**The nature and extent of the protection of whistle-blowers and investigators in the Public Service**

**JUNE 2015**

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**The nature and extent of the protection of whistle-blowers and investigators in the Public Service**

Published in the Republic of South Africa by

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Compiled by: Branch: Integrity and Anti-Corruption

Distributed by: Directorate Communications and Information Services

ISBN:

**TABLE OF CONTENTS**

[**1. executive sum**](#_Toc415471346)**MARY**……………………………..………………………………….**vi**

[CHAPTER 1: INTRODUCTION 1](#_Toc415471350)

[1.1 Background 2](#_Toc415471351)

[1.2 Objectives of the study 2](#_Toc415471352)

[1.3 Mandate of the PSC 2](#_Toc415471353)

[1.4. Outline of the report](#_Toc415471354) 2

[CHAPTER 2: RESEARCH METHODOLOGY 4](#_Toc415471357)

[2.1 Introduction 5](#_Toc415471358)

[2.2 Scope of the study------------------------------------------------------------------------------------5](#_Toc415471359)

[2.3 Data collection tool 5](#_Toc415471360)

[2.3.1 Data collection process](#_Toc415471361) 5

2.4 Data analysis-------------------------------------------------------------------------------------------6

2.5 Limitations of the study------------------------------------------------------------------------------6

[CHAPTER 3: PROTECTION OF WHISTLEBLOWERS AND INVESTIGATORS IN SOUTH AFRICA AND OTHER](#_Toc415471362) COUNTRIES ---------------------------------------------------------------------- 7

3.1 Introduction 8

3.2 Cases of alleged corruption reported to the NACH by whistleblowers……………….8

3.3 Protection of whistleblowers 9

3.4 Protection of investigators 10

3.5 The state of protection of whistleblowers and investigators in other countries ….. 11

3.6 Conclusion 18

[CHAPTER 4: FINDINGS](#_Toc415471374) 19

4.1 Introduction 20

4.2 Key Findings 20

4.2.1 The nature and extent of the protection of whistle-blowers when reporting

cases of alleged corruption in the Public Service 20

4.2.2 The views of the whistleblowers are that the current framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service is weak --------------------------------------------------------------------------------------21

4.2.3 The views of the investigators are that there is no current framework with regard to

the protection of investigators when conducting investigations of cases of

alleged corruption in the Public Service---------------------------------------------------------21

4.2.4 An appropriate body that will effectively deal with the protection

of whistleblowers and investigators----------------------------------------------------------------22

**CHAPTER 5: RECOMMENDATIONS AND CONCLUSION----------------------------------------- 23**

5.1 Introduction 24

5.2 Recommendations 24

5.3 Conclusion 26

LIST OF TABLES

[**Table 1**: Status of NACH cases as at February 2015 8](#_Toc411854141)

[**Table 2**: Australia and Canada Whistleblowing Framework .8](#_Toc411854142)

**APPENDIX A: PROTECTED DISCLOSURE ACT OF 2000-----------------------------------------28**

**APPENDIX B: CASE STUDIES ON BLOWING THE WHISTLE ON CORRUPTION-------- 35**

**APPENDIX C: DATA COLLECTION TOOL-----------------------------------------------------------38**

**GLOSSARY OF ABBREVATIONS--------------------------------------------------------------------------iv**

AUCPCC African Union Convention on Preventing and Combating Crime

CMS Case Management System

COSATU South African Congress of Trade Unions

CPIB Corrupt Practices Investigation Bureau

DoJCD Department of Justice and Constitutional Development

EACC Ethics and Anti-Corruption Commission

EFCC Economic and Fiscal Corruption Commission

EU European Union

TFAC The Fight Against Corruption

ICPC Independent Corrupt Practices Commission

ISS Institute for Security Studies

GDP Growth Domestic Products

LRA Labour Relation Act

NACH National Anti-Corruption Hotline

NSG National School of Government

ODAC Open Democracy Advice Centre

OPSC Office of the Public Service Commission

PDA Protected Disclosure Act

PIDA Public Interest Disclosure Act

PWC PricewaterhouseCoopers

PSC Public Service Commission

PSDPA Public Servant Disclosure Protection Act

RAG Retail Apparel Group

TUT Tshwane University of Technology

UNCAC United Nations Convention Against Corruption

**EXECUTIVE SUMMARY**

**1. INTRODUCTION**

Whistleblowing plays a critical role in the fight against corruption and maladministration. It is through effective whistleblowing where members of the public can report any suspected cases of corruption to the relevant authorities. The Protected Disclosure Act of 2000 was enacted to enable and legalize reporting of corrupt activities where the whistleblowers are protected.

It is important to protect the investigators who investigate corruption cases. Investigators are likely to be vulnerable and targeted by those implicated in corruption. This study focused on the nature and the extent of the protection of the whistleblowers and investigators.

## 2. OBJECTIVES OF THE STUDY

The following were the objectives of the study:

* To analyse the available literature on the nature and extent of the protection of whistle-blowers when reporting cases of alleged corruption in the Public Service;
* To establish the views of the whistleblowers on the current framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service;
* To establish the views of the investigators on the current framework with regard to the protection of investigators when conducting investigations of cases of alleged corruption in the Public Service; and
* To establish views on the appropriate body that will effectively deal with the protection of whistleblowers and investigators.

## 3 MANDATE OF THE PUBLIC SERVICE COMMISSION

The PSC has been given the responsibility by Cabinet to manage the National Anti-Corruption Hotline (Cabinet Memorandum No 45 of 2003 dated 14 August 2003). Whistleblowers report acts of corruption and maladministration through the NACH. Paragraph 4.11 of Cabinet Memorandum No 45 of 2003 provides that the PSC will from time to time evaluate the efficiency of the hotline system and recommend improvements where necessary. Section 196 (4) (f)(i) of the Constitution of the Republic of South Africa mandates the PSC to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executing authority and legislature.

In pursuance of the above, the PSC in 2011 conducted research on “*Measuring the Effectiveness of the NACH*”. In this research, it was found that often employees who blow the whistle on corruption are victimized and intimidated by senior management and have had little recourse. Similarly, the PSC received numerous complaints from investigators about threats from senior management while conducting investigations. It is, therefore, evident that those who are affected by the investigations turn against the whistleblowers and the investigators. Whistle-blowers and investigators need to be protected in order for them to report any case of alleged corruption without fear and favour. The PSC approved a project to conduct a research study on *“The nature and extent of the protection of whistle-blowers and investigators in the Public Service”* and come up with feasible recommendations so as to contribute towards the protection of the whistleblowers and investigators.

## 4 SCOPE OF THE STUDY

The scope of the study was the South African Public Service.

## 5 RESEARCH METHODOLOGY

The following research methodology was applied during the study:

* 1. **Data collection method**
* **Literature review**: The existing body of literature was extensively reviewed to establish the most widely accepted theoretical conceptualizations of whistleblowing and the state of the discourse on the subject of study.
* **Face-to-face interviews**: Face-to-face interviews were conducted with the whistleblowers known through the NACH and the investigators in the selected departments and Chapters 9 and 10 institutions.
* **Study visits**: The PSC approved study visits to the Republic of Kenya, Federal Republic of Nigeria, Canada and Australia. These visits were to be undertaken to study the countries’ systems of fighting corruption, specifically as they pertain to whistleblowing, protection of whistleblowers and investigators. The purpose of the study was to draw lessons for South Africa in enhancing the PDA. Study tours to the Republic of Kenya and the Federal Republic of Nigeria could not be undertaken because at the time, both countries were experiencing insurgencies by Al Shabaab and Boko Haram respectively.
* **Expert opinion:** The PSC interacted with Open Democracy Advice Centre (ODAC), Institute for Security Studies (ISS) and the Tshwane University of Technology for the expert opinion and expert knowledge and experience in the study. ODAC usually hosts leading experts in access to information and freedom of expression in South Africa, and on the continent**.**

**5.2** **Data analysis**

Data analysis was done according to the following themes derived from the objectives of the study:

* The nature and extent of the protection of whistle-blowers when reporting cases of alleged corruption in the Public Service
* The views of the whistleblowers on the current framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service, is weak
* The views of the investigators on the current framework with regard to the protection of investigators when conducting investigations of cases of alleged corruption in the Public Service
* An appropriate body that will effectively deal with the protection of whistleblowers and investigators

Evidence provided in document form by countries selected to augment the information provided, was also analyzed where appropriate.

**6. KEY FINDINGS**

The following are the key findings of the study:

**6.1. The nature and extent of the protection of whistle-blowers when reporting cases of alleged corruption in the Public Service**

The study sought to establish the nature and extent of the protection of whistle-blowers when reporting cases of alleged corruption in the Public Service.

The analysis of various research reports on whistleblowing in South Africa are unanimous in their findings that the number of people who blew the whistle against corruption has declined. This is attributed to the changing profile of the perpetrators and whistleblowing legislation in South Africa. It appears that many people do not have faith in the current framework. It is regarded as ineffective in the protection of the whistleblowers and investigators.

The Business Ethics Survey of 2013 in South Africa reveals that 65 percent of employees with knowledge of wrongdoing in their organizations prefer to remain silent for fear of reprisal and victimization. This finding is consistent with that of the PricewaterhouseCoopers (PWC) Global Economic Crime Survey for South Africa of 2013, which, as referred to above, points to a downward whistleblowing trend. In 2007, 16 percent of the wrongdoing was discovered through whistleblowing. This figure dropped to 6 percent in 2013. In 2007 the number of those who blew the whistle was at 25,3 percent and came down to 18,4 percent in 2011.

However, the PSC’s analysis of the number of calls that came through the NACH indicates that there is a tremendous increase in the utilization of the NACH, which has received 229 576 calls from the whistleblowers since September 2004 to 28 February 2015. The NACH has since its inception in 2004 and as at 28 February 2015 received **229 576** calls. Out of the **229 576** calls, a total of **22 000** case reports of alleged corruption were generated between the period 01 September 2004 to 28 February 2015. Twenty thousand (**20 000)** caseswere reported to the NACH by anonymous whistleblowers and **2 000** were reported by identified whistleblowers.

The declining whistleblowing rate is caused by the inadequacy of the legislation to protect the whistleblowers and investigators. However, this does not mean that the existing PDA is necessarily poor.

**6.2 The views of the whistleblowers are that the current framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service is weak**

The study sought to establish the views of the whistleblowers on the current framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service.

Case studies were obtained from six (6) whistleblowers (see case studies in Appendix B). These were whistleblower who were severely affected because of them blowing the whistle and coming out in the open. Some of them were interviewed and they expressed the extent to which their acts of blowing the whistle affected them. The majority of them listed the following issues:

* Their families went through a painful experience, fearing for their safety. Some even developed medical conditions such as high blood pressure because of constant harassment meted out at them. They were labelled ‘traitors’, ‘thunderhead’, ‘relic of the past’ who are resistance to change, and *impimpis*.
* Their friends deserted them as they too characterized them as traitors, troublemakers who are unemployed because they could not just mind their own businesses. Some lost their properties.
* They faced heavy financial burden because of the loss of their jobs or bearing of legal costs especially when the whistleblowing is unsuccessful. It emerged from the interviews that very often the employers hold the position that they have a duty to maintain its public image.

Most whistleblowers that were interviewed fully understood the importance of blowing the whistle as an important tool that could be used to fight corruption. However, they felt that they are not adequately protected. Some of the cases cited in **Appendix B** were used to underscore their view about the inadequacies in protecting the whistleblowers.

It is only in few cases where the interviewed whistleblowers indicated that if the opportunity to blow the whistle could arise again they would do it, despite what they had to go through following their blowing of the whistle. Their view is that if people do not talk about corruption the culprits would think that corruption is permissible. These whistleblowers regard whistleblowing as an important responsibility that needs to be pursued to achieve public interest.

**6.3 The views of the investigators are that there is no current framework with regard to the protection of investigators when conducting investigations of cases of alleged corruption in the Public Service**

The study sought to establish the views of the investigators on the current framework with regard to the protection of investigators when conducting investigations of cases of alleged corruption in the Public Service. The study found that the whistleblowing legislation does not make any provision for the protection of investigators. It is, therefore, proposed that a provision should be made in the whistleblowing legislation that protect the investigators against occupational detriment in much the same way it protects the whistleblowers. The legislation should make it a serious offence for anybody who interferes with the investigation of impropriety. Interference in the legislation should be broadly defined to include any act that deliberately seeks to obstruct investigations into any impropriety. This should include, but not limited to, threatening investigators, not co-operating or withholding any information or document needed for the investigation or deliberately misleading the investigation. Obstructing an investigation should be made a punishable offence.

