

SUBMISSION

to the

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

on

**THE DISCUSSION DOCUMENT ON PROPOSED REFORMS FOR THE WHISTLEBLOWER
PROTECTION REGIME IN SOUTH AFRICA**

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1. INTRODUCTION

1.1. The Centre for Applied Legal Studies (CALs) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALs is also a law clinic, registered with the Legal Practice Council. As such, CALs connects the worlds of academia and legal practice in advancing social justice.

1.2. CALs operates across a range of programmatic areas, namely: Business and Human Rights, Civil and Political Justice, Environmental Justice, Gender Justice and, Home, Land and Rural Democracy.

1.3. Through its intersectional programmes, CALs has for over 40 years sought to contribute towards the achievement of a socially, economically and politically just society where state institutions are strengthened and repositories of power, including the state and private sector, are held to account by marginalised actors. In aspiring towards this vision, CALs is guided by four pillars:

- Expanding the agency of marginalised actors
- Developing a critical partnership with the state
- Ensuring horizontal application of the Constitution
- Taking an intersectional and gendered approach to human rights violations

2. BACKGROUND

CALs welcomes the invitation by the Department of Justice and Constitutional Development to make comments on its discussion paper on reforms for the protection of whistleblowers in South Africa. We are of the same mind with the Department on the importance of protecting whistleblowers and ensuring that those who do speak out against corruption and other illegal and immoral activities are adequately protected by the law and shielded against reprisals for such reporting.

CALs has been involved in several activities related to the protection of activists in general and more specifically whistleblowers. The activities include reporting on the victimisation experiences of activists, tracking trends of attacks and threats to activists and whistleblowers, providing support to

activists and connecting activists and whistleblowers to support and resource networks. CALS also represents activists facing civil and criminal suits for expressing their right to protest and freedom of expression. In one of the criminal suits for instance, CALS' intervention in the trial is two-fold, firstly, to ensure that the activists are not criminalised for their activism. Secondly, to amplify the voices of activists and the importance of their work in a society where activists voices are constantly suppressed by the state and private actors.

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3. WHO IS A WHISTLEBLOWER?

There is a misconception that whistleblowers are only employed individuals. However, a whistleblower is an individual with access to classified information regarding suspicious activities or operations in any industry. This individual could be an employee or not in that specific industry being reported. The definition of the whistleblower is in the act of reporting rather than an employment status. The interventions to protect whistleblowers should therefore not be limited to one's employment status and should rather be extended given the definition above.

The establishment of legislation that seeks to protect the rights and dignity of whistleblowers is essential in the fight against corruption. The political atmosphere surrounding state capture has placed the threats faced by whistleblowers at the forefront and illuminated how they are being victimised and are at risk of losing their lives. The Protected Disclosures Act (PDA) has expanded on the duty to report acts of corruption, however, it has not provided sufficient remedy for the support and resource mobilisation of whistleblowers in private and public industries. To avoid placing whistleblowers in further compromising predicaments, legislative amendments alongside other practical interventions must be put into place across all institutions after whistleblowers report misconduct and whilst investigations are under way.

4. WHAT SHOULD ADEQUATE PROTECTION INCLUDE?

South Africa has an obligation under international law to ensure the protection of whistleblowers. International instruments such as the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption place an obligation on the state to combat corruption and other illegal activities. It also mandates the state to ensure the implementation and enforcement of adequate measures of protection of those who speak out against any illegal and/or immoral activities.

Whistleblowers are essential in promoting accountability and transparency in both the private and public sectors. The protection of whistleblowers should therefore be at the forefront of every state and private entity. The state must mandate every organisation in South Africa to create policies that implement whistleblower protection measures that align with international standards.

4.1. **What forms of disclosures should be protected?**

4.1.1. The inclusion of the bill of rights framework as a basis for protected disclosures

Currently under section 1 of the PDA, protected disclosures include conduct by an employer, or employee to that employee that shows or tends to show the following seven factors:

- 4.1.1.1. A criminal offence has been, is being or is likely to be committed;
- 4.1.1.2. A person has, is or is likely to fail to comply with a legal obligation;
- 4.1.1.3. A miscarriage of justice has, is, or is likely to occur;
- 4.1.1.4. The health or safety of an individual has, is, or is likely to be endangered;
- 4.1.1.5. The environment has been, is being or is likely to be damaged;
- 4.1.1.6. Unfair discrimination on one of the protected grounds in PEPUDA;
or
- 4.1.1.7. Any of the above, is being or is likely to be concealed.

