Protected Disclosures Bill:
Submission of public comment to the Department of Justice and Constitutional Development

14 May 2026

Introduction

The Public Affairs Research Institute (PARI) welcomes the opportunity to comment on the Protected Disclosures Bill. PARI is a research institute affiliated to the University of Johannesburg, with extensive experience with issues of governance and service delivery. It has an ongoing concern, among other matters, in the question of whether and how to introduce incentives into South Africa's whistleblowing system.[1] Its work in this regard was cited by the Zondo Commission,[2] and the Commission has been an important influence on this Bill.[3]

The Protected Disclosures Bill contains a number of positive developments. The Bill:

- Expands protections beyond traditional employees, to include all disclosers and persons related to them.
- Maintains a wide variety of alternative channels for disclosure, recognising that disclosers should have freedom to reasonably choose the channel appropriate to them.
- Puts more stringent duties on the state and on employers to educate the public and manage disclosures, including through the creation of a central database within the Department of Justice and Constitutional Development (hereafter Department of Justice), dedicated procedures and functions within employer organisations, and an independent complaints mechanism.
- Expands the concept of retaliation against a discloser to include non-occupational detriments.
- Establishes retaliation against a discloser as a criminal offense and reverses the onus for proving that a detriment was not in retaliation.

[1] Ryan Brunette and Jonathan Klaaren. 2020. "The Case for Encouraged Whistleblowing in Public Procurement in South Africa." Public Affairs Research Institute Policy Brief. Available at: https://pari.org.za/wp-content/uploads/2021/04/20201105_PolicyBrief_EncouragedWhistleblowingWithCitation.pdf; Jonathan Klaaren, Steven Powell, Sopé Williams-Elegbe, Carika Fritz, and Ryan Brunette. 2023. "Financial Incentives and Whistleblowing in South Africa." Public Affairs Research Institute Webinar. Available at: https://pari.org.za/watch-financial-incentives-and-whistleblowing-in-south-africa/.

[2] Page 808 of Raymond Zondo, "Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State, Part One," January 2022.

[3] Minister's speech introducing the Bill.

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- Extend protections of the identity and confidentiality of disclosers, making it a criminal offense for authorised receivers of disclosures to inappropriately release information.
- Affords disclosers the physical safety of the Witness Protection Act.
- Provides for legal aid to disclosers.
- Offers financial rewards to disclosers.

PARI's submission focuses on strengthening measures for the central monitoring of procurement disclosures; for the protection of the information contained in disclosures; and for the provision of financial support and rewards to whistleblowers. Our comments affect sections 3 and 18 of the Bill.

Section 3: Central Database

Section 3 of the Bill proposes to establish a central electronic database for disclosures overseen by the Director-General of the Department of Justice. Authorised persons or their designates will be required to populate the database with information regarding all disclosures received by them, the date of receipt of the disclosures, and whether the disclosures are being investigated, referred to another authorised person for investigation, dismissed with the reasons for dismissal, and finalised including the date of finalisation. This information may not include personal information as defined under the Protection of Personal Information Act, and the database may only be accessible to authorised persons, their delegates, and those managing the database in the Department of Justice.

Analysis

We welcome the establishment of a database to enable government to track disclosures, supporting the effective functioning of the system. However, we argue that section 3 is vague about the purpose of the database, it does not provide sufficient security for whistleblowers, and the scope and sources of the information to be covered by the database are so broad as to further threaten security, while creating inordinate administrative burden for the state.

<u>Vague purpose and legality</u>

The overarching purpose and operation of the section is in crucial respects unclear. We do not know whether the database is to be used for oversight of case management or for the generation of statistics or both. We do not know how the database will be used to perform these functions, and therefore what level of detail of information will be necessary to collect. This vagueness creates difficulties for evaluation and public comment. It also creates legal uncertainty, and a loosening of guardrails, regarding what information could enter the database and how this information may be used. Section 3 shows awareness of these concerns, asserting at section 3(5) that no protected personal information of whistleblowers may be uploaded onto the database. There is reason to believe, however, that this may be

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challenging to achieve in practice, and that the failure to establish a clear purpose for the database is one aspect of a broader failure to ensure database security for whistleblowers, a matter to which we now turn.