**6.4 There is a need for an appropriate body that will effectively deal with the protection of whistleblowers and investigators**

The study sought to establish the appropriate body that will effectively deal with the protection of whistleblowers and investigators.

The current framework states that the disclosure could be made to the Public Protector, the Auditor-General or any person or body as envisaged in section 8 of the PDA. When making a disclosure to these bodies the following requirements should be adhered to:

* The disclosure should be made in “good faith”.
* The employee who is blowing the whistle should reasonably believe that the impropriety falls within the ordinary course of the business of the said bodies or persons.
* The information disclosed should be substantially true.

A general protected disclosure should be made in good faith. This refers to disclosure to the organizations other than those prescribed in the legislation. The requirements of the general protected disclosure are more stringent. Any such disclosure should be made in good faith, with the information required to be substantially true; and should not have been made for personal gain, except for a reward payable in terms of any law. The employee who make a general protected disclosure should have “*had a reason to believe that he or she will be subjected to an occupational detriment*”; or that making of the disclosure to the prescribed institutions may result in the evidence concealed; or that the matter was reported and no action was taken. Much as these requirements for the disclosure in various sections of the legislation are understandable to prevent vexatious and frivolous blowing of the whistle, making a disclosure “in good faith” is a function of context, which might be understood differently.

The PSC should be listed in the PDA as one of the bodies through which disclosures could be made. The reason for this is that in 2004 Cabinet approved the establishment of a single National Anti-Corruption Hotline (NACH). According to the Cabinet Memorandum which established and assigned the management of the NACH to the PSC, whistle-blowers report complaints and cases of maladministration to the NACH which are referred by the PSC to the respective departments for investigation. The NACH is a visual and physical manifestation to the general public and state employees of government’s express commitment to fight corruption. One of the key obstacles faced in the fight against corruption is the fact that individuals are often too intimidated to speak out or “blow the whistle” on corrupt and unlawful activities they observe occurring in the workplace, despite being obliged to do so in terms of their conditions of employment. Often those who do report corruption are victimized and intimidated, and have little recourse. However, callers to the NACH are guaranteed anonymity. Through its management of the NACH, the PSC is playing a key role with regard to the management of complaints received from whistle-blowers and therefore should be formally included as one of the institutions through which whistle-blowers can lodged complaints.

**7** **RECOMMENDATIONS**

The following are the recommendations of the study:

**7.1 The protection of whistle-blowers when reporting cases of alleged corruption in the Public Service should be enhanced**

**Action should be taken against employers who victimize whistleblowers:** No previous liability was considered for employers who unfairly victimized whistleblowers. Criminal liability of the employer where detriment was suffered by the employee/worker is therefore, recommended.

**The PDA should have a clause that provides for confidentiality of whistle-blowers:** Currently the Act does not ensure the confidentiality of whistleblower-identity. The history of whistleblowers in this country is replete with examples of victimization, in both the public and private sectors. The PSC is of the opinion that if the Act is to become an effective tool against corruption and maladministration, then the Act needs to be revised to include an obligation, on the part of the employer, to keep the identity of whistleblowers confidential. It requires departments, therefore, to take the necessary steps to ensure such confidentiality. Protection of whistleblowers should, therefore, be enhanced and guaranteed.

**The PDA should provide for a Public Servant Disclosure Protection Tribunal**: The PSC is of the view that Canadian model can be applied. The PSC therefore recommends that the PDA should be amended to include a Public Servant Disclosure Protection Tribunal that may put sanctions for any reprisal against employee or occupational detriment. The Public Servant Disclosure Protection Tribunal should be empowered to make verdicts on the cases which could lead to reinstatement of an employee if he or she was suspended, compensation to the loss; rescinding of any disciplinary measure; reimbursing financial losses incurred; awarding compensation for pain and suffering (**the amount for compensation should be determined by the tribunal**). Anybody who is found to have subject whistleblowers to occupational detriment should be imprisoned (the magistrate should determine the maximum number of years in prison based on the outcome of the court case).

**Consequential amendments to the PDA:** The PSC is of the view that when amending or strengthening the PDA, there should be consequential amendments. The PSC therefore recommends that as one of the consequential amendments, the PDA should provide that employers should have appropriate internal procedures in place for receiving and dealing with information about improprieties. This goes hand in hand with the duty, on the part of the employer, to investigate. Employees who make protected disclosures may experience difficulties where they, in the absence of an obligation to give feedback or to be notified, are not notified of a decision not to investigate the disclosure or of a decision to refer the matter to another body to investigate, or of the outcome of the investigation. The PSC, therefore, recommends that a duty should be imposed upon the employer to investigate a disclosure. However, the PSC recommends that in cases where an employee made a false disclosure, such employee should be guilty of an offence.

**7.2 The current framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service should be strengthened**

**The Witness Protection Act should provide for the physical security for whistleblowers:** A whistleblower may take on serious risk to his/her financial position, reputation and personal safety when disclosing wrongdoing in the public interest. After making a disclosure, a whistleblower may be subjected to threats and reprisal from fellow employees or another person as a result of that disclosure. Currently, the PDA does not have provisions for physical security measures to protect threatened whistleblowers and investigators such as:

* No provision for 24 hour armed protection when raided by people who are involved in corruption
* No provision for safe housing with advanced security measures to protect the threatened whistleblower from any harm
* No provision for new identity to hide the name of the whistleblower who is threatened from alleged perpetrators
* No provision for relocation to other countries if the state feels that the life of the whistleblower is gravely in danger
* No provision for job placement for fear of reprisals and to protect the identity of the threatened whistleblower
* No provision for trauma and psychological assessment and to help with any trauma that may be experienced by threatened whistleblower
* No provision that if the whistleblower is employed, a replacement salary will be provided
* No provision for after-care to help the whistleblower to adjust after leaving the permanent whistleblower protection programme

The PSC recommends that the Witnesses Protection Act needs to be amended to include the security of whistleblowers. Should there be any financial implications arising out of the protection of the whistleblowers National Treasury should make the necessary funds available.

* 1. **The framework with regard to the protection of investigators when reporting cases of alleged corruption in the Public Service should be put in place**

**Any action where an investigator is victimized or intimidated should be punishable by law:** After a wrongdoing is reported it needs to be investigated in order to establish the relevant facts. The study found that investigators are intimidated and victimized during the course of investigations of cases of alleged corruption reported to the NACH. Especially when cases of impropriety investigated implicate high ranked officials in the departments investigators are met with hostile reactions intended to ensure that the investigations fail. Sometimes the information that they need is withheld.

The PSC, therefore, recommends that the PDA should be amended to include the provision that any action where an investigator is intimidated or victimized or information from her/him is withheld during the conducting of an investigation, is an offence punishable by imprisonment for a period not less than three years but not exceeding five years.

**The Witness Protection Act should provide for the physical security of investigators:** Currently, the PDA does not have provisions for physical security measures to protect threatened investigators such as:

* No provision for 24 hour armed protection when raided by people who are involved in corruption,
* No provision for safe housing with advanced security measures to protect the threatened investigator from any harm
* No provision for new identity to hide the name of the investigator who is threatened from alleged perpetrators
* No provision for relocation to other countries if the state feels that the life of the investigator is gravely in danger
* No provision for job placement for fear of reprisals and to protect the identity of the threatened investigator
* No provision for trauma and psychological assessment and to help with any trauma that may be experienced by threatened investigator
* No provision that if the investigator is employed, a replacement salary will be provided
* No provision for after-care to help the investigator to adjust after leaving the permanent investigator protection programme

The PSC recommends that the Witnesses Protection Act needs to be amended to include the physical security of investigators. Should there be any financial implications arising out of the protection of the whistleblowers National Treasury should make the necessary funds available.

**7.4 There should be an establishment of an appropriate body that will effectively deal with the protection of whistleblowers and investigators**

With regard to this aspect, the South African Law Reform Commission argued that there are a number of other “state institutions supporting constitutional democracy” to whom it would be equally if not more appropriate to make disclosures. The South African Law Reform Commission recommended the list of institutions to which disclosures may be made. The National Development Plan also talks about the multiple agency when it comes to dealing with the issue of reporting corruption. It includes:

* the Public Protector
* the Auditor-General
* the Human Rights Commission
* the Commission for the Promotion and Protection of rights of Cultural, Religious and Linguistic Communities
* the Commission for Gender Equality
* the Independent Authority to Regulate Broadcasting
* the Speaker of Parliament
* the Commissioner of Police
* an Ombudsperson
* an organ of state
* a labour inspectorate

The PSC recommends that it should be regarded as one of the institutions to which a disclosure could be made since the PSC manages the NACH on behalf of Government. Whistleblowers report any suspected cases of alleged corruption to the PSC anonymously without providing their details.

**CHAPTER 1:**

**INTRODUCTION**

## 1.1 BACKGROUND

Whistleblowing plays a critical role in the fight against corruption and maladministration. It is through effective whistleblowing where members of the public can report any suspected cases of corruption to the relevant authorities. The Protected Disclosure Act of 2000 was enacted to enable and legalize reporting of corrupt activities where the whistleblowers are protected.

It is important to protect the investigators who investigate corruption cases. Investigators are likely to be vulnerable and targeted by those implicated in corruption. This study focused on the nature and the extent of the protection of the whistleblowers and investigators.

## 1.2 OBJECTIVES OF THE STUDY

The following are the objectives of the study:

* To analyze the available literature on the nature and extent of the protection of whistle-blowers when reporting cases of alleged corruption in the Public Service;
* To establish the views of the whistleblowers on the current framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service;
* To establish the views of the investigators on the current framework with regard to the protection of investigators when conducting investigations of cases of alleged corruption in the Public Service; and
* To establish views on the appropriate body that will effectively deal with the protection of whistleblowers and investigators.

## 1.3 MANDATE OF THE PUBLIC SERVICE COMMISSION

The PSC has been given the responsibility by Cabinet to manage the National Anti-Corruption Hotline (Cabinet Memorandum No 45 of 2003 dated 14 August 2003). Whistleblowers report acts of corruption and maladministration through the NACH. Paragraph 4.11 of Cabinet Memorandum No 45 of 2003 provides that the PSC will from time to time evaluate the efficiency of the hotline system and recommend improvements where necessary. Section 196 (4) (f)(i) of the Constitution of the Republic of South Africa mandates the PSC to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executing authority and legislature.

In pursuance of the above, the PSC in 2011 conducted research on “*Measuring the Effectiveness of the NACH*”. In this research, it was found that often those employees who blow the whistle on corruption are victimized and intimidated by senior management and have had little recourse. Similarly, the PSC received numerous complaints from investigators about threats from senior management while conducting investigations. It is, therefore, evident that those who are affected by the investigations turns against the whistleblowers and the investigators. Whistle-blowers and investigators need to be protected in order for them to report any acts of corruption without fear and favour. The PSC approved a project to do a research study on *“The nature and extent of the protection of whistle-blowers and investigators in the Public Service”* and come up with feasible recommendations so as to contribute towards the protection of the whistleblowers and investigators.

**1.4 OUTLINE OF THE REPORT**

The structure of the report is as follows:

* **Chapter 2** presents the research methodology used during the study.
* **Chapter 3** presents the protection of whistle-blowers and investigators in South Africa and other countries as well as the literature review on the “The nature and extent of the protection of whistle-blowers and investigators in the Public Service”.
* **Chapter 4** presents thefindings.
* **Chapter 5** presents the recommendations and conclusion of the study.

# 

# CHAPTER 2:

# RESEARCH METHODOLOGY

**2.1 INTRODUCTION**

## This chapter presents the scope and research methodology applied during the study. Data collection tools such as literature review, interviews, face to face interviews, study visits and expert opinion are presented in this chapter. The chapter also presents the limitation of the study.

**2.2 SCOPE OF THE STUDY**

The scope of the study was the South African Public Service.

