards for whistle blowers who have made a great contribution in the fight against corruption and wrongdoing (Whistle blowers Recognition and Awards).

Zondo Commission Report

In line with the above, the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud into the Public Sector Including Organs of State - Report: Part VI Vol. 4 Summary of Recommendations (page 23, paragraph 60), makes the following recommendations in relation to the protection of whistle blowers:

#That the Government introduce legislation or amend existing legislation:

-to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption;

-identifying the inspectorate of the Agency as the correct channel for the making of such disclosure [TST- where does this put existing agencies such as the Public Protector]

-authorising the Litigation Unit of the Agency to incentivise such disclosures by entering into agreements to reward the giving of such information by way of a percentage of the proceeds recovered on the strength of such information

-authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure of the information which might otherwise render the informant liable to prosecution or litigation.

UN Convention Against Corruption

The UN Convention Against Corruption (2004) provides as follows in relation to the protection of witnesses, experts, victims, and those who report on corruption (whistle blowers):

Article 32. Protection of witnesses, experts, and victims

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.
2.

Article 33. Protection of reporting persons

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

African Union Convention on Preventing and Combating Corruption (adopted on 11 July 2003)

Article 12 (2) “State Parties should ...”Create an enabling environment that will enable civil society and the media to hold government to the highest level of transparency and accountability in the management of public affairs.

[An enabling environment for civil society participation in holding government to account requires the protection and support for whistle blowers]

Public Service Commission-Custodian of Good Governance

-The nature and the extent of the protection of whistle-blowers and investigators in the Public Service – September 2014

(Extracts)

Foreword

“The eradication and combatting of corruption is a priority for South Africa and the country’s vision for 2030 is expressed in the National Development Plan as:

“A South Africa in which an empowered citizenry have the confidence and knowledge to hold public and private officials to account and in which leaders hold themselves to high ethical standards and act with integrity. This South Africa has a resilient anti-corruption system in which anti-corruption have the resources, credibility and powers to investigate corruption and their investigations are acted upon.

“In this research the PSC found that there is a need to extend the Protected Disclosure Act in areas such as employer/employee relationship, criminal liability of employers, occupational detriment, protection of identity of whistle blowers as well as the provision of physical security measures. The primary objectives of this assessment were to safeguard the protection of whistle-blowers and to enhance the reporting of corruption in the Public Service. Based on this analysis, the PSC has made action-oriented recommendations aimed at assisting the Department of Justice and Correctional Services to effect the proposed amendments on the Open Democracy Bill and the subsequent promulgation of the Protected Disclosure Act 26 of 2000.”

Chapter 1

“...the PDA proves to be inadequate in protecting the whistle blowers in the Public Service for the following reasons

- Whistle-blowers are not safeguarded enough against reprisals from their employers;
- The PDA does not guarantee immunity against civil or criminal liability for making a disclosure in good faith. This militates against creating an environment for making good faith disclosures;
- The PDA does not ensure the protection of whistle blowers by an appropriate body such as the Human Rights Commission;
- The PDA places no obligation on employers to investigate allegations made whistle blowers;
- The PDA does not protect whistle blowers from realising the information which is not authorised or authorised
- The PDA makes no provision for systems to protect whistle blowers and investigators such as 24 hour armed protection, safe housing, new identity and relocation to other countries or job placement.

TS Thipanyane