The types of information which can be deemed as being protected are arguably, only broad if one relies on the court's discretion to include certain disclosures under one of the above. Leaving discretion to the court is practically problematic as uncertainty around what constitutes protected disclosures would need to be verified through jurisprudence. This is where the development of jurisprudence takes a long time and approaching a court is expensive.

Instead, the legislature should be more explicit in describing the types of disclosures that are protected. In asserting this, it is not akin to saying that the legislature should narrow the scope of protection but rather be less vague, so that laypersons would find it easier to ascertain whether their disclosures would be protected.

One potential avenue for framing could include whether a right in the Bill of Rights has been, is being, or is likely to be infringed. The wider scope, yet specificity, would include many of the factors above, such as criminal offences, miscarriages of justice, health and safety harms of the individual and environmental damage. It would thus be easier for individuals to consider acknowledged and entrenched rights under the Constitution as a lens for determining whether their disclosure may be protected than relying on the seven factors above and their vagueness.

A practical example of this way of approaching protected disclosures, in relation to rights violations, is the case of someone in a community who would like to report the unlawful assignment of government subsidised housing. The individual can see that under section 26 of the Constitution, there is a right to adequate housing and that the action of frustrating access to this right through unlawful assignment of housing is making disclosures relating to this protected right.

It is important to acknowledge that it is difficult for lay persons to ascertain whether the disclosure would be related to a factor under section 1 of the PDA, such as a criminal offence, or failure to comply with a legal obligation. However, considering the action as a violation under the Constitution may make ascertaining whether the disclosure is protected easier. Furthermore, and in addition to the above, the broadening of section 1 (the forms of disclosures) to include all rights in the Constitution aligns itself with the recognition that the Constitution is the supreme law of the land (section 1) and that the democratic state is founded upon the values of human dignity, equality and the advancement of human rights and freedoms (section 1). Also, by permitting disclosures outside of the narrow scope of only employment relationships (section 1 of the PDA) the PDA can reflect the acknowledgment that rights under the Constitution are applicable both vertically and horizontally and can thus obligation can take various forms.

4.1.2. Explicitly protecting disclosures around gender-based violence

Currently, in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA), there is an obligation on individuals who have knowledge, a reasonable belief or suspicion that a child or a person with a disability has been a victim of a sexual offence to report such. The protection in relation to the above only extends to a limitation in relation to civil liability and criminal liability around such disclosures and does not extend to include any provisions around other forms of harm a GBV-whistleblowers may experience. A GBV-whistleblower is a whistleblower who may be reporting on an incident or conduct related to gender-based violence. At this juncture, the PDA does not protect adult victims of GBV or those who are aware of the commission of GBV (who are not employees) who want to report violations. The PDA must be amended to protect individuals who report violations. The protection must include a limitation in relation to civil and criminal sanctions which may be pursued against them due to such disclosure (as present in SORMA). Other protective measures must include protection from all forms of harassment (including cyber-related harassment) and other forms of violence.

5. HOW TO EFFECTIVELY PROTECT WHISTLEBLOWERS

5.1 Reporting internally

Adequate internal avenues in whistleblowing are important for the effective running of an organisation. It motivates any employee who would like to report or disclose any allegation to do so confidently and without fear of reprisal. Effective internal forums for whistleblowing in an organisation must be supportive and be able to offer protection for whistleblowers.

The support and protection of whistleblowers within an organisation must be part of the key functioning of the executive team within the organisation. This can be achieved by having an executive whose values are aligned with undoing any wrong, illegal or unscrupulous conduct in the organisation. The executive team must have a clear understanding of the benefits of whistleblowing and be able to provide incentives and protections to whistleblowers. Executives must also be held accountable for disclosures brought forward to them. They must do so by including them in their periodic reports with the organisation.¹

An organisation should also set up adequate reporting structures that can guaranteeing the effectiveness of whistleblowing. This can be done by means of setting up resources such as trainings for staff to enable them to whistleblow effectively, create clear procedures that must be followed when whistleblowing, ensure proper investigation and follow ups of the cases, and providing confidentiality on all disclosures made. Considerations for costs that are involved in reporting and investigating whistleblowing must also form part of an organisation's budget. This will also encourage a whistleblowing culture within the organisation.²

5.2 Reporting Externally

In instances that internal avenues are not adequate in addressing whistleblowing, parties may find themselves having to use external bodies to disclose. These external institutions can be institutions of the state or they can be independent institutions. Independent bodies that can be utilised as external reporting institutions are Chapter 9 bodies. The Chapter 9 institution must, however, have a unit primarily focused on whistleblowing so that they are also not distracted or limited in capacity or resources in their mandate of executing this duty.