**2.3 DATA COLLECTION TOOL**

The following data collection process was applied during the data collection. A questionnaire was, *inter alia*, used. The questionnaire is shown in **Appendix C.**

**2.3.1 Data collection process**

### 2.3.1.1 Literature Review

The existing body of literature was extensively reviewed to establish the most widely accepted theoretical conceptualizations of whistleblowing and the state of the discourse on the subject of study. Literature review was also conducted to establish widely accepted empirical findings on the adequacy or otherwise of the PDA, especially as its provision on the protection of whistleblowers and investigators is concerned. The key documents reviewed include: Constitution of the Republic of South Africa, Protected Disclosure Act, 2000 (Act 26 of 2000), Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004), Public Service Act, 1994 (Act 103 of 1994), Public Finance Management Act, 1999(Act 1of 1999), Promotion of Access to Information Act, 2000( Act 2 of 2000), Promotion of Administrative Justice Act, 2000(Act 3 of 2000), and Local Government Municipal Finance Management Act, 2003(Act 56 of 2003).

### 2.3.1.2 Interviews

Face-to-face interviews were conducted with the whistleblowers identified through the NACH. The investigators in the selected government departments, state agencies and Chapter 9 institutions were interviewed. Some of the notable participants in the study were whistleblower one, former Deputy Director-General of the Department of Justice and Constitutional Development and two officials from a public entity[[1]](#footnote-1). The information obtained from such participants were very useful to the study of this nature.

### 2.3.1.3 Study Visits

The PSC approved study visits to the Republic of Kenya, Federal Republic of Nigeria, Canada and Australia. These visits were to be undertaken to study the systems of fighting corruption, specifically as they pertain to whistleblowing, protection of whistleblowers and investigators on selected countries. The purpose of the study tours was to draw lessons for South Africa in enhancing the PDA. The tour to Australia took place on 30 September - 03 October 2014 whereas that to Canada was from 20-24 October 2014. In Australia meetings and interviews with the Office of the Ombudsman of the Commonwealth, Australian Commission for Law Enforcement Integrity, Attorney General, Public Service Commission, Australian Capital Territory, and Australian Federal Police were conducted. In Canada meetings and interviews with the Office of the Public Sector Integrity Commissioner, Office of the Chief Resource Officer (Treasury Board of Canada Secretariat), Office of the Conflict of Interest and Ethics Commissioner, and the Ombudsman of Ontario, Toronto were conducted. The study tours generated a great deal of valuable information to the study of this nature.

### 2.3.1.4 Expert Opinion

An important technique in research is expert opinion. It was solicited for problem identification in the South African protected disclosure regime for a scientific study. The PSC interacted with the Open Democracy Advice Centre (ODAC), Institute for Security Studies (ISS) and the Tshwane University of Technology with expert knowledge and experience in policy making. The ODAC hosts leading experts in access to information and freedom of expression in South Africa, and on the continent. It drove what it terms "strategic litigation" on the Promotion of Access to Information Act and Protected Disclosure Act. The ISS was established to enhance human security on the African continent. It conducts research; does policy analysis; provides experts opinion and advice. Like ODAC, the ISS took interest in the Protected Disclosure Act, which was analyzed to determine its effectiveness in protecting the whistleblowers. The interaction of the PSC with ODAC and ISS was specifically premised on the outcome of their analysis of the PDA, which determined that there is a need to strengthen its provision on the protection of whistleblowers. Such interactions took place in the form of group discussions, which the PSC facilitated. In this regard, a workshop on the nature and extent of the protection of the whistleblowers and investigators was conducted on 21 July 2014. In the workshop, a presentation was made by the Open Democracy Advice Centre as well as by Whistle blower five, Senior Investigator from the Department of Health and Social Development. The presentations provided insights with regard to the nature and extent of the protection of whistle-blowers and investigators in the workplace.

**2.4** **DATA ANALYSIS**

Data analysis was done according to the following themes derived from the objectives of the study:

* The nature and extent of the protection of whistle-blowers when reporting cases of alleged corruption in the Public Service.
* The views of the whistleblowers on the framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service, is weak.
* The views of the investigators on the current framework with regard to the protection of investigators when conducting investigations of cases of alleged corruption in the Public Service.
* An appropriate body that will effectively deal with the protection of whistleblowers and investigators.

Evidence provided in document form by countries selected to augment the information provided, was also analyzed where appropriate.

## 2.5 LIMITATIONS OF THE STUDY

It was initially planned that four (4) countries would be visited to obtain information on the protection of whistleblowers and investigators. These countries included Kenya, Nigeria, Australia and Canada. However, only two countries, namely, Australia and Canada were visited. During the time of the research study there was conflict in Kenya and Nigeria. Groups such as Boko Haram in Nigeria were abducting citizens and Al Shabaab was allegedly responsible for bombings in Kenya. It was felt that due to such conflict, the PSC should not visit these countries. However, a literature review on the protection of whistleblowers and investigators pertaining to these countries was done.

# CHAPTER 3:

# PROTECTION OF WHISTLEBLOWERS AND INVESTIGATORS IN SOUTH AFRICA AND OTHER COUNTRIES

## 3.1 INTRODUCTION

This Chapter discusses whistleblowing as a concept. The Chapter also discusses the nature and extent of the protection of whistleblowers and investigators in South Africa and selected countries. Challenges experienced by the whistleblowers and investigators are also discussed.

**3.2 CASES OF ALLEGED CORRUPTION REPORTED TO THE NACH** **BY WHISTLEBLOWERS**

In South Africa whistleblowing protection legislation came into being in 2000 following the resolution of the National Anti-Corruption Summit of 1999 where a need for the protection of the whistleblowers was underscored. It was promulgated in 2000 as the Protected Disclosures Act and came into operation in 2001. In 2014 the whistleblowing protection legislation was fourteen (14) years old. A major instrument through which persons can blow the whistle is the National Anti-Corruption Hotline (NACH).

Cabinet decided that the NACH for the Public Service be established to replace all existing anti-corruption hotlines. Therefore, the NACH was established on 1 September 2004 as a “one stop” mechanism for members of the public to report acts of corruption in the Public Service. In addition to providing for the safe and anonymous reporting of corruption, the NACH also created opportunities for different role-players (e.g. departments) to co-operate more efficiently in receiving and handling cases of alleged corruption.

The NACH has since its inception in 2004 and as at 28 February 2015 received **229 576** calls (such as wrong numbers, drop calls, enquiries, children playing, advice etc.). Out of the **229 576** calls, a total of **22 000** case reports of alleged corruption were generated between the period 01 September 2004 to 28 February 2015. Twenty thousand (**20 000)** caseswere reported to the NACH by anonymous whistleblowers and **2 000** were reported by identified whistleblowers. Out of these **22 000** cases, the PSC referred **15 434** cases of alleged corruption to the relevant national and provincial departments, and public entities for investigation, see **Table 1** below. These are the cases which the PSC identified that required further investigation. The PSC received feedback on **11806** cases and closed **9362** cases. A total of approximately six thousand five hundred and sixty six (**6566**) cases of alleged corruption were closed due to lack of details.

Table 1 Status of NACH cases as at February 2015

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **NATIONAL/ PROVINCE** | **CASES REFERRED** | **FEEDBACK RECEIVED** | **% Feedback received** | **CASES CLOSED** | **% Cases closed** |
| **National** | **6257** | **4391** | **70%** | **3328** | **53%** |
| **Eastern Cape** | **697** | **554** | **79%** | **161** | **23%** |
| **Free State** | **314** | **120** | **38%** | **71** | **23%** |
| **Gauteng** | **1760** | **1449** | **82%** | **1242** | **71%** |
| **KwaZulu-Natal** | **682** | **265** | **39%** | **124** | **18%** |
| **Limpopo** | **459** | **440** | **96%** | **197** | **43%** |
| **Mpumalanga** | **1085** | **942** | **87%** | **880** | **81%** |
| **North West** | **415** | **253** | **61%** | **167** | **40%** |
| **Northern Cape** | **106** | **60** | **57%** | **42** | **40%** |
| **Western Cape** | **491** | **429** | **87%** | **277** | **56%** |
| **Public Entities** | **3168** | **2903** | **92%** | **2873** | **91%** |
| **TOTAL** | **15434** | **11806** | **76%** | **9362** | **61%** |

**Table 1** above shows the cases reported to the NACH by whistleblowers since the NACH’s inception in 2004. The PSC observed that the lack of whistleblowers’ details make it difficult to follow up on cases especially where key details might be missing. All these indicate that the Protected Disclosure Act is inadequate to protect whistleblowers and the investigators in the public service. The majority of the whistleblowers prefer to remain anonymous. This means that they do not want to be identified. The challenge with this practice is that adequate information is not supplied by the whistleblowers.

The declining rate of blowing the whistle exemplifies the extent of its muteness. The lack of whistleblowers’ details makes it difficult to follow up on cases especially where key details might be missing. Most of these cases are closed on the Case Management System (CMS) due to lack of such key details[[2]](#footnote-2).

**3.3 PROTECTION OF WHISTLEBLOWERS**

The whistleblowers who were interviewed during the study ((see, details in **Appendix B**) expressed the extent to which their acts of blowing the whistle affected them. The majority of these whistleblowers interviewed raised the following issues that occurred to them as a result of them blowing the whistle against corruption:

* Their families went through a painful experience, fearing for their safety.
* Some even developed medical conditions such as high blood pressure because of constant harassment meted out at them.
* They were labelled ‘traitors’, ‘thunderhead’, ‘relic of the past’ who are resistance to change, and *impimpis*.
* Their friends deserted them as they too characterized them as traitors, troublemakers who are unemployed because they could not just mind their own businesses. Some lost their properties.
* They faced heavy financial burdens because of the loss of their jobs or bearing of legal costs especially when the whistleblowing is unsuccessful.

It emerged from the interviews that very often the employers hold the position that they have a duty to maintain its public image. Because of this, disclosure of wrongdoing is wittingly or unwittingly changed from a duty to report in public interest to a personal initiative. In others words, a disclosure is not understood as a duty intended to pursue the public interest. The consequences of all these cases, which some extensively reported in the media, is the decline in whistleblowing.

Most officials that were interviewed fully understood the importance of blowing the whistle as an important tool that could be used to fight corruption. However, they felt that whistleblowers are not adequately protected. Some of the cases cited above were used to underscore their view about the inadequacies in protecting the whistleblowers. Because of this, most of them prefer to just not get involved in blowing the whistle.

It is only in few cases where interviewees, especially those who came out in public as whistleblowers, indicated that if the opportunity to blow the whistle could arise again they would do it, despite what they had to go through following their blowing of the whistle. Their view is that if people do not talk about corruption the culprits would think that corruption is permissible. They regard whistleblowing as an important responsibility that needs to be pursued because it would be in the public interest.

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 reporting corrupt cases to the law enforcement agencies. Some of these reasons are that:

* They are fearful of the possible response from their local community, or even outside persons. They fear intimidation, or even death, should they blow the whistle on corruption.
* They don’t know the protection that is available to them, should they blow the whistle on corruption.
* They are concerned about the social impact of the disclosure. They are worried about being ostracized, or the risk that people may lose trust in them and they are worried about becoming a “social pariah”.
* Whistleblowers also don’t know who to trust with information, or even whom they can approach to make a disclosure.
* Sometimes there is 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.
* There is sometimes a direct monetary incentive for whistleblowers if they do not speak.
* 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).

The Business Ethics Survey of 2013 in South Africa reveals that 65 percent of employees with knowledge of wrongdoing in their organizations prefer to remain silent for fear of reprisal and victimization[[3]](#footnote-3). Its findings are consistent with the outcome of the interviews conducted with a group of officials who worked as investigators in the different departments and the PWC Global Economic Crime Survey for South Africa of 2013. It points to a disturbing downward trend regarding the effectiveness of whistleblowing.