Insufficient security for whistleblowers

A plausible reading of section 3 is that it aims to deliver a very basic central case management and statistical tool. Although the language of section 3 is unclear on these points, this tool would allow the Department of Justice to track when specific authorised persons have received disclosures, the time of decisions about whether to dismiss or refer or investigate those disclosures, and when investigations are finalised. By determining whether authorised persons are meeting their statutory obligations regarding how to deal with disclosures under section 14, the Department could use that knowledge to hold authorised persons who are not meeting these obligations to account, and to publish overall statistics on compliance in its annual report. This approach would be consistent with the section 3(5) prohibition on uploading protected personal information onto the database, but it would not entirely resolve the trouble that this prohibition aims to address: even if the database is purged of any information directly identifying the whistleblower, the mere fact that an authorised person associated with a specific organisation lodges a disclosure in the database at a specific time, if leaked from the database, could alert a retaliator and lead to the re-identification of that whistleblower.

This challenge is obviously compounded if the purposes behind section 3 are more ambitious. Section 3(2)(b)(i) provides for the uploading of information regarding "the disclosure received by the authorised person." This is a broad and open-ended provision. To be sure, receiving detailed information about a disclosure could be publicly useful in a whole range of ways, allowing the Department not only to prioritise case management according to the severity of the allegations and other characteristics, but also to generate more detailed statistics to aid adaptation and reform of the whistleblowing system. That more detailed information, however, will if leaked from the database substantially increase the risk of re-identification of whistleblowers. Similar points can be made for the section 3(2)(b) provision for "the reasons for dismissal" to be uploaded on the database, such that for each gain in database functionality achieved by uploading more detailed information on that database, we can expect a commensurate increase in risk for whistleblowers.

These considerations refer back to our earlier point, that the precise purpose of section 3 is unclear, but they also suggest more strongly that section 3 does not offer sufficient security to whistleblowers, and that this security cannot adequately be provided by reference to protected personal information alone. This security can only be achieved by more specific provisions tailored around section 3 itself, but the Bill does not do this, and there are at least three relevant omissions.

First, there are concerns around the location of the database, which according to section 3(1) is put under the Director-General in the Department of Justice. The Department of Justice is a senior executive agency, responsible for a wide-range of often sensitive legal

matters. It may for this reason often be the subject of disclosures, which would open management of the central database to conflicts of interest, and resulting breaches to the security of whistleblowers.

Second, sub-sections 3(1) and (6) construe access to and operation of the database vaguely and ambiguously. The Director-General is required to develop and maintain the database, and they can designate departmental officials to maintain and operate it. This provision does not clearly specify who can have access to the information contained in the database and what they can use it for, nor does it address the likelihood that external service providers will be necessary to construct the required information systems. Section 3(6) provides further for access to authorised persons and their designates, but does not specify what the extent of this access is.

Third, section 19 of the Bill provides for the confidentiality of information. It establishes criminal sanctions for those who breach this confidentiality, yet its provisions only apply to person's authorised to receive disclosures, and this category does not include Department of Justice officials responsible for managing the database, nor does it extend to others who may come across confidential whistleblower information.

Data scope and administrative burden

Section 3 suggests that the database will hold a great variety of information from a wide array of sources. This could create a considerable administrative burden, where the operators of the database will need to deal with much information of uneven relevance, quality, and compliance.