5.2.1. The composition of external institutions' reporting mechanism

5.2.1.1. Everyone should be aware of the external reporting channels available to them

5.2.1.2. External institutions ("EI") should publish easily accessible information about the conditions, procedures and protection available when reporting as a whistleblowers

¹ United States Department of Labor, 2015. Best practices for protecting whistleblowers and preventing and addressing retaliation, p.2

² British Standards Institute, 2008. Whistleblowing arrangements code of practice, p.18.

5.2.1.3. EI should have dedicated and trained staff responsible for handling disclosures. This staff should have specialised knowledge and expertise in handling whistleblowers' cases, including, legal, investigative and ethical considerations.

5.2.1.4. EI should ensure security of reporting channels and ensure that confidentiality of whistleblowers are maintained

5.2.1.5. EI must indicate that disclosures can be made both in writing and orally

5.2.1.6. EI must ensure that accurate and encrypted records of disclosures are kept

5.2.1.7. Acknowledgement of a report must be made within a stipulated period, and feedback provided within a reasonable timeframe

5.2.1.8. Ensure that the outcome of the investigation is communicated to the whistleblower.

5.3 Creating an independent body on whistleblowing

Whistleblowing can be done internally where individuals are in a position to easily access mechanisms in reporting. At the failure of internal processes, whistleblowers can further report their matters to external institutions that are able to investigate and provide solutions to their allegations. In some instances, external bodies are also inadequate to address the concerns that are raised by the whistleblowers. In these cases, it is then important that the whistleblowers reach out to an independent institution where they are able to get help.

The first independent body that whistleblowers could use is an ombuds on whistleblowing. The ombuds can be an impartial body that will assess disclosures and assist whistleblowers with any reprisal or fear of victimisation from the parties concerned. The Ombud's primary focus would be whistleblowing.

6. CONSEQUENCES OF WHISTLEBLOWING

6.1. Protecting whistleblower disclosures

Disclosing can be an intimidating act. The act of whistleblowing itself places whistleblowers at risk of attacks and victimisation. Some of the protection mechanisms that can be implemented for whistleblowers include:

6.1.1. Making reporting as easy as possible to encourage whistleblowers to come forward.

6.1.2. Order regular check-in's with whistleblowers in the process of investigation

6.1.3. Providing anonymity for disclosures

6.1.4. Creating communication channels for after filing a report where whistleblowers can follow up on their matter and track its progress

6.1.5. Creating a whistleblower hotline

Suspension without pay and Corrupt Offenders Public Register

If a disclosure is made by a whistleblower implicating a person in an employment setting, the person should be suspended by the employer immediately, pending internal investigations, legal and court proceedings. The terms of the suspension should be without payment of the suspect's salary, or any benefit provided to the suspect by the employer, if the investigation is outstanding after a period of six (6) months of suspension.

If a suspect is found guilty and/or convicted by either a court of law/tribunal or any other body authorised to make a decision on the merits of a disclosure by a whistleblowers, the name of the convicted should be included in a public register of offenders on offences related to corruption. Should an entity be fined as a result of what was disclosed by the whistleblower, a portion of that fine must be paid to the whistleblower.

It is important that the protection offered to whistleblowers extends not only to job security. Reprisals from whistleblowing can disturb the entire life of a whistleblower. It is common for whistleblowers to be met with retaliation when reporting. This is because whistleblowers often disclose information that might see the prosecutions or other consequence for high-ranking persons within institutions. The investigations that need to take place in that aspect ought to be responsive to this fact. The investigations and protection measures must therefore anticipate and mitigate possible harm that can result.