A whistleblower may take on serious risk to his/her financial position, reputation and personal safety when disclosing wrongdoing in the public interest. After making a disclosure, a whistleblower may be subjected to threats and reprisal from fellow employees or another person as a result of that disclosure. Currently, the PDA does not have provisions for physical security measures to protect threatened whistleblowers such as:

* No provision for 24 hour armed protection when raided by people who are involved in corruption
* No provision for safe housing with advanced security measures to protect the threatened whistleblower from any harm
* No provision for new identity to hide the name of the whistleblower who is threatened from alleged perpetrators
* No provision for relocation to other countries if the state feels that the life of the whistleblower is gravely in danger
* No provision for job placement for fear of reprisals and to protect the identity of the threatened whistleblower
* No provision for trauma and psychological assessment and to help with any trauma that may be experienced by threatened whistleblower
* No provision that if the whistleblower is employed, a replacement salary will be provided
* No provision for after-care to help the whistleblower to adjust after leaving the permanent whistleblower protection programme

**3.4 PROTECTION OF INVESTIGATORS**

An investigator may take on serious risk to his/her financial position, reputation and personal safety when investigating cases of alleged corruption in the Public Service. During investigation of a case or after the investigation of a case, an investigator may be subject to threats and reprisal from fellow employees or another person as a result of that disclosure. Currently, the PDA does not have provisions for physical security measures to protect threatened investigators such as:

* No provision for 24 hour armed protection when raided by people who are involved in corruption
* No provision for safe housing with advanced security measures to protect the threatened investigator from any harm
* No provision for new identity to hide the name of the investigator who is threatened from alleged perpetrators
* No provision for relocation to other countries if the state feels that the life of the investigator is gravely in danger
* No provision for job placement for fear of reprisals and to protect the identity of the threatened investigator
* No provision for trauma and psychological assessment and to help with any trauma that may be experienced by threatened investigator
* No provision that if the investigator is employed, a replacement salary will be provided
* No provision for after-care to help the investigator to adjust after leaving the permanent investigator protection programme

In view of the above it is proposed that a provision should be made in the whistleblowing legislation that protect the investigators against occupational detriment in much the same way it does with the whistleblowers. The legislation should make it a serious offence for anybody who interferes with the investigation of impropriety. Interference in the legislation should be broadly defined to include any act that deliberately seeks to obstruct investigations into any impropriety. This should include, but not limited to, threatening investigators, not co-operating or withholding any information or document needed for the investigation or deliberately misleading the investigation. Obstructing an investigation should be made a punishable offence.

**3.5 The STATE OF PROTECTION OF WHISTLEBLOWERS and investigators IN OTHER COUNTRIES**

**3.5.1** **Australia and Canada Whistleblowing Framework**

Australia and Canada are the countries that the PSC visited to study its whistleblowing protection system. Participants who were interviewed in these countries indicated that their officials fully understood the importance of blowing the whistle as a mechanisms to fight corruption. They indicated that whistleblowers are adequately protected. Australia participants indicated that public officials making disclosures on wrongdoing are protected against reprisals as a direct ramification of making a disclosure. Canadian participants indicated that it is in the public interest to maintain and enhance public confidence in the integrity of public servants. The Public Servants Disclosure Protection Act seeks to ensure that confidence in public institutions is enhanced by establishing effective procedures for the disclosure of wrongdoings and for protection of public servants who disclose wrongdoings. The disclosure of wrongdoing is emphasized as part of the freedom of expression. However, the ambit of Australia and Canada’s legislation does not extend protection to the investigators. The Australian and Canadian whistleblowing framework is summarized in **Table 2**.

**Table 2:** **Australia and Canada Whistleblowing Framework**

|  |  |
| --- | --- |
| **AUSTRALIA** | **CANADA** |
| **(a) Who can make a disclosure?**  Section 26 of the Public Interest Disclosure Act (PIDA) (2013) states that the disclosure can be made by a person (the ***disclosure*)** who is, or has been, a public official. The public official in terms section 69 of the PIDA (2013) means the person could be:  “1. A Secretary of a department  2. A Head of an Executive Agency  3. An Australian Public Service employee in an Executive Agency  4. A principal officer of a prescribed authority  5. A member of the staff of a prescribed authority (including an APS employee in the prescribed authority)  6. An individual who constitutes a prescribed authority  7. A member of a prescribed authority (other than a court)  8. A director of a Commonwealth company  9. A member of the Defence Force  10. An appointee in terms of the *Australian Federal Police Act 1979*  11. A Parliamentary Service employee (within the meaning of the *Parliamentary Service Act 1999*)  12. An individual who:  (a) is employed by the Commonwealth otherwise than APS employee; and  (b) performs duties for a Department, Executive Agency or prescribed authority  13. A statutory officeholder, other than an individual covered by any of the above items  14. An individual who is a contracted service provider for a Commonwealth contract  15. An individual who:  (a) is an officer or employee of a contracted service provider for a Commonwealth contract; and  (b) provides services for the purposes (whether direct or indirect) of the Commonwealth contract  16. An individual (other than statutory officeholder, a judicial officer or an official of a registered industrial organization) who exercises powers, or performs functions, conferred on the individual by or under a law of the Commonwealth, other than:  (a) the Corporations (Aboriginal and Torres Strait Islander) Act 2006; or  (b) the Australian Capital Territory (sled-Government) Act 1988; or  (c) the Corporations Act 200; or  (d) the Norfolk Island Act 1979; or  (e) the Northern Territory (Self-Government) Act 1978  17. An individual (other than a judicial officer) who exercises powers, or performs functions, conferred on the individual under a law in force in the Territory of Christmas Island (whether the law is a law of the Commonwealth or a law of the Territory)  18. An individual (other than a judicial officer) who exercises powers, or performs functions, conferred on the individual under a law in force in the Territory of Cocos (keeling) islands (whether the law is a law of the Commonwealth or a law of the Territory)  19. The Registrar, or a Deputy Registrar, of Aboriginal and Torres Strait Islander Corporations”.  It is stated that a person can be protected by the PIDA in terms of section 70, which states that where the person is, for example, a volunteer or person works closely with the public official, the authorized officer is able to make or deem him/her a public official for the purpose of protected disclosure. Normally such persons would refer to those who would have volunteered in a department or has inside information about wrongdoing. | 1. **Who can make a disclosure?**   Section 12 of the Public Servants Disclosure Protection Act provides that *“a public servant may disclose to his or her supervisor or to the senior officer designated for the purpose by the chief executive of the portion of the public sector in which the public servant is employed any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing”.*  A public servant refers to any person who is employed in public sector, every Chief Executive and every member of the Royal Canadian Mounted Police. Section 16 provides that any public servant may make a disclosure to the public provided there is not enough time to make a disclosure in a manner that is prescribed in section 12. The requirement of this disclosure is that a public servant must believe on reasonable ground that the activity in question constitute a serious transgression of an Act of Parliament or any legislation of a province. Any person who is not a public servant may disclose information. Section 33(1) states that *“if, during the course of investigation or as a result of any information provided to the Commissioner by a person who is not a public servant, the Commissioner has a reason to believe that another wrongdoing or a wrongdoing, as the case may be, has been committed, he or she may, subject to section 23 and 24, commence an investigation into wrongdoing if he or she believes on reasonable ground that the public interest requires an investigation”.* |
| **(b) What Information is to be disclosed?**  Any information that relates to what the legislation termed “disclosable conduct”, may be disclosed. The legislation states that a public official can disclose information that, on reasonable grounds, believes constitutes ‘disclosable conduct’. This refers to any conduct by an agency, a public official or a contracted Commonwealth service provider (in connection with the Commonwealth contract) that:   * contravenes a law * is corrupt * perverts the course of justice * results in wastage of public funds or property * is an abuse of public trust * unreasonably endangers health and safety or endangers the environment * is misconduct relating to scientific research, analysis or advice * is maladministration, including conduct that is unjust, oppressive or negligent   The Act further explains that disagreement with government policy, action or expenditure does not form part of the definition of the ‘disclosable conduct’. So are the judicial conduct and the proper activities of intelligence agencies. | 1. **What information is to be disclosed?**   In terms of section 12 of the PSDPA a public servant may disclose any wrongdoing that has occurred or about to occur to his supervisor or senior officer in the public service. The PSDPA further defines wrongdoing in terms of section 8 as *“(a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act; (b) a misuse of public funds or a public asset; (c) a gross mismanagement in the public sector; (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant; (e) a serious breach of a code of conduct established under section 5 or 6; and (f) knowingly directing or counseling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).”* |
| **(c ) How can a disclosure be made?**  Section 28 (1) to (3) of the Act states that a disclosure can be made orally or in writing. It affords the disclosures to be made anonymously and that a disclosure can be made without being stated that it is done according to this Act. | 1. **How can a disclosure be made to?**   Section 12 of the PSDPA provides that a disclosure may be made to a supervisor or to the senior officer designated. Section 10 of the PSDPA provides that the Chief Executive must establish internal mechanisms of how disclosures will be managed. The PSDPA further provides that, in Section 10(4), the Chief Executive ought to assign a senior officer whom a disclosure will be made to. In terms of section 16 a disclosure can be made as follows;  *“(1) A disclosure that a public servant may make under sections 12 to 14 may be made to the public if there is no sufficient time to make the disclosure under those sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that-*  *(a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or*  *(b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment”*  A disclosure can also be made to the Office of the Public Sector Integrity Commissioner or the Auditor General of Canada. |
| 1. **Who can a disclosure be made to?**   Section 26 of the Act states that a disclosure is protected when it is made to an ‘authorised internal recipient’. Authorised internal recipient (in terms of section 73 of the PIDA) refers to the principal officer (Head of the Executive of Agency, Secretary of the Agency, the Commissioner of Police, Chief Executive officer of the court, official secretary of the Governor-General), and/or authorised officers appointed to handle public interest disclosure in the agency the disclosure relates to, or the agency the discloser works in (or last worked in, for former officials). The Commonwealth Ombudsman can receive public interest disclosures about other agencies if the discloser believes on reasonable grounds that it would be appropriate for the ombudsman/Inspector General of Intelligence and Security (IGIS) to investigate.  Once the supervisor passes information to the authorised officer it becomes a protected public interest disclosure. If a supervisor has reasonable ground to believe the disclosed information concerns “disclosable conduct’ he/she must pass it to an ‘authorised officer’ as soon as reasonably practicable. Once the supervisor passes the information to the authorised officer, it becomes a PIDA (section 43) this implies that the process (disclosure) between the subordinate and supervisor is not protected until the supervisor makes it to the authorised officer. In the case of external disclosure the requirement is that firstly one must make a disclosure internally. If there are reasonable grounds that the public interest disclosure investigations were inadequate an external disclosure could be made. An emergency disclosure can be made. This is a disclosure that relates to potential public harm or danger to health. A disclosure can also be made to a legal practitioner. | 1. **How are the whistleblowers protected?**   In terms of section 42 (1) whistleblowers are protected precisely because the Act obligates the employer not to enforce reprisals against any public servant who made a disclosure in good faith. The reprisal will include the following:  *“(a) take a disciplinary measure against the employee;*  *(b) demote the employee;*  *(c) terminate the employment of the employee*  *(d) take any measure that adversely affects the employment or working conditions of the employee; or*  *(e) threaten to take any measure referred to in paragraphs (a) to (d)”*  The PSPDA does not protect any person who discloses false information or who makes a disclosure in bad faith. |
| 1. **How are the whistleblowers protected through the PIDA?**   The PIDA provides protection of the identity of a person making a disclosure in terms of section 20 and section 21 respectfully. In terms of section 10 (1) and section 10(2) the discloser has immunity against civil, criminal and administrative liability or any disciplinary action for making a disclosure in the public interest. The PIDA states further there should not be any contractual or other remedy that may be imposed against a whistleblower for making the disclosure, and that the discloser has absolute privilege in proceedings for defamation. | 1. **How are the whistleblowers protected?**   In terms of section 42 (1) whistleblowers are protected precisely because the Act obligates the employer not to enforce reprisals against any public servant who made a disclosure in good faith. The reprisal will include the following:  *“(a) take a disciplinary measure against the employee;*  *(b) demote the employee;*  *(c) terminate the employment of the employee*  *(d) take any measure that adversely affects the employment or working conditions of the employee; or*  *(e) threaten to take any measure referred to in paragraphs (a) to (d)”*  The PSPDA does not protect any person who discloses false information or who makes a disclosure in bad faith. |
| 1. **What constitutes a reprisal?**   In terms of section 13 of the PIDA a reprisal is committed when a discloser takes detriment from another person. The PIDA in terms of section 13(2) defines detriment as any of the following;  *“(a) dismissal of an employee*  *(b) injury of an employee in his or her employment*  *(c) alteration of an employee’s position to his or her detriment*  *(d) discrimination between an employee and other employees of the same employer”*  Section 19 of the Act criminalizes an offence to take or threaten to take a reprisal against the discloser. Taking an offence to whistleblowing or reprisal refers to instances like discriminatory treatment, termination of employment, injury or alteration of employment position to the detriment of the whisleblower. A person who make or threaten to make a reprisal can get imprisonment for up to two (2) years. | 1. **What constitutes a reprisal?**   No information provided. |
| 1. **Legal remedies**   Sections 14 and 16 of the PIDA state that the whistleblower may take legal action to address reprisal or occupational detriment actions. The discloser may engage the Federal Court and Federal Circuit Court, which have expanded jurisdiction: compensation claims, injunctions, apologies, position reinstated. The whistleblower may apply the Fair Work Act (2009) in case of contravention of section 14 to section 16 of the PIDA. | 1. **Legal remedies**   The Public Servant Disclosure Protection Tribunal is an independent body whose roles are to determine whether reprisal has taken place and put sanctions for any reprisal against employee or occupational detriment. The tribunal is formed by judges or former judges of the Federal Court and superior court of a province. This a very important institutional arrangement created to specifically focus on the reprisal of whistleblowers or occupational detriment. The Public Servant Disclosure Protection Tribunal is empowered to make verdicts on the cases which could lead to reinstatement of an employee if he or she was suspended, compensation to the loss; rescinding of any disciplinary measure; reimbursing financial losses incurred; awarding compensation for pain and suffering up to $10 000. Anybody who subject whistleblowers to occupational detriment could also be imprisoned to a maximum of two (2) years in prison. |