Section 1 of the Bill defines a disclosure broadly and the definition of improper conduct encompasses a wide range of potential and actual acts, including anything that might involve a failure to comply with a legal obligation, or that infringes on the rights to health, safety, and environment of others. The persons authorised to receive disclosures, under Part 1 of Chapter 2, include not only an array of government officials, but also business and non-profit officials, along with an open-ended set of individuals to whom it might be reasonable to make disclosures to. In terms of section 3(4), it appears that all of these authorised persons or their designates must register on the database, in order to upload the information required under section 3(2)(b).

This broad scope will plausibly impose, especially for more sophisticated uses of the database, prohibitive administrative burdens on both the Department of Justice and society. The range of misconducts that might be the subject of disclosures is so wide as to suggest that many will not be particularly relevant to the Department of Justice. Since authorised persons will often lack capacity to effectively operate the database, such as those working in small businesses or non-profits, data coverage, quality, and compliance will suffer. It would be difficult to correct such deficiencies through capacity-building, or by imposing negative sanctions for non-compliance across such a broad set of actors. These considerations amplify the security challenges posed by the database, and they indicate that unless the

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scope of information brought onto the database is narrowed, the database may ultimately prove dysfunctional.

This analysis leads to a number of recommendations.

Recommendations on Section 3

Recommendation 1: clarify the purpose of the database

The purpose of section 3 must be clarified, by stating clearly what the database will be used for, and how it will achieve these objectives. The purposes thereby established should be aligned with the objects laid down in section 2, which include the encouragement of disclosures, the security of disclosers, and the effective management of the whistleblowing system. The purpose of the database should then rigorously inform allocations of official powers, necessary safeguards, and the scope of information that will be uploaded onto it.

Recommendation 2: Reframe the scope of information and sources

We propose that the scope of information to be provided should be more precisely specified and the sources of information limited (i.e. rationally restricting reporting obligations). This would service to address the real risk of excessive administrative burden, how this might affect the quality of data provided and levels of compliance, and the related security risk this may generate.

The relevant datapoints to be included on the database should be scoped across a number of dimensions.

- The first dimension covers specific datapoints across the stages of the whistleblowing process.
- A second dimension involves deciding which authorised persons will be required to submit information into the database. We proposed that it is preferable to confine the obligation to lodge disclosures on the database to the authorised persons of state organisations, together with medium-to-large businesses and non-profits.
- A final dimension according to which to scope the database might be the types of misconducts that disclosures refer to. Entries onto the database could be restricted to high-priority issues, where follow through on investigation is known to be weak, such as corruption and organised crime.

In addressing the above, the Department of Justice should also make decisions about what parameters to entrench in the primary statute, and what can be elaborated in regulations.

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Recommendation 3: consider relocating the database

Serious consideration should be given to relocating the database outside of the Department of Justice. The Department may be a site of disclosures, and this could open the database to conflicts of interest, which would generate security concerns. A common location for such a function is instead independent institutions, for which there may be a number of options. The existing institution the mandate of which aligns most closely is probably the Public Protector, although its mandate does not extend to the purely private sector misconduct also covered by the Bill. The National Anti-Corruption Strategy has proposed the construction of an Office of Public Integrity, but while this Office is focused on anti-corruption, the Bill encompasses many other forms of illegality. The broad mandate created by the Bill provides one reason for establishing a dedicated and independent whistleblower agency, which will no doubt be proposed in more detail in other submissions on this Bill.

Recommendation 4: Provide enhanced safeguards regarding access to and use of the database

Section 3 should clearly establish who has access to the database, for what specific uses, and according to what safeguards. It is not sufficient for the provision to assert that the Director-General will only be responsible for developing and maintaining the database, if they are also to use the database to exercise oversight over case management and generate related statistics. A similar point can be made for the Director-General's designates, who will presumably be doing more than maintaining and operating the system, and should be empowered to conduct those broader functions, within clear limits. There may also be issues around the appointment of information technology service providers, issues which will have to be considered in legislative drafting. The technical characteristics of the database for ensuring security, such as logging of access and traceability of use, could also be entrenched in statute.

