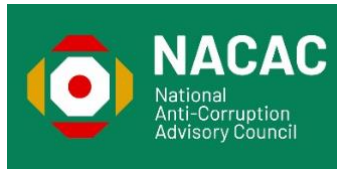




Presidency: Republic of South Africa



ADVISORY ON THE APPOINTMENT OF A RETIRED JUDGE AS WHISTLEBLOWER PROTECTOR OF SOUTH AFRICA

Dear Mr President

The National Anti-Corruption Advisory Council (NACAC) has undertaken a far-reaching review of the legislative frameworks aimed at addressing the hardships experienced by whistleblowers by prescribing protections. We note that such protections – even if robust on paper – fail thus far to provide sufficient protection for whistleblowers in practice. Therefore, while the Protected Disclosures Act undergoes a period of review, there is a profound need to address the dangers, needs, and denial of rights experienced by whistleblowers, urgently through the implementation of an interim institutional mechanism. It is for this reason that we propose the establishment of an office of the whistleblower protector under the auspices of a retired judge. Chief Justice Raymond Zondo has acknowledged that the protection of whistleblowers is paramount in the fight against state capture, corruption, and larceny. Chief Justice Zondo has remarked:

‘If we do not look after these whistleblowers during state capture, they won't be around next time. Others will look at how whistleblowers were treated and will not come forward. A lot of people are reporting corruption. We must assure that they are properly protected.’

The legislative framework attempts to address hardships experienced by whistleblowers by prescribing protections. However, such protections – even if robust on paper – fail to protect whistleblowers in practice. While the Protected Disclosures Act undergoes a period of review, there is a profound need to address the needs of whistleblowers urgently through the implementation of institutional mechanisms.

Applying the required resources and expertise towards such measures will help to ensure that there is a 'safe haven' to which whistleblowers can turn for support. This will serve as a crucial risk-mitigation factor which can potentially lead to more members of the public developing confidence to blow the whistle on wrongdoing.

Existing lacunae in the whistleblower protection and support environment

In South Africa at present, there are several gaps in the protections afforded to whistleblowers. These include a lack of:

- Legal advice and representation;
- Personal security provisions for the whistleblower and their families;
- Financial support to meet the losses that often flow from retaliatory action;
- Information and awareness about whistleblowing;
- Psycho-social support to meet the emotional and mental health detriments experienced by whistleblowers;
- Employment support to assist whistleblowers to obtain gainful employment after suffering occupational detriment; and
- Cultural awareness about whistleblowing to combat stigma.

While it may not be possible for an institutional mechanism to address all of these deficits, it is important to recognise that the difficulties that whistleblowers face are often interlinked. There is therefore a need for a mechanism to assist whistleblowers that is comprehensive in its service offering, while still closely attuned to their experiences and needs.

Proposed Intervention

Essential features

To address these needs, it is proposed that a whistleblower protection institution be developed with a number of essential characteristics. The institution must, at the outset, have a clearly **defined mandate**, that is, the protection of whistleblowers. It is understood that there is a need for clarity who would be considered 'whistleblowers' and therefore eligible to seek assistance of the institution.

It should be **specialist** in nature and have a **singular focus** towards the aim of protecting whistleblowers. It should be **independent** and insulated from political interference. It should be imbued with **legal authority** to take certain steps to enforce whistleblower protection.

The institution should ideally be headed by a retired judge. The appointment of such a retired judge should be undertaken through a **legitimate and transparent process**. The appointed judge should have

security of tenure in their position to guard against political interference against the threat of dismissal. Ideally, the retired judge should occupy this position on a **full-time basis** and not take on concurrent responsibilities.

Essential to the success of the institution is the provision of **adequate resources** to meet its mandate. These include budget and operational resources to ensure its ability to function day-to-day. It must also be staffed with appropriate personnel possessing the required skills and expertise in relation to law, and more specifically, whistleblower protection. In order to ensure independence, the institution should be given autonomy over its own budget and resource management. This is subject to the institution remaining fully **accountable** for its expenditure. In carrying out its mandate, the institution should maintain **confidentiality** at all times in relation to the individual whistleblowers it is assisting. However, the need for confidentiality must be balanced with **transparency** in relation to its general operations.

Functions of the institution

It is proposed that the institution be responsible for several interrelated functions. These include:

- Certification of whistleblower status: Bearing in mind the need to define ‘whistleblower’, people who have made disclosures (or are contemplating making disclosures) would be able to approach the institution with the relevant facts relating to their disclosure as well as retaliation suffered or likely to be suffered. The retired judge would then apply the relevant definitional criteria and make a determination whether the person is a ‘whistleblower’ or not. Certified whistleblowers would then have access to the services of the institution.
- The institution would then conduct a risk assessment, noting the whistleblower’s particular circumstances. This would take into account risks relating to personal safety, occupational detriment and more.
- The mandate (and empowering legislation) of the institution would imbue it to take several actions on the basis of the risk assessment. This could include:
 - *Referral* to other institutions who are able to assist the whistleblower. For example, a need for legal representation could be referred to the Legal Practice Council. Referrals could also be made to non-governmental organisations, such as referring a whistleblower suffering mental health detriments to organisations offering psycho-social support.

- The referral function should be combined with an *oversight* function. This would give the institution the power to enquire of the organisations who receive referrals regarding what they have done to mitigate risks or alleviate harm to the whistleblower. This is analogous to the manner in which courts exercise supervisory jurisdiction.
 - The entitlement to apply for *urgent interdicts* on behalf of whistleblowers to halt retaliatory action against whistleblowers.
 - The power to *instruct* institutions to take certain actions to protect or support whistleblowers. For example, the South African Police Service could be instructed to issue a protection order in favour of a whistleblower.
 - The resources and capacity to provide *financial assistance* to whistleblowers who are in financial distress as a result of making disclosures.
 - The capacity to conduct its own *research*, generate *reports* based on its work and make policy *recommendations* about whistleblower protection.
- It may be that a single institution is not able, by itself, to meet these requirements. It is proposed that the institutional model employed in relation to competition (i.e. the Competition Commission and Competition Tribunal) be examined as a possible structure. A Whistleblower Commission could have administrative powers to make decisions, while at Whistleblower Tribunal could have judicial-type powers.

Way forward

The need to address the needs of whistleblowers is urgent. Therefore, it is proposed that the formation of an institution to protect whistleblowers be achieved through a two-phase process:

1. Interim phase: The President establishes the institution and appoints a retired judge to lead it. Members of the Special Investigations Unit are seconded to assist in the establishment of the organisation. The first responsibility of the retired judge is to determine the structure to enable them to fulfil the mandate of the institution. The interim institution should be established by no later than 30 September 2023. This is one year from the date that Judge Zondo's recommendations were made in relation to whistleblowing.

2. Permanent phase: Based on the learnings of the interim phase, a permanent institution as described above is established.

Conclusion

Whistleblowers play a vital role in both the public and private sectors by shedding light on wrongdoing and paving the way for official investigation and consequent accountability measures to follow. It is thus of paramount importance that the laws and institutions of this country accept the responsibility to protect them. Society in general benefits from these disclosures, despite the fact that society often visits recrimination on whistleblowers with devastating consequences for their lives and livelihoods. Protecting whistleblowers by appointing a retired judge to look after their welfare will go a long way towards ameliorating their plight. We have the honour to make this request of the Honourable President of the Republic of South Africa.

Acknowledgements

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