The research study also looks into Kenya and Nigeria Whistleblowing Framework. The whistleblowing protection in Kenya are offered by the Kenyan Constitution, the Anti-Corruption and Economic Crimes Act (2003) and the Witness Protection Act (2006). In Article 236 of the Kenyan Constitution it is stated that no public official shall be *“(a) victimized or discredited or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law”. This provides a bases upon which employees are protected against any form of reprisals or occupational detriment for having performed duties that are guided by the legislations, rules and regulations of the Republic of Kenya. The Anti-Corruption and Economic Crimes Act (2003) gives effect to this constitutional provision. Section 65(1) of the Act states that no action, be it a reprisal or disciplinary hearing, would be instituted against any person for respect of“(a) assistance given by the person to the Commission or an investigator; or (b) a disclosure of information made by the person to the Commission or an investigator”.* A condition in this regard is that the discloser should believe that the information disclosed is true.

The Witness Protection Act of 2006 was promulgated to establish a Witness Protection Agency and to provide a “framework and procedures” for giving special protection, on behalf of the state, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with the prosecution and other law enforcement agencies. Among others, the Agency makes temporary protection for the witnesses pending full assessment of the potential risk they face. The whistleblowers are permitted by the Act to acquire new identity for their safety. The Ethics and Anti-Corruption Commission Act of 2011 was promulgated, as enjoined by the Constitution of Kenya, to establish Ethics and Anti-Corruption Commission. Its mandate is to *“combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption”. It achieves this by eeducating and creating awareness on any matter within the Commission’s mandate; undertaking “preventive measures against unethical and corrupt practices”*; conducting “investigations on its own initiative or on a complaint made by any person”, and, conducting “mediation, conciliation and negotiation”. The Ethics and Anti-Corruption Commission (EACC) hosts an anonymous reporting facility, which claims to guarantee complete anonymity and information confidentiality. The facility transfer data from the whistle-blower to the system, which uses encryption technologies. It is designed in such a manner that the identity of a whistle-blower is hidden, with the report of his or her being confidential. It can only be accessed by the EACC.

The Leadership and Integrity Act of 2012, Public Officer Ethics Act of 2003, the Public Procurement and Disposal Act of 2005 and the Proceeds of Crime and Anti-Money Laundering Act of 2009 do not necessarily deal with the protection of the whistle-blower. Their focus is on prescribing an ethical conduct that state officials should subscribe to; regulation of public procurement and disposal of the asset of the state; and combating of money laundering. The Leadership and Integrity Act was promulgated to give effect to, and establish procedures and mechanisms for the effective administration of the Kenyan Constitution, especially its provision on leadership and integrity where the ethical duties of state officers are specified. The provision of this Act is similar to those of the Public Officer Ethics Act, promulgated to prescribe a Code of Conduct and Ethics for the state officials. It also requires public officials to declare financial interests. The Public Procurement and Disposal Act was enacted to *“to establish procedures for the efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities to achieve the following objectives (a) maximisation of economy and efficiency in managing public assets (b) promotion of competition and ensuring that competitors are treated fairly; (c) promotion of integrity and fairness in the procurement procedures; and (d) maximisation of transparency and accountability in those procedures”.* These are intended to increase public confidence in the procedures in respect to the management of public assets. The Proceeds of Crime and Anti-Money Laundering Act of 2009 criminalize the proceeds of crime. It was enacted to make money laundering an offence and to introduce measures to combat this activity. This legislation provides for *“the identification, tracing, freezing, seizure, and confiscation of the proceeds of crime”.*

In terms of Nigeria’s whistleblowing framework “Whistleblower Protection Bill of 2008” provides protection of whistle-blowers against victimization of persons who is suspected of corruption[[4]](#footnote-4). Section 12(1) of the Whistleblower Protection Bill of 2008 states that no whistleblower may suffer retaliation (victimization) by employer or by employees, in the employ of the employer, for having made a disclosure. The Bill classifies the following as victimization; *“(i) dismissed; (ii) suspended; (iii) declared redundant; (iv) denied promotion; (v) transferred against the whistleblower’s will; (vi) harassed; (vii) intimidated; (viii) threatened with any of the matters set out in (i)-(vii)”*. Section 14 and Section 15 of the Bill state in a situation where the whistleblower is victimized as a result of the disclosure he/she could report such victimization to the Commission on Human Rights and Administrative Justice for Redress. The victimized whistleblower could also approach the High Court to claim damages arising from the breach of contract. Section 17 of the Whistleblower Protection Bill further states that *“where a whistleblower has a reasonable cause to believe that [his/her] life or property or that any of [his/her] member is in danger he/she may request protection from the police, who are required by the law to provide adequate protection”[[5]](#footnote-5)*. Section 18 of the Whistleblower Protection Bill states that the whistleblower can suffer civil or criminal charges in case if [he/she] disclosed false information with malicious intensions.

Section 1(1) of the Whistleblower Protection Bill of 2008 states that *“a person may make a disclosure of information where that person has reasonable cause to believe that an impropriety is committed or is just about to be committed by another person or company. Section 21(1) of the Bill of 2008 defines a ‘disclosure’ envisaged in Section 1(1) as any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by another employee who has reason to believe that the information concerned …”* is about any wrongdoing and is reasonably true. This means a disclosure can be made by an “employee”. Section 21 (ii) of the Bill 2008 defines an employee as *“(a) 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 (b) any person who in any manner assists in carrying on or conducting the business of an employer”.* In Section 1(3) the Bill (2008) states that “a person who makes a disclosure of impropriety is referred to as a whistleblower”.

Section 1(1) of the Whistleblower Protection Bill of 2008 states that a disclosure can be made by an employee who has a reason to believe that an act of impropriety has been committed. The employee must have a reason to believe that the information shows or is possible to show that *“(a) an economic crime has been committed, is about to be committed or is likely to be committed; (b) another person has not complied with a law or is in the process of breaching a law or is likely to break a law which imposes an obligation on that person;(c) a miscarriage of justice has occurred, is occurring or is likely to occur; (d) in a public institution there has been, there is or there is likely to be waste, misappropriation or mismanagement of public resources; (e) the environment has been degraded, is being degraded or is likely to be degraded; or (f) the health or safety of an individual or a community is endangered, has been endangered or is likely to be endangered.”*

Section 1(1) of the Safeguarded Disclosure Bill of 2009 states that *“every person employed or engaged in both the public and private sector shall have responsibility to disclose information related to suspected or alleged unlawful or other irregular and forbidden practices, conduct, etc. occurring in their respective workplaces, and which unlawful or irregular practices, conduct, etc. have the potential to cause social damage or injury to society, and can endanger the economic stability and development of Nigeria”.*

Section 4 (1) of the Bill of 2008 prescribes that a disclosure can be done either orally or in writing and it must contain the following *“(a) the full name, address and occupation of the whistleblower; (b) the nature of the impropriety in respect of which the disclosure is made; (c) the person alleged to have committed, who is committing or is about to commit the impropriety; (d) the time and place where the alleged impropriety is taking place, took place or likely to take place; (e) the full name, address and description of a person who witnessed the commission of the impropriety if there is such a person; (f) whether the whistleblower has made a disclosure of the same or of some impropriety on a previous occasion and if so, about whom and to whom the disclosure was made; and (g) if the person is an employee making a disclosure about that person’s employer or a fellow employee, whether the whistleblower remains in the same employment”*. Section 5 of the Bill of 2008 also makes provision for people who are illiterate to make a disclosure, which must be read, interpreted and clarified to the whistleblower in the language of the whistleblower.

Section 3(1) of the Whistleblower Protection Bill provides that a disclosure of information can be made to *“(a) an employer of the whistleblower; (b) the Inspector General of Police; (c) the Attorney-General; (d) the Auditor-General; (e) a staff of the Independence Corrupt Practices Commission; (f) a member of the National Assembly; (g) the Economic and Financial Crimes Commission; (h) the Human Rights Commission; (i) the print and Electronic Media; (j) the National Drug Law Enforcement Agency; (k) a chief; (l) the head or elder of the family of the whistleblower; (m) a head of a recognized religious body; (n) a Minister; (o) the Office of the President (p) the Federal Inland Revenue Service; or (q) the Public Complaint Commission”* this is a long list of the institution to whom a disclosure could be made. Section 6-11 of the Safeguarded Disclosure Bill of 2009 states that disclosure can, in good faith, be made to *“a legal practitioner or counselor; employer; the a member of the National Assembly or House of Assembly of a State, the Auditor-General of the federation, a member of the Federation Executive Council or Executive Council of a State, the chairman or member of a local government council or area council, certain persons or relevant organs of government; the Nigeria Police Force; the National Securities Organization; the Economic and Financial Crimes Commission; the Auditor-General of the federation; the Independent Corrupt Practices Commission”*

* 1. **CONCLUSION**

This Chapter showed that generally whistleblowing protection legislation in South Africa compares favorably with those of Canada and Australia. It appears far effective than that of Kenya and those that are still in the making in Nigeria. South Africa is said to be the only African country with comprehensive whistleblower protection legislation. The 2014 findings of the DLA Piper research indicates that South Africa’s whistleblowing legislation is one of the most effective in the world, better than that of Germany, France, Hong Kong and Australia. However, this does not mean that the South African whistleblowing legislation is flawless. The whistleblowing legislation in the countries that this Chapter focused on provides important insights to enhance the whistleblowing legislation in South Africa. Those areas from which lessons could be drawn form part of the discussion of the findings of the study in Chapter 4.

# CHAPTER 4:

# FINDINGS

* 1. **INTRODUCTION**

This chapter presents the findings of the study. The findings are presented according to the thematic areas derived from the objectives of the study. The thematic areas are also sub-divided into the predetermined indicators against which other whistleblowing legislations were assessed.

**4.2 THE NATURE AND EXTENT OF THE PROTECTION OF WHISTLE-BLOWERS WHEN REPORTING CASES OF ALLEGED CORRUPTION IN THE PUBLIC SERVICE**

The study sought to establish the nature and extent of the protection of whistle-blowers when reporting cases of alleged corruption in the Public Service.

The analysis of various research reports on whistleblowing in South Africa are unanimous in their findings that the number of people who blew the whistle against corruption has declined. This is attributed to the changing profile of the perpetrators and whistleblowing legislation in South Africa. It appears that many people do not have faith in the current framework. It is regarded as ineffective in the protection of the whistleblowers and investigators.

The Business Ethics Survey of 2013 in South Africa reveals that 65 percent of employees with knowledge of wrongdoing in their organizations prefer to remain silent for fear of reprisal and victimization. This finding is consistent with that of the PricewaterhouseCoopers (PWC) Global Economic Crime Survey for South Africa of 2013, which, as referred to above, points to a downward whistleblowing trend. In 2007, 16 percent of the wrongdoing was discovered through whistleblowing. This figure dropped to 6 percent in 2013. In 2007 the number of those who blew the whistle was at 25,3 percent and came down to 18,4 percent in 2011.

However, the PSC’s analysis of the number of calls that came through the NACH indicates that there is a tremendous increase in the utilization of the NACH, which has received 229 576 calls from the whistleblowers since September 2004 to 28 February 2015. The NACH has since its inception in 2004 and as at 28 February 2015 received **229 576** calls. Out of the **229 576** calls, a total of **22 000** case reports of alleged corruption were generated between the period 01 September 2004 to 28 February 2015. Twenty thousand (**20 000)** caseswere reported to the NACH by anonymous whistleblowers and **2 000** were reported by identified whistleblowers.