Recommendation 5: penalties for non-compliance and abuse

After access is appropriately regulated, the Bill should impose sanctions along two lines. First, the Bill currently lacks any penalty for authorised persons who fail to upload information onto the database, a*nd such penalties become feasible where those who are obliged to do so is narrowed to the state and larger business and non-profit organisations (see recommendation 2 above).* Second, the Bill should establish an offense with criminal sanctions for any other person to gain access to the database, for anyone to use the database in ways other than they are legally empowered to, and for anyone to inappropriately divulge information from it.

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Section 10: Disclosure made to other person, body or institution

Section 9 of the existing Protected Disclosures Act provides for general protected disclosures, clearly making provision for reasonable disclosures proceeding outside of existing institutional channels. This is an important provision the purpose of which is to ensure that whistleblowers retain options even where institutional channels are inappropriate or compromised. Section 10 of the Bill largely reproduces the old section 9, but it is worth noting that in our conversations on the Bill our interlocutors have often expressed uncertainty regarding what the provision is for.

Recommendations on Section 10

Recommendation 1: Clarify the purpose of section 10

Since one of the functions of legislation is to guide even laypersons regarding proper conduct under the law, it may be useful to clarify that section 10 creates open-ended channels of disclosure in addition to those covered in sections 6 to 9.

Recommendation 2: Expand section 10(2)(a) to include persons other than employees and detriments other than occupational

Section 9(2)(a) of the existing Act states that one of the conditions for using a general protected disclosure is if an employee or worker has reason to believe that they would be subject to occupational detriment if they were to make a disclosure to their employer. This section has been wholly transposed into the Bill's section 10(2)(a), and it continues to confine the provision to occupational detriments. This is inconsistent with the Bill's expanded conception of both who can make disclosures (going beyond employees and workers) and the character of detriments (including not only occupational detriments, but also other harms). Section 10(2)(a) should be rewritten to reflect this expansion.

Section 18: Award to discloser

Section 18 creates a mechanism where whistleblowers can receive awards for disclosures. Where a court convicts an employer for improper conduct as defined in the Bill and imposes a monetary sanction, the court may order that an amount not exceeding one-fourth of that monetary sanction be awarded to the whistleblower whose evidence led to the conviction. An award may not be paid to persons in the employ of the public service. An award may not be paid to persons contemplated in section 34 of the Prevention and Combatting of Corruption Activities Act, which basically includes the chief executives of most state, business, and non-profit organisations. Where information was provided as part of a plea agreement, where the whistleblower was accomplice to the offense, and where the whistleblower is an official of a law enforcement agency, in these cases an award can also not be paid. Where conviction is a result of disclosures made by several disclosers, then the

court can split the proceeds between them according to their contributions. When determining whether a whistleblower is entitled to a reward, the court must consider whether the information originated from the discloser, whether the information was not known prior to the disclosure, and whether that information proves the elements of a criminal or administrative offence.

Analysis

Arbitrary restriction of the basis for calculating awards

We welcome the inclusion of a reward mechanism in the Bill, but we have concerns with the model being established by specific provisions in section 18.

The central purpose of an incentivised whistleblowing mechanism is to encourage the disclosure of useful information that helps prove legal violations, reclaim monies gained in the course of those violations, and impose other penalties that will deter such violations in future. An important secondary effect is to reward whistleblowers for their efforts, which is especially justified given the harm whistleblowers can face as a result of making disclosures. In order to achieve these outcomes, it is important to ensure that awards are distributed *reliably and, as far as possible, proportionally to the useful value of disclosures to the state and the public interest.* Section 18 does not achieve this.

Section 18(1) confines the award to cases where disclosures provide evidence in "court," where the court process results in "conviction," and where that conviction results in a "monetary sanction."