6.2. Providing psychological support to whistleblowers and those close to them

Whistleblowing has dire effects on the mental and emotional wellbeing of all those involved. These range from the employees of the company where whistleblowing is alleged to the whistleblowers and those alleged to have committed wrongdoing as well as their close friends and family. It is then vital that all parties involved during reporting be afforded psychological and/or any other mental and emotional support. The psychological support that must be afforded to these individuals must be from an impartial party. This helps in creating an equilibrium where every party involved feels heard.

The psychological support offered must take place before, during and after investigation of the alleged conduct. After the conclusion of the investigation, there must also be a debrief where mental health professional(s) facilitate sessions to address any unresolved emotions in order to ensure that the company or organisations can continue post the incident.

Whistleblowing is alienating in its nature. In order to address this, organisations must have support structures that whistleblowers can lean.³

6.3. Compensation

In the United States of America, Whistleblowers are awarded for their bravery through monetary compensation. In instances where whistleblowing results in a fine for an institution, a portion of the fine should be allocated to the whistleblower. If the disclosure ends up in court, there should be no cost order made against the whistleblower if they lose the matter.

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALS COMMENT
Section 1 Definitions	'occupational detriment' , in relation to an <i>employee</i> or a <i>worker</i> , means being subjected to any disciplinary action; (b) being dismissed, suspended, demoted, harassed or intimidated; (c) being transferred against his or her will; (d) being refused transfer or promotion; (e) being subjected to a term or	'detrimental action' , not in relation to an <i>employee</i> or a <i>worker</i> , means being subjected to discrimination; being intimidated, harassed; any action causing personal harm or injury; any loss or damage to property; or any interference with his or her business or livelihood by any person or an institution.	It is proposed that in the definition of 'occupational detriment' is expanded to include persons which are not employees but who have disclosed in terms of the PDA. It is important to point out that should this proposal be approved the phrase 'occupational detriment' should be changed to 'detrimental action' or 'improper conduct' to remove any confusion the word	

³ J Garrick 'Peer Support for Whistleblowers' July 2027 www.fradprac.com accessed 10 August 2023.

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CAL'S COMMENT
	<p>condition of employment or retirement which is altered or kept altered to his or her disadvantage; being refused reference, or being provided with an adverse reference, from his or her employer;</p> <p>being denied appointment to any employment, profession or office;</p> <p>being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of</p> <p>a criminal offence; or</p> <p>(ii) information which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur;</p> <p>being threatened with any of the actions referred to</p>	<p>“qualifying disclosure” means any disclosure of information which, in the reasonable belief of the discloser making the disclosure, tends to show one or more of the following—</p> <p>(i) that a criminal offence has been committed, is being committed or is likely to be committed,</p> <p>(ii) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is a subject,</p> <p>(iii) that a miscarriage of justice has occurred, is occurring or is likely to occur,</p> <p>(iv) that the health or safety of any individual has been, is being or is likely to be endangered,</p> <p>(v) that the environment has been, is being or is likely to be damaged, or</p> <p>(vi) that information tending to show any matter falling within any one of the</p>	<p>‘occupational’ might bring. Consideration should also be given to inclusion of detrimental action by fellow employees. Incidental to this there will be a need for an additional definition of who is a ‘discloser’ which must not be limited to employee and worker. This will also require provisions that will exclude certain disclosures, such as those relating to national</p>	

	<p>in paragraphs (a) to (h) above; or being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services</p>	<p>preceding paragraphs has been, is being or is likely to be deliberately concealed.’ (UK PIDA) Improper conduct 2. (1) For the purposes of this Act, improper conduct which if disclosed and proved shows or tends to show that - (a) a criminal offence has been</p>	<p>security etc....</p>	
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALS COMMENT
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		<p>committed, is about to be committed or is likely to be committed;</p> <p>(b) a person has -</p> <ul style="list-style-type: none">) violated any of the rights and freedoms protected by Chapter 2 of the Constitution or is in the process of violating any of those rights or is likely to violate any of those rights; or) not complied with a provision of any law or is in the process of contravening a provision of any law or is likely to contravene a provision of any law which provision imposes an obligation on that person;) a miscarriage of justice has occurred, is occurring or is likely to occur;) a disciplinary offence has been committed, is about to be committed or is likely to be committed;) in any institution, organisation or entity there has been, there is or there is likely to be waste, misappropriation or mismanagement of resources in such a manner that the public interest has been, is		
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		<p>being or is likely to be affected;</p> <p>the environment has been degraded, is being degraded or is likely to be degraded;</p> <p>) the health or safety of an individual or a community is endangered, has been</p>		
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALS COMMENT
		<p>endangered or is likely to be endangered; or</p> <p>(h) information showing or tending to show that any of the matters falling within paragraphs (a) to (g) has been, is being or is likely to be deliberately concealed.</p> <p>(Whistleblower Protection Act, 2017: Namibia)</p>		