The declining whistleblowing rate is caused by the inadequacy of the legislation to protect the whistleblowers and investigators. However, this does not mean that the existing PDA is necessarily poor.

**4.3 THE VIEWS OF THE WHISTLEBLOWERS ARE THAT THE CURRENT FRAMEWORK WITH REGARD TO THE PROTECTION OF WHISTLEBLOWERS WHEN REPORTING CASES OF ALLEGED CORRUPTION IN THE PUBLIC SERVICE IS WEAK**

The study sought to establish the views of the whistleblowers on the current framework with regard to the protection of whistleblowers when reporting cases of alleged corruption in the Public Service. Case studies were obtained from six (6) whistleblowers (see case studies in **Appendix B**). These were whistleblowers who were severely affected because they blew a whistle against corruption. The majority of these whistleblowers interviewed raised the following issues that occurred to them as a result of them blowing the whistle against corruption:

* Their families went through a painful experience, fearing for their safety. Some even developed medical conditions such as high blood pressure because of constant harassment meted out at them. They were labelled ‘traitors’, ‘thunderhead’, ‘relic of the past’ who are resistance to change, and *impimpis*.
* Their friends deserted them as they too characterized them as traitors, troublemakers who are unemployed because they could not just mind their own businesses. Some lost their properties.
* They faced heavy financial burden because of the loss of their jobs or bearing of legal costs especially when the whistleblowing is unsuccessful. It emerged from the interviews that very often the employers hold the position that they have a duty to maintain its public image.

Most whistleblowers that were interviewed fully understood the importance of blowing the whistle as an important tool that could be used to fight corruption. However, they felt that they are not adequately protected. Some of the cases cited in **Appendix B** were used to underscore their view about the inadequacies in protecting the whistleblowers.

It is only in few cases where the interviewed whistleblowers indicated that if the opportunity to blow the whistle could arise again they would do it, despite what they had to go through following their blowing of the whistle. Their view is that if people do not talk about corruption the culprits would think that corruption is permissible. These whistleblowers regard whistleblowing as an important responsibility that needs to be pursued to achieve public interest.

**4.4 THE VIEWS OF THE INVESTIGATORS ARE THAT THERE IS NO CURRENT FRAMEWORK WITH REGARD TO THE PROTECTION OF INVESTIGATORS WHEN CONDUCTING INVESTIGATIONS OF CASES OF ALLEGED CORRUPTION IN THE PUBLIC SERVICE**

The study sought to establish the views of the investigators on the current framework with regard to the protection of investigators when conducting investigations of cases of alleged corruption in the Public Service. The study found that the whistleblowing legislation does not make any provision for the protection of investigators. It is, therefore, proposed that a provision should be made in the whistleblowing legislation that protect the investigators against occupational detriment in much the same way it protects the whistleblowers. The legislation should make it a serious offence for anybody who interferes with the investigation of impropriety. Interference in the legislation should be broadly defined to include any act that deliberately seeks to obstruct investigations into any impropriety. This should include, but not limited to, threatening investigators, not co-operating or withholding any information or document needed for the investigation or deliberately misleading the investigation. Obstructing an investigation should be made a punishable offence.

**4.5 AN APPROPRIATE BODY THAT WILL EFFECTIVELY DEAL WITH THE PROTECTION OF WHISTLEBLOWERS AND INVESTIGATORS**

The study sought to establish the appropriate body that will effectively deal with the protection of whistleblowers and investigators. The current framework states that the disclosure could be made to the Public Protector, the Auditor-General or any person or body as envisaged in section 8 of the PDA. When making a disclosure to these bodies the following requirements should be adhered to:

* The disclosure should be made in “good faith”.
* The employee who is blowing the whistle should reasonably believe that the impropriety falls within the ordinary course of the business of the said bodies or persons.
* The information disclosed should be substantially true.

A general protected disclosure should be made in good faith. This refers to disclosure to the organizations other than those prescribed in the legislation. The requirements of the general protected disclosure are more stringent. Any such disclosure should be made in good faith, with the information required to be substantially true; and should not have been made for personal gain, except for a reward payable in terms of any law. The employee who make a general protected disclosure should have “*had a reason to believe that he or she will be subjected to an occupational detriment*”; or that making of the disclosure to the prescribed institutions may result in the evidence concealed; or that the matter was reported and no action was taken. Much as these requirements for the disclosure in various sections of the legislation are understandable to prevent vexatious and frivolous blowing of the whistle, making a disclosure “in good faith” is a function of context, which might be understood differently.

The PSC should be listed in the PDA as one of the bodies through which disclosures could be made. The reason for this is that in 2004 Cabinet approved the establishment of a single National Anti-Corruption Hotline (NACH). According to the Cabinet Memorandum which established and assigned the management of the NACH to the PSC, whistle-blowers report complaints and cases of maladministration to the NACH which are referred by the PSC to the respective departments for investigation. The NACH is a visual and physical manifestation to the general public and state employees of government’s express commitment to fight corruption. One of the key obstacles faced in the fight against corruption is the fact that individuals are often too intimidated to speak out or “blow the whistle” on corrupt and unlawful activities they observe occurring in the workplace, despite being obliged to do so in terms of their conditions of employment. Often those who do report corruption are victimized and intimidated, and have little recourse. However, callers to the NACH are guaranteed anonymity. Through its management of the NACH, the PSC is playing a key role with regard to the management of complaints received by whistle-blowers and therefore should be formally included as one of the institutions through which whistle-blowers can lodged complaints.

**CHAPTER 5:**

**RECOMMENDATIONS AND CONCLUSION**

**5.1** **INTRODUCTION**

This chapter presents the recommendations and conclusion of the study. Recommendations are presented according to the thematic areas derived from the objectives of the study.

**5.2. THE PROTECTION OF WHISTLE-BLOWERS WHEN REPORTING CASES OF ALLEGED CORRUPTION IN THE PUBLIC SERVICE SHOULD BE ENHANCED**

**Action should be taken against employers who victimize whistleblowers:** No previous liability was considered for employers who unfairly victimized whistleblowers. Criminal liability of the employer where detriment was suffered by the employee/worker is therefore, recommended.

**The PDA should have a clause that provides for confidentiality of whistle-blowers:** Currently the Act does not ensure the confidentiality of whistleblower-identity. The history of whistleblowers in this country is replete with examples of victimization, in both the public and private sectors. The PSC is of the opinion that if the Act is to become an effective tool against corruption and maladministration, then the Act needs to be revised to include an obligation, on the part of the employer, to keep the identity of whistleblowers confidential. It requires departments, therefore, to take the necessary steps to ensure such confidentiality. Protection of whistleblowers should, therefore, be enhanced and guaranteed

**The PDA should provide for a Public Servant Disclosure Protection Tribunal**: The PSC is of the view that Canadian model can be applied. The PSC therefore recommends that the PDA should be amended to include a Public Servant Disclosure Protection Tribunal that may put sanctions for any reprisal against employee or occupational detriment. The Public Servant Disclosure Protection Tribunal should be empowered to make verdicts on the cases which could lead to reinstatement of an employee if he or she was suspended, compensation to the loss; rescinding of any disciplinary measure; reimbursing financial losses incurred; awarding compensation for pain and suffering (**the amount for compensation should be determined by the tribunal**). Anybody who is found to have subject whistleblowers to occupational detriment should be imprisoned (the magistrate should determine the maximum number of years in prison based on the outcome of the court case).

**Consequential amendments to the PDA:** The PSC is of the view that when amending or strengthening the PDA, there would inevitably be consequential amendments. The PSC therefore recommends that as one of the consequential amendments, the PDA should provide that employers should have appropriate internal procedures in place for receiving and dealing with information about improprieties. This goes hand in hand with the duty, on the part of the employer, to investigate. Employees who make protected disclosures may experience difficulties where they, in the absence of an obligation to give feedback or to be notified, are not notified of a decision not to investigate the disclosure or of a decision to refer the matter to another body to investigate, or of the outcome of the investigation. The PSC, therefore, recommends that a duty should be imposed upon the employer to investigate a disclosure. However, the PSC recommends that in cases where an employee made a false disclosure, such employee should be guilty of an offence.

**5.3 THE CURRENT FRAMEWORK WITH REGARD TO THE PROTECTION OF WHISTLEBLOWERS WHEN REPORTING CASES OF ALLEGED CORRUPTION IN THE PUBLIC SERVICE SHOULD BE STRENGTHENED**

**The Witness Protection Act should provide for the physical security for whistleblowers:** A whistleblower may take on serious risk to his/her financial position, reputation and personal safety when disclosing wrongdoing in the public interest. After making a disclosure, a whistleblower may be subjected to threats and reprisal from fellow employees or another person as a result of that disclosure. Currently, the PDA does not have provisions for physical security measures to protect threatened whistleblowers and investigators such as:

* No provision for 24 hour armed protection when raided by people who are involved in corruption
* No provision for safe housing with advanced security measures to protect the threatened whistleblower from any harm
* No provision for new identity to hide the name of the whistleblower who is threatened from alleged perpetrators
* No provision for relocation to other countries if the state feels that the life of the whistleblower is gravely in danger
* No provision for job placement for fear of reprisals and to protect the identity of the threatened whistleblower
* No provision for trauma and psychological assessment and to help with any trauma that may be experienced by threatened whistleblower
* No provision that if the whistleblower is employed, a replacement salary will be provided
* No provision for after-care to help the whistleblower to adjust after leaving the permanent whistleblower protection programme

The PSC recommends that the Witnesses Protection Act needs to be amended to include the security of whistleblowers. Should there be any financial implications arising out of the protection of the whistleblowers National Treasury should make the necessary funds available.

* 1. **THE FRAMEWORK WITH REGARD TO THE PROTECTION OF INVESTIGATORS WHEN REPORTING CASES OF ALLEGED CORRUPTION IN THE PUBLIC SERVICE SHOULD BE PUT IN PLACE**

**Any action where an investigator is victimized or intimidated should be punishable by law:** After a wrongdoing is reported it needs to be investigated in order to establish the relevant facts. The study found that investigators are intimidated and victimized during the course of investigations of cases of alleged corruption reported to the NACH. Especially when cases of impropriety investigated implicate high ranked officials in the departments investigators are met with hostile reactions intended to ensure that the investigations fail. Sometimes the information that they need is withheld.

The PSC, therefore, recommends that the PDA should be amended to include the provision that any action where an investigator is intimidated or victimized or information from her/him is withheld during the conducting of an investigation, is an offence punishable by imprisonment for a period not less than three years but not exceeding five years.

**The Witness Protection Act should provide for the physical security of investigators:** Currently, the PDA does not have provisions for physical security measures to protect threatened investigators such as:

* No provision for 24 hour armed protection when raided by people who are involved in corruption,
* No provision for safe housing with advanced security measures to protect the threatened investigator from any harm
* No provision for new identity to hide the name of the investigator who is threatened from alleged perpetrators
* No provision for relocation to other countries if the state feels that the life of the investigator is gravely in danger
* No provision for job placement for fear of reprisals and to protect the identity of the threatened investigator
* No provision for trauma and psychological assessment and to help with any trauma that may be experienced by threatened investigator
* No provision that if the investigator is employed, a replacement salary will be provided
* No provision for after-care to help the investigator to adjust after leaving the permanent investigator protection programme

The PSC recommends that the Witnesses Protection Act needs to be amended to include the physical security of investigators. Should there be any financial implications arising out of the protection of the whistleblowers National Treasury should make the necessary funds available.

**5.5 THERE SHOULD BE AN ESTABLISHMENT OF AN APPROPRIATE BODY THAT WILL EFFECTIVELY DEAL WITH THE PROTECTION OF WHISTLEBLOWERS AND INVESTIGATORS**

With regard to this aspect, the South African Law Reform Commission argued that there are a number of other “state institutions supporting constitutional democracy” to whom it would be equally if not more appropriate to make disclosures. The South African Law Reform Commission recommended the list of institutions to which disclosures may be made should be extended. The National Development Plan also talks about the multiple agency when it comes to dealing with the issue of reporting corruption. It includes:

* the Public Protector
* the Auditor-General
* the Human Rights Commission
* the Commission for the Promotion and Protection of rights of Cultural, Religious and Linguistic Communities
* the Commission for Gender Equality
* the Independent Authority to Regulate Broadcasting
* the Speaker of Parliament
* the Commissioner of Police
* an Ombudsperson
* an organ of state
* a labour inspectorate

The PSC recommends that it should be regarded as one of the institutions to which a disclosure could be made since the PSC manages the NACH on behalf of Government. Whistleblowers report any suspected cases of alleged corruption to the PSC anonymously without providing their details.

