



For attention: Adv. T Nkabinde

Email: whistleblowingreforms@justice.gov.za

15 August 2023

Submission on Proposed Reforms for Whistleblower Protection Regime in South Africa

We attach our written submission in response to the invitation for comments on the Proposed Reforms for Whistleblower Protection Regime in South Africa.

We would like to confirm our interest in making oral representations at a later convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: nicole@hsf.org.za.

Yours sincerely

A handwritten signature in black ink that reads 'Nicole Fritz'.

Nicole Fritz

Executive Director

Executive Director: Nicole Fritz
Trustees: Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Palesa Morudu • Kalim Rajab • Gary Ralfe • Phila Zulu
Patrons: Prof. Thuli Madonsela • Lord Robin Renwick



1. Introduction

- 1.1. In this submission, the Helen Suzman Foundation (“HSF”) signals its broad support for the Department of Justice and Constitutional Development’s (“Department”) laudable proposed reforms to South Africa’s whistleblower protection regime (“Whistleblower Reforms”).¹
- 1.2. Nonetheless, HSF submits that the Department has overlooked several proposals made by civil society, the State Capture Commission, and the Acting Deputy Public Protector to the detriment of whistleblowers and the vital national interests that they serve.
- 1.3. In summary, HSF submits that the Whistleblower Reforms fall short by failing to provide for:
 - 1.3.1. institutional capacity that is dedicated to ensuring that whistleblowers receive the protection owed to them by law and that their disclosures are duly considered;
 - 1.3.2. equal protection for whistleblowers who make disclosures to the media and/or civil society, as opposed to their employers or the institutions listed in section 8 of the Protected Disclosures Act No. 26 of 2000 (“PDA”); and
 - 1.3.3. a standard that protects whistleblowers for the veracity of their disclosures, without vague reference to their motives.

2. Whistleblowers Require Dedicated State Institutional Capacity

- 2.1. The State Capture Commission’s report and various members of civil society² have maintained that whistleblowers require state institutional capacity that is dedicated

¹ Discussion Document on Proposed Reforms for the Whistleblower Protection Regime in South Africa at p 100 (“Whistleblower Discussion Document”).

² Ibid at para 2.10, 3.2, 3.4 and 3.5.

to ensuring that they receive the protection owed to them by law and that their disclosures are duly considered.

2.2. While HSF is not prescriptive about the form that such institutional capacity should take,³ making provision for it in the final version of the Whistleblower Reforms is critical to ensuring that South Africa properly protects whistleblowers and the vital national interests that they serve.

2.3. HSF appreciates that the Department proposes giving the Human Rights Commission "powers" to deal with protected disclosures, however no provision is made for additional institutional capacity to administer the following laudable proposals put forward in the Whistleblower Reforms:

2.3.1. the inevitable demands placed on the Office for Witness Protection following the proposed inclusion of whistleblowers in the definition of a "witness" in section 1 of the Witness Protection Act No. 112 of 1998 ("WPA");⁴

2.3.2. the increased reliance on Legal Aid in providing legal assistance to whistleblowers;⁵

2.3.3. a fund assisting whistleblowers who face financial hardship after being dismissed;⁶ and

2.3.4. monitoring and enforcement of section 3 of the PDA, which the Whistleblower Reforms broadens to protect all whistleblowers from facing harmful backlash by employers and the public at large.⁷

³ The State Capture Commission envisaged that the inspectorate of its proposed anti-corruption agency would receive disclosures from whistleblowers. See Whistleblower Discussion Document at para 3.2. The Active Citizens Movement, Just Share and the Platform to Protect Whistleblowers in Africa all suggest a self-standing whistleblower agency. See Whistleblower Discussion Document at para 2.10, 3.2, 3.4 and 3.5.

⁴ Whistleblower Discussion Document at p 99.

⁵ Ibid at p 97.

⁶ Ibid.

⁷ Ibid at p 85 to 86.



2.4. Moreover, when making provision for state institutional support for whistleblowers, the Department should also consider the following proposals, overlooked by the Whistleblower Reforms:

- 2.4.1. monitoring and enforcing section 6 of the PDA, which requires employers to design and implement internal whistleblowing reporting procedures;⁸ and
- 2.4.2. coordinating and assisting in building capacity for whistleblower protection at the institutions mentioned by section 8 of the PDA.⁹

3. Whistleblowers Who Make Disclosures to the Media and/or Civil Society Require Equal Protection.

- 3.1. The PDA does not expressly mention disclosures made to the media and civil society and instead regulates them in terms of section 9's "general disclosure" regime.
- 3.2. However, disclosures made under section 9 of the PDA only receive protection under exceptional circumstances,¹⁰ chilling the ability of the media and civil society to act as effective recipients of whistleblower disclosures.
- 3.3. As such, HSF submits that disclosures made to civil society and/or the media receive the same protection as those made in terms of section 6 and 8 of the PDA, as long as the whistleblower reasonably believes in the veracity of the information disclosed and that it would be more effectively dealt with by the media and/or civil society.

4. The Veracity of a Disclosure is What Matters

- 4.1. Sections 8 and 9 of the PDA require that protected disclosures be made in "good faith" in addition to the whistleblower having a reasonable belief in the veracity of the

⁸ As suggested by Just Share. See Whistleblower Discussion Document at para 2.10.

⁹ As suggested by the Acting Deputy Public Protector. See Whistleblower Discussion Document at para 2.4.

¹⁰ Whistleblower Discussion Document at para 2.13.



information disclosed – section 9 adds yet another qualification that a disclosure cannot be made for “personal gain”.

- 4.2. These qualifications create the impression that whistleblower protection is dependent on vague circumstances going to the ostensible motives for the disclosure – and not primarily on whether the whistleblower reasonably believes in the veracity of the information disclosed.
- 4.3. This could chill the incentive for whistleblowers to make disclosures and the PDA should be amended accordingly to make a whistleblower’s belief in the veracity of the information disclosed the prime reason for receiving protection.

5. Conclusion

- 5.1. In this submission, HSF has welcomed the Department’s laudable Whistleblower Reforms but has cautioned that they require improvement.
- 5.2. We have submitted that the Whistleblower Reforms can be improved by providing for state institutional capacity that is dedicated to protecting whistleblowers and processing their disclosures; and by ensuring that the veracity of a disclosure be the prime factor for determining whether a whistleblower is owed protection.