New section		<p>) Every receiver of a protected disclosure must use their best endeavours to keep confidential information that might identify the discloser.</p> <p>) a receiver of a disclosure need not keep a discloser's identity confidential if—</p> <p>) the discloser consents to the release of the identifying information;</p> <p>) there are reasonable grounds to believe that the release of the identifying information is essential—</p> <p>) for the effective investigation of the disclosure;</p> <p>) to prevent a serious risk to public health, public safety, the health or safety of any individual, or the environment;</p> <p>ii) to comply with the principles of natural justice; or</p> <p>v) to an investigation by a law</p>		
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALC COMM

		<p>enforcement or regulatory agency for the purpose of law enforcement.</p> <p>(4) After releasing identifying information the receiver must inform the discloser.</p>		
Section 3	<p>Employee or worker making protected disclosure not to be subjected to occupational detriment</p> <p>No <i>employee</i> or <i>worker</i> may be subjected to any <i>occupational detriment</i> by his or her <i>employer</i> on the account, or partly on the account, of having made a <i>protected disclosure</i>.</p>	<p>(2) Any conduct or threat contemplated in subsection (1) is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat.</p>		
New section		<p>A person who uses force, coercion, threats, intimidation, or any other coercive means against another person with intent to prevent that person from, or influence that person to refrain from, making a disclosure commits an offence and is liable on conviction to a fine not exceeding 5 million or to imprisonment for a period not exceeding 5 years, or to both the fine and imprisonment.</p>		
New section		<p>A provision in any agreement, contract, or internal procedure</p>		<p>in addition, inc employers to protected disc and highlight</p>

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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONAL E	CAL S COMMENT
		<p>has no effect if it apparently requires a person to do any of the following;</p> <ul style="list-style-type: none">) not to disclose serious wrongdoing that is or could be a protected disclosure;) not to disclose information that could support, or relate to, a protected disclosure;) to withdraw a protected disclosure;) to abandon a protected disclosure;) to make a disclosure of serious wrongdoing in a way that is inconsistent with this Act. 		
New section		<p>Anonymous disclosures A disclosure may be made orally or in writing; and may be made anonymously.</p>	<p>It is proposed that the procedure of how to disclose anonymously is included in the guidelines as</p>	

			envisioned by s10(4)(a)	
Section 3B(3)	as soon as reasonably possible, but in any event within six months after the protected disclosure has been made or after the referral has been made, as the case may be, in writing inform the employee or worker of the decision— to investigate the matter, and where possible, the time-frame within which the investigation will be completed; or not to investigate the matter	Shorten period to 3 months	Taking six months to decide whether to investigate a matter or not is far too long. Should an investigation become necessary, the time period for that lengthens the investigation possibly even longer	

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALS COMMENT
	and the reasons for such decision.			

<p>Section 4 (1B)(d) (new provision added)</p>	<p>(1B) If the court or tribunal, including the Labour Court is satisfied that an employee or worker has been subjected to or will be subjected to an occupational detriment on account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances, including—</p> <ul style="list-style-type: none">) payment of compensation by the employer or client, as the case may be, to that employee or worker;) payment by the employer or client, as the case may be, of actual damages suffered by the employee or worker; or) an order directing the employer or client, as the case may be, to take steps to remedy the occupational detriment. 		<p>Add a new provision after(c) (d)payment of interim legal costs (security) by the employer or client where the employee seeks recourse through the courts to adjudicate their rights, where the prospects of success are in favour of the employee or worker. This process can be aligned to the court rules depending on the court where the matter is adjudicated.</p>	
<p>Section 8 Protected disclosure to certain persons or bodies</p>	<p>(1) Any disclosure made in good faith to (a) the Public Protector; (aA) the South African Human Rights Commission;</p>	<p>(3) A person or body referred to in, or prescribed in terms of, subsection (1), who does not act upon receipt of a disclosure made to him or</p>		<p>Ensure that Ch adequately cap deal with disclos</p>

