



6 February 2016

To: the National Council of Provinces: South Africa;
Select Committee on Security and Justice

CC Chairperson, Portfolio Committee On Justice and Constitutional Development

Re: Criminal sanctions for false disclosures in the amendment to the Protected Disclosures Act of South Africa

We write to urge you to scrap section 9B of the Protected Disclosures Act that will create a criminal offence if persons intentionally disclose false information. We believe, for all the reasons stated below, that this is a retrogressive act that is based on an insufficient reflection of both international case studies, and existing research. We have requested our international partners to provide further evidence on the issue, and they have prepared a letter which we submit to you. This new information, we believe, makes a convincing case for the section to be scrapped.

International Best Practice

While we understand in the National Assembly certain other jurisdictions were cited that may criminalise false disclosures in their laws, we would submit this in no way encapsulates best, or even prevailing, practices on whistleblowing.

The South African Law Reform Commission has taken the stance, for instance, that the inclusion would contradict existing international best practice:

“South Australia’s Whistleblowers Act, the United Kingdom PIDA and the New Zealand Protected Disclosures Act do not provide for criminal offences. In South Australia the opinion is held that the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it.

The Commission confirms its preliminary recommendations that where an employee or a worker knowingly makes a false disclosure such disclosure should not be criminalized... There has been no alteration of best practice in this regard, and **we do not agree with those that say that this is a way of preventing false claims of wrongdoing**". [Emphasis added].

The “Chilling Effect” of sec 9B and evidence

In relation to the potential “chilling effect” on whistleblowing, we submit that it is inconsistent to have a punitive criminal sanction within a framework of promotion of whistleblowing. It is particularly worrying that the inevitable “chilling effect” will take effect within a context in which whistleblowers are currently discouraged.

In South Africa, there are a variety of risks to whistleblowers – such as physical harm to the whistleblower, family strain, significant financial losses in the context of high level of unemployment – that all contribute to a South African landscape hostile to those wanting to make protected disclosures.¹

Statistical evidence from a number of sources supports this assessment. The Ethics Institute’s South African Business Ethics Survey 2016 noted that only 48% of those who observed misconduct reported it (down from 66% in 2009). And Price Waterhouse Coopers reported in 2014 that only 3 out of 10 South African feel safe disclosing sensitive information. This evidence demonstrates that stronger support for whistleblowers is needed for them to speak out, and that any chilling effect must be avoided.

There is no evidence that we are aware of that there is a significant level of false disclosures, or a higher level of false disclosures in South Africa or elsewhere. We submit the explanatory note to the Bill itself does not provide such evidence, noting the justification for the inclusion of the offence only to relate to a fear of “reputational damage” with no link to a more evidence-based

¹ Razzano, G (2015) *Heroes Under Fire* (Cape Town: ODAC and FesMedia Africa).



description of harm.

Necessity and constitutionality

The only envisioned harm is “reputational damage”. In considering whether the provision sought to alleviate this harm is constitutional, such provision should be considered within the context of necessity. As with Ireland, in the PDA states that any falsely laid information could not constitute a disclosure in terms of the Act. Thus, a falsely laid disclosure *already* does not attract the protection of the law.

The reason that criminal sanctions are not included in whistleblower laws is that their chilling effect is unnecessary. In virtually every jurisdiction it is a criminal offense to provide false statements to the government, and defamation laws create civil and in some cases criminal liability as well. Within South Africa too, there are a variety of pre-existing laws that can be used to sanction or deter a false disclosure. Such alternative remedies could come from within contract law, *crimen injuria* and civil law. Further, if as the Guide Note suggests the main purpose for criminalisation is to defend against defamation, this contradicts the international trend against criminalisation of defamation, which also constitutes a major activity of the African Union.

Further, after an analysis of laws in a variety of jurisdictions measured against the UN Convention Against Corruption, Transparency International proposed that any formulation of a provision against false disclosures consistent with the Convention should only be drafted to reference civil and employment sanctions already in existence. Thus a law which merely acknowledges that a false disclosure does not constitute a disclosure, and such disclosure would be subject to existing laws, would be considered a best practice draft.

In the Department of Justice’s research they indicated that civil remedies resulted in “expensive and drawn out” legal proceedings, but provide absolutely no substantive support to indicate how a criminal process that occurs within the same justice system would significantly mitigate against this, especially given the *additional* expense burdens on the state that are then *borne by the tax*



payer to participate in criminal prosecution.

No adequate evidence has been provided to support the necessity of such a provision, nor evidence provided that it could offer a significant deterrence to false disclosures in a manner more effective than other remedies. The concerns expressed around a tide of allegations made against the state must be seen in context. Where there are people who are intent on causing harm to individuals, reputational or otherwise, this law will not deter them. The likelihood of prosecution and a jail term in terms of this law, given the high pressures on SAPS and NPA as a result of our high crime levels, is low. The deterrent effect for those who are genuinely malicious is low – but the deterrent effect for genuine whistleblower is high. Remember, only 3 out of 10 South Africans feel safe disclosing sensitive information.

We are very concerned that the attempt to include this provision constitutes a retrogressive step taken by the legislature against the fulfillment of the right to free speech and dignity. We would strongly recommend that the legislature removes this section. We fully support the balance of the Bill, which will, we believe, strengthen the right to speak out against wrongdoing.

Sincerely,

Alison Tilley

Open Democracy Advice Centre,
Head of Advocacy