**5.6 CONCLUSION**

Corruption destroys societies and the institutions established to deliver quality services. It holds development at ransom. Various attempts are made to counteract corruption. One of those is whistleblowing–a duty to report any wrongdoing in the public and private organizations. The challenge has always been to develop effective whistleblowing protection legislation. Countries all over the world have always grappled with the challenge of developing effective whistleblowing protection legislation and the protection of the investigators thereof.

Given the extent of external socio-political factors that inhibit whistleblowers from blowing the whistle on corruption and maladministration, the PSC is of the view that the PDA must make express provision for organizations and other recipients of disclosures to protect the confidentiality of whistleblowers. Furthermore, remedies must be extended to immunity from civil, criminal and administrative prosecution. Furthermore, the PDA should be amended to include the Public Servant Disclosure Protection Tribunal and put sanctions for any reprisal against employee or occupational detriment. In this regard, the Public Servant Disclosure Protection Tribunal should be empowered to make verdicts on the cases which could lead to reinstatement of an employee if he or she was suspended, compensation to the loss; rescinding of any disciplinary measure; reimbursing financial losses incurred; awarding compensation for pain and suffering.

In terms of the security for whistleblowers, the PSC deemed it necessary that there should be an amendment to the Witnesses Protection Act to include the security measures for the whistleblowers. Protective measures should include 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 which include, where the discloser lives; how the discloser makes a living; and the family situation of the whistleblower.

**APPENDIX A**: **PROTECTED DISCLOSURES ACT 26 OF 2000**

*(ASSENTED TO 1 AUGUST 2000) (DATE OF COMMENCEMENT: 16 FEBRUARY 2001)*

*(English text signed by the President)*

**ACT**

**To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.**

**Preamble**

Recognizing that-

* The Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
* Section B of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right;
* Criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage;

And bearing in mind that-

* Neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector;
* Every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace;
* Every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure;

And in order to-

* Create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures;
* Promote the eradication of criminal and other irregular conduct in organs of state and private bodies;

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

1. **Definitions**

In *this Act*, unless the context otherwise indicates-

(c) being transferred against his or her will;

(d) being refused transfer or promotion;

(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;

(f) being refused a reference, or being provided with an adverse reference, from his or her *employer;*

(g) being denied appointment to any employment, profession or office;

(h) being threatened with any of the actions referred to paragraphs (a) to (g) above; or

(i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;

**‘organ of state’** means-

1. Any department of state or administration in the national and provincial sphere of government or any municipality in the local sphere of government; or
2. Any other functionary or institution when-
3. Exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
4. Exercising a public power or performing a public function in terms of any legislation;

**‘prescribed’** means prescribed by regulation in terms of section 10;

**‘protected disclosure’** means a disclosure made-

1. a legal adviser in accordance with section 5;
2. an employer in accordance with section 6;
3. a member of Cabinet or of the Executive Council of a province in accordance with section 7;
4. a person or body in accordance with section 8; or
5. any other person or body in accordance with section 9, but does not include a disclosure-

(i) in respect of which the *employee* concerned commits an offence by making that *disclosure*-

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;

‘**this Act’** includes any regulation made in terms of section 10.

1. **Objects and application of Act**
2. The objects of this Act are-
3. To protect an *employee*, whether in the private or the public sector, from being subjected to an *occupational detriment* on account of having made a *protected disclosure*;

‘**disclosure’** means any 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 following:

1. That a criminal offence has been committed, is being committed or is likely to be committed;
2. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
3. that a miscarriage of justice has occurred, is occurring or is likely to occur;
4. that the health or safety of an individual has been, is being or is likely to be endangered;
5. that the environment has been, is being or is likely to be damaged;
6. unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
7. that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;

**‘employee’** means

1. 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;
2. any other person who in any manner assists in carrying on or conducting the business of an *employer;*

‘**employer’** means any person-

1. who employs or provides work for any other person and who remunerates or expressingly or tacitly undertakes to remunerate that other person; or
2. 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 of behalf or on the authority of such employer;

‘**impropriety’** means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of ‘*disclosure*’ irrespective of whether or not-

1. the impropriety occurs or occurred in the Republic of South Africa or elsewhere;
2. the law applying to the impropriety is that of the Republic of South Africa or of another country;

‘**Minister’** means the Cabinet member responsible for the administration of Justice;

‘**occupational detriment’**, in relations to the working environment of an employee, means-

1. being subjected to any disciplinary action;
2. being dismissed, suspended, demoted, harassed or intimidated;

(c) to provide for certain remedies in connection with any *occupational detriment* suffered on account of having made a protected disclosure; and

(d) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her *employer*.

1. *This Act* applies to any *protected disclosure* made after the date on which this section comes into operation, irrespective of whether or not the *improprieties* by his or after the said date.
2. Any provision in a contract of employment or other agreement between an *employer* and an *employee* is void in so far as it-
3. purports to exclude any provision of *this Act*, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
4. (i) purports to preclude the *employee*; or
5. has the effect of discouraging the employee from making a *protected disclosure*.
6. **Employee making protected disclosure not to be subjected to occupational detriment**

No *employee* may be subjected to any *occupation detriment* by his or her employer on account, or partly on account, of having made a *protected disclosure.*

1. **Remedies**
2. Any employee who has been subjected, is subject or may be subjected, to an *occupational detriment* in breach of section 3, may-
3. Approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act 66 of 1995), for appropriate relief; or
4. Pursue any other process allowed or prescribed by any law.
5. For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court-
6. any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal must follow the procedure set out in Chapter VIII of that Act; and
7. any other *occupational detriment* in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.
8. *Any employee* who has made a *protected disclosure* and who reasonable believes that he or she may be adversely affected on account of having made that *disclosure,* must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by his or her at the time of the *disclosure* to another post or position in the same division or another division of his or her *employer* or, where the person making the disclosure is employed by an organ of state, to another organ of state.
9. The terms and conditions of employment of a person transferred in terms of subsection (2) may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer.
10. **Protected disclosure to legal adviser**

Any *disclosure* made-

1. to a legal practitioner or to a person whose occupation involves the giving of legal advice; and
2. with the object of and in the course of obtaining legal advice,

is a protected disclosure-

1. **Protected disclosure to employer**
2. Any *disclosure* made in good faith-
3. And substantially in accordance with any procedure prescribed, or authorized by the *employee’s* employer for reporting or otherwise remedying the *impropriety* concerned; or
4. To the employer of the *employee*, where there is no procedure as contemplated in paragraph (a),

is a protected disclosure.

1. Any *employee* who, in accordance with a procedure authorized by his or her employer, makes a *disclosure* to a person other than his or her *employer*, is deemed, for the purposes of this Act, to be making the *disclosure* to this or her *employer.*
2. **Protected disclosure to member of Cabinet or Executive Council**

Any *disclosure* made in good faith to a member of Cabinet or of the Executive Council of a province is a *protected disclosure* if the *employee’s employer* is-

1. an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;
2. a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; or
3. an organ of state falling within the area of responsibility of the member concerned.
4. **Protected disclosure to certain persons or bodies**
5. Any disclosure made in good faith to-
6. the Public Protector;
7. the Auditor-General; or
8. a person or body prescribed for purposes of this section; and

In respect of which the employee concerned reasonably believes that-

(i) The relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and

(ii) The information disclosed, and any allegation contained in it are substantially true,

is a protected disclosure

1. A person or body referred to in, or *prescribed* in terms of, subsection (1) who is of the opinion that the matter would be more appropriately dealt with by another person or body referred to in, or *prescribed* in terms of, that subsection, must render such assistance to the *employee* as is necessary to enable that *employee* to comply with this section.
2. **General protected disclosure**
3. Any disclosure made in good faith by an employee-
4. Who reasonable believes that the information disclosed, and any allegation contained in it, are substantially true; and
5. Who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law; is a *protected disclosure* if-

(i) one or more of the conditions referred to in subsection (2) apply; and

(ii) in all the circumstances of the case, it is reasonable to make the *disclosure*

1. the conditions referred to in subsection (1) (i) are-
2. that at the time the *employee* who makes the disclosure has reason to believe that he or she will be subjected to an *occupational detriment* if he or she makes a disclosure to his or her *employer* in accordance with section 6;
3. that, in case where no person or body is prescribed for the purposes of section 8 in relation to the relevant *impropriety*, the *employee* making the *disclosure* has reason to believe that it is likely that evidence relating to the *impropriety* will be concealed or destroyed if he or she makes the *disclosure* to his or her *employer*;
4. that the *employee* making the *disclosure* has previously made a *disclosure* of substantially the same information-
5. his or her employer or;
6. a person or body referred to in section 8,

In respect of which no action was taken within a reasonable period after the *disclosure*; or

1. that the *impropriety* is of an exceptionally serious nature.
2. In determining for the purposes of subsection (1) (ii) whether it is reasonable for the *employee* to make the *disclosure*, consideration must be given to-
3. the identity of the person to whom the *disclosure* is made;
4. the seriousness of the *impropriety*;
5. whether the *impropriety* is continuing or is likely to occur in the future;
6. whether the *disclosure* is made in breach of a duty of confidentiality of the *employer* towards any other person;
7. in a case falling within subsection (2)(c), any action which the *employer* or the person or body to whom the *disclosure* was made, has taken, or might reasonably be expected to have taken, as a result of the previous *disclosure*;
8. in a case falling within subsection (2) (c) (i), whether in making the disclosure to the *employer* the *employee* complied with any procedure which was authorized by the *employer*; and
9. the public interest.
10. For the purposes of this section a subsequent disclosure may be regarded as a *disclosure* of substantially the same information referred to in subsection (2) (c) *where* such subsequent *disclosure* extends to information concerning an action taken or not taken by any person as a result of the previous *disclosure*.
11. **Regulations**
12. The *Minister* may, after consultation with the Minister for the Public Service and Administration, by notice in the Gazette make regulations regarding-
13. for the purposes of section 8 (1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to the Public Protector or the Auditor-General, as the case may be;
14. any administrative or procedural matter necessary to give effect to the provisions of *this Act*; and
15. any other matter which is required or permitted by *this Act* to be prescribed.
16. Any regulation made for the purposes of section 8 (1) (*c*) must specify persons or bodies and the descriptions of matters in respect of which each person or body is prescribed.
17. Any regulation made in terms of this section must be submitted to Parliament before publication thereof in the *Gazette*.
18. (a) The *Minister* must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of *this Act* and all procedures which are available in terms of any law to *employee’s* who wish to report or otherwise remedy an *impropriety*.

(b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the *Gazette*.

1. All organs of state must give to every *employee* a copy of the guidelines referred to in paragraph (a) or must take reasonable steps to bring the relevant notice to the attention of every *employee*.
2. **Short title and commencement**

This Act is called the Protected Disclosures Act, 2000, and commences on a date determined by the President by proclamation in the Gazette.

**APPENDIX B: CASE STUDIES ON BLOWING THE WHISTLE ON CORRUPTION**

The following cases illustrate the plight of the whistleblower in South Africa, which underscores the significance of enhancing the whistleblowing protection legislation as indicated by Open Democracy Advice Centre[[6]](#footnote-6).