	(aB) the Commission for Gender Equality; (aC) the Commission for the Promotion and Protection of the	her, commits an offence and is liable on conviction to imprisonment not exceeding 2 years or a fine not exceeding 2 million.		
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALC COMMEN
	<p>Rights of Cultural, Religious and Linguistic Communities; (aD) the Public Service Commission; (b) the Auditor General; or (c) a person or body <i>prescribed</i> for purposes of this section; and in respect of which the <i>employee</i> or <i>worker</i> concerned reasonably believes that</p> <p>) the relevant <i>impropriety</i> falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and</p> <p>) the information disclosed, and any allegation contained in it, are substantially true, is a <i>protected disclosure</i>.</p>	<p>(4) A person against whom any action is taken for committing an occupational detrimental against a discloser in retaliation for a disclosure of improper conduct may be sued and is liable for damages or to pay compensation in his or her personal capacity.</p>		

New Provision		<p>(1) A discloser who has reasonable grounds for believing that a detrimental action has been taken against him or her may file a complaint in a prescribed form.</p> <p>(a)The complaint may also be filed by a person designated by the discloser for the purpose.</p> <p>(b)The complaint must be filed not later than 60 days after the day on which the complainant knew, or in the Commissions opinion ought to have known, that the detrimental action was taken.</p> <p>(2) The South African Human Rights Commission must decide</p>		
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CAL'S COMMENT
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		<p>whether to deal with the complaint or not within the prescribed period after the date on which the complaint is received.</p> <p>(3) If the Commission decides-</p> <ul style="list-style-type: none">) to deal with the complaint it must send a written notice of its decision to the complainant and to the person or entity that has the authority to take disciplinary action against each person who participated in the taking of the measure alleged by the complainant to constitute a detrimental action; or) not to deal with a complaint, it must send a written notice of its decision to the complainant and set out the reasons for the decision. <p>(4) The Commission may refuse to deal with a complaint if it is of the opinion that-</p> <ul style="list-style-type: none">) the subject matter of the complaint has been adequately dealt with or could more appropriately be dealt with by other bodies such as the Commission for		
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		<p>Conciliation, Mediation and Arbitration (CCMA);</p> <p>) the complaint is beyond the jurisdiction of the Commission; or</p> <p>) the complaint was not made in good faith</p> <p>(4) A person who is aggrieved</p>		
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALS COMMENT
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		<p>by the decision of the Commission made under subsection (2) may in the prescribed manner and within the prescribed period apply for the decision to be reviewed by a High Court.</p> <p>Investigation of detrimental action</p> <ul style="list-style-type: none">) If the Commission decides to deal with a complaint, it must assign an investigator/duly qualified staff member to investigate the complaint.) An investigator must conduct an investigation into the complaint as informally and expeditiously as possible and in the prescribed manner.) Before commencing an investigation under this section an investigator must-) notify the Director-General concerned or any other person against whom a complaint of detrimental action has been made and inform that Director-General or that other person of the substance of the		
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		<p>complaint to which the investigation relates; and</p> <p>) notify any other appropriate person, including every person whose conduct is called into question by the complainant, and inform that person of the substance of the complaint.</p>		
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CAL'S COMMENT
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		<p>) If the investigator so request, employers and other persons who have information that is relevant to an investigation must provide the investigator with any facilities, assistance, information and access to their respective premises that the investigator may require for the purpose of the investigation.</p> <p>) If the investigator concludes that he or she is unable to complete an investigation because of insufficient cooperation on the part of the employer or other person, the investigator must make a report to the Commission to that effect.</p> <p>) A person who contravenes or fails to comply with subsection (4) or with a request made by an investigator under that subsection commits an offence and is liable on conviction to a fine not exceeding R50 000 or to imprisonment for a period not exceeding 10 years, or to both the fine and</p>		
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		<p>imprisonment.</p> <p>Commission's decision after the investigation</p> <p>19. (1) As soon as possible after the completion of an investigation, the investigator must submit a report of his or her findings to the Commission.</p> <p>(2) If, after receipt of the report, the Commission is of the opinion that a reference of the matter to</p>		
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALS COMMENT
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		<p>a court in relation to the complaint is-</p> <ul style="list-style-type: none">) warranted, the Commission must refer the matter to a court or another appropriate forum for a determination of whether or not detrimental action was taken against the complainant; or) is not warranted in the circumstances, the Commission must dismiss the complaint. <p>(3) In considering whether referring the matter to a court or another appropriate forum, the Commission must take into account whether-</p> <ul style="list-style-type: none">) there are reasonable grounds for believing that detrimental action was taken against the complainant;) having regard to all the circumstances relating to the complaint, it is in the public interest to refer the matter to a court or another appropriate forum. <p>(4). The Commission must in writing notify each of the following of the action under subsection (1)-</p>		
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		<p>(a) the complainant;</p> <p>(b) if the complainant is an employee, the complainant's employer;</p> <p>(c) if the complainant is a former employee, the person or entity who was the complainant's employer at the time the alleged</p>		
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SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALS COMMENT
		<p>detrimental action was taken;</p> <p>) if the complainant is against any other person that is not an employer, that other person;</p> <p>) the person or persons identified in the investigation report as being the person or persons who may have taken the alleged detrimental action; and</p> <p>the person or entity with the authority to take disciplinary action against any person referred to in paragraph (e);</p>		