- The requirement of a court decision would preclude awards of monies arising from administrative findings and non-trial resolutions, an increasingly important feature of the South African legal landscape, where even serious matters are often finalised out of court.
- The concept of a conviction, according to its ordinary meaning, would tend to restrict awards to *criminal* verdicts arising from disclosure, precluding the whistleblower from getting a portion of monies from administrative penalties, compensations for damages, civil recoveries of the proceeds of illegality, and forfeitures of the property used in criminal enterprises.
- The concept of monetary *sanctions* would tend to have similar consequences, confining the award to a portion of deterrent penalties, such as fines, while excluding from consideration monetary remedies, such as compensatory damages, civil recoveries, and asset forfeitures.

It is not clear why the basis for calculation of awards has been restricted in this way, or whether the drafters intend it.

In consequence of these exclusions, the process of granting awards could generate uncertainty and injustices. A whistleblower who discloses evidence proving serious crimes

might be denied an award for no other reason than that prosecutors decide to pursue non-trial resolution, or that regulations have constructed administrative penalties to reduce burdens on the courts. A similar whistleblower could be denied if courts award damages to the state, order civil recoveries, or approve the forfeiture of assets, just because those courts did not also impose monetary fines and instead put the convicts in prison. Indeed, monetary fines function as a lesser penalty than terms of imprisonment, and courts often do not apply both simultaneously, so the effect of these restrictions would tend to be to deny awards to whistleblowers who prove more serious crimes.

The resulting uncertainty will discourage disclosures. The associated injustices would tend to delegitimate the system. There is a real risk that the incentives created for whistleblowing will be applied arbitrarily and unevenly across the legal system, and the fundamental reason is that court imposed, criminal, and monetary sanctions *do not accurately track the value of the information brought forward in disclosures, and so do not align with the purpose that the state hopes to achieve in establishing an incentivised whistleblowing mechanism.*

There are means available to address this issue, and these will be dealt with in our recommendations.

Overbroad application of the mechanism to all improper conduct

While the mechanism for making an award is restrictive, the application of the reward clause is very broad: under section 1 of the Bill, disclosures can be made regarding *any* failure to comply with a legal obligation, or to negatively affect the rights to healthy, safety and environment of others.

The problem that this creates is partly one of opacity. It would seem impossible to map the range of matters that would be affected by whistleblower incentives, or how the legal and social contexts of those matters would react to the introduction of whistleblower incentives into them.

Presumably that range of matters to which the award provisions will apply could be extremely broad, creating a second problem of administrative burdens, where awards incentivise disclosures *across a very wide number of matters, so wide that South Africa's law enforcement system may not have the capacity to handle*. Restricting awards to court convictions with monetary sanctions is one way to reduce this burden, but we have seen above that it comes with other overwhelming costs.

A third problem is that we cannot know how incentivisation of whistleblowing will work in all of these contexts, creating the prospect of negative and unintended consequences. *In other countries, incentivised whistleblowing has been operationalised in very specific domains*, most famously fraudulent claims in public procurement, where it has been fine-tuned over considerable periods of time. This fine-tuning is essential to aligning the mechanism with its operational contexts, avoiding issues of over-enforcement where otherwise widely tolerated minor crimes and illegalities become a focus of whistleblower

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attention, and finding institutional means for suppressing abusive and otherwise unproductive disclosures.

None of this is to suggest that South Africa cannot entrench a working and ambitious incentivised whistleblowing mechanism in this law (this is something that we actively support), but it is rather to propose that this law should proceed more cautiously and incrementally.

Inappropriate approach to restricting who can receive awards

Section 18(2) asserts that awards will not be paid to various categories of person. There can be good reasons for restricting who can benefit from awards. These reasons have to do with not destabilising necessary organisational disciplines, not allowing incentives to conflict with official duties, and otherwise suppressing abuse of the award mechanism. The categories chosen for restriction, however, misconceive how these issues will play out across the whistleblowing system.