**Case studies on blowing the whistle on corruption**

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| ***Whistleblower one***  *In 1997 Whistleblower one was appointed to the position of a Deputy-Director General in one of the National Departments. His core functions were to oversee administration of estates, liquidations, trusts, and guardian funds. One of the challenges Whistleblower one had to face was to prevent and combat wide-spread corruption in the liquidation industry. In July 2002 while Whistleblower one was on leave, his Deputy called him to request an advice on a Pietermaritzburg matter where the Minister had instructed the master of high court in Pietermaritzburg, Mr X, to appoint Mr E as one of the liquidators on the Retail. Whistleblower one advised that a legal opinion be obtained from the department’s legal advisors. Mr Y responded by saying that the Minister did not agree with the legal opinion. The Minister does not have the power to instruct the Master of the High Court to appoint a liquidator.*  *In coming back to Office after his leave, Whistleblower one requested Mr X to write a report about the instruction to appoint a liquidator, which he did and handed it over to Whistleblower one. The four other liquidators who were initially appointed to the Retail disputed the appointment of Mr E. The court agreed with the legal opinion that the Minister does not have the powers to instruct the Master of High Court to appoint a liquidator. The Minister appealed the decision of the high court. While the appeal was still in progress the Minister appointed an Assistant Master (Pretoria) to act as an Assistant Master of High Court in Pietermaritzburg. He was tasked to oversee the appointment of liquidators in the Retail case. The Assistant Master appointed Mr E and his close associates without following a due process. It was discovered that Assistant Master had a questionable relationship with Mr E. He was quoted blatantly praising Mr E. The appeal by the Minister was dismissed.*  *Whistleblower one held a meeting with Ms M and the Director Gneral in January 2003. Ms M was working in the Master of High Court’s Office. In that meeting Ms M and Whistleblower one raised concerns about the relationship that the Minister had with Mr E. On 28 January 2003 Whistleblower one received a call from the Minister who sounded very unhappy. He instructed that Whistleblower one be removed as the head of the Master’s Business Unit. The Minister did not care where Whistleblower one was to be placed by the Director-General. All what he wanted was the removal of Whistleblower one from that office. Among the reasons put by the Minister for the removal of Whistleblower one were that unions felt their interests were not taken into consideration by the Master’s Businness Unit and that Whistleblower one was not helpful on the Retail matter. The Minister indicated that Whistleblower one was the first target, with Mr Y and Ms M to follow. The following day Whistleblower one met with the Director-General, who confirmed the decision for his removal. Later the Director-General briefed Whistleblower one that they were to second him to a position of a Managing Director in the Office of the Director General, which was not on the structure. Whistleblower one refused and wanted to know why he was removed from his position. Later Director-General advised Whistleblower one to take leave and while on leave he got a call from Managing Director of the Legal Advisory Services Unit in Cape Town who told Whistleblower one that he had been appointed to act in his position until further notice. When Whistleblower one came back from leave he was given a memorandum indicating that he was strategically deployed to the position of a Managing Director in the Office of the Director-General*  *Whistleblower one in February 2003 came across some information pertaining to irregularities in the Retail liquidation matter. Whistleblower one met Mr P where they discussed the Retail matter. Mr P briefed Whistleblower one that he asked Mr K to conduct a forensic audit into the guardian funds in which he also dealt with the Retail matter. The report was presented to the Director-General who did nothing about it. The report revealed that the Retail matter was similar to other corruptions that were taking place in other parts in the department throughout the country. The report from Mr X and Mr K were reasons enough to blow the whistle about possible corruption between the Minister and other people who might have been involved. Whistleblower one made a disclosure to the Public Protector who appointed an investigator The Public Protector took time without providing any direction on the disclosure. Whistleblower one took the matter to the Auditor General. The matter was referred back to the Public Protector as it was still investigating it. After hearing this, Whistleblower one took the matter to the Minister in Presidency. The Minister advised Whistleblower one to go back to the Department and try to resolve this matter. Whistleblower one asked the Director-General to arrange a meeting between the Minister and himself. Unfortunately the meeting could not take place. Whistleblower One took the matter to the media. He convened a press conference where he exposed corruption in the liquidation industry. Because of this, Whistleblower one received notice of a disciplinary hearing against him. He was suspended. This amounted to occupational detriment. Whistleblower one fought the case in the Labour Court, which agreed with him that his treatment by the department following his disclosure of wrongdoing is indeed occupational detriment. It ordered the department to pay Whistleblower one R277 000 in compensation and the legal costs.*  ***Whistleblower Two***  *Whistleblower two was an employee in the Northern Cape Department who made a disclosure about corruption in 2003. Whistleblower two found information depicting that former MEC had misappropriated funds for personal use. Just like Whistleblower one he made a disclosure to the provincial Auditor-General, Scorpions and the Public Protector. Some few months later the MEC was removed from his position as an MEC. However, no disciplinary action was taken against him. On the other side Whistleblower two was subjected to a disciplinary action with an intention to fire him.*  ***Whistleblower three***  *Whistleblower three is a doctor who was employed by the Department. However, he was placed at prison – a facility that belongs to the Department of Correctional Services. Whistleblower three made a disclosure to the Judicial Inspectorate and Portfolio Committee on Correctional Services concerning poor medical conditions in the prison. Because of this, Whistleblower three was later suspended from his duties. The Open Democracy Advice Centre took the matter to court based on unfair labour practice. Later a settlement was reached between Whistleblower three and the Department. However, the Department of Correctional Services refused to allow him back to work in the facility. Another application was brought to the court including minister’s defamation case against Whistleblower three. Whistleblower three won all the cases. However, these cases had an impact on his health and requested to be moved to another public health facility.*  ***Whistleblower four***  *In 2010 Whistleblower four, in his position as then Acting Chief Financial Officer in the Limpopo Provincial Department, sought to raise concerns about the legality of a tender between the province and company to procure and deliver textbooks to Limpopo schools. After his internal complaints were ignored, he escalated his disclosure to the Premier, the Public Protector and the Presidency. Nothing came out of his attempt to blow the whistle. Because of the inaction of the organization to where he escalated the disclosure of wrongdoing, Whistleblower four resorted to the media. His story featured on the investigative television programme Carte Blanche on 19 August 2012 in an expose of corruption. Because of this, he was victimized at work, including setting a forensic audit on him, and was eventually dismissed from the Public Service. At the time of compiling a report for this study, Whistleblower four was challenging his dismissal in the Labour Court. Whistleblower four case is that of occupational detriment.*  ***Whistleblower five***  *In 2005, Whistleblower five, who was an Investigating Officer in the Limpopo Provincial government received a case which he had to investigate. The cases of alleged corruption or wrongdoing are lodged by the whistleblowers through the NACH, which are sent to Departments for investigations. The investigations were done jointly with the Commercial Crime Unit of the South African Police Service. The perpetrators who had defrauded the State an amount of R 3.5 million were apprehended. However, Whistleblower five was told by the Chief Financial Officer that he will never get a promotion and seemingly it happens to be the case because Whistleblower five to date is still in Acting in the position of Director for the past four years. In 2009, Whistleblower five investigated another case brought through the NACH. He investigated the case and presented the report with findings and recommendations. The recommendations were not implemented. Instead Whistleblower five was suspended by the former MEC. The State failed to prove why Whistleblower five was suspended. He was acquitted. Whistleblower five is being attacked by the perpetrator, who is peddling rumours he has planned to assassinate him*. |

*All these are cases of occupational detriment. In other words, the whistleblowers were victimized for blowing the whistle, which affected their careers in the Public Service. However, Whistleblower five was not a whistleblower, but an investigator. He suffered the same fate as those who blew the whistle. Whistleblower five was punished for investigating the wrongdoing reported. In most of these cases it is clear that where a politician is involved in wrongdoing, for which a whistle was blown, the whistleblower get punished whereas nothing is done to a politician. Some whistleblowers had to pay the ultimate price. This is illustrated in the following case.*

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| ***WHISTLEBLOWER SIX***  *In 2009 Whistleblower six was gunned down outside his home. In the attack his 19-year-old son was shot in the leg. Whistleblower six, the former Municipal Speaker of Mbombela, had exposed irregularities in tenders issued for the construction of the Mbombela stadium for the 2010 World Cup. Whistleblower six 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 projects. In 2012, the charges against the four arrested for his murder were provisionally withdrawn by the National Prosecuting Authority because of “lack of sufficient evidence”. His widow has suggested that the state may have arrested the wrong people. Whistleblower six paid the ultimate price for blowing the whistle on corruption.* |

**APPENDIX C: DATA COLLECTION TOOL**

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| **DISCRIPTION** |
| 1. Whistleblowing is a much bandied about concept in the existing body of literature on corruption. How the concept is understood does have a profound implication on the structure of the law that prescribe anti-corruption practices. How does the Australian system define whistleblowing in policy terms? 2. A national sense on the concept as important as whistleblowing is necessary to optimise the legislative and institutional mechanisms created to fight corruption. As a commonwealth ombudsman, what is your assessment of the Australian sense on whistleblowing, and to what extent does that sense optimise the implementation of your legislative framework on whistleblowing? 3. Perhaps as a follow up to this question, it is necessary to request you to share your experience in how the Australian system inculcates a national sense on whistleblowing, especially as it pertains to the public understanding of the concept and a commitment to it as part of the fight against corruption. Your sharing of experience in this regard is critically important as the impact of multiple interventions in the fight against corruption that range from legislation, government-appointed authorities, special police units, code of conduct, internal rules and regulations depends on the effectiveness of a whistleblowing system. 4. Your whistleblowing system is theorised in the existing body of literature in terms of various models that underpin its evolution: anti-retaliatory model, institutional and structural models. Can you unpack your whistleblowing system, in terms of its history and the extent to which it has evolved to where it is now? 5. Is it possible to share with us the extent of the success of your whistleblowing system, and also its limitations, in various aspects of the disclosures and protection of whistleblowers? 6. Let us now move to the specific laws that constitute the Australian whistleblowing legal framework. What are those laws, and what is the extent of their congruence/ synchronicity in their provisions on various aspects of disclosures and whistleblowing protection? 7. In practical terms, how does the Australian whistleblowing system as prescribed in the laws work, especially in terms of the institutional mechanisms put in place to give administrative effect to the legal framework? The essence of this question is, in more specific terms, subsumed in the following subtexts, which need a specific emphasis.    1. What type of information is to be disclosed?    2. What are the mechanisms put in place to ensure that largely required information is disclosed?    3. How does the system encourage whistleblowing?    4. Who can make a disclosure and what is the reason for specifying the categories of people for this purpose? Does that categorisation include citizen whistleblowing? In other words, does it include a wide range of potential whistleblowers?    5. What are the institutional arrangements for the disclosure, and the reason for their configuration? In other words, who can a disclosure be made to and why specifically those individuals or institutions?    6. The biggest challenge for most countries that use whistleblowing in the fight against corruption relates to the protection of whistleblowers. In this regard the question is: how is a person who makes a disclosure protected?    7. Does that disclosure protection arrangement deal with prohibition against reprisals, remedies and compensation?    8. Does the protection arrangement specify how the employer who victimizes the whistleblowers should be held liable?    9. If the answer to question 7.8. is in affirmative, is it possible to share with us cases where employers who victimized whistleblowers were held liable? What was the nature of that liability?    10. What are the confidentiality arrangements in the management of the disclosures?    11. Does the legal framework places an obligation on the employer to investigate allegations/ disclosures of wrongdoing?    12. What are your remedial arrangements for the whistleblowers who have been subjected to or will be subjected to occupational detriments? How do these arrangements ensure that the recourse for whistleblowers is accessible in the case where they are to fight occupational detriments such as defamation suit arising from the breach of duty of confidentiality or being prevented from participating in physical security programmes such as witness protection programme?    13. Are there arrangements in your legal framework that protect the victims of blowing the whistle in bad faith?    14. Are there guarantees of immunity against civil or criminal liability for making a disclosure in good faith?    15. In your legal system, is the disclosure a “legal duty” or discretionary? If the former is the case, what are the consequences of non-disclosure? If the latter is the case, how is whistleblowing system incentivised to encourage disclosure? 8. Your Public Interest Disclosure Act 2013 came into effect on 15 January 2014 to facilitate disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector. How did you deal with matters of disclosures before the coming into effect of this Act? What prompted its promulgation? 9. As part of the attempt to inculcate a culture of organisational disclosure, are there programmes that seek to educate and create awareness on the importance of whistleblowing in the fight against corruption? If there are, how are they being run? 10. If you were to offer advice on how whistleblowing system could be enhanced, particularly with regard to the protection of those that disclose wrongdoing in the affairs of the state, what would you say? |

1. Whistle-blower One: See Appendix B [↑](#footnote-ref-1)
2. Public Service Commission.(2014) Successes and challenges of the National Anti-Corruption Hotline [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. Sule, I. 2014. Sanusi – The Whistleblower and the Nigerian Laws [↑](#footnote-ref-4)
5. Ibid [↑](#footnote-ref-5)
6. Open Democracy Advice Centre, Empowering our whistle-blowers, 2014, [↑](#footnote-ref-6)