		<p>(5) A person who is aggrieved by the decision of the Commission made under subsection 2 may, within the prescribed period, apply for the decision to be reviewed by a court.</p> <p>(Provision from Canada PSDPA)</p>		
New provision		<p>During any legal proceedings instituted against a discloser concerning a matter arising from a disclosure made by a discloser, if the Minister is of the opinion that the discloser needs legal assistance, the Minister must issue a certificate to the discloser recommending that the Legal Aid Board in terms of the Legal Aid South Africa Act, 2014 (Act No. 29 of 2014) considers granting legal aid to that</p>		

SECTION	PROVISION IN THE PDA	PROPOSED AMENDMENT	RATIONALE	CALS COMMENT
		discloser.		
		A discloser who makes a disclosure and who has reasonable cause to believe that his or her life or property; or the life or property of a member of his or her family is endangered or likely to be endangered because of the disclosure, may request state protection and the state shall provide the protection considered adequate.		<p>The proposed is still problematic. Legal Aid cannot be optional but has to be a mandatory inclusion. Whistleblowers should be entitled to receive legal assistance from Legal Aid or a competent legal institution in the private or public sector. Costs for the legal representation should be at the state expense. Legal Aid SA should be permitted to out-source its services for whistleblowers to extend their capacity and to ensure that whistleblowers are always represented legally should they require this assistance.</p>

<p>New provision</p>	<p>No provision for proactive measures employers</p>	<p>appoint “whistleblowers by champion” who is responsible for ensuring and overseeing the integrity, independence and effectiveness of the firm’s policies and procedures on whistleblowing; establish, implement, and maintain appropriate and effective internal arrangements for the disclosure of “reportable concerns” by whistleblowers; provide appropriate training on whistle-blowing arrangements to employees, managers and those responsible for operating internal whistle-blowing mechanisms; publish a report at least annually to the firm’s governing body on the effectiveness of its systems in relation to whistleblowing; and include a term in any settlement agreement with a worker that workers have a legal right to whistleblowing</p>	<p>aThe PDA has been criticised for its lack of proactive measures for employers to protect its employees. These are some measures that can be considered.</p>
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		<p>The above is from the UK Financial Conduct Authority Rules and creates proactive steps to be taken by the certain financial institutions in protecting whistleblowers</p>		
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New provision	No current provision	Creation of a fund for whistleblowers	Should this be in the Witness Protection Act or the PDA? Creation of fund through CARA.	
New provision		<p>Witness Protection Act: consideration to be given to amendments to change who witness whistleblower is</p>	<p>The WPA does not talk of whistleblowers, even though the definition of a witness is broad enough to cater for whistleblowers being entitled to protection</p>	<p>Amendments must be protection act to explicitly and to specify that they activists may find their (including threats to their due to disclosing and protections afforded by V</p>

8. CONCLUSION

We commend the Department for heeding the call for better protection mechanisms for whistleblowers. We strongly agree that this starts with effecting comprehensive amendments to the PDA. We trust that our above contributions will assist the Department in making these necessary changes and we remain available to assist the Department in present and future iteration of the amendments to the PDA.