The most acute problems are likely to occur in executive functions and law enforcement, where coordination could be severely destabilised by opportunistic whistleblowing, where official duties to investigate and report non-compliance and crimes are especially stringent, and where opportunities for making abusive disclosures so as to receive awards are wide-ranging. These categories are perhaps appropriately addressed in section 18(2)(b), encompassing executive officials in government, business, non-profits, and various other categories, and section 18(2)(e), which includes law enforcement officers.

The section 18(2)(a) exclusion of all of the public service, however, is too expansive. Section 18(2) also at no point addresses how the issues mentioned above (particularly conflicts of interest) are likely to arise outside the public service, in public entities, municipalities, legislatures, courts, businesses, and non-profits. Rank-and-file officials in all of these categories, and also thus in the public service, are likely to be a valuable source of information about illegalities, *so valuable that excluding them would severely undermine the incentivised whistleblowing mechanism as a whole*.

But simultaneously, incentives for whistleblowing could create conflicts of interest for rank-and-file officials across these categories, especially those who are responsible for auditing, investigating, and enforcing organisational compliance.

This tension has fairly standard solutions, well-established in other jurisdictions. These solutions do not rely on blanket exclusions of officials, and we will develop these in recommendations.

Recommendations on Section 18

Recommendation 1: Align the value of quantification of awards with the value of disclosures

The section 18(1) restriction of awards to court convictions with monetary sanctions generates uncertainty, distributive irrationality detached from the purposes of incentivised whistleblowing, and will result in substantial injustice. This can be addressed straightforwardly by lifting these restrictions and recognising that awards could also be quantified from compensation for damages accruing to the state, civil recoveries of the proceeds of crime, and potentially also asset forfeitures of property used in criminal enterprises.

This should not, however, be formulated as a blanket rule. The basis for calculating awards in specific categories of matters should be contingent on the regulation of differentiated incentivised whistleblowing mechanisms (i.e. see our next recommendation).

Recommendation 2: Regulate differentiated incentivised whistleblowing mechanisms incrementally

In a sense, section 18 is laudably ambitious. It proposes to provide awards across a wide variety of disclosures, addressing many distinct types of misconduct. This ambition, however, possibly underestimates the challenges around designing incentivised whistleblowing mechanisms, which must often manage interactions with complex operational contexts. A first risk is to over-burden the law enforcement system. A second is to not anticipate the various ways in which incentivised whistleblowing can bring forward disclosures that are abusive or otherwise unproductive.

The recommendation, therefore, is that section 18 should empower the Minister of Justice to proceed cautiously, incrementally, by regulating differentiated incentivised whistleblowing mechanisms, and doing so after consultation with the ministers responsible for the sectors that will be affected. This would open the way to developing incentivised whistleblowing mechanisms tailored, for instance, to public procurement, to taxation, to organised crime, and to other high-profile challenges. There is much institutional experience with bringing incentivised whistleblowing to bear on some of these challenges in other jurisdictions, which will facilitate moving forward quickly.

Develop conflict of interest rules governing awards

There can be legitimate concerns about how incentives for whistleblowers can create conflicts of interest with official duties. Blanket restrictions on who can get awards, however, as in the case of the section 18(2)(a) exclusion of the whole public service, are often not the best method for addressing this.

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A standard alternative is to elaborate tighter rules to govern potential conflicts. In order to do so, it may be useful to start with the proposition that whistleblower awards are there to pay for information that the relevant authorities would otherwise not have. In order to receive an award, therefore, whistleblowers should be required to do more than their (ordinarily already paid) official duties require. Such a rule would tend to preclude officials involved in auditing, investigating, and enforcing compliance with the law from collecting an award, unless their disclosure goes significantly further than their job description. This could be the case where their superiors are themselves involved in improper conduct, such that the ordinary channels for investigating and reporting this conduct are no longer plausibly available.

Related constructions of this rule could include requiring courts to refuse a reward where officials did not discharge their official obligations, or where they unreasonably did not follow formal reporting channels, or where giving a reward would set a precedent likely to create conflicts with official duties in